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Labor Law-Availability Of Injunctive Relief Against Peaceful Picketing Under Illegal Purpose Doctrine

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CASE COMMENTS

COPYRIGHTS—DUTY OF ONE OWNER TO ACCOUNT TO CO-OWNER FOR PROFITS FROM USE AND LICENSING OF COPYRIGHT. [New York]

In the past four decades, there have been many new developments in those fields of enterprise affected by copyrights. Radio, motion pictures, offset methods of printing, microfilming, new and improved methods of recording and reproducing phonograph records, comic strips, and featured columns have all been developed, along with the organizations which exploit them, such as press associations, broadcasting networks, the motion picture and so-called "juke box" industries, feature syndicates, and many others. Various associations have been organized to protect against the illegal exploitation of copyrights, the most outstanding of which is the American Society of Composers, Authors, and Publishers. The basic American copyright law¹ was, with few amendments, 39 years old before its repeal in 1947. As a result of the lag in the development of this branch of the law, the increasingly complex systems built up to take advantage of the above-mentioned innovations had become entangled in outmoded rules which had failed to keep abreast of the times, much as the automobile became entangled in "horse and buggy" law. Men dealing in this field were forced to take actions with ignorance as to their legal consequences—in fact, as to their very legality. Courts were forced to legislate judicially in order to fill in "the open spaces in the law,"² with the result, in many instances, of a lack of uniformity in a field where, because of its national and even international scope, uniformity was and is a necessity. With an eye to correcting this anachronism, Congress has recently passed a new copyright law,³ supplanting entirely the old statute and its amendments.

However, in enacting the new statute, Congress failed to provide for a phase of copyright law which seems to be growing in importance because of the pyramiding of interests in modern exploitation methods: the question of whether one owner of a copyright must account to his co-owner for the profits he derives from the use and licensing of the copyright. One of the few direct holdings on the subject is the early decision of *Carter v. Bailey*.⁴ There, two partners in a book publish-

¹35 Stat. 1075 (1909).

²Cardozo, *Nature of the Judicial Process* (1921) 113.

³61 Stat. 652, 17 U. S. C. A. §§ 1-32, 101-116, 201-215 (1947).

⁴64 Me. 458, 18 Am. Rep. 273 (1874).

ing business dissolved the partnership, agreeing that all plates and copyrights should belong to them as "individuals, co-owners, co-tenants, and tenants in common." One partner later sold all of the plates to a third party, who had knowledge of the above agreement. The latter published and sold books from the plates, whereupon the other partner sued him for an accounting for the profits in this enterprise. The court, basing its decision on a strict analogy to patent law,⁵ held that the defendant was not liable for an accounting.

When the recent case of *Jerry Vogel Music Co., Inc. v. Miller Music, Inc.*⁶ came before the New York courts, this seventy-year old precedent and its reasoning still stood as an obstacle to accounting rights as between co-owners of a copyright. In this case it appeared that two men had written a song and copyrighted it in 1913. One author assigned his interest to the present plaintiff, and the other assigned his interest to the present defendant. Plaintiff renewed the copyright in its own name in 1940, and it was conceded that defendant had the same interest in the new copyright as it had in the old.⁷ A motion picture company, seeking a license to use the song, contacted both assignees. Plaintiff offered the license for \$1000, but while this offer was pending, defendant sold the license for \$200. Plaintiff then sued for an accounting of the profits and for damages for the wasting of the copyrighted property, attempting to avoid the unfavorable patent-law analogy by arguing that the renewed copyright was held by plaintiff as a trustee for both itself and defendant, and that each was under a duty to account to the other for profits as an incident of the trust relationship.⁸ A New York Supreme Court ignored this ingenious contention and held for defendant,⁹ on the orthodox patent-law view that the parties were tenants in common of the copyright and in that capacity neither was liable to

⁵2 Walker, Patents (Deller's ed. 1937) § 365.

⁶74 N. Y. S. (2d) 425 (1st Dept. 1947).

"If one co-author copyrights the musical composition in his own name he becomes a constructive trustee for the other co-author . . ." Edward B. Marks Music Corp. v. Jerry Vogel Music Co., Inc., 42 F. Supp. 859, 864 (S. D. N. Y. 1942). "... the renewal copyright obtained by a co-author of a joint work embraces the whole work, . . . his interest in the renewal copyright is that of an owner in common, [and] the renewal copyright enures to the benefit of his co-author or of those entitled to a renewal under the provisions of the Copyright Act. . . ." 42 F. Supp. 859, 865. See also Ball, Law of Copyright and Literary Property (1944) 202-203, 485.

⁸Plaintiff based its contention on the rule of note 7, supra. However, while it is true that the co-owner holding the copyright holds it in trust for the remaining co-owners, the benefits derived from this "trust" extend only to those rights to which the co-owners would be entitled had the copyright been in their names also. An accounting is not necessarily one of these benefits.

⁹59 N. Y. S. (2d) 728 (N. Y. County 1945).

the other for profits made by use of the song or by licensing others to use it.¹⁰ However, the Appellate Division, choosing to depart from the stereotyped patent-law analogy, reversed the judgment and held the defendant liable to plaintiff for an accounting of the profits made in licensing the use of the song. The court refused to consider plaintiff's claim for damages for wastage of the property, saying that the rule laid down with regard to accounting would promote soundness of marketing and a fair division of profits, and that therefore no decision was required on the other point. Refusing to be controlled by the "name-tag" given to the relation between the parties,¹¹ the appellate court based its decision on the equitableness of requiring an accounting, and reasoned that the contrary rule would lead to co-owners competing with and contriving against one another in licensing copyrighted works, in much the same manner as the two litigants in this case had done.

Direct authority on the point at issue is very limited.¹² There is dicta, however, that would seem to support the rule applied by the Appellate Division court. In *Klein v. Beach*, the court, in referring to a

¹⁰"In the absence of a special agreement, each co-owner may manufacture, use, and sell the patented invention with or without the consent of his co-owner, no matter how small his interest may be, without liability to account for his individual use of the invention, and without being liable to account for profits . . ." 48 C. J. Patents § 364. See also 2 Walker, Patents (Deller's ed. 1937) § 363.

¹¹"We think that the rights of the parties should not be determined by the name-tag given to their relationship. They are equal owners of a copyrighted work, and, in the absence of agreement between them governing their rights in the exploitation of the work, should be held to a standard of dealing befitting their mutual interest in the work. We may call them tenants in common, but there is nothing magical in that description, and the incidents of their relationship do not necessarily follow from that description." *Jerry Vogel Music Co., Inc. v. Miller Music, Inc.*, 74 N. Y. S. (2d) 425, 426 (1947).

¹²Representative of the difficulty in reaching a definitive answer to the problem are two references in Ball, *Law of Copyright and Literary Property* (1944): At page 202, "The interpretation of the statute creating such common ownership depends in no small degree upon the well-known incidents of a title by tenancy in common. Thus, where a copyright is the subject of common ownership, there is no right to an accounting among the co-owners . . . Any act of one is presumed to be for the common benefit and hence the act of all; such, for example, as the purchase or acquisition of an outstanding title affecting the common property, or a license by one of the co-owners of certain rights covered by the copyright held in common ownership." At page 587, "When two parties enter into a contract under which they acquire the ownership, as tenants in common, of all rights in a drama, either co-owner is entitled to license its production on the stage or to contract with a third party for its conversion into a photoplay for exhibition on the screen, subject to the duty of the licensor of accounting to his co-owner for the profits or royalties." The cases cited as authority for these propositions did not involve the issue under discussion, and statements in the opinions on that point are pure dicta. Similarly, see 13 C. J., Copyrights §§ 27, 261; 18 C. J. S., Copyrights § 88.

play written by one person, based on the book of another, said: "Here both Beach and Klein became the owners of Klein's drama, and each could then do with it what he pleased, with the duty of accounting over."¹³ In *Maurel v. Smith*, the court used the following language: "Where two or more persons have a common interest in a property, equity will not allow one to appropriate it exclusively to himself, or to impair its worth as to others. The settlement of rights between joint tenants or joint owners of property is the subject matter of equity jurisdiction . . ." ¹⁴ The California court, in the more recent case of *Brown v. Republic Productions, Inc.*, found occasion to state: "By lease or license one tenant in common may confer upon a stranger the right to occupy and use the property of the co-tenants to the same extent that the licensor may have used it . . . Such licensor's sole obligation is to account to his co-tenants."¹⁵ The direct question of whether or not an accounting would be required of co-owners was not, however, decided in any of these cases.

In regard to the more common instances of co-ownership, involving tangible personalty or real property, Anglo-American common law makes tenants in common accountable to each other for profits made by using the property or by licensing its use by others.¹⁶ But in searching other segments of the law for analogies applicable in copyright cases, the status of co-owners of patents must be given special attention, because of the traditional connection between patent and copyright matters.

¹³232 Fed. 240, 247 (S. D. N. Y. 1916). Plaintiff, who had dramatized defendant's novel, contracted with defendant to share the royalties from the play. A producer was licensed to present the play on the stage, but the rights reverted to the plaintiff and the defendant because the play was not produced a sufficient number of times. Defendant then gave permission for a movie to be made. The question for decision was whether the movie was based upon the novel or the play. The court specifically refrained from deciding the question of accountability.

¹⁴271 Fed. 211, 216 (C. C. A. 2d, 1921). Plaintiff contracted with one defendant to write a scenario and libretto from her opera, then later gave defendant permission to employ a third person to assist, specifically contracting that plaintiff should share in the profits and royalties. Defendant and his assistant assigned their rights to publishing company, which took out a copyright on the work. The court allowed plaintiff an accounting for the profits, on the express terms of the contract.

¹⁵156 P. (2d) 40, 41 (Cal. App. 1945). Two co-owners of a song, both employed by motion picture company, licensed a company to use a song in a motion picture without obtaining permission from the third co-owner. A lower court allowed an accounting among the co-owners, but the appellate court did not decide that problem, merely holding that the excluded co-owner could not recover from the licensee for the licensee's profits.

¹⁶62 C. J., Tenancy in Common § 65; 2 Tiffany, Real Property (3d ed. 1939) § 450.

In the early law of patents in this country, a distinction was made between a co-owner who himself engaged in business to profit from the invention and one who merely sold or licensed his right. In the case of the co-owner engaging in the business himself, no accounting was required to account to his co-owners for the profits.¹⁷ This view was recognized and specifically abandoned in the case of *Blackledge v. Weir & Craig Manufacturing Co.*¹⁸ There the court denied that use by the owner and his licensing of the work to another should be treated differently. It reasoned that in either case, it was not the exercise of the entire monopoly conferred by the patent, and that the remaining co-owner still had the same rights he formerly had and was at liberty to use the invention in all legitimate ways for his individual profit. "Each [co-owner] is entitled to the fruits of his endeavors, taking no risk and expecting no reward from enterprises in which he does not choose to join."¹⁹

It seems obvious from the reasoning in the *Blackledge* case that the analogy between patents and copyrights breaks down on the point of accounting. A copyright is usually licensed or sold to a large business or corporation. Exploitation by that business or corporation is done on a huge, nationwide basis, as, for example, in a motion picture, or over coast-to-coast broadcasting networks, or on phonograph records. Because of these methods, the exercise of the copyright by the owner or his licensee or assignee may render the most promising ventures useless to the other owners. Fields open to co-owners are materially limited by the sale of the copyrights to a national promoting industry.

The reasoning used by those courts that favor accounting is that if accounting is not allowed, co-owners will compete with one another and contrive against one another in selling and licensing the work, materially decreasing the value of the copyright to each owner. On the other hand, if accounting is allowed, an assignee subjects himself to an accounting for the profits although he may have risked his own capital and losses.²⁰ It would seem that a return, in the copyright field, to

¹⁷See *Dunham v. Indianapolis & St. L. R. Co.*, 7 Bissell 223, 8 Fed. Cases, No. 4151 (C. C. N. D. Ill. 1876).

¹⁸108 Fed. 71 (C. C. A. 7th, 1901).

¹⁹*Blackledge v. Weir & Craig Manufacturing Co.*, 108 Fed. 71, 76 (C. C. A. 7th, 1901).

²⁰Co-owners may use the work themselves without an accounting. When one co-owner assigns his right to a third person, that third person becomes the co-owner and therefore is entitled to use the work without an accounting. The all-inclusive rules laid down by courts ignore the rights of one co-owner against a former who has assigned his rights to a third person, the new co-owner.

the original rule of requiring an accounting for the profits derived by a co-owner who sells or licenses the work, but not requiring an accounting from a co-owner who has himself engaged in business to profit from the use of the copyright would be the better solution to the problem. This rule would eliminate the principal objections to the absolute rules of either allowing or disallowing an accounting, and would result in an equitable settlement between co-owners.

The New York court's decision in the principal case is both equitable and practicable on the facts involved. It is perhaps unfortunate that the court did not trace the history of both rules, and the reasons behind them, in order more clearly to show the equitableness of its decision, to indicate its proper place in the overall picture of accounting, and to provide a more definite guide for future decisions.

JOHN E. SCHEIFLY

DAMAGES—EXTENT TO WHICH EARNINGS OF EMPLOYEE AFTER WRONGFUL DISCHARGE APPLY IN MITIGATION OF DAMAGES FOR BREACH OF CONTRACT. [Federal]

The doctrine of avoidable consequences¹ in the law of damages has developed from a balancing of two considerations of public policy—the prevention of idle hands, and the promotion of stability of contractual obligations. Although the latter is desirable, it is even more important that society be not deprived of the productivity of useful members by permitting them to remain idle and recover the full measure of damages.² One of the most familiar applications of the doctrine places an employee who has been wrongfully discharged under a duty³ to seek other work in order to minimize the damages arising from the employer's breach. The amount which is actually earned by the employee in any other employment during the original contract term, and the amount which the employee could, by the exercise of proper diligence, have earned in other employment of similar nature, will be credited to the employer in mitigation of damages.⁴

¹McCormick, *Damages* (1935) § 33.

²McCormick, *Damages* (1935) 127.

³Although courts commonly speak of the plaintiff's "duty" to mitigate damages: *Key v. Kingwood Oil Co.*, 110 Okla. 178, 236 Pac. 598, 599 (1924); *Tabor v. Porter-Gildersleeve Co.*, 271 Pa. 245, 114 Atl. 773, 774 (1921), it is more accurate to say that he is placed under "a 'disability' to recover for avoidable loss." McCormick, *Damages* (1935) 128.

⁴*Van Winkle v. Satterfield*, 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 853 (1894);

A number of perplexing problems arise out of the part of the rule requiring a reduction of the damages in the amount which the employee *could have earned*.⁴ Construction and definition of the elusive concept of "proper diligence" have been necessary for applying the rule to many varying facts. Divergent conclusions are inevitably reached on such difficult questions as how much effort must the employee exert in finding other work; over what area must he carry his efforts;⁵ to what expense must he go;⁶ and what type of work must he accept.⁷

On the other hand, the application of the part of the rule under which sums actually earned by the employee during the contract term are credited in mitigation of damages has been comparatively simple. The principle has been repeatedly reaffirmed that all moneys so earned, in whatsoever place and type of work, are regarded as reducing the damages, provided only that the employee could not have made those earnings without violating his duty under the original employment contract had the employer not committed the breach.⁸ Thus, for

Elkhart Rubber Works v. Neff, 46 Ind. App. 332, 92 N. E. 553 (1910); Baltimore Baseball Club v. Pickett, 78 Md. 375, 28 Atl. 279 (1894); Maynard v. Royal Worcester Corset Co., 200 Mass. 1, 85 N. E. 877 (1908); Cutter v. Gillette, 163. Mass. 95, 39 N. E. 1010 (1895); Winkler v. Racine Wagon & Carriage Co., 99 Wis. 184, 74 N. W. 793 (1898).

⁴ The burden of proof is upon the defendant-employer to show what the employee has earned, or what he could have earned by the exercise of reasonable diligence, during the term covered by the contract. *Leatherbeery v. Odell, Ragan & Co.*, 7 Fed. 641 (C. C. W. D. N. C. 1880); *Maynard v. Royal Worcester Corset Co.*, 200 Mass. 1, 85 N. E. 877 (1908).

⁵*San Antonio & A. P. Ry. Co. v. Collins*, 61 S. W. (2d) 84 (Tex. Comm. App. 12933) (wrongfully discharged railroad employee held not required to accept employment at distant places, involving change of residence and loss of position and seniority in local yards, in mitigation of damages).

⁶*Rench v. Hayes Equipment Mfg. Co.*, 134 Kan. 865, 8 P. (2d) 346, 348, 84 A. L. R. 166, 169 (1932): "Expenses in seeking other employment, if allowable at all, must be reasonable, and what would be reasonable would depend upon all the circumstances. There is good authority for the view that such an element of damages is allowable on wrongful discharge."

⁷The general rule is that a wrongfully discharged employee is required only to search for, or accept, employment of a like rank and grade, in the same kind of work, in the same locality. *American Trading Co. v. Steele*, 274 Fed. 774 (C. C. A. 9th, 1921) (chief accountant not required to take job as bookkeeper); *Curtis v. A. Lehmann & Co.*, 115 La. 40, 38 So. 887 (1905) (general manager not required to take job as traveling salesman); *Cooper v. Stronge & Warner Co.*, 111 Minn. 177, 126 N. W. 541, 27 L. R. A. (N.S.) 1011 (1910).

⁸The only relaxation of this rule is found in some Texas decisions which hold that if the employee is unable within a reasonable time to secure similar employment, he will be required to seek some other kind of employment for which he is fitted. *Simon v. Allen*, 76 Tex. 398, 13 S. W. 296 (1890); *Kramer v. Wolf Cigar Stores Co.*, 99 Tex. 597, 91 S. W. 775 (1906).

⁹*Sanders v. Schenley Products Co.*, 108 F. (2d) 23 (C. C. A. 2d, 1939); *Van Winkle*

example, wages which a wrongfully discharged school superintendent earned as a farmer have been held to decrease the amount for which the employer was liable.⁹

The recent decision in *MacKnight v. Twin Cities Broadcasting Corp.*¹⁰ demonstrates, however, that even this principle is not so rigidly crystallized as to be immune from modification in "the hard case which may make bad law." The plaintiff was employed in an executive position by the broadcasting company, under a contract providing for a forty hour week and granting the employer the right to require longer hours of work under certain conditions. This right had seldom, if ever, been exercised. After being wrongfully discharged, the plaintiff obtained other employment on a forty hour week basis, and in addition became an instructor in a night school where he worked four and one half hours two nights a week. When sued for breach of contract, the broadcasting company claimed to be entitled to credit against the damages all the earnings gained from the two jobs. The court, in holding that the money earned by the plaintiff as a night school instructor should not be so credited, advanced two lines of reasoning: (1) "The evidence indicates that plaintiff could have performed the extra work of nine hours a week 'without intruding on that time that would have been required to discharge his duties under the contract with the defendant.'" (2) "If respondent's theory is correct that it is entitled by way of mitigation to credit for all earnings of petitioner regardless of the number of hours worked by him after discharge, *inequitable results might obviously ensue*. For instance, a discharged veteran with unusual ambition might put in an eighty hour week. But, generally speaking, *it would be manifestly inequitable* to credit a forty hour a week employer with wages earned by the discharged employee on an eighty hour a week basis."¹¹

The particular facts of this case, though not revealed in sufficient detail in the opinion, may have justified the decision for the plaintiff on the first point; but the court's form of statement of the rule and the authority relied upon are both open to question. It is to be noted that

v. Satterfield, 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 853 (1894); *Gates v. School District*, 57 Ark. 370, 21 S. W. 1060 (1893); *Nuckolls v. College of Physicians and Surgeons*, 7 Cal. App. 233, 94 Pac. 81 (1907); *Kyle v. Pou*, 96 Ga. 166, 23 S. E. 114 (1895); *Allgeyer v. Rutherford*, 45 S. W. 628 (Tex. Civ. App. 1898); 2 *Sedgwick, Damages* (9th ed. 1920) § 667; *McCormick, Damages* (1935) 629.

⁹*Gates v. School District*, 57 Ark. 370, 21 S. W. 1060 (1893).

¹⁰21 L. R. R. M. 2009, 16 U. S. L. Week 2205 (D. C. Minn. 1947).

¹¹*MacKnight v. Twin Cities Broadcasting Corp.*, 21 L. R. R. M. 2009, 2010 (D. C. Minn. 1947) [*italics* supplied].

the court speaks only of the intrusion of the employee's extra work upon the *time* called for by the original contract of employment. The element of time, although of major importance, is not the exclusive factor to be considered. For example, an employee under a forty hour week contract might, as suggested by the court, work an additional forty hours in other employment during times of the day not required for the original job. Yet it can hardly be denied that the employee would thereby substantially impair his operational efficiency under the original contract, and so would have breached his duty to his employer, but for the latter's breach. Accordingly, the wages so earned by the extra hours would be credited to the original employer in mitigation of damages.

In the only case cited as authority,¹² the employment contract specifically permitted the employee to do outside work, and so the employer was precluded from contending that working at another job simultaneously would have constituted a breach of obligation. In the principal case, the contract not only lacked such a term, but expressly provided that plaintiff could be required to work extra hours when conditions demanded. Presumably, this provision would require the employee to hold himself in readiness for overtime work, and the night-school teaching could not have been carried on except for the defendant's breach of the contract. By the usual rule, therefore, the earnings from that work would be credited against the damages for the breach. The court denied any effect to this factor, however, because it did not appear that plaintiff had in fact been called on to work extra hours. This conclusion may have been proper as a matter of policy, for if such a term should be held to require that all earnings must automatically be credited in mitigation of damages, employers might make a practice of incorporating the provision in all employment contracts for the sole purpose of obtaining that advantage in case of a breach.

In dealing with the point of intrusion on the contract time, the court seemed to have in mind a broader concern over the fairness of the operation of the regular damages rules in such a situation as was involved in the principal case. Its assertion that "the equitable principle of mitigation does not imply that a wrongfully discharged veteran should be required to work a forty-nine hour week in order to lessen the damages to his employer for whom he worked on a forty hour week basis"¹³ does not quite meet the issue, however. He was

¹²*Sanders v. Schenley Products Co.*, 108 F. (2d) 23, (C. C. A. 2d, 1939).

¹³*MacKnight v. Twin Cities Broadcasting Corp.*, 21 L. R. R. M. 2009 (D. C. Minn. 1947)

not "required" to do so, in the sense that he would have been penalized had he failed to work the longer hours. But under the general rule, when the employee has actually made earnings, they are credited against the damages even if he was not legally required to have done the work.

A few decisions have been found which support the implication of the instant case that where the earnings after discharge are made in more rigorous work than was called for in the original employment, the employer is not entitled to credit for that part of the earnings attributable to the output of extra effort by the employee. In *Evenson v. Ziegfeld*,¹⁴ an actress who was employed at \$100 per week, after wrongful discharge accepted employment at \$175 per week in other cities during a part of the period covered by the original contract. It was held that the employer was not entitled to be credited with the excess over one hundred dollars a week in view of the fact that his contract called for only seven or eight performances a week, while the subsequent employment involved fourteen performances a week.

*Williams v. Chicago Coal Co.*¹⁵ similarly held that the mere fact that one who is wrongfully discharged receives as much or more in another employment after discharge does not necessarily preclude recovery of substantial damages for breach of contract of employment, where the subsequent employment is of a different nature from the work for which he contracted in that it might require more severe effort, greater responsibility and risk of capital.

In *Pond v. Wyman*¹⁶ it was declared: "To the extent that the time

¹⁴22 Pa. Super. 79 (1903).

¹⁵60 Ill. 149, 1 Mor. Min. Rep. 397 (1871). The court declared: "...some questions of fact must necessarily be involved, viz: Was the employment of the same general character, or was the labor more severe, or the responsibility greater or less? Was the new business such as required the use of capital, while that from which he was discharged did not? If a young man should enter into a contract with a merchant, to act as his clerk for a specified time, at a stated salary, and be wrongfully discharged, and if the only employment he could get would be to work as a brakeman on railroad trains, would it be claimed that because he received as much wages as a brakeman as he was to receive as a clerk, such facts would constitute a defense for the merchant? Would they, as a matter of law, operate as mitigation of damages, to such as were nominal, merely? Clearly not; simply because the question of fact should be passed upon whether the labor was not different in character and more severe in the performance." 60 Ill. 149, 155 (1871).

¹⁶15 Mo. 175, 183 (1851). Defendant entered into a contract with plaintiff for the purpose of drawing plans and specifications for a school house, and agreed to permit plaintiff to superintend its construction, but later prevented plaintiff from fulfilling the contract. The opinion does not indicate the nature of the substitute work in which plaintiff engaged.

of the plaintiff, which would be required to perform the contract, has been employed in business, not more laborious, and equally profitable, it is evident that he would not be injured by the violation of the contract. Yet, to give him the full benefit of his contract, he must be entitled to the difference in advantage, in ease and profit, between the service he was to perform, and the business substituted for that service, although his whole time might have been employed."

The line of thought projected by these cases, as well as the principal case, is unquestionably logical, but seems certain to lead to almost prohibitive difficulties of administration. If every contingency and deviation in ease and comfort as well as position and convenience is to be considered in determining the measure of damages on the facts of each individual case, the ramifications become numberless and the door to extravagant speculation is opened wide. It is obvious that no dependable standard can be applied in the determination of whether one particular job is more demanding on the worker than another. And if it is decided that the work done after discharge is more difficult than that of the original employment, there is no logical system for allocating part of the earnings to the degree of greater difficulty.¹⁷ Left with no definable standard for deciding such issues, juries will surely reach their conclusions on the basis of irrelevant considerations.

Though the court in the *MacKnight* decision deserves commendation for its efforts to give effect to some appealing equities in favor of the employee, its approach to the issue opens up such a multitude of administrative difficulties that doubt remains as to whether satisfactory results can be achieved under the rule of the case.

CHARLES F. BLACKBURN

¹⁷As an illustration, consider the following hypothetical case: A works for B as a laborer in a coal mine. His contract of employment requires a forty hour week with time and a half for overtime at the rate of \$1.00 an hour. He is a member of the union and receives whatever benefits are to be derived therefrom. A is in ill health due to the working conditions in the mine, and a substantial part of his income is paid out in medical bills. A is wrongfully discharged by B. There are no other coal mines in the vicinity and A obtains a job as chauffeur and gardener for C, a very rich man. The new employment requires A to work fifty hours a week at the rate of 80 cents an hour. The work is all out of doors, and in a month's time A's health is so improved that he no longer has to spend money on doctor's bills. In addition, C furnishes A, for C's own convenience, room, board, and uniforms reasonably worth \$100 per month. C always makes a substantial gift to all of his employees at Christmas time and besides that takes A to Florida with him at least once a year.

Under the general rule, the measure of damages is easily ascertainable. The tendency of the court in *MacKnight v. Twin Cities Broadcasting Corp.*—i.e., that of considering all factors in attempting to give the employee the full benefit of his contract—would result in mere speculation.

DAMAGES—MEASURE OF DAMAGES IN CONTRACT AND TORT ACTIONS FOR DESTRUCTION OF GROWING CROPS. [California]

In the recent California case of *Dutra v. Cabral*,¹ plaintiff brought an action for damages² caused by defendant's failure to supply water as provided for in a lease under which plaintiff was to receive 80% of the market price of the crops he was to raise on the leased premises. The crops failed because defendant did not furnish the water. In reviewing the case on the question of the proper measure of damages,³ the Supreme Court of California was required to determine what specific formula would satisfy the general statutory mandate that:

"For the breach of an obligation arising from contract, the measure of damages . . . is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things would be likely to result therefrom."⁴

Indicative of a general uncertainty of approach to this issue is the legislature's use of the tort-law language of "proximate cause" in fixing a standard of recovery for contract cases. The court may have been unconsciously following this wavering path of logic when it recited two inconsistent rules for the measure of damages for destruction of growing annual crops. Remarking that the cost of planting and cultivating the crops had merged into the market value, the court quoted the following language from a case where the theory of the action was in tort:

"The true measure of damages for the total destruction of a growing or standing crop is the value of the crop in the condition it was in at the time and place of destruction."⁵

Three paragraphs later in the opinion, a general rule was laid down that "the measure of damages for the . . . destruction of planted crops . . . is the local market value of the crops at the time and place of destruction, less the cost of producing and marketing the same."⁶ The

¹181 P. (2d) 26 (Cal. 1947).

²California has one form of civil action. Cal. Civ. Proc. Code (Deering, 1941) § 307.

³The appellate court had three issues to decide: Was the verdict sustained by the evidence; were the damages excessive; and had the defendant successfully carried the burden of showing necessity for the plaintiff to minimize the damages? Although the lower court had erred in the instructions as to the measure of damages, it was held that the defendant could not take advantage of this error as it was favorable to him. 181 P. (2d) 26, 29 (Cal. 1947).

⁴Cal. Civ. Code (Deering, 1941) § 3300.

⁵181 P. (2d) 26, 29 (Cal. 1947).

⁶181 P. (2d) 26, 30 (Cal. 1947).

decisions cited for this last proposition are all tort cases, and it is submitted that a more accurate analysis indicates their rule to be that the measure of damages is the *actual value* of the crop at the time of the injury, and that the market value of the crop at maturity is merely some evidence of this value.⁷

When the theory of the action is breach of contract, the perfect recovery would put the plaintiff ahead to where he would have been but for the defendant's failure to perform.⁸ The ideal measure of damages would determine what the total value of the marketed crop would have been, and deduct the cost of producing and marketing that the plaintiff was spared after the breach by defendant caused the failure of crops. Such a recovery includes in it the plaintiff's expenditures and his loss of profits which normally are treated as two separate items.⁹ This test involves only the normal difficulty of ascertaining the future of that particular crop that failed and the actual market value of the crop in view of the events which *subsequently did occur*. The damages

⁷The court cites *Staub v. Muller*, 7 Cal. (2d) 221, 228, 60 P. (2d) 283, 286 (1936), where the court was dealing with perennial crops, and in speaking of damage to a mature crop said the measure of damages was the "local market value of the crop less the cost of production and marketing." The only fair inference is that they were speaking of market values as of the time the crop was mature.

In *Fay v. Cox*, 45 Cal. App. 696, 188 Pac. 623 (1920), the defendant had negligently set fire to the plaintiff's mature barley crop. The court, in approving *Teller v. Bay & River Dredging Co.*, 151 Cal. 209, 90 Pac. 942 (1907), took the position that the value of the crop at the time of its destruction is the correct measure of damages and that the market value at maturity or a reasonable time after destruction is proper evidence. "While all such evidence may be considered by the jury in determining the amount of damages, if any, still the true measure of compensation is the value of the crops in the condition they were in at the time of their injury or destruction." 188 Pac. 623, 626 (1920). Notice again that if the inquiry is reduced to the value of the crop at the time of destruction, the chance of its maturing becomes the most significant variable of all in placing a dollars and cents evaluation on it.

In *Strecker v. Gaul*, 35 Cal. App. 619, 170 Pac. 646 (1917) the court held that the measure of damages was to be determined by the market value at harvest time, less the cost of cutting, baling and hauling to market. Here the court allowed loss of profits as having been "proximately caused" by the injury.

In *Dennis v. Crocker-Huffman L. & W. Co.*, 6 Cal. App. 58, 91 Pac. 425 (1907) the court held that for a tort the true measure of damages was the value of the crops in the condition they were in at the time of destruction and that market value at maturity was merely evidentiary.

⁸It is not the purpose of this comment to go into factors which would qualify and limit recovery short of this ideal goal, such as remote and speculative profits and mitigation of damages.

⁹*2* Sedgwick, *Damages* (9th ed. 1920) §§ 616, 624, 633E and cases cited. Note that in some instances the form of instruction will allow recovery for expenses where in fact there would have been a net loss if profits were considered.

are proved by reference to actual developments during the rest of the season and by reference to the market conditions in effect at harvest time.¹⁰

When the theory of the action is in tort, the ideal recovery would return the plaintiff to the status quo ante. The basic inquiry is as to the plaintiff's situation just before the tort was committed. This ideal is often expressed as the "actual present value" of his crop at the time, place and condition it was in when destroyed.¹¹ What the plaintiff actually has lost is his *prospect of having a mature crop*.¹² Though this prospect is a chance which is recognized in business enterprise and in crop insurance, the law of damages is steeped in precedent against the recognition of the value of a chance.

The refusal to instruct on the value of the prospects of having a crop leads to the adoption of diverse systems for ascertaining the *actual present value* of the crop destroyed. Normally, market value, though one step away from the ideal of actual value, is the best evidence of value. But, except in rare instances in which the sale of partly-grown crops is customary, there is no market value as of the time and condition of the crop just before destruction. Thus, before the jury has anything concrete to measure with, another step away from the ideal is necessary. Reference must be made to the *probable future market value* of the crop if it had matured. These two steps are taken in different forms of instruction in different jurisdictions. Some courts declare that the measure of recovery is the present value of the crop, then admit as evidence of this value the probable yield and probable market value when harvested, and instruct that from these two factors must be deducted costs of further production which were not incurred but otherwise would have been.¹³ Other courts take a third step away from the ideal by stating that the measure of damages is the probable market value of the crop when harvested less the probable cost of further production.¹⁴ It is to be noted that this last form of instruction

¹⁰Rios v. Azcuenaga, 19 Idaho 739, 115 Pac. 922 (1911); Smith v. Hicks, 14 N. M. 560, 98 Pac. 138, 19 L. R. A. (N.S.) 938 (1908); Colorado Co. v. McFarland, 94 S. W. 400, 403 (Tex. Civ. App. 1906).

¹¹McCormick, Damages (1935) 486, note 21 and cases cited.

¹²For a case which recognizes the plaintiff's prospects as an element of damages, see Zuidema v. Sanitary District of Chicago, 223 Ill. App. 130 (1921).

¹³Teller v. Bay & River Dredging Co., 151 Cal. 209, 90 Pac. 942, 12 L. R. A. (N.S.) 267 (1907); Hall v. Brown, 102 Ore. 389, 202 Pac. 719 (1921); Lester v. Highland Boy Gold Mining Co., 27 Utah 470, 76 Pac. 341 (1904).

¹⁴United Verde Copper Co. v. Ralston, 46 F. (2d) 1 (C. C. A. 9th, 1931); Hanken v. United States, 50 F. Supp. 996 (E. D. Pa. 1943); International Agr. Corp. v. Aber-

retains its tort theory characteristics only to the extent that its language is prospective, and that if probabilities are resolved into actualities it becomes a perfect instruction under contract recovery.¹⁵

The theoretical differences between the two measures of recovery are simple to state. Where the theory of recovery is breach of contract, hindsight should be used, and the triers of fact should look back upon all events up to and including the price at marketing time, and base their decision on actual occurrences.¹⁶ This involves little difficulty because normally neighboring crops have actually matured and been sold on the market. Where the theory of recovery is tort, the triers of fact should put themselves in the position of the plaintiff at the time of the injury, and use foresight to determine the value of his prospects and the injury thereto.¹⁷ But the increased difficulties of proof of such a measure, plus the insistent determination not to recognize the value of a chance, has forced the courts to resort to the market value measure, with the result that there is a tendency to treat the two theories of recovery as the same.

Nevertheless, certain differences should still be observed. When the theory of recovery is breach of contract, the jury is trying to find the *actual* market value of the plaintiff's *probable* yield in light of all the events that have happened.¹⁸ Thus, in theory at least, the jury

crombie, 184 Ala. 244, 63 So. 549 (1913); Harrington v. Blohm, 136 Ark. 231, 206 S. W. 316 (1918); Smith v. Hicks, 14 N. M. 560, 98 Pac. 138 (1908).

¹⁵Still another line of authority apparently recognizes the hopelessness of the market value of the crop test and offers the plaintiff the decreased rental value of the land as his recovery. Notice that in determining the decrease in rental value, the loss of the prospects for a good crop plays the only important role, either consciously or unconsciously. This rule has been applied most frequently in cases of injury to perennial crops or to young and immature annual crops. It has been applied in both tort and breach of contract cases. Pittsburgh, C. & St. L. Ry. Co. v. Hixon, 110 Ind. 225, 11 N. E. 285 (1887). For the application of this rule to a breach of contract case, see Pallett v. Murphy, 131 Cal. 192, 63 Pac. 366 (1900).

¹⁶McCormick, Damages (1935) 561.

¹⁷A good example of the proper application of the tort principal is Zuidema v. Sanitary District of Chicago, 223 Ill. App. 138 (1921).

¹⁸Bell v. Reynolds, 78 Ala. 510, 515, 56 Am. Rep. 52, 56 (1885) is a good example of hindsight calculation applied to a breach of contract case. The action was for failure to furnish fertilizer. The court said: "Speculative opinions of witnesses, as to the probable influences of [season, soil, and climate] . . . , would be a poor criterion for the measure of values In this case, however, these difficulties are entirely removed. The character of the season is absolutely known. So is the precise effect of fertilizer used *during this particular season*. No speculation is needed as to how much rain and how much sunshine were requisite to produce a given amount of crops to the acre, nor as to the probable effect of the fertilizer upon different kinds of soil, or even the proportion of it best suited to the land, and therefore what would necessarily have been produced on the remainder, which is shown to

should consider the abnormal event if it occurs. A drought which would have ruined the crops should count against the plaintiff as much as the necessity of feeding Europe and the fact of a good crop year would count for him in considering market value and yield.¹⁹ When the theory is tort, the prospect at the time of injury is the material element. Evidence of actual yield of similar crops should not be used to establish the very item of recovery but to give an indication of the value of his normal prospects at the time of his loss. No abnormal events that happened after the defendant's wrongdoing should weigh in the balance.²⁰

The theoretical distinction usually breaks down when the courts apply the more simple contract test of market value at maturity less further costs of production as the measure of damages in a tort case, in an effort to recompense the plaintiff for his prospects without recognizing their value in so many words. In the instant case, the California court is in the unusual position of applying tort precedents to the comparatively simple contract situation, when in fact it had ample precedent in its own jurisdiction dealing with breach of irrigation contracts on the contract theory of damages.²¹

The use of the "single form of action" procedural system does not justify the indiscriminate intermingling of tort and contract principles, and this is especially evident in California where the legislature has expressly preserved the tort-contract distinction in regard to damages measures.²²

It seems probable that neither party was prejudiced by the confused thinking which crept into the principal decision. However, if there is

have been in precisely the same state of cultivation, and similar in quality of soil." (italics supplied). Notice that the court is dealing in actualities looking back after the events that in fact did occur.

¹⁹It is doubtful whether this theory can be carried to its logical extreme, since at plaintiff's option he may sue only for expenses incurred before breach. 2 Sedgwick, Damages (1920) § 616 and cases cited.

²⁰Zuidema v. Sanitary District of Chicago, 223 Ill. App. 138 (1921).

²¹In *Allen v. Los Molinas Land Co.*, 25 Cal. App. 206, 143 Pac. 253 (1914) a plaintiff whose half-grown crops had been destroyed because the defendant failed to supply water was awarded damages in a sum equal to what the value of the potato crop would have been if water had been furnished, less the additional costs and expenses that would have been incurred in taking care of, harvesting and selling the crop. This decision has been followed on its statement as to the measure of damages for breach of contracts in the following cases: *Griffith v. Welbanks & Co.*, 29 Cal. App. 238, 155 Pac. 120, 123 (1915); *Parkinson v. Langdon*, 36 Cal. App. 80, 171 Pac. 710 (1918); *Chrisman v. Southern California Edison Co.*, 256 Pac. 618, 629 (Cal. App. (1927)); *Cross v. Ramdullah*, 274 Fed. 762, 771 (C. C. A. 9th, 1921).

²²Cal. Civ. Code (Deering, 1941) §§ 3300, 3333.

any valid reason for continuing to distinguish between the purposes of the two types of recovery, this decision may well become a source of embarrassment to the California court if it is cited as precedent in some subsequent case in which a clear observance of the contract-tort distinction is needed.

EDMUND D. WELLS, JR.

EVIDENCE—INVALIDITY UNDER DUE PROCESS CLAUSE OF CONVICTIONS
BASED ON CONFESSIONS OBTAINED BY DURESS. [United States Supreme Court]

The adoption by state police officers of so-called third degree methods to extort confessions from suspected criminals has in the past twelve years brought before the Supreme Court of the United States a series of cases to test the validity of convictions obtained by such means. In nine of the ten decisions, the Court has invoked the due process clause of the Fourteenth Amendment as the weapon with which to strike down convictions based on allegedly involuntary confessions.¹

Brown v. Mississippi,² decided in 1936, was the first decision in which the operation of the due process clause was extended to this issue.³ Brown and another defendant were arrested and taken to jail. A deputy sheriff, other officers, and a group of white men went to the jail, made them remove their clothes and lay over chairs, and flogged them with a heavy leather strap with a metal buckle on it. This whipping was continued until the victims confessed in every manner of detail as demanded by those present. After the confessions were obtained, defendants were warned of receiving the same treatment again should they change their story. The confession obtained by this means was used by the State of Mississippi to convict Brown. Aside from it, there was no evidence sufficient to warrant the submission of the case to the jury. Facts regarding the physical mistreatment were not only undisputed, but the mistreatment was admitted to have been administered by officers of the state. The Supreme Court, in a unanimous decision, invalidated the conviction, declaring:

"... the trial equally is a mere pretense where the state authori-

¹Cases cited in notes 2, 6, 9, 10, 11, 12, 13, *infra*.

²297 U. S. 278, 56 S. Ct. 461, 80 L. ed. 682 (1936).

³Note (1940) 1 Bill of Rights Rev. 58, 59. "... in *Brown v. Mississippi*... the Supreme Court for the first time extended the due process clause of the Fourteenth Amendment to include the privilege against self-incrimination as against the States."

ties have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'."

"It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process."⁴

This declaration afforded an important step in the protection of civil rights of persons accused of crime. However, cases involving this problem in clear cut form seldom arise because of the difficulty of proving that torturous methods were in fact resorted to by the law enforcement officials. In most cases, the accused is taken into custody of the officers, and all proceedings leading up to his confession are conducted behind closed doors with only these same officials as witnesses. When such an accused introduces evidence of violent mistreatment, he is met with unanimous contradictory testimony by the officials against whom he has complained.⁵

Four years later in *Chambers v. Florida*,⁶ the Supreme Court unanimously held that the Fourteenth Amendment applies with the same effect in a situation in which the charge of the use of physical mistreatment was not clearly proved,⁷ but in which there was positive evidence that the accused had been questioned severely over long periods of time under conditions capable of inspiring terror. The record in this case showed, without conflict, that the young, ignorant, colored farmer was repeatedly questioned and cross-questioned by state officers and other white citizens in a fourth floor jail room, where as a prisoner he was without friend or counsel, and under circumstances calculated to

⁴*Brown v. Mississippi*, 297 U. S. 278, 286, 56 S. Ct. 461, 465, 80 L. ed. 682, 687 (1936).

⁵Evidence of this difficulty is apparent from the Supreme Court's method of handling such a problem. Each time the Court is faced with this dilemma, it places such controverted evidence to one side. See *Chambers v. Florida*, 309 U. S. 227, 231, 60 S. Ct. 472, 474, 84 L. ed. 716, 719 (1940); *Lisenba v. California*, 314 U. S. 219, 230, 62 S. Ct. 280, 287, 86 L. ed. 166, 176-177 (1941); *Ward v. Texas*, 316 U. S. 547, 550-552, 62 S. Ct. 1139, 1141-1142, 86 L. ed. 1663, 1665-1666 (1942); *Ashcraft v. Tennessee*, 322 U. S. 143, 152, 64 S. Ct. 921, 925, 88 L. ed. 1192, 1198 (1944); *Malinski v. New York*, 324 U. S. 401, 405-406, 65 S. Ct. 781, 783-784, 89 L. ed. 1029 (1945).

⁶309 U. S. 227, 60 S. Ct. 472, 84 L. ed. 716 (1940).

⁷*Chambers v. Florida*, 309 U. S. 227, 231, 60 S. Ct. 472, 474, 84 L. ed. 716, 719 (1940).

break the strongest nerves and stoutest resistance. Basing its decision upon this record the Court said:

"To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol."

"Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death."⁸

In the four years following this decision, eight cases of very similar nature were carried to the Supreme Court to test convictions which had been sustained by the highest courts of Alabama,⁹ Texas,¹⁰ California,¹¹ Tennessee,¹² and New York.¹³ Seven of the convictions were invalidated on due process grounds, upon reasoning much the same as that employed in the *Chambers* case.¹⁴

Striking evidence of the widespread employment of these questionable practices by police officers is found in the many common elements of the fact situations in these cases. In most of them, the confessions were taken from Negro men of humble station in life, and of comparatively low degree of intelligence, most of whom were too poor to employ counsel and too friendless to have any one advise them of their

⁸*Chambers v. Florida*, 309 U. S. 227, 240-241, 60 S. Ct. 472, 479, 84 L. ed. 716, 724 (1940).

⁹*Canty v. Alabama*, 309 U. S. 629, 60 S. Ct. 612, 84 L. ed. 988 (1940); *Vernon v. Alabama*, 313 U. S. 547, 61 S. Ct. 1092, 85 L. ed. 1513 (1941).

¹⁰*White v. Texas*, 309 U. S. 631, 60 S. Ct. 706, 84 L. ed. 989 (1940); *Lomax v. Texas*, 313 U. S. 544, 61 S. Ct. 956; 85 L. ed. 1511 (1941); *Ward v. Texas*, 316 U. S. 547, 62 S. Ct. 1139, 86 L. ed. 1663 (1942).

¹¹*Lisenba v. California*, 314 U. S. 219, 62 S. Ct. 280, 86 L. ed. 166 (1941).

¹²*Ashcraft v. Tennessee*, 322 U. S. 143, 64 S. Ct. 921, 88 L. ed. 1192 (1944).

¹³*Malinski v. New York*, 324 U. S. 401, 65 S. Ct. 781, 89 L. ed. 1029 (1945).

¹⁴*Canty v. Alabama*, 309 U. S. 629, 60 S. Ct. 612, 84 L. ed. 988 (1940); *White v. Texas*, 309 U. S. 631, 60 S. Ct. 706, 84 L. ed. 989 (1940); *Lomax v. Texas*, 313 U. S. 544, 61 S. Ct. 956, 85 L. ed. 1511 (1941); *Vernon v. Alabama*, 313 U. S. 547, 61 S. Ct. 1092, 85 L. ed. 1513 (1941); *Ward v. Texas*, 316 U. S. 547, 62 S. Ct. 1139, 86 L. ed. 1663 (1942); *Ashcraft v. Tennessee*, 322 U. S. 143, 64 S. Ct. 921, 88 L. ed. 1192 (1944); *Malinski v. New York*, 324 U. S. 401, 65 S. Ct. 781, 89 L. ed. 1029 (1945).

In the *Canty*, *Lomax* and *Vernon* cases, the state court decisions were reversed without opinion, on the authority of the *Chambers* case.

rights had they been given an opportunity to do so.¹⁵ They were grilled over long periods of time under various terrorizing conditions,¹⁶ and when the controverted evidence of physical mistreatment was considered, it was put to one side by the Supreme Court.¹⁷

In *Lisenba v. California*,¹⁸ the single instance in this series of cases in which the conviction was sustained, several of the foregoing elements were notably absent. The defendant was a white man, experienced in business, very shrewd, and of a nature not easily intimidated. That these factors had some effect upon the decision is clearly indicated at one point in the majority opinion:

"We have not hesitated to set aside convictions based in whole, or in substantial part, upon confessions extorted in graver circumstances. These were secured by protracted and repeated questioning of ignorant and untutored persons, in whose minds the power of officers was greatly magnified; who sensed the adverse sentiment of the community and the danger of mob violence; who had been held incommunicado, without the advice of friends or of counsel; some of whom had been taken by officers at night from the prison into dark and lonely places for questioning. This case is outside the scope of those decisions."¹⁹

It is to be noted also that in this case there was substantial evidence in addition to the confession pointing to the guilt of the defen-

¹⁵In the following cases, defendants were poor, illiterate Negroes: *Brown v. Mississippi*, 297 U. S. 278, 56 S. Ct. 461, 80 L. ed. 682 (1936); *Chambers v. Florida*, 309 U. S. 227, 60 S. Ct. 472, 84 L. ed. 716 (1940); *Canty v. Alabama*, 309 U. S. 629, 60 S. Ct. 612, 84 L. ed. 988 (1940); *White v. Texas*, 309 U. S. 631, 60 S. Ct. 706, 84 L. ed. 989 (1940); *Lomax v. Texas*, 313 U. S. 544, 61 S. Ct. 956, 85 L. ed. 1511 (1941); *Vernon v. Alabama*, 313 U. S. 547, 61 S. Ct. 1092, 85 L. ed. 1513 (1941); *Ward v. Texas*, 316 U. S. 547, 62 S. Ct. 1139, 86 L. ed. 1663 (1942).

¹⁶Petitioner was questioned from the afternoon of May 20th until sunrise of the 21st without the aid of friend or counsel in *Chambers v. Florida*, 309 U. S. 227, 230, 60 S. Ct. 472, 474, 84 L. ed. 716, 718 (1940); after being interrogated on several successive nights in the woods by Texas Rangers, defendant confessed in *White v. Texas*, 310 U. S. 530, 532-533, 60 S. Ct. 1032, 1033, 84 L. ed. 1342, 1344-1345 (1940); accused was questioned in three different jails on three different days as he was being taken around to various places in the state in *Ward v. Texas*, 316 U. S. 547, 551, 62 S. Ct. 1139, 1141, 86 L. ed. 1663, 1665-1666 (1942); defendant was questioned in a jail room before a table with high-powered overhead lights from 7:00 p.m. Saturday until 9:30 a.m. Monday without sleep or rest in *Ashcraft v. Tennessee*, 322 U. S. 143, 149, 64 S. Ct. 921, 924, 88 L. ed. 1192, 1196-1197 (1944); accused was arrested and taken to a hotel where he was questioned for three hours with all his clothes removed in *Malinski v. New York*, 324 U. S. 401, 403, 65 S. Ct. 781, 782, 89 L. ed. 1029 (1945).

¹⁷See note 5, *supra*.

¹⁸314 U. S. 219, 62 S. Ct. 280, 86 L. ed. 166 (1941).

¹⁹*Lisenba v. California*, 314 U. S. 219, 239-240, 62 S. Ct. 280, 291, 86 L. ed. 166, 181-182 (1941).

dant. The Court made no mention of this fact, and in later cases²⁰ it has declared that the existence of such supporting evidence of guilt has no bearing upon the due process issue. However, it must be extremely difficult for even the most clear thinking judge to eliminate such considerations entirely from his mind in close cases.

In the latest case in this series, and the only post-war decision on the issue, the Supreme Court has conformed to the general pattern of the earlier cases, while emphasizing the significance of one factor not previously considered. In *Haley v. Ohio*,²¹ decided in January, 1948, the accused was a 15-year old Negro boy who was arrested for robbery and murder. He was not permitted to see counsel or friend and was questioned behind closed doors from mid-night until dawn by relays of policemen. Following this all-night ordeal, the defendant was shown confessions of his two friends, likewise suspected of the same crimes, and he confessed. This confession along with other evidence against the accused was introduced by the State of Ohio to secure a conviction. However, the age of petitioner, the hours when he was grilled, the duration of his quizzing, the absence of any friend or counsel to advise him, and the callous attitude of the police towards his rights all combined to convince the majority of the Supreme Court that the confession was wrung from a child in a manner which could not be squared with that due process of law which the Fourteenth Amendment requires.²² The closeness of the case is well indicated by the 5 to 4 decision,²³ and the vigorous nature of the dissenting opinion. The dissenting Justices considered the issue a clear question of fact, and, relying upon the decision in *Lisenba v. California*, stated that such issues should be determined by the triers of fact.²⁴ They were also of the opin-

²⁰*Lyons v. Oklahoma*, 322 U. S. 596, 597, 64 S. Ct. 1208, 1210, 88 L. ed. 1481, 1483 (1944); *Malinski v. New York*, 324 U. S. 401, 404, 65 S. Ct. 781, 783, 89 L. ed. 1029 (1945).

²¹322 U. S. 596, 68 S. Ct. 302 (1948).

²²*Haley v. Ohio*, 332 U. S. 596, 600-601, 68 S. Ct. 302, 304 (1948).

²³Justice Burton wrote a lengthy dissenting opinion, in which Justices Reed and Jackson and Chief Justice Vinson joined. Justice Douglas wrote the opinion for the Court, but only Justices Black, Murphy and Rutledge joined in that opinion. The majority necessary for the reversal of the state court decision was mustered from the vote of Justice Frankfurter, who wrote a special concurring opinion.

²⁴*Haley v. Ohio*, 332 U. S. 596, 623, 68 S. Ct. 302, 314-315 (1948). Mr. Justice Burton declared: "The rule of law governing this case is stated in *Lisenba v. California*: '... an issue has been resolved by the court and jury which involves an answer to the due process question. In such a case, we accept the determination of the triers of fact, unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process'."

ion that there was little need for such a confession because of the additional evidence in the case.²⁵

In addition to the significant factors in the previous cases supporting the determination that coercion had been used, the Court relied heavily upon the fact of the youth of the accused. In the course of a comparatively short opinion, Justice Douglas, speaking for the majority, stated seven times that the petitioner had been only 15 years of age at the time of his arrest. The significance of this factor is elaborated in detail:

"Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest."²⁶

Doubtlessly these decisions are the despair of many law-enforcement officers who may be so hard pressed by public opinion to obtain convictions that they feel it necessary to apply some coercion to obtain confessions as buttresses for circumstantial evidence of guilt. The firm stand which has been taken in the cases in the past decade seems to demonstrate that the Supreme Court is deliberately acting in a remedial capacity to check the use of such practices.²⁷ The employment of the very flexible due process clause to this end gives the Court a sufficiently adaptable source of authority to allow for the careful scrutiny

²⁵Haley v. Ohio, 332 U. S. 596, 609, 68 S. Ct. 302, 308 (1948): "In considering the record as a whole . . . it is appropriate to note that the foregoing undisputed facts left comparatively little need for such a confession as was signed by Haley."

²⁶Haley v. Ohio, 332 U. S. 596, 599-600, 68 S. Ct. 302, 304 (1948).

²⁷The case of Lee v. Mississippi, 332 U. S. 742, 68 S. Ct. 300 (1948), decided one week after Haley v. Ohio, gives some support to this premise by indicating the zeal with which the Court protects the right of a convicted defendant to raise the constitutional issue. At the trial, the defendant had testified both that he had never made the alleged confession at all, and that the alleged confession had been obtained from him by duress, threats and violence. The Mississippi Supreme Court affirmed the conviction on the reasoning that the accused cannot be allowed to claim that a confession was obtained by unconstitutional means when he also claims that he never made the confession. The United States Supreme Court, in a unanimous decision, reversed the conviction, declaring that "inconsistent testimony as to the confession should not and cannot preclude the accused from raising the due process issue in an appropriate manner." 332 U. S. 742, 745, 68 S. Ct. 300, 302.

of the circumstances of each case before declaring the conviction illegal. However, the decisions make it clear that nearly every doubt is likely to be resolved in favor of the accused.

BENTON C. TOLLEY, JR.

INSURANCE—RECOVERY FOR DEATH IN MILITARY AVIATION ACCIDENT
UNDER POLICY WITH AVIATION CLAUSE BUT NO WAR CLAUSE. [Ohio]

Arising as an outgrowth of aviation accidents during the war is a series of cases in which plaintiffs have sought recovery under life insurance policies which contained an "aviation clause"¹ but did not contain the standard "war clause."² Though the insured parties have in each case been killed in military plane crashes, plaintiffs have argued that because the company did not attach any provision relating to military service, the policy was not intended to exclude the hazard of flying in military service, and the aviation clause must be construed as referring to civilian flying only.

The most recent adjudication on this point is the 4 to 3 decision of the Ohio Supreme Court in *Gonaway v. Life Insurance Co. of Virginia*.³ The insured, then a civilian, applied for a policy with the defendant company in 1940. In the application, he stated that he had made several trips in aircraft but had failed to pass his test as a civilian air reserve pilot, that he was not in military service, and that he did not contemplate owning a plane. Six days after the application was made, the company issued his policy with the following indorsement attached:

"On account of the aviation hazard of the insured, this policy is issued with the following amendment: Death as a result directly or indirectly of service, travel or flight in or on any species of aircraft, except as a farepaying passenger in a licensed plane

¹"Death as a result, directly or indirectly, or service, travel, or flight in any species of aircraft, except as a passenger on a regularly scheduled passenger flight of a duly licensed common carrier, is a risk not assumed under this policy; but, if the Insured shall die as a result, directly or indirectly, of such service, travel, or flight, the Company will pay to the beneficiary the reserve on this policy." Typical example of an aviation clause taken from *Knouse v. Equitable Life Insurance Co. of Iowa*, 163 Kan. 213, 181 P. (2d) 310, 311 (1947).

²"It is expressly provided that death while in the service in the army or navy of the government in time of war is not a risk covered at any time during the continuance or reinstatement of this policy for any greater sum than the amounts actually paid to the Company thereon." Typical example of a war clause taken from *Miller v. Illinois Bankers' Life Ass'n*, 138 Ark. 442, 212 S. W. 310 (1919).

³76 N. E. (2d) 284 (Ohio 1947).

operating on a regular schedule with a licensed pilot over established air lines, is a risk not assumed under this policy . . ."⁴

The only mention of war in the entire policy was in the double indemnity portion, and there death in the service during wartime was excluded from double recovery only. A year and a half later insured became a pilot of a Navy torpedo bomber and subsequently lost his life in a crash at sea. The Supreme Court of Ohio allowed the beneficiary to recover under the policy, and in so doing stressed the language of the indorsement. Since it read, "On account of the aviation hazard of the insured," the court felt that the words referred specifically to the answers in the application which indicated that only private civilian flying was in the minds of the parties when the contract was made. The court intimated that if the indorsement had read merely, "On account of aviation hazard," recovery might have been disallowed.⁵ But as the policy stood, it was held to be ambiguous, and particularly so since the only mention of war was in the double indemnity clause.

In reaching its decision, the court cited no authority whatever, and three judges dissented. These judges felt that the language of the indorsement was intended to cover both military and civilian aviation hazards since war and military service were imminent; and inasmuch as the language of the policy was clear and unequivocal, there was no room for construction.

In the construction of insurance contracts, it has long been held that the policy is to be most strongly construed against the maker, and that any ambiguities should be resolved in favor of the insured.⁶ Because the insurance company chooses the language, this canon is an excellent one where real ambiguity and uncertainty exist, but it is not and was never intended to be a justification for varying the legal effect of terms when the meaning of the language is clear.⁷ Very often insurance policies have contradictory provisions, and this rule of construction may be aptly used to resolve the conflict. However, the employment of the word "ambiguous" as a screen for mere result-getting is certainly a misuse of the rule, and courts should be extremely careful in using the device.

Supporting the Ohio court is the 1944 New York decision in *Paradises v. Travelers Ins. Co.*⁸ There the facts presented an even stronger

⁴Conaway v. Life Insurance Co. of Va., 76 N. E. (2d) 284, 285 (Ohio 1947).

⁵Conaway v. Life Insurance Co. of Va., 76 N. E. (2d) 284, 285 (Ohio 1947).

⁶1 Couch, Cyclopedia of Insurance Law (1919) § 188.

⁷1 Couch, Cyclopedia of Insurance Law (1919) § 184.

⁸183 Misc. 887, 52 N. Y. S. (2d) 290 (1944).

case for the insurance company, because the aviation clause did not contain specific terms referring to the insured, as was true in the *Conaway* case. In construing this policy the court said:

"... It tells the insured, if you travel by air, the company is not liable in the event of your death, unless you travel under circumstances that are outlined in your policy.... This, to my mind, means civilian flying, ... because the very next clause mentions 'except for violation of the conditions of the contract relating to military or naval service.'... In this case Lieutenant Paradies followed the colors into the shock of invasion. He is a military casualty. He was in a plane, that's true, when he met his death. If he were killed in a foxhole, on a landing beach, or lost at sea, I am certain the defendant would have paid, ... so ... I feel substantial justice requires me to say... [judgment for the plaintiff]."⁹

The opinion failed to cite a single case in favor of its views. It seems quite evident that had decedent died in a foxhole the defendant would have paid, but it is difficult to see how that analogy applied to aviation when the plain language of the policy excluded death from flight in "any species of aircraft."¹⁰ The court in its effort to do "substantial justice" to the plaintiff has made a substantial addition to the language of the policy.¹¹

In the greater number of cases, the courts have been unwilling to find ambiguity from the mere fact that the policy contained an "aviation clause" and not a "war clause." In a federal Circuit Court of Appeals case¹² on the point, the plaintiff contended that military and

⁹*Paradies v. Travelers Ins. Co.*, 183 Misc. 887, 888, 52 N. Y. S. (2d) 290, 291 (1944).

¹⁰*Paradies v. Travelers Ins. Co.*, 183 Misc. 887, 888, 52 N. Y. S. (2d) 290, 291 (1944).

¹¹See *Durland v. New York Life Ins. Co.*, 186 Misc. 580, 61 N. Y. S. (2d) 700 (1946), in which another New York Supreme Court distinguished the facts of the *Durland* case from the *Paradies* case, and refused to follow the latter decision. In the *Durland* case there was a specific clause stating that the policy was free from any military service exclusion, but directly under it there was a rubber stamped imprint referring to the aviation rider attached.

One of the earliest cases involving this same question was *Sovereign Camp, W. O. W. v. Compton*, 140 Ark. 313, 215 S. W. 672 (1919), also cited and distinguished in the *Durland* case on the same basis as the *Paradies* case. Irrespective of this distinguishing feature, the *Compton* case is weakened by the reasoning used. Two by-laws were adopted by the society, one precluding recovery by persons in certain employment (including aviators), and the other barring recovery for death in the military service. Even though the two by-laws were worded practically identically, the court held that the latter one applied only to new members while the former applied to old and new members but did not affect the insured because employment meant civilian employment only.

¹²*Green v. Mutual Benefit Life Ins. Co.*, 144 F. (2d) 55 (C. C. A. 1st, 1944).

civilian aviation were entirely separate and distinct, and the fact that the company's application did not mention military aviation showed an intent on its part not to exclude this form of aviation hazard. In overruling this contention, the court, pointing out that civil and military aviation were not separate and distinct but were overlapping, refused to read into the aviation clause an exception for military aviation. It came to the very logical conclusion that the insurance company was only interested in the risk of flying, and not the reason for the flying. This same point was discussed and disposed of in *Hyfer v. Metropolitan Life Ins. Co.*¹³ Under an almost identical situation, the plaintiff proceeded on the basis of ambiguity, but the Massachusetts court declared:

"[This interpretation] is in direct conflict with its express language [the aviation clause] The absence of a provision excluding death due to war risks did not operate to engraft an implied exception upon the unambiguous aeronautical clause, *which relates to the risk itself and not to the reason for the exposure* It is fallacious reasoning to say that, because the policy failed to exclude liability for war losses in general, the scope of the undertaking, which clearly did exclude certain aviation deaths, is through such failure to be construed to comprehend all war losses and so to cover war aviation of the excluded kind."¹⁴

In a slightly different case,¹⁵ a New York Supreme Court in 1946 followed the reasoning of the *Green* and *Hyfer* cases to deny plaintiff a double recovery under a double indemnity clause which excluded accidental death resulting from flight in any aircraft other than as a farepaying passenger on commercial airlines. The court found, "that the policy is not ambiguous in respect to aviation coverage."¹⁶

In another recent case¹⁷ in this series, the Kansas Supreme Court, after an exhaustive review of the authorities, denied recovery, stating:

"Its language [the aviation clause] refers to flight 'in any spe-

¹³318 Mass. 175, 61 N. E. (2d) 3 (1945).

¹⁴*Hyfer v. Metropolitan Life Ins. Co.*, 318 Mass. 175, 61 N. E. (2d) 3, 4 (1945) [italics supplied].

Another recently decided (although unreported) case on the same point, and holding the same way is *Douglas v. Metropolitan Life Ins. Co.*, 16 U. S. L. Week 2290 (N. D. Ohio 1947).

¹⁵*Durland v. New York Life Ins. Co.*, 186 Misc. 580, 61 N. Y. S. (2d) 700 (1946).

¹⁶*Durland v. New York Life Ins. Co.*, 186 Misc. 580, 584, 61 N. Y. S. (2d) 700, 703 (1946).

¹⁷*Knouse v. Equitable Life Insurance Co. of Iowa*, 163 Kan. 213, 181 P. (2d) 310 (1947).

cies of aircraft,' about as all-inclusive language as could be used. We are not warranted in reading into this plain language, any words that would modify that language and make it say something other than was said."¹⁸

Clearly the two lines of cases represent an irreconcilable split of authority. The minority finds the policy ambiguous and then construes it in favor of the insured, while the majority of cases finds no ambiguity from the same facts. It would seem that the majority holding is the more sound view. An insurance policy is a contract, and the terms of the agreement should be observed by the courts, even if sympathy and patriotic fervor call for the contrary. However, in view of the well-established tendency of courts to aid the insured at every opportunity because of his inferior bargaining position, insurance companies must attempt to make the language of the policies clear enough to avoid controversies by stating that the aviation clause refers to both civilian and military flying. Until this is done the insurers will continue to lose a percentage of cases involving this point.¹⁹

T. HALLER JACKSON, JR.

INSURANCE—RIGHT OF DIVORCED WIFE TO RECOVER AS BENEFICIARY OF POLICY WHICH SHE PROCURED ON LIFE OF HUSBAND. [Kentucky]

With the recent decision of *Ficke v. Prudential Life Insurance Company of America*,¹ the Kentucky Court of Appeals has taken a step toward repudiating the confused and unique rules of law in that state concerning the right of a divorced wife to recover as beneficiary of an insurance policy on the life of her former husband. The plaintiff had procured several policies on the life of her husband, and had paid all the premiums thereon out of her own funds. Thereafter, the marriage was dissolved by divorce and the husband married another woman, who in this action claimed the proceeds of the policies for the estate of the deceased insured. Plaintiff sued for the proceeds, or in the alternative, the amount she paid in premiums, with interest.

The trial court dismissed plaintiff's petition, on the authority of prior Kentucky cases² applying a statute which provides that upon

¹⁸*Knouse v. Equitable Life Insurance Co. of Iowa*, 163 Kan. 213, 181 P. (2d) 310, 317 (1947).

¹⁹Although there is no way to compel present policy holders to accept a rider amending the aviation clause, it is possible that a great number of the holders would voluntarily assent to such a rider if they were contacted by the company.

¹305 Ky. 171, 202 S. W. (2d) 429 (1947).

²*Schauberger v. Morel's Adm'r*, 168 Ky. 368, 182 S. W. 198 (1916); *Eversole v.*

obtaining a divorce, the parties must restore all property received from each other by reason of the marriage.³ In reversing this judgment and holding the plaintiff entitled to recover the proceeds of the policy, the Court of Appeals expressly overruled its earlier decisions which had established the contrary rule.⁴

In those previous decisions it had been concluded that the interest of the wife as beneficiary of an insurance policy on the husband's life was property received by reason of the marriage, and thus came within the mandate of the statute.⁵ In regard to policies taken out by the husband on his own life, naming the wife as beneficiary, this conclusion may be obvious; and as that particular point was not involved, the court in the principal case carefully avoided committing itself.⁶ Even

Eversole's Adm'x, 169 Ky. 234, 183 S. W. 494 (1916); *Western and Southern Life Ins. Co. v. Webster*, 172 Ky. 444, 189 S. W. 429 (1916). In the first two decisions the proceeds of the policy were awarded to the estate of the deceased ex-husband, except for the amount of the premiums which had been paid by the wife. The sum was held to be recoverable by the wife as property received by the husband by reason of the marriage, within the provisions of the Kentucky statute, cited note 3, *infra*. In the last cited case, involving an annulment of an illegal marriage rather than a divorce, the estate apparently had made no claim for the proceeds of the policy, and the insurance company was held liable to the ex-wife only for the return of premiums paid.

In view of these holdings, the action of the trial court in the principal case in dismissing both the claim for the proceeds and the alternative claim for an amount equal to premiums paid seems a departure from the precedents relied upon. However, in none of the cited cases did the amount of premiums paid approach the face value of the policy, whereas in the principal case the plaintiff had paid more in premiums on one of the policies than its face value. The Court of Appeals points out that the previously adopted rule would require the peculiar result of charging the deceased's estate more for the premiums paid than it would be awarded in the form of the full proceeds of that policy. 305 Ky. 171, 202 S. W. (2d) 429, 430 (1947).

³Ky. Rev. Stat. (1946) § 403.060 (2): "Upon final judgment of divorce from the bonds of matrimony, each party shall be restored all the property, not disposed of at the beginning of the action, that he or she obtained from or through the other before or during the marriage and in consideration of the marriage."

⁴*Ficke v. Prudential Ins. Co. of America*, 305 Ky. 171, 202 S. W. (2d) 429, 432 (1947): "We have given very careful consideration to the problem presented here and have concluded that our previous opinions have been erroneous. We have now determined to follow the general rule and hold that where the wife has procured and paid for insurance on the life of her husband during the marriage, subsequent divorce does not abrogate the contract, and that she is entitled to continue to pay the premiums after the divorce and collect the proceeds of the policy upon its maturity. Cases to the contrary are overruled."

⁵*Eversole v. Eversole's Adm'x*, 169 Ky. 234, 183 S. W. 494 (1916); *Schauberg v. Morel's Adm'r*, 168 Ky. 368, 182 S. W. 198 (1916); *Sea v. Conrad*, 155 Ky. 51, 159 S. W. 622 (1913).

⁶*Ficke v. Prudential Ins. Co. of America*, 305 Ky. 171, 202 S. W. (2d) 429, 431 (1947).

where the wife had procured the policy and paid the premiums, the Kentucky court had heretofore taken the same view, on the reasoning that it was only by virtue of the marriage that the wife obtained an insurable interest in the life of the husband. This questionable line of logic gave effect, by implication, at least, to the unorthodox view that the insurable interest in the life of another must exist at the time of the loss as well as at the inception of the policy.⁷

That the countenancing of this minority view was done inadvertently is indicated by the fact that the Kentucky court has apparently not applied it in other types of controversies. In one square adjudication on the point, it was held that where a stockholder procured insurance on the life of the general manager of the corporation, with the stockholder as beneficiary, the existence of an insurable interest at the inception of the policy was sufficient.⁸ In permitting the plaintiff to recover in the principal case, the court expressly adopted that general principle of insurance law as the rule in Kentucky.

This shift leaves Texas as apparently the only state requiring the existence of an insurable interest at the time the insured dies.⁹ The Texas courts regard this rule necessary to prevent wagering contracts and to avoid the creation of an inducement to homicide. It is argued that if the interest terminates while the policy is in force, the temptation to take the life of the insured is just as great as if the interest had never existed.¹⁰ This view is thus analogous to the general rule of property insurance which, as a means of discouraging the willful destruction of insured property, requires that the interest be present at the time of the loss.¹¹

The Texas reasoning as to the prevention of homicide has been severely criticized by use of analogy to life estates in real property or testa-

⁷*Ficke v. Prudential Ins. Co. of America*, 305 Ky. 171, 202 S. W. (2d) 429, 432 (1947).

⁸*Sandlin's Adm'x v. Allen*, 262 Ky. 355, 90 S. W. (2d) 350 (1936).

⁹*Patterson, Essentials Of Insurance Law* (1935) 141: "... without going into detail, it may be safely asserted that no other state has consistently adhered to the Texas rule." *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251 (1876); *Rawles v. Insurance Co.*, 27 N. Y. 282, 84 Am. Dec. 280 (1863); *Overhiser's Adm'x v. Overhiser*, 63 Ohio St. 77, 57 N. E. 965 (1900); *Appeal of Corson*, 113 Pa. 438, 6 Atl. 213 (1886); *Marquet v. Aetna Life Ins. Co.*, 128 Tenn. 213, 159 S. W. 733 (1913); *Cheeves v. Anders*, 87 Tex. 287, 28 S. W. 274 (1894).

¹⁰*Cheeves v. Anders*, 87 Tex. 287, 28 S. W. 274 (1894).

¹¹*Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495, 10 L. ed. 1044 (U. S. 1842); *Commercial Fire Ins. Co. v. Capital City Ins. Co.*, 81 Ala. 320, 8 So. 222 (1886); *Clinton v. Norfolk Mut. Fire Ins. Co.*, 176 Mass. 486, 57 N. E. 998 (1900); *Foley v. Manufacturers' Ins. Co.*, 152 N. Y. 131, 46 N. E. 318 (1897).

mentary dispositions.¹² In *Ritter v. Smith*¹³ the Maryland court stated,

"In some cases they [contracts of life insurance in which no insurable interest existed at the time of loss] have been denounced as void, not simply because they tend to promote gambling, but because they are incentives to crime. The force of this latter suggestion has been, and may well be, doubted. It means that one not related or connected by consanguinity or marriage, who may have a direct pecuniary interest in the speedy death of another, will thereby be tempted to murder him, though he knows that hanging is the penalty for such crime. This doctrine carried to its logical result, has a far reaching effect. It strikes down every legacy to a stranger which may become known to the legatee . . . before the death of the testator. It makes void every similar limitation in remainder after the death of a life tenant . . . Yet we know of no case in which a court has declared such testamentary dispositions or conveyances to be void on this ground."

It is doubtful that human experience will support the Texas theory as to the need for thus protecting human life. The penalty for the commission of such a crime, if the offender is apprehended, is severe enough to restrain the normal schemer. Further deterrent effect lies in the fact that the moral wrong of taking a life is so much greater than that of destroying property. Professor Patterson suggests still another safeguard, in that "the consent of the *cestui que vie* affords sufficient assurance that the beneficiary will be a person who may safely be entrusted to resist the temptation to murder."¹⁴ By requiring the beneficiary to obtain the consent of the insured before procuring the policy or continuing the policy after the divorce is granted, he believes that the danger will be reduced to a "negligible minimum."

Reliance on the analogy of property insurance law as support for the Texas rule has been questioned. It is pointed out that a property insurance contract is one of indemnity, and there is no need to indemnify the insured if his interest in the property has terminated prior to the occurrence of the loss.¹⁵ But a life insurance contract is not re-

¹²*Union Fraternal League v. Walton*, 109 Ga. 1, 34 S. E. 317 (1899); *Rittler v. Smith*, 70 Md. 261, 16 Atl. 890 (1889); *Chamberlain v. Butler*, 61 Neb. 730, 86 N. W. 481 (1901); *Crosswell v. Connecticut Indemnity Ass'n*, 51 S. C. 103, 28 S. E. 200 (1897).

¹³70 Md. 261, 16 Atl. 890, 891-2 (1889).

¹⁴*Patterson, Insurance Interest In Life* (1918) 18 Col. L. Rev. 381, 392.

¹⁵*Clinton v. Norfolk Mut. Fire Ins. Co.*, 176 Mass. 486, 57 N. E. 998 (1900): "Inasmuch, however, as the contract of insurance is one of indemnity, and not a wager, it is manifest that where, before the fire, the insured had parted with his entire interest in the property insured, he suffered no loss by its destruction, and

garded as one of indemnity, and hence it is not essential that the insurable interest should exist at the time the loss is incurred.¹⁶ It has been said that a contract of life insurance is a "promise to pay a fixed sum of money, not measured in terms of the hardship or loss occasioned by death. It is, therefore, a misnomer to call it an 'indemnity' contract."¹⁷

If this distinction is controlling, then in situations in which the relationship of the parties is such that an interest ascertainable in a liquidated amount arises in the continuance of the life of the insured, the contract should be considered one of indemnity. In situations of this type, as in those of property insurance, an insurable interest should be required to exist at the time of the loss. This principle seems applicable where a creditor insures the life of a debtor or in reinsurance contracts, because it is obvious that such insurance is procured by the beneficiary for the purpose of indemnifying himself in the event the loss occurs,¹⁸ even though the insurer may be required to pay an amount in excess of the loss. In such situations the extent of the insurable interest can easily be ascertained. If the relationship is of the debtor-creditor type, the beneficiary's interest would be the amount of the debt plus interest; in a reinsurance contract, it would be the amount of the original insurance policy plus the cost of the reinsurance. In the event the amount recovered on the policy exceeds the insurable interest, this surplus should be transferred to the estate of the deceased.¹⁹

Upon the termination of the insurable interest, such as by the debt being paid, the policy should become void; and the beneficiary, having paid the premiums on the policy, would become entitled to the cash surrender value of the policy. The amount of the premiums paid would exceed the amount thus recovered, but the difference is referable to the protection the beneficiary has received.²⁰

needed no indemnity." *Foley v. Manufacturers' Ins. Co.*, 152 N. Y. 131, 134, 46 N. E. 318, 319 (1897): "... there must be an insurable interest in the insured ... existing at the time of the happening of the event insured against, to enable him to maintain an action on a fire policy. This flows from the nature of a contract of fire insurance, which is a contract of indemnity; and, where there is no interest, there is no room for indemnity."

¹⁶*Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251 (1876); *Insurance Co. v. Bailey*, 13 Wall. 616, 20 L. ed. 501 (U. S. 1871); *Keckley v. Coshoccon Glass Co.*, 86 Ohio St. 213, 99 N. E. 299 (1912); *Wurzburg v. New York Life Ins. Co.*, 140 Tenn. 59, 203 S. W. 332 (1918).

¹⁷*Patterson, Insurable Interest In Life* (1918) 18 Col. L. Rev. 381, 388.

¹⁸*Exchange Bank of Macon v. Loh*, 104 Ga. 446, 31 S. E. 459 (1898) held that a creditor insured the life of a debtor for indemnification purposes.

¹⁹*Exchange Bank of Macon v. Loh*, 104 Ga. 446, 31 S. E. 459, 461 (1898).

²⁰*Patterson, Insurable Interest In Life* (1918) 18 Col. L. Rev. 381, 414: "... each

In the cases in which dependents have insured the lives of their providers, though the amount of the hardship on the beneficiary due to the death of the insured cannot be exactly evaluated, the purpose of the insurance is generally still indemnification against loss of support. While the courts have almost uniformly refused to recognize this indemnity element of life insurance, it seems that this may be a rule of expediency, designed to circumvent the difficult problem of determining the value of the insurable interest actually involved. In that event, the distinction is purely superficial, and could well be abolished in favor of the rule that in contracts of life insurance an insurable interest must exist at the death of the person insured.

It is true that the amount of the policy may far exceed the actual economic value of the person insured to the named beneficiary, and therefore a life insurance policy would not be a true indemnity contract. However, the policy may be treated like a valued property insurance policy "in which a definite valuation is, by the agreement of both parties, put upon the subject-matter of insurance and written in the face of the policy . . ." ²¹ On this theory it becomes unnecessary to compute the actual extent of the interest of a dependent in the life of the party on whom he is relying for support.

However, to permit a divorced wife, who is no longer dependent on the insured, to recover on a policy is an entirely different matter, because here it is not a question of *extent* of interest but rather of *lack* of interest. The insurance has been reduced to a pure wagering transaction which the law should have no desire to countenance. The interests of justice might be better served through restoring the parties to their original position by requiring the insurance company to repay the amount of the premiums paid since the divorce, plus interest, but less a sum representing the reasonable cost to the company of handling the nullified policy.²²

premium represents two payments, one to cover the current risk, and the other to maintain the policy reserve. As to the former, the insured [beneficiary] has received full value, because the risk has been incurred . . . As to the latter, the policy may be fully protected by giving him his share of the reserve in the form of a 'cash surrender value; that is, as soon as his interest is terminated, he can be given his 'investment'."

²¹Vance, Insurance (2d ed. 1930) 44.

"It is perfectly competent for the parties to a contract of insurance to determine by prior agreement what shall be regarded as the value of the property insured . . . and . . . such valuation is the measure of recovery, even though it might be proved that the actual value of the property lost is more or less." Vance, Insurance (2d ed. 1930) 77.

²²The fact that the amount of the premiums to be repaid might exceed the

The position taken by the Kentucky Court of Appeals in the principal case, though it brings that state in accord with the great weight of authority, may thus have been a move in the wrong direction. Its previous view, while unorthodox, may be better supported by reason and more in accord with realities.

JAMES O. PORTER

LABOR LAW—AVAILABILITY OF INJUNCTIVE RELIEF AGAINST PEACEFUL PICKETING UNDER ILLEGAL PURPOSE DOCTRINE. [Massachusetts]

The Massachusetts court's recent decision in *Saveall v. Demers*¹ exemplifies the reluctance of some states to accept the United States Supreme Court's classification of peaceful picketing as an exercise of the constitutionally guaranteed right of freedom of speech.² The plaintiff owned and operated a barber shop in Fitchburg, Massachusetts, in which he had no employees, but rather did all the work himself. The defendant union, International Journeymen Barbers of America, Local 284, had about 40 members, over half of whom operated their own shops and employed no one. Plaintiff having refused a request to join the union or to raise his price to the union scale, the union began picketing his shop, carrying signs reading, "This barber shop unfair

face value of the policy seems to have troubled the Kentucky courts. However, if the purpose is to rescind the insurance contract and restore the parties to their original positions, the principle is not changed by the relative amount of premiums paid to face value of the policy. The difficulty comes in the further—and seemingly unwarranted—step of holding the estate of the deceased entitled to the proceeds of the policy (subject to accountability for the amount of the premiums paid by the ex-wife). The possibility of the estate's being charged with more than it would receive is thereby raised. Some authority is available for the view that if the beneficiary lacks an insurable interest, the estate of the insured can collect the proceeds of the policy. See 2 Couch, Insurance (1929) 923; 29 Am. Jur. 291, and that even where the insurance company has paid the proceeds to the beneficiary, the estate of the insured can recover the money from the beneficiary. *Howe v. Griffin*, 126 Ky. 373, 103 S. W. 714 (1907); *Riner v. Riner*, 166 Pa. St. 617, 31 Atl. 347 (1895). But the usual American view is that only the insurer may assert the want of insurable interest in the beneficiary. 1 Couch, Insurance (1929) 772; 29 Am. Jur. 291-292. There appears to be no reasonable basis for allowing the deceased's estate to claim any interest in the policy, where neither deceased nor the beneficiaries of his estate took out the insurance or paid for it. This seems to be the incorrect factor in the previous Kentucky view—not the refusal to allow the ex-wife to recover on the policy.

¹76 N. E. (2d) 12 (Mass. 1947).

²*Thornhill v. Alabama*, 310 U. S. 88, 60 S. Ct. 736, 84 L. ed. 1093 (1940); *Carlson v. California*, 310 U. S. 106, 60 S. Ct. 746, 84 L. ed. 1104 (1940); *American Federation of Labor v. Swing*, 312 U. S. 321, 61 S. Ct. 568, 85 L. ed. 855 (1941); *Bakery and Pastery Drivers and Helpers v. Wohl*, 315 U. S. 769, 62 S. Ct. 816, 86 L. ed. 1178 (1942); *Cafeteria Employees Union v. Angelos*, 320 U. S. 293, 64 S. Ct. 126, 88 L. ed. 58 (1943).

to organized labor. The Fitchburg Barbers Union." The picketing was peaceful at all times. Two men walked back and forth on the sidewalk in front of the shop during business hours; no threats or interference with customers occurred.

The trial court, finding that there was no labor dispute as defined by the state anti-injunction statute,³ enjoined the picketing as an unlawful interference with the plaintiff's business. The Massachusetts Supreme Court affirmed, classifying the defendants' action as an unlawful combination to injure the plaintiff in his business. Defendants' contention that the picketing could not be enjoined because it was an exercise of the constitutionally protected right of free speech was rejected by the Massachusetts court with the assertion that picketing "possesses elements of compulsion upon the person picketed which bear little relation to the communication to any one of information or of ideas,"⁴ and that a tortious act could not be made non-tortious merely by calling it speech. The court concluded that "the defendants' method of speaking involves an otherwise unlawful combination for an unjustified objective and a form of compulsion which is not speech and which strikes directly at the basic right of a man to use his hands to earn his living."⁵

Although it is undeniably true that the picketing strikes at the plaintiff's right to earn a living, and although the Massachusetts court makes a strong case for its premise that "the essentials of free speech are possible without destruction of other constitutional rights as fundamental to a free society as the right of free speech itself,"⁶ yet it is difficult to see how such an injunction can be sustained in the face of the United States Supreme Court's "free speech doctrine" as announced in some half-dozen cases.

Prior to 1937 most courts allowed picketing only when carried on in conjunction with a lawful strike. Labor disputes were considered the business of the individual states, and picketing was subject to regulation or prohibition depending upon whether or not the union showed sufficient justification for its action.⁷ Against this background came the dictum of *Senn v. Tile Layers Protective Union*⁸ implying that picket-

³Mass. Gen. Laws (Ter. ed.) c. 149, § 20C, as added by St. 1935, c. 407, § 1; c. 214, § 9A, as added by St. 1935, c. 407, § 4.

⁴76 N. E. (2d) 12, 14-15 (Mass. 1947).

⁵76 N. E. (2d) 12, 15 (Mass. 1947).

⁶76 N. E. (2d) 12, 15 (Mass. 1947).

⁷1 Teller, *Labor Disputes and Collective Bargaining* (1940) § 136.

⁸301 U. S. 468, 57 S. Ct. 857, 81 L. ed. 1229 (1937).

ing was a form of free speech guaranteed by the Federal Constitution.⁹ Three years later, in *Thornhill v. Alabama*,¹⁰ the Supreme Court implemented this dictum by holding that under the Fourteenth Amendment no state could validly pass a statute prohibiting all picketing, because such a statute would deny freedom of speech.

The following year, in *American Federation of Labor v. Swing*,¹¹ "stranger picketing" was brought within the *Thornhill* case doctrine, with the effect of nullifying the "no strike-no picket" common law policy of Illinois.¹² In this case the Supreme Court spoke of peaceful picketing as if it were an absolute right,¹³ but on the same day the decision in *Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies Inc.*¹⁴ was handed down, holding that the Illinois court could enjoin peaceful picketing when such peaceful picketing was so enmeshed with acts of violence as to make further picketing coercive.¹⁵

⁹301 U. S. 468, 478, 57 S. Ct. 857, 862, 81 L. ed. 1229, 1236 (1937): "Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

¹⁰310 U. S. 88, 60 S. Ct. 736, 84 L. ed. 1093 (1940).

¹¹312 U. S. 321, 61 S. Ct. 568, 85 L. ed. 855 (1941).

¹²*Swing v. American Federation of Labor*, 372 Ill. 91, 22 N. E. (2d) 857 (1939); *Maywood Farms Co. v. Milk Wagon Drivers Union*, 301 Ill. App. 607, 22 N. E. (2d) 962 (1939); *Hendrickson v. International Ass'n*, 301 Ill. App. 608, 22 N. E. (2d) 969 (1939); *Jaffe v. Auto Mechanics*, 301 Ill. App. 624, 22 N. E. (2d) 723 (1939).

In twelve other states (Connecticut, Florida, Georgia, Indiana, Kentucky, Maine, Massachusetts, New Jersey, Ohio, Pennsylvania, Texas, and Washington) at the time the *Swing* case was decided, picketing in the absence of a strike was outlawed. Subsequent to the *Swing* decision, five of these states (Connecticut, Indiana, Kentucky, New Jersey, and Washington) have authorized picketing in the absence of a strike, either because of its identification with free speech or on other grounds. See 1 *Teller, Labor Disputes and Collective Bargaining* (1940 and Supp. 1947) § 117.

¹³"The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. . . . Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in *Tornhill's* case." 312 U. S. 321, 325-326, 61 S. Ct. 568, 570, 85 L. ed. 855, 857 (1941).

¹⁴312 U. S. 287, 61 S. Ct. 552, 85 L. ed. 836, 132 A. L. R. 1200 (1941).

¹⁵It is interesting to note that the Illinois court did not enjoin the picketing in the *Meadowmoor* case on this basis, but because such picketing was a secondary boycott and an unlawful interference with the plaintiff's business. The Illinois court did not consider the violence a controlling element. *Meadowmoor Dairies v. Milk Wagon Drivers Union*, 371 Ill. 377, 21 N. E. (2d) 308 (1939). Presumably the Supreme Court seized upon the violence in this case in an effort to clarify and qualify the "free speech doctrine" before it got out of control, for as pointed out by Justice Reed in the dissenting opinion, 312 U. S. 287, 317, 61 S. Ct. 552, 566,

Carpenters and Joiners Union of America v. Ritter's Cafe,¹⁶ decided in 1942, placed a further restriction on the "free speech doctrine" by limiting the right to picket to the area of the industry within which the labor dispute arises,¹⁷ and by ruling that picketing of an establishment which industrially has no connection with the dispute may be enjoined. In the course of that opinion the Court cast considerable doubt upon the validity of the classification of picketing as free speech by making a distinction between "picketing" and "other traditional modes of communication."¹⁸

*Bakery and Pastry Drivers and Helpers v. Wohl*¹⁹ was decided the same day as the *Ritter's Cafe* case. The New York courts had enjoined picketing on the basis that no labor dispute existed as defined by the state Civil Practice Act,²⁰ but the Supreme Court invalidated the injunction, declaring that "one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive."²¹ And a further qualification of the "free speech doctrine" was expressed in the opinion:

"... there are no findings and no circumstances from which we can draw the inference that the publication was attended or likely to be attended by violence, force or coercion, or conduct

85 L. ed. 836, 854 (1941), there were no findings that the union authorized or encouraged violence, nor did the union contest the right of the Illinois court to enjoin acts of violence.

¹⁶ 315 U. S. 722, 62 S. Ct. 807, 86 L. ed. 1143 (1942).

¹⁷This limitation is comparable to the New York "Unity of Interest" concept. Cf. *Goldfinger v. Feintuch*, 276 N. Y. 281, 11 N. E. (2d) 910 (1937); *People v. Belows*, 281 N. Y. 67, 22 N. E. (2d) 238 (1939).

¹⁸"But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute. Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication." 315 U. S. 722, 727, 62 S. Ct. 807, 810, 86 L. ed. 1143, 1148 (1942).

It was rather startling for the Court to maintain that picketing is free speech and in the same decision allow freedom of speech, in the form of picketing, to be restricted to the area of industrial conflict. This seems entirely inconsistent with what was said in *Schneider v. State of New Jersey*, 308 U. S. 147, 163, 60 S. Ct. 146, 151, 84 L. ed. 155, 166 (1939) "...one is not to have the exercise of this liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

¹⁹315 U. S. 769, 62 S. Ct. 816, 86 L. ed. 1178 (1942).

²⁰N. Y. Laws (1935) c. 477.

²¹315 U. S. 769, 744, 62 S. Ct. 816, 818, 86 L. ed. 1178, 1183 (1942).

otherwise unlawful or oppressive; and it is not indicated that there was an actual or threatened abuse of the right to free speech through the use of excessive picketing. A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual."²²

In 1943, the New York court, thinking it had made the findings referred to in the *Wohl* case as necessary for the issuance of an injunction, enjoined a labor union from picketing a cafeteria operated by the owners without the aid of employees.²³ The purpose of the picketing was to organize the establishment, but the pickets had carried misleading signs, had told prospective customers that the cafeteria served bad food and that customers of the cafeteria were aiding the cause of Fascism, and had directed prospective customers to competitors' restaurants. The New York court found that the picketing was unlawful and coercive and declared:

"... a citizen is not required to tolerate peaceful picketing accompanied by untruthful representations, interferences with his business or coercive conduct designed to injure or destroy his business whether a labor dispute exists or not. . . . *Unlike the record in the Wohl case, there are findings of fact here to sustain the decree.*"²⁴

The United States Supreme Court, by a unanimous decision in *Cafeteria Employees Union v. Angelos*,²⁵ reversed the New York court and refused to retreat further from the "free speech doctrine." The findings of unlawful and coercive acts were apparently rejected, and "the right of workers to state their case and to appeal for public support in an orderly and peaceful manner regardless of the area of immunity as defined by state policy"²⁶ was reaffirmed. Evidently the implied limitations of the *Wohl* case proved to be an illusion. If it is true that "A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual,"²⁷ those places and circumstances are still to be determined by the Supreme Court of the United States and not by the individual states themselves.

Thus it appears that the "free speech doctrine" in its present status embraces the principles of the *Thornhill*, *Swing* and *Wohl* cases as limited by qualifications expressed in the *Meadowmoor* and *Ritter*

²²315 U. S. 769, 755, 62 S. Ct. 819, 86 L. ed. 1178, 1184 (1942).

²³*Angelos v. Mesevich*, 289 N. Y. 498, 46 N. E. (2d) 903 (1943).

²⁴289 N. Y. 498, 502, 46 N. E. (2d) 903, 905 (1943) [italics supplied].

²⁵320 U. S. 293, 64 S. Ct. 126, 88 L. ed. 58 (1943).

²⁶320 U. S. 293, 295, 64 S. Ct. 126, 127, 88 L. ed. 58, 60 (1943).

²⁷315 U. S. 769, 775, 62 S. Ct. 816, 819, 86 L. ed. 1178, 1184 (1942).

cases: Peaceful picketing is an exercise of the constitutionally guaranteed right of freedom of speech, so long as the picketing is not so enmeshed with violence as to become coercive, and so long as the pickets restrict their activities to the area of industrial conflict, "regardless of the area of immunity as defined by state policy."²⁸

Although the immediate objective of the picketing enjoined by the Massachusetts court in *Saveall v. Demers*²⁹ was to bring pressure upon the plaintiff to raise his prices, the primary purpose was to enable the union shops to maintain their prices, and that could hardly be considered an unlawful objective. The free speech decisions, particularly the *Angelos* case,³⁰ would appear to embrace the facts of this case, but the Massachusetts court, although paying some verbal homage to these decisions, apparently declines to follow them. Instead, it continues to apply the unlawful purpose and civil conspiracy concepts as tests for the legality of peaceful picketing, with the result that the "free speech doctrine" has little effect on Massachusetts law.³¹

The Massachusetts court is not alone in currently voicing protest against the broad implications of the free speech decisions. The Supreme Court of Washington, in a 5 to 4 decision in *Gazzam v. Building Service Employees International Union, Local 262*,³² has done an about-face in regard to stranger picketing. A hotel proprietor had refused to sign a closed shop agreement with the defendant union. His employees had been given an opportunity to join the union, but had declined to do so, and the proprietor contended that to sign a closed shop agreement, thereby requiring his employees to join the union, would be unlawful under the state labor code. When the union peacefully picketed the establishment, the proprietor brought an action for damages suffered as a result of the picketing.

The Washington court not only allowed the plaintiff to recover damages, but went further than was necessary to decide the issues of the case by indicating that an injunction against further picketing was

²⁸*Cafeteria Employees Union v. Angelos*, 320 U. S. 293, 295, 64 S. Ct. 126, 127, 88 I. ed. 58, 60 (1943). See Teller, *Picketing and Free Speech* (1942), 56 Harv. L. Rev. 180; Dodd, *Picketing and Free Speech: A Reply* (1943) 56 Harv. L. Rev. 532; Jaffe, *In Defense of the Supreme Court's Picketing Doctrine* (1943) 41 Mich. L. Rev. 1037.

²⁹76 N. E. (2d) 12 (Mass. 1947).

³⁰320 U. S. 293, 64 S. Ct. 126, 88 L. ed. 58 (1943).

³¹See *Simon v. Schwachman*, 301 Mass. 573, 18 N. E. (2d) 1 (1938); *Quinton's Market v. Patterson*, 303 Mass. 315, 21 N. E. (2d) 546 (1939); *R. H. White Co. v. Murphy*, 310 Mass. 510, 38 N. E. (2d) 685 (1942); *Fashioncraft Inc. v. Halpern*, 313 Mass. 385, 48 N. E. (2d) 1 (1942); *Colonial Press Inc. v. Ellis*, 321 Mass. 495, 74 N. E. (2d) 1 (1947).

³²188 P. (2d) 97 (Wash. 1947).

a proper remedy and that such injunctive relief would be authorized if requested.³³ In the course of the opinion the court expressly overruled two 1941 decisions³⁴ in which injunctive relief against stranger picketing had been denied solely on the ground that the Washington court was bound by the United States Supreme Court's decisions that peaceful picketing is constitutionally protected free speech.³⁵ By overruling these earlier decisions and making available injunctive relief against stranger picketing, the Washington court places picketing back into the status it held prior to the United States Supreme Court's "free speech decisions." Therefore, although peaceful picketing may be constitutionally protected in that state, it loses such protection when used in the furtherance of what is termed an unlawful labor objective by the Washington court.

It seems possible that state courts which have for some time considered themselves unequivocally bound by the Supreme Court decisions are realizing the futility of attempting to explain the "free speech doctrine" in the light of accepted principles of tort law, and the recent decisions of the Massachusetts and Washington courts may foreshadow a rising opposition to the classification of peaceful picketing as free speech. In future cases the United States Supreme Court may be faced with a full force of hostile public opinion demanding a restriction of the broad rights of free speech picketing.

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³³The court sustained the plaintiff's contention that the state Labor Code made a closed shop agreement unlawful; hence the picketing was for an unlawful purpose. 188 P. (2d) 97, 103 (Wash. 1947). It is interesting to note that the California court reached the opposite conclusion in interpreting a similar statute. *Shafer v. Registered Pharmacists Union*, 16 Cal. (2d) 379, 106 P. (2d) 403 (1940).

³⁴*O'Neil v. Building Service Employees International Union*, 9 Wash. (2d) 507, 115 P. (2d) 662, 137 A. L. R. 1102 (1941), and *S & W Fine Foods Inc. v. Retail Delivery Drivers and Salesmen's Union*, 11 Wash. (2d) 262, 118 P. (2d) 962 (1941).

³⁵Although following the Supreme Court decisions in the *O'Neil* case, the Washington court expressed a strong distaste for the "free speech doctrine." Chief Justice Robinson in a concurring opinion said: "While I concur in the result of the foregoing opinion, I desire to make it clear that I do not pretend to have arrived at that result through the employment of any kind of intellectual process. In fact, I agree with substantially everything that is said in the opinion of the dissenting judges, but I feel compelled to follow the opinions of the Supreme Court of the United States in the *Swing* case and the other so-called 'freedom of speech' cases recently decided by that court." 9 Wash. (2d) 507, 115 P. (2d) 662, 664-665, 137 A. L. R. 1102, 1105 (1941).

And in a rather sharp dissenting opinion Judge Steinert said: "If this state of affairs is the logical outcome of 'freedom of speech,' I would rather have the United States supreme court so interpret the constitution than to have a part in thus declaring the law. If that is to be the law, then I think that the time has arrived when we should have less speech and more freedom." 9 Wash. (2d) 507, 115 P. (2d) 662, 666-667, 137 A. L. R. 1102, 1108 (1941).

NEGOTIABLE INSTRUMENTS—STATUS OF HOLDER OF INSTALLMENT NOTE
TAKEN AFTER MATURITY OF ONE OF INSTALLMENTS. [California]

The rule that the taker of a negotiable note after maturity is not a holder in due course, and is thus subject to the personal defenses of the maker is no longer open to question.¹ If a note is not paid at maturity, it is considered dishonored, and such fact, appearing on the face of the note, is equivalent to notice to the holder that he takes the note subject to inherent infirmities which may exist presently or subsequently.² This element of notice, established in the earliest cases,³ has been codified in Section 52 (2) of the Negotiable Instruments Law as a requisite for *hdc* status: "That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact . . ."

It would seem that this reasoning would warrant the same result where a series of notes, known by the purchaser to be given for the same consideration, are transferred after the maturity of the first note; thus the taker of any of the notes of the series would be precluded from the *hdc* status. Under the law merchant rule it generally was held that knowledge that the note was one of a series in which a note was overdue was such a suspicious circumstance as would justify the jury in denying *hdc* status to the taker.⁴ Since the adoption of the N.I.L. and the trend towards achieving greater negotiability, a few courts have reached a contrary conclusion.⁵ In these cases it was held that un-

¹"The rule of law that he who takes a note overdue and dishonored, takes it encumbered with all the equities between the prior parties to it, is the law . . . of those states which have adopted the common law." *Foley v. Smith*, 6 Wall. 492, 493, 186 L. ed. 931, 932 (1867); *Fisher v. Leland*, 58 Mass. 456 (1849); *Emerson v. Crocker*, 5 N. H. 159 (1830); 1 *Daniel*, *Negotiable Instruments* (3d ed. 1886) § 796, and cases cited; *Britton, Bills and Notes* (1943) 497.

²"But where a negotiable note is found in circulation after it is due, it carries suspicion on the face of it. The question instantly arises, why is it in circulation,—why is it not paid? [There] is something wrong. Therefore, although it does not give the indorser notice of any specific matter of defense . . . yet it puts him on inquiry . . ." *Fisher v. Leland*, 58 Mass. 456, 458 (1849).

³*Brown v. Davies*, 3 T. R. 80, 100 Eng. Rep. 466 (1789).

⁴In the following cases it was held that a transferee who acquires notes forming a series, or a part of them, after one or more of the series had matured, did not take as an *hdc* if it appeared on the face of the notes, or he had knowledge that they formed a series. *Old National Bank v. Marcy*, 79 Ark. 149, 95 S. W. 145 (1906); *Stoy v. Bledsoe*, 31 Ind. App. 643, 68 N. E. 907 (1903); *McGuigan v. Abele*, 78 Mich. 415, 44 N. W. 393 (1889); *Lockwood v. Noble*, 113 Mich. 418, 71 N. W. 856 (1897); *Rowe v. Scott*, 28 S. D. 145, 132 N. W. 695 (1911); *Harrington v. Claffin*, 91 Tex. 294, 42 S. W. 1055 (1897); *Norwood v. Leeves*, 115 S. W. 53 (Tex. Civ. App. 1908).

⁵*Hobart M. Cable Co. v. Bruce*, 135 Okla. 170, 274 Pac. 665 (1928); *Mountjoy*

less the purchaser had actual knowledge of the infirmity or defect which constituted the defense against the note, the mere knowledge that one note of the series was overdue will not prevent his attaining hdc status as to the other notes. These decisions, however, were not rendered with reference to Section 52 of the N.I.L., but solely with reference to Section 56,⁶ and hold that knowledge that one of the notes was overdue, was not "knowledge of such facts that his action in taking the instrument amounted to bad faith."⁷ It seems that the arbitrary rule requiring purchase before maturity was not regarded by these courts as controlling.⁸ In the absence of legislation covering the situation, such a viewpoint seems hard to sustain, for it is provided expressly in Section 196 of the N.I.L. that in any case not provided for in the Act, the law merchant shall govern.⁹

Parts Co. v. San Antonia National Bank, 12 S. W. (2d) 609 (Tex. Civ. App. 1928); Morgan v. Farmington Coal & Coke Co. 97 W. Va. 83, 124 S. E. 591 (1924). Contra: Beasley Hardware Co. v. Stevens, 42 Ga. App. 114, 155 S. E. 67 (1930).

⁶Section 56: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

⁷The overdueness and non-payment of one of a series of negotiable notes does not constitute per se notice of infirmity in the notes to a purchaser in due course of those not due. A purchaser is not precluded from the status of hdc due to the mere suspicion of an infirmity. Strong and obvious facts and circumstances, pointing to an infirmity, might impute bad faith in a passive purchaser who fails to make prudent inquiry. But the rights of a holder are determined by honesty and good faith, and not by such speculative standards as negligence or diligence. See Morgan v. Farmington Coal & Coke Co., 97 W. Va. 83, 124 S. E. 591, (1924).

⁸This point was recognized in Beasley Hardware Co. v. Stevens, which held contra to the cases cited in note 5, supra: "These decisions were not rendered with reference to the provisions of Section 52 of the Negotiable Instrument Law, but were rendered solely with reference to Section 56." 42 Ga. App. 114, 155 S. E. 67, 71 (1930).

⁹In Beasley Hardware Co. v. Stevens, the result was reached on such basis. "Section 4287 of the Civil Code of 1910, which purports to be only a codification of a rule of the law merchant, or of the common law in force in this state, must, since it announces a rule of the law merchant or the common law as respects a situation which is not covered or provided for in the Negotiable Instrument Law, be taken as expressing the rule obtaining in this State." 42 Ga. App. 114, 155 S. E. 67, 71 (1930). The logic of the court has met with approval in Note (1930) 44 Harv. L. Rev. 464, and Note (1931) 15 Minn. L. Rev. 585, 586: "And since the Negotiable Instrument Law expressly provides that in any case not provided for in the act the rules of the law merchant shall govern, . . . the court proceeded to apply that rule and hold that the purchaser was not a holder in due course. It would seem that this interpretation has considerable merit." In Note (1930) 64 A. L. R. 457, a reference to the cases cited in note 5, supra, and which were decided solely with reference to Section 56 of the N. I. L., states: "The rule established by the reported case (Hobart M. Cable Co. v. Bruce, . . .) appears to be supported by a minority of

A different and controversial problem is presented in regard to the status of a transferee of an installment note after the maturity of one or more of the installments, yet before the due date of the remaining installments. In the recent case of *Bliss v. California Co-Op Producers*,¹⁰ the makers of installment notes had a personal defense of fraud and failure of consideration, such defense having developed after the plaintiffs purchased the notes. At the time of purchase there had been default in the payment of an installment of principal, and defendants pleaded that the plaintiffs were not hdc's under Section 52 (2) of the N.I.L. and consequently took the note subject to the defense of the maker. The trial court gave judgment for the plaintiffs on the finding that they had acquired the notes in good faith and without notice of any defenses of the defendants.¹¹ The Supreme Court of California reversed the judgment and remanded the case for retrial only on the issue of notice of non-payment of the first installment at the time of transfer. If it should be found that plaintiffs had notice of non-payment of an installment of principal, judgment was to be entered for the defendants; otherwise, the plaintiffs would be hdc's, and the verdict would be in their favor. Two judges dissented, arguing that such a view would greatly impair the negotiability of installment notes, and that notice of non-payment was totally irrelevant as to the status of the purchaser, since each installment was to be treated as a separate note and default as to one would have no bearing on the others.¹²

Earlier cases were unanimous in the rule that where an installment note containing an acceleration clause was purchased after the maturity date of an installment, the note was "overdue as to its entirety," and the holder was precluded from claiming the rights of an hdc.¹³

the decided cases involving that question. It has the support of West Virginia, and apparently one Texas case supports the rule, the courts of that state being in an apparent conflict."

¹⁰181 P. (2d) 369 (Cal. 1947).

¹¹This view of the trial court seems consistent with the view expressed by the series note cases cited in note 5, supra. The former holds that notice or knowledge of an installment default is irrelevant in determining the status of the holder with regard to future installments; the latter holds that notice or knowledge of the default in a note of a series is irrelevant in determining the status of the holder of the unmaturing notes of the series. Both views contend that the controlling factor is the good faith of the purchaser.

¹²*Bliss v. California Co-Op Producers*, 181 P. (2d) 369, 383 (Cal. 1947). This seems precisely the view expressed by the trial court. See note 11, supra.

¹³*Hall v. E. C. Wells & Son*, 24 Cal. App. 238, 141 Pac. 53 (1914); *Stoy v. Bledsoe*, 31 Ind. App. 643, 68 N. E. 907 (1903). It was held in *Hodge v. Wallace*, 129 Wis. 84, 108 N. W. 212, 213, 116 Am. St. Rep. 938 (1906), under a clause providing that an interest default should "cause the whole note to immediately become due and col-

Although such a view may be regarded as correct in a technical sense, the weight of modern authority is to the effect that the purchaser of such an instrument after acceleration can rely on the ultimate due date if he has no knowledge of the installment default, and thus he can be deemed to be an *hdc* as to later installments.¹⁴

A slightly different question is presented in the case of a non-acceleratory installment note. Many cases have upheld the strict view that a purchaser after the default of a principal installment cannot be deemed an *hdc* under either the common law or Section 52 (2) of the N.I.L. because such paper was "overdue" at the time of transfer.¹⁵ But in view of the trend of efforts to enhance negotiability of installment notes, and of legislation providing that one overdue installment does not render the paper in default in its entirety, contrary conclusions have been reached. There is now strong authority that the taker in good faith and without actual notice of the non-payment of an installment of principal is an *hdc* as to the future installments.¹⁶

This latter position, which was taken by the majority of the California court in the principal case, is consistent with other phases of installment note law which have been liberalized to permit greater negotiability of such instruments. It is well recognized that the bona fide purchaser for value is within the protection of the law merchant although an interest installment is overdue and unpaid at the time of

lectible," that a failure to pay interest rendered the note automatically due, and a purchaser after such default was not an *hdc*.

¹⁴*Taylor v. American National Bank*, 63 Fla. 631, 57 So. 678, Ann. Cas. 1914A, 309 (1912); *Britton, Bills and Notes* (1943) 504, and cases cited. "It is hardly necessary to state that a holder without notice of either default or exercise of the option is not affected by the acceleration provision." Chaffee, *Acceleration Provisions in Time Paper* (1919) 32 *Harv. L. Rev.* 747, 770.

¹⁵*Vinton v. King*, 4 Allen 562 (Mass. 1862); *Field v. Tibbets*, 57 Me. 358, 99 Am. Dec. 779 (1869); *Hibbard v. Collins*, 127 Me. 383, 143 Atl. 600 (1928); 8 C. J. 410 n. 14, and cases cited. "The reason of the rule is that, where one or more of the installments remain due, the presumption arises that there is some valid reason for the failure or refusal to pay, which, if established, would likely go to the defeat of the entire debt, and thus all subsequent purchasers or holders of the discredited paper are put on inquiry." *McCorkle v. Miller*, 64 Mo. App. 153, 156 (1895). 1 Daniel, *Negotiable Instruments* (3d ed. 1886) § 787: "If the note be payable by installments, it is dishonored when the first installment becomes overdue and unpaid, and he who takes it afterward takes it subject to all equities between the original parties."

¹⁶*United States v. Capen*, 55 F. Supp. 81 (D. C. Vt. 1944); *Reed v. West Loan & Trust Co.*, 22 Ga. App. 397, 95 S. E. 1002 (1918); "Where the principal of a note is payable in installments and one installment is overdue and unpaid at the time of transfer of the note, the transferee is not a holder before maturity and hence is not a holder in due course, unless he does not take with notice of the past-due installment." 10 C. J. S., *Bills and Notes* § 313.

purchase.¹⁷ Since the interest is but a mere incident to the debt, it is but a fact for jury consideration concerning the purchaser's actual knowledge of an existing defense that the purchaser knew of the actual default and non-payment of interest at the time of transfer.¹⁸ The absence of recordation on the note itself of installment payments made is not *per se* evidence of actual knowledge of a default or of a defense, but is also mere evidence to be considered with other factors for determination by a jury of the good faith of a purchaser.¹⁹

The dissenting opinion in the *Bliss* case has recognized the liberalized commercial trend in installment notes, and advocates pushing the rule to a further point of commercial expediency whereby even notice of default on past installments shall have no bearing on the status of the taker as to future installments. By this view, the taker would be an *hdc* as to the part of the note not yet matured, unless it could be shown that he had actual notice of the defenses against the enforcement of the note when it was purchased.

Thus there appear to be three possible conclusions which the courts might reach, and the choice as between them turns less on operation of law and reason than on the promotion of commercial advantage. From a standpoint of business usage the first view must be rejected as imposing too strict limitations on negotiability, by unduly penalizing a holder who had no particular reason to suppose that some installments were in default, and no ready means of determining that a default had occurred. The intermediate view, as adopted by the majority of the court in the principal case, seems to represent the more usual trend of the modern decisions. It enhances the negotiability of the note, yet the maker is still well protected. Notice of de-

¹⁷*City of New Port Richey v. Fidelity & Deposit Co.*, 105 F. (2d) 348, 123 A. L. R. 1352 (C. C. A. 5th, 1939); *Britton, Bills and Notes* (1943) 456; 1 *Daniel, Negotiable Instruments* (3d ed. 1886) § 787 and cases cited.

¹⁸*Britton, Bills and Notes* (1943) 455: "While the cases were in conflict on this question at common law, and possibly may continue, there is little dissent at the present time from the rule that knowledge that interest is due and unpaid does not, of itself, constitute bad faith, but such fact may be taken into consideration by the jury along with other facts on the issue of purchase in good faith." A purchaser of an instrument before maturity with knowledge that interest was due and unpaid, was held not to be a purchaser in bad faith in *McPherrin v. Tittle*, 36 Okla. 510, 129 Pac. 721, 44 L. R. A. (n.s.) 395 (1913), and in *Higby v. Bahrenfuss*, 180 Iowa 316, 163 N. W. 247 (1917).

¹⁹"In all these situations, the holder must have notice of the default. The absence of any indorsement on the instrument that installments have been paid in not *per se* notice and does not subject a purchaser to equities. It is, however, evidence of notice." Chafee, *Acceleration Provisions in Time Paper* (1919) 32 *Harv. L. Rev.* 747, 769, and cases cited.

fault in an installment principal payment or notice of a defense precludes a taker from the *hdc* status, and the question of whether the taker had or should have had notice under the circumstances is for jury consideration in each case. This view of the majority of the court is precisely the same as is adopted by the American Law Institute in its proposed Final Draft of the Commercial Code: "The purchaser has notice that an instrument is overdue only if he has reason to know: (a) that any part of the principal amount is overdue . . ." ²⁰

The view of the dissenting judges in the principal case finds no support in decided cases, unless authority can be drawn from the minority view of the series note cases in which the purchaser had knowledge of the maturity of one of the serial notes, yet maintained his *hdc* status as to those notes not yet due.²¹ It can well be argued in the serial note cases that the maker, in executing separate instruments, must have contemplated their falling into separate hands, and cannot rightly expect termination of negotiability of all at the maturity of the first. This reasoning cannot be applied to installment notes, however, and the maker's protection would be unduly hindered if the series note rule were invoked in such cases. Fraudulent payees could easily transfer the notes after an installment default to those who knew of the default, and who would not be duty bound to inquire of the maker. The maker would then have a difficult task of proving the taker's actual knowledge of the infirmity or defect which constituted the defense, as notice of an installment non-payment would be irrelevant. Thus, his defenses are considerably lessened; and, although greater freedom of negotiability is desired, the safeguards of a maker must be maintained to a reasonable standard.

The dissent, nevertheless, illustrates a persistent tendency of the law. Courts are constantly striving to further the cause of negotiability, particularly in series and installments notes. However, in the light of the contrary position taken in Section 306 (4) of the proposed Commercial Code, it is most unlikely that such a view will be adopted in installment notes. But the uncertainty as to series notes defaults might still exist, for the Code has no provision for that situation. It can be argued that this omission implies the independence of each note of a series, and strengthens the minority rule that knowledge of a de-

²⁰A. L. I. Commercial Code: Proposed Final Draft No. 1 (Apr. 15, 1948) Art. III, § 306 (4).

²¹See cases cited in note 5, *supra*. This point is discussed in notes 11 and 12, *supra*.

fault in one series note will not deprive the taker of other notes of the same series of the hdc status. Such a distinction between series and installment notes could be well founded, and in the absence of provisions in the Code concerning the series notes, that aspect of the question will continue to be a source of litigation.

CARTER C. CHINNIS

TORTS—LIABILITY INSURANCE AS AFFECTING A CHARITABLE CORPORATION'S IMMUNITY FROM TORT LIABILITY. [Illinois]

In attempting to determine what effect the existence of liability insurance should have upon the tort liability of a charitable institution, an Illinois appellate court, in the recent case of *Wendt v. Servite Fathers*,¹ has injected a new element of uncertainty into one of the most confused segments of American law. A five year old boy who was injured while playing on the premises of the charity sued for damages.² The institution carried a general liability insurance policy under which the insurance company would pay up to \$10,000 to any person to whom the Servite Fathers might become obligated because of liability imposed on the institution. The policy provided that the insurer would not use the defense of immunity unless requested to do so by the institution, and that any waiver of the defense by the institution would not subject the insurer to any amount of a claim in excess of the \$10,000 limit.³ It did not appear that the Servite Fathers had requested that the defense be used, but it was nevertheless invoked by the insurer;⁴ however, this violation of the contract terms as between insurer and insured seems not to have been given much weight by the court in determining to impose liability on the defendant charitable institution. The decision was stated in unqualified terms:

"We hold that where insurance exists and provides a fund from which tort liability may be collected so as not to impair the trust fund, the defense of immunity is not available."⁵

¹332 Ill. App. 618, 76 N. E. (2d) 342 (1947), noted (1948) 36 Ill. B. J. 488.

²The plaintiff's allegation that the institution's stadium was an attractive nuisance maintained in an unsafe condition was sustained.

³It is interesting to note that in the *Wendt* case the plaintiff waived all right to levy his execution upon the real estate or other assets of the charitable corporation.

⁴It is assumed in Note (1948) 36 Ill. B. J. 488, 490 that the defendant-charity did authorize the use of the defense. However, the court in the instant opinion stated: "There is nothing in the record to indicate that any such request [to assert the defense of immunity] was made." 332 Ill. App. 618, 634, 76 N. E. (2d) 342, 349 (1947).

⁵332 Ill. App. 618, 634, 76 N. E. (2d) 342, 349 (1947).

In view of the fact that the insurance contract called for payment by the insurer only upon the condition that the insured charity would become obligated to pay first, it would seem necessary for the court to have found this prior obligation on the part of the defendant. The rule in Illinois for some forty years has been, however, that a charitable institution is absolutely immune from tort liability;⁶ and, up to the time of the *Wendt* decision, that rule seems not to have been changed by the fact that the institution was insured. This view was clearly stated in 1945 in *Piper v. Epstein*⁷ where the court, while weighing very logically the effect of the existence of insurance, observed that the policy "was procured to protect the hospital, not to enlarge its liability."⁸

The same view as to the effect of such insurance seems to prevail generally in other jurisdictions,⁹ the vast weight of authority being that where liability is not first imposed by law upon the charity, then the existence of insurance will not create a right of action or impose liability or additional liability.¹⁰

The validity of the principal decision is open to further question on the ground that it violates the intended import of the insurance contract. As previously indicated by one Illinois court,¹¹ such policies are presumably taken out for the protection of the charity, and not to neutralize the defense of immunity. To allow liability to grow out of the existence of insurance is to rewrite the insurance contract so that, instead of being for the benefit of the two contracting parties, it becomes a contract between the eleemosynary institution and the insurance

⁶*Parks v. Northwestern University*, 218 Ill. 381, 75 N. E. 991, 2 L. R. A. (N.S.) 556 (1905); *Tollefson v. City of Ottawa*, 228 Ill. 134, 81 N. E. 823 (1907); *Armstrong v. Wesley Hospital*, 170 Ill. App. 81 (1912); *Johnston v. City of Chicago*, 258 Ill. 494, 101 N. E. 960 (1913); *Hogan v. Chicago Lying-In Hospital*, 335 Ill. 42, 166 N. E. 461 (1929); *Saffron v. Y.M.C.A. of Chicago*, 317 Ill. App. 149, 45 N. E. (2d) 555 (1942); *Lenahan v. Ancilla Domini Sisters*, 331 Ill. App. 27, 72 N. E. (2d) 445 (1947).

⁷236 Ill. App. 400, 62 N. E. (2d) 139 (1945). The Appellate Court in the *Piper* case was also from the First District. It sat, however, for the First Division while the court deciding the *Wendt* case was that of the Second Division.

⁸326 Ill. App. 400, 62 N. E. (2d) 139, 144 (1945).

⁹14 C. J. S. 550.

¹⁰*Ayers v. Hartford Accident & Indemnity Co.*, 106 F. (2d) 958 (C. C. A. 5th, 1939); *Hughes v. Hartford Accident & Indemnity Co.*, 223 Ala. 59, 134 So. 461 (1931); *Williams' Adm'x v. Church Home for Females and Infirmary for Sick*, 213 Ky. 355, 3 S. W. (2d) 753, 62 A. L. R. 721 (1928); *Enman v. Trustees of Boston University*, 270 Mass. 299, 170 N. E. 43 (1930); *Mississippi Baptist Hospital v. Moore*, 156 Miss. 676, 126 So. 465, 67 A. L. R. 1106 (1930); *Stedem v. Jewish Memorial Hospital Ass'n of Kansas City*, 187 S. W. (2d) 469 (Mo. App. 1945).

¹¹*Piper v. Epstein*, 326 Ill. App. 400, 62 N. E. (2d) 139 (1945).

company for the benefit of third persons, and no insurance contract at all.¹²

If the policy involved is a contract of strict indemnity, rather than one of general liability, even greater doubt is cast on the creation of liability because of the existence of insurance. In such case, the insurance company "is not liable thereon until loss or damages have actually been suffered by the assured, and . . . the amount of the insurance does not become available until the assured has paid the loss or damages."¹³ Had the policy in the *Wendt* case been one of strict indemnity, the Illinois court might have been restrained from finding liability because that court acknowledges that it is bound by the full immunity doctrine of *Parks v. Northwestern University*¹⁴ which was based on the avoidance of impairment of the trust fund. Under a pure indemnity agreement the trust fund must necessarily be impaired temporarily because the insured must first pay before it can recover its insurance. There is an obvious possibility that the trust fund might become permanently impaired in the event that the indemnitor should have some valid defense of its own against the insured defendant who had already satisfied the tort judgment.

Apart from the issue of the coverage of the contract, there is still the question of whether as a matter of policy the existence of liability insurance should vary the immunity status of charitable institutions. In the few states¹⁵ which hold that the charitable corporations are as liable in tort "as though they were operating for profit, and [that] the problem of tort-liability is no different than in the case of any other corporation,"¹⁶ the existence of insurance is obviously immaterial in regard to the charity's tort responsibility.

While it is true that the majority American rule is against imposing total liability on the charity,¹⁷ that majority embraces degrees of immunity varying from complete to very limited,¹⁸ and where im-

¹²*Stedem v. Jewish Memorial Hospital Ass'n of Kansas City*, 187 S. W. (2d) 469, 471 (Mo. App. 1945).

¹³*Hagerhorst v. Indemnity Insurance Co. of North America*, 30 F. Supp. 152, 156 (E. D. Mo. 1939).

¹⁴ 218 Ill. 381, 75 N. E. 991, 2 L. R. A. (N.S.) 556 (1905).

¹⁵Prosser, *Torts* (1941) 1085.

¹⁶Harper, *Torts* (1933) 655.

¹⁷In *England*, the rule is total liability. Prosser, *Torts* (1941) 1084.

¹⁸Until the *Wendt* decision, Illinois allowed complete immunity. Another rule is that the defense of immunity is not available when the plaintiff is a stranger to the charity. *President and Directors of Georgetown College v. Hughes*, 76 App. D. C. 123, 130 F. (2d) 810 (1942). A third rule permits judgments against the charities but prohibits the levying of an execution on them. Both Colorado and Tennessee

munity is granted, in full or in part, a number of theories are employed in justification. The Illinois court, in arriving at the *Wendt* decision, points out the four general theories used to find exemption from liability for the charity: the trust fund theory, the inapplicability of respondeat superior, the waiver theory, and public policy.¹⁹

It may well be argued that the need for concern for the preservation of the trust fund completely vanishes when the charitable institution is insured. Those courts which refuse to impose liability because to do so would be to put the donor's gift to a purpose for which it was never intended lose sight of the fact that insurance nullifies this reasoning by providing protection against impairment of the trust fund. All well-run institutions must carry fire and theft insurance as a normal operating expense, and it seems only reasonable that tort liability insurance should be considered in the same light.²⁰ Even if the payment of premiums by the charity is deemed a diversion of the trust fund, that dissipation is an accomplished fact, and allowing a judgment against the charity which will be paid by the insurer works no further impairment. All that the policy of the law requires is that the funds and property held in trust cannot be diverted,²¹ and an Illinois court has already condoned the payment of premiums, in the *Piper* case.²²

A second reason given for exempting charities from tort liability is the fact that they derive no profit from the work of their servants and, therefore, should not have to bear the loss caused by the torts of these servants. Insurance, however, counterbalances this argument for immunity just as it does the trust fund theory. The charity does not have to bear the loss of damages out of its property when it is insured.

The existence of insurance seems to be irrelevant to the third basis

have such a rule. *Stedem v. Jewish Memorial Hospital Ass'n of Kansas City*, 187 S. W. (2d) 469 (Mo. App. 1945). Louisiana allows the injured party to bring suit directly against the insurer and the defense of immunity is held to be personal to the charity itself. *Lusk v. United States Fidelity & Guaranty Co.*, 199 So. 666 (La. App. 1941). A fifth view is that recovery may be had against the eleemosynary institution, but only against that property which is not used in the charity itself. *Robertson v. Executive Committee of Baptist Convention*, 55 Ga. App. 469, 190 S. E. 432 (1937). For a general discussion of immunity rules, see Note (1947) 4 Wash. and Lee L. Rev. 241.

¹⁹332 Ill. App. 618, 623, 76 N. E. (2d) 342, 344 (1947).

²⁰Prosser, *Torts* (1941) 1082: "...with the development of liability insurance, it seems unlikely that donors would fail to recognize it as a legitimate expense of operation...."

²¹*Parks v. Northwestern University*, 218 Ill. 381, 75 N. E. 991, 2 L. R. A. (N.S.) 556 (1905).

²²326 Ill. App. 400, 62 N. E. (2d) 139, 144 (1945).

for granting immunity, the waiver theory. This theory holds that one who accepts the benefits of the charity assents to the fact that he will not be compensated for any harm that befalls him while so doing. Under facts similar to those in the *Wendt* case this theory is totally inapplicable; and under any set of facts to which this theory is applicable, there seems to be no sensible basis for arguing that a patient waives the right to recover if the hospital has no insurance but does not waive the right if the hospital is insured.

The final argument for granting the defense of immunity is simply that of public policy in the encouragement of charitable enterprises. Where liability insurance exists, it may well be to the greatest interest of the public in general that liability of the charity be created, because in this way the work of the charity remains unimpaired while the injured individual is recompensed for his suffering.

Because it is possible that insurance may create liability, the eleemosynary institutions now enjoying full immunity or immunity against a certain class of claims or plaintiffs are faced with the extremely provocative question of whether to insure or not. Under any rule of immunity, the contracting on the part of the charity for an insurance policy to cover liability from which it is immune may be seriously questioned as being an unnecessary expenditure. There are, however, several reasons why an institution, even in a full immunity jurisdiction, might find it wise to insure against tort liability. In the first place, in view of current trends in this field of the law, there is forever the possibility that liability may be imposed tomorrow where immunity exists today. The Illinois court in the *Wendt* case criticizes the immunity rule so severely that the impression is created that, if it had the power to do so, that court would abandon the rule of complete immunity in favor of a rule of total liability, without passing through even one of the intermediate stages. Another cause for the fully or partially immune charity to carry liability insurance is that the policy almost always provides for the defense of suits against the assured, and proving the defense of immunity could easily involve enough litigation to make insurance a very economical measure.²³ At least one court has said that the undertaking to defend actions against the insured is sufficient consideration for the premiums paid by it.²⁴ A third reason why the institution, sure of no liability, might insure is simply that it feels a moral obli-

²³See Note (1948) 36 Ill. B. J. 488, 490.

²⁴*Ayers v. Hartford Accident & Indemnity Co.*, 106 F. (2d) 958 (C. C. A. 5th, 1939).

gation. In all probability the Servite Fathers had been motivated by such a consideration, which explains the presence of the clause that the immunity defense was not to be invoked unless the insured so requested. The building and perpetuation of good will outside the walls of these charitable institutions is almost as important to their existence as the doing of good on the inside.

JAMES C. HOLLORAN, JR.

TORTS—LIABILITY OF PARTY CAUSING FIRE TO PERSON INJURED WHILE ATTEMPTING TO SAVE THREATENED PROPERTY. [New Hampshire]

In the field of negligence law, the problem of determining the existence or absence of a legally recognized duty has challenged the analytical powers of courts and writers. It has been aptly observed by one authority, "that the problem of duty is as broad as the whole law of negligence, and that no universal test for it has been formulated. It is a shorthand statement of a conclusion, . . . [and] is not sacrosanct in itself but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection . . ."¹ This authority then concludes, "Perhaps no better general statement can be made, than that the courts will find a duty where, in general, reasonable men would recognize it, and agree that it exists."²

Representative of one segment of negligence law in which the resolution of the duty problem is traditionally in conflict with the sympathies of the reasonably prudent layman is the recent case of *Glines v. Maine Central Railroad Co.*³ The New Hampshire court denied recovery to the plaintiff who was injured in fighting a fire threatening the premises owned by his mother, the fire having been started as a result of the defendant's negligence and the plaintiff having been summoned to the scene by his nephew. The court declared that, "there is no evidence that the plaintiff had any existing legal interest in his mother's property which would entitle him to

¹Prosser, *Torts* (1941) 180; Professor Winfield in summarizing as to the duty concept in tortious negligence states: "As to the usefulness of the idea in theory it might well be eliminated from the tort of negligence, for it got there only by a historical accident and it seems to be superfluous." Winfield, *Duty In Tortious Negligence* (1934) 34 *Col. L. Rev.* 41, 66.

²Prosser, *Torts* (1941) 181; Green, *The Duty Problem in Negligence Cases* (1928) 28 *Col. L. Rev.* 1014, (1929) 29 *Col. L. Rev.* 255.

³52 A. (2d) 298 (N. H. 1947).

rights not enjoyed by a volunteer, or impose upon him any duty to minimize the damages occasioned by the defendant's negligence The plaintiff's injuries may fairly be said to have resulted from a risk which he voluntarily encountered."⁴

The course of the court's reasoning and the nature of the decisions cited as authority⁵ clearly indicate that the widely recognized policy of the law here invoked generally restricts recovery to persons who hold a proprietary interest in the property being threatened by the fire which defendant has negligently caused. This basis of the rule is further demonstrated by the cases which *do allow recovery* for injuries suffered by one having ownership interests.⁶ In *Illinois C. R. Co. v. Siler*, the leading decision in this line of authority, the following principle was stated:

"Even though one's property has been negligently set on fire by another, the owner can not permit it to be consumed without an effort to save it and then claim reimbursement from the setter out of the fire. He must use every reasonable effort, consistent with his personal safety, to preserve the property."⁷

The decision that no duty runs to volunteers who attempt to

⁴*Glines v. Maine Cent. R. R.*, 52 A. (2d) 298, 301 (N. H. 1947). The court carefully pointed out that the plaintiff did not reside on the threatened premises, had no authority over the property nor any responsibility for it.

⁵*Illinois Cent. Railroad Co. v. Siler*, 229 Ill. 390, 82 N. E. 362, 15 L. R. A. (N.S.) 819, 11 Ann. Cas. 368 (1907) held it was the duty of the decedent to make all reasonable efforts to arrest the fire so as to save her house when she saw the fire approaching her dwelling; *Makay v. Atlantic Coast Line Railroad Co.*, 160 N. C. 260, 75 S. E. 1081 (1912) holding that it is the right and duty of an owner to make every reasonable endeavor to save his property from destruction and allowing plaintiff to recover where intestate had been burned to death while trying to beat back a fire negligently started by defendant and which was threatening land and dwelling owned by the intestate; *Wilson v. Northern Pac. Railroad Co.*, 30 N. D. 456, 153 N. W. 429, L. R. A. 1915E 991 (1915) holding that the wife of a homesteader has such a proprietary interest in the home as to raise a duty to protect it from fire negligently caused by defendant and to recover for injuries suffered in fighting the fire.

⁶*Glanz v. Chicago, M. & St. P. R. Co.*, 119 Iowa 611, 93 N. W. 575 (1903); *Leavenworth Coal Co. v. Ratchford*, 5 Kan. App. 150, 48 Pac. 927 (1897); *Harvey v. Illinois C. R. Co.*, 159 Ky. 492, 167 S. W. 875 (1914); *Illinois C. R. Co. v. Thomas*, 109 Miss. 536, 68 So. 773 (1915); *Cooper v. Richland County*, 76 S. C. 202, 56 S. E. 958 (1907); *Temple Electric Light Co. v. Halliburton*, 136 S. W. 584 (Tex. Civ. App. 1911); 38 Am. Jur. Negligence Sec. 81.

⁷229 Ill. 390, 82 N. E. 362, 363 (1907). And in *Wilson v. Northern Pac. Ry. Co.*, 30 N. D. 456, 153 N. W. 429, 432 (1915) it was stated, "Plaintiff could certainly recover damages if all of the property were her own for her loss of time and services in fighting the fire, and this is on the theory of the duty of reducing the damages, if on no other."

save threatened property appears to be one of the "shorthand statements of a conclusion" which characterize duty rules.⁸ And the policy consideration which prompts this conclusion in this situation is probably the reluctance of courts to open their dockets and extend their administration⁹ to the multitudinous claims that might be asserted against persons who, in their socially utilitarian activities, do inevitably cause occasional injury to others. As the law is now generally applied, the casual rescuer of property is not accorded legal justification for taking the risk to his personal safety which his morally commendable actions involved.¹⁰ This risk is justifiable at law when taken by the owner-rescuer, however, on the basis of his "duty" to the defendant to avoid the consequences of the latter's wrong as far as reasonably possible.¹¹ Since this obligation of mitigation of damages rests only on those who would have a cause of action against the defendant for damages to the threatened property, persons without a proprietary interest are logically excluded from recovery under this theory.¹²

⁸Some of the courts employ "proximate cause" terminology to state the same conclusion as the principal case reached by the duty approach. Recovery is denied in those decisions on the "reasoning" that the plaintiff's voluntary intervention rather than the defendant's negligence was the proximate cause of the injury. One form of statement of the no-liability ruling seems no more convincing than the other. E. g., *Pike v. Grand Trunk R. Co.*, 39 Fed. 255 (C. C. D. N. H. 1889); *Crowley v. City of West End*, 149 Ala. 613, 43 So. 359 (1907); *Logan v. Wabash R. Co.*, 96 Mo. App. 461, 70 S. W. 734 (1902); *Allison v. St. Louis Southwestern R. Co.*, 257 S. W. 959 (Tex. civ. App. 1924); *Seale v. Gulf, C. & S. F. R. Co.*, 65 Tex. 274, 57 Am. Rep. 602 (1885); *Prosser, Torts* (1941) 180.

⁹See Green, *The Duty Problem In Negligence Cases* (1928) 28 Col. L. Rev. 1014, 1035.

¹⁰In *Clark v. Boston & M. Railroad*, 78 N. H. 428, 101 Atl. 795, 796, L. R. A. 1918A (1917) cited and relied upon in the principal case the defendant railroad's freedom from liability to a municipal fireman injured while endeavoring to extinguish the fire was rested upon the absence of any duty owed to the plaintiff. The court said, "As to the intervener the defendant's previous conduct is wrong only in the sense that it is a wrong to society at large. It may be a moral wrong and may be punishable on behalf of the public; but it is not a private legal wrong to individual members of the public, who of their own motion undertake to lessen the evil effects of the defendant's dereliction from duty. The Good Samaritan could not recover from the thieves the value of the oil and wine which he poured into the wounds of the man at Jericho. His recompense is the same today that it always has been."

¹¹*Illinois C. R. Co. v. Siler*, 229 Ill. 390, 82 N. E. 362 (1907); *McKenna v. Baesler*, 86 Iowa 197, 53 N. W. 103 (1892); *Wilson v. Northern Pac. R. Co.*, 30 N. D. 456, 153 N. W. 429 (1915).

¹²In *Pike v. Grand Trunk Ry. Co.*, 39 Fed. 255, 257 (C. C. D. N. H. 1889), where plaintiff went 40 or 50 rods to where the fire was set and was killed in fighting it, the court said, "Mrs. Pike had no legal or equitable interest in this property, and

While most of the courts have consistently maintained this restrictive policy, the limitation has been disregarded on occasion, usually without any clear recognition that a departure is being made.¹³ Obviously, the proprietary interest required to justify the rescue attempt need not be complete ownership. It has been held that a plaintiff whose interest was confined to a wife's homestead rights in the premises could recover for her injuries sustained in fighting defendant's fire.¹⁴ Further, an employee of the owner of the threatened property was allowed recovery on the reasoning that the employee and owner in trying to prevent the destruction were doing, "... not only what the law authorized but what their duty to the defendant required..."¹⁵ People who live on the premises owned by others and suffer injuries while seeking to save the property have been granted damages against the negligent originator of the fire. And the Iowa court, in sustaining such a recovery, expressly denied that the right against the defendant was dependent upon a "legal liability" of the plaintiff to attempt a rescue. A much broader basis for defendant's duty to non-owners was declared:

"So far as we are advised by the record, he was under no legal obligation to protect the property of his neighbor; yet his attempt to do so was entirely lawful, and was most praiseworthy. If he had failed to make a reasonable effort to save it, he would have merited the censure and contempt of his neighbors; and this would have been so notwithstanding the fact that defendant may have been liable for loss which could occur, and that what he accomplished would inure to its benefit."¹⁶

consequently in this action her administrator cannot invoke the principle that it was her duty to approach the fire, and endeavor to put it out."

¹³*Liming v. Illinois C. R. Co.*, 81 Iowa 246, 47 N. W. 66 (1890); *Berg v. Great Northern R. Co.*, 70 Minn. 272, 73 N. W. 648 (1897); *Wilson v. Great Northern Pac. Ry. Co.*, 30 N. D. 456, 153 N. W. 429 (1915). In each of the above cases the proximate cause factor was emphasized in the opinions.

¹⁴*Wilson v. Northern Pac. Ry. Co.*, 30 N. D. 456, 153 N. W. 429 (1915).

¹⁵*Berg v. Great Northern R. Co.*, 70 Minn. 272, 73 N. W. 648, 649 (1897). The court made no distinction between the owner and the employee of the owner in speaking of the duty owed, and in holding the defendant liable to both parties, declared, "This doctrine has been held and applied under so great a variety of circumstances that we shall only cite two cases in which it has been applied to 'fire cases' like the present,..." (One of the two cases cited was not in point, as no rescue question was involved.) But it cannot be said that if the employee had failed to endeavor to reduce the damages which the fire would cause, the defendant would be allowed to cut down the owner's recovery for damage to his property; yet this is what is inferred from the court's opinion. The most logical explanation of the inclusion of the employee within the ambit of liability is the mention of proximate cause and casual connection to which the court referred.

¹⁶*Liming v. Illinois C. R. Co.*, 81 Iowa 246, 47 N. W. 66 (1890). So far as can

Such reasoning sheds a revealing light upon the weakness of the narrow approach more generally taken by American courts which refuse to recognize that the socially desirable conduct involved in preserving property should be encouraged.

This social policy has long led the law to allow recovery to a person who is injured in an effort to rescue another *person* from danger caused by the defendant's negligence.¹⁷ Recognition of the rescuer's right rests basically upon the policy of promoting efforts to save the precious commodity that is human life,¹⁸ and no personal relationship or legal responsibility between rescuer and rescued is required in these cases. Property, while perhaps not quite so highly regarded as life, is nevertheless given such vigilant protection by the law as to indicate that society has a strong interest in its preservation. And placing liability for injuries to a non-owning rescuer on the defendant who menaces property does not extend his responsibility beyond the bounds of reasonable foreseeability.¹⁹ The conduct of the rescuer, short of rashness and recklessness, arises from normal human reactions. As indicated by one court:

"It is the duty of everyone, according to the requirements of an enlightened and just public sentiment, to use reasonable efforts to preserve the property of others from threatened destruction; and, as is well known, it is a duty which people generally are quick to discharge. Defendant could have foretold, with almost absolute certainty, when it set the fire in question, the plaintiff, being near, would use every reasonable means in attempting to save Ortman's horses from the flames, and there was nothing surprising or unusual in the attempt he made."²⁰

Further argument for the fairness of imposing this form of lia-

be determined the soundness of this decision or the reasoning contained therein has been neither criticised or questioned.

¹⁷*Pennsylvania Co. v. Roney*, 89 Ind. 453, 46 Am. Rep. 173 (1883); *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692 (1879); *Wagner v. International R. Co.*, 232 N. Y. 176, 133 N. E. 437, 19 A. L. R. 1 (1921); *Eckert v. Long Island R. Co.*, 43 N. Y. 502, 3 Am. Rep. 721 (1871). See Note (1947) 4 Wash. and Lee L. Rev. 235.

¹⁸In the leading case of *Eckert v. Long Island R. Co.*, 43 N. Y. 502, 506, 3 Am. Rep. 721, 723 (1871) in discussing the deceased's efforts to rescue a child the court said: "The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, . . . [but where a person acts] . . . in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, . . . but when the exposure is for the purpose of saving life, it is not wrongful, and therefore, not negligent, . . ."; *Condiff v. Kansas City, Ft. S. & G. R. Co.*, 45 Kan. 256, 25 Pac. 562 (1891).

¹⁹*Page v. Bucksport*, 64 Me. 51, 18 Am. Rep. 239 (1874); *Cooper v. Richland County*, 76 S. C. 202, 56 S. E. 958 (1907); note (1929) 64 A. L. R. 515, 517-518.

²⁰*Liming v. Illinois C. R. R. Co.*, 81 Iowa 246, 47 N. W. 66, 68 (1890).

bility on the defendant is the fact that to the extent the rescuer succeeds in saving the property from destruction, defendant is benefited by being relieved of paying damages to the owner. If he is to receive this benefit, it seems not unjust to require him to bear the risk of injury to a rescuer who acts within the limits of reasonable prudence.

Most courts continue to reject these arguments for extending the defendant's liability to cover injuries to volunteers with no legal or personal interest in the endangered property. However, such contentions have been frequently accepted in support of the recovery of employees of the owner²¹ or non-owning occupants of the premises.²² It is not clear why they do not apply as aptly to the case of a careful and prudent volunteer. And this seems especially true where the volunteer, as in the principal case, has a personal concern for the interests of the owner of the premises. That the son has a moral responsibility to render such services to his mother, that there is a strong social pressure on him to do so, and that his efforts to that end are clearly to be anticipated in the situation involved are all obvious and beyond question. So far as sympathetic appeal is concerned, the plaintiff-son's position in the New Hampshire case is certainly as strong as that of the non-owning occupant of the premises or of the incidental employee of the owner. As far as administrative difficulties in adjusting such claims are concerned, it is not clear wherein these cases would be any more burdensome to the courts or treacherous for juries than the general run of negligence litigation.

BERNARD LEVIN

TORTS—RES IPSA LOQUITUR DOCTRINE AS DEVICE FOR IMPOSING LIABILITY WITHOUT FAULT. [California]

Since the rule of *res ipsa loquitur* was introduced into the law by *Byrne v. Boadle*¹ in 1863, there has been little dispute that two basic

²¹*Berg v. Grant Northern R. Co.*, 70 Minn. 272, 73 N. W. 648, (1897); *Chattanooga Light & Power Co. v. Hodges*, 109 Tenn. 331, 70 S. W. 616 (1902).

²²*Liming v. Illinois C. R. Co.*, 81 Iowa 246, 47 N. W. 66 (1890).

¹H. & C. 722, 727, 159 Eng. Rep. 299, 301 (Ex. 1863), Pollock, C. B.: "The present case upon the evidence comes to this, a man is passing in front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant who occupied the premises, and who is responsible for the acts of his servants who had the con-

factors control the applicability of the rule: (1) the thing which caused the injury complained of must have been under the management of the defendant or his servants, and (2) the accident must have been such as in the ordinary course of things does not happen if those who have the management or control use proper care. Given these factors, *res ipsa loquitur* affords reasonable evidence that the accident arose from the defendant's negligence *in the absence of other explanation*.²

Beyond this point, however, confusion arises in the American decisions,³ resulting in at least three diverse views as to the effect of the application of the doctrine: (1) There is a basis for a permissive inference⁴ of negligence to be drawn by the jury; (2) In the absence of rebutting testimony from the defendant, the plaintiff is entitled to have the court direct a verdict for him; (3) In case the defendant does introduce rebuttal testimony, the defendant is required to assume the burden of persuading the jury of his freedom from negligence by a preponderance of evidence.⁵

Assuming that the plaintiff has proved the elements of a *res ipsa loquitur* case, under any of the three views the next move is up to the defendant. If the jurisdiction applies the "permissive inference of negligence" rule, the defendant of course may either let the case go to the jury without evidence or submit evidence of the cause of the accident. In either event the question is one for the jury.⁶ But if the jurisdiction has adopted the second or third rule, the problem is pre-

control of it; and in my opinion the fact of its falling is *prima facie* evidence of negligence, and the plaintiff who was injured by it is not bound to show that it could not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them."

²For many cases approving this view, see 45 C. J. 1193.

³It should be noted that individual jurisdictions often vary in their choice of effect to be given *res ipsa loquitur*. For citations of jurisdictions applying each type of effect see 9 Wigmore, Evidence (3d ed. 1940) § 2509.

⁴As used in this comment, *inference* "means that the inference of negligence to be drawn from the circumstances is left to the jury. They are not compelled to find it. The plaintiff escapes a nonsuit, or a dismissal of his case; but no burden of introducing evidence is cast upon the defendant, in the sense of a directed verdict against him if he fails to do so . . ." A *presumption* "always requires a directed verdict for the plaintiff if the defendant offers no evidence to meet it." Prosser, Torts (1941) 303, 304.

⁵Carpenter, The Doctrine of *Res Ipsa Loquitur* in California (1937) 10 So. Calif. L. Rev. 166, 171-173. For other excellent discussions of these three effects given *res ipsa loquitur* see Prosser, Torts (1941) 302; Harper and Heckel, Effects of the Doctrine of *Res Ipsa Loquitur* (1928) 22 Ill. L. Rev. 724; Prosser, The Procedural Effect of *Res Ipsa Loquitur* (1936) 20 Minn. L. Rev. 241.

⁶Prosser, Torts (1941) 303. See also *Sweeney v. Erving*, 228 U. S. 233, 240, 33 S. Ct. 416, 418, 57 L. ed. 815, 819 (1913).

sented as to what proof is required for rebuttal. The great weight of authority holds that only the burden of producing evidence or going forward is shifted to the defendant. The burden of proof in the sense of the burden of non-persuasion should not be shifted and remains on the plaintiff.⁷ This splitting of the "burden of proof" results in uncertainty and confusion when the effect of the defendant's testimony is considered.⁸

Illustrating this difficulty is the recent case of *Dierman v. Providence Hospital et al.*,⁹ in which the California Supreme Court divided 4 to 3 on the problem of what is required of the defendant to avoid suffering a directed verdict in a *res ipsa loquitur* case. The plaintiff-patient brought an action against the hospital and attending physicians and nurses for injuries sustained from an explosion of an anaesthetic gas. Two separate gases were to be used in different phases of the operation, because the first phase required use of an electric needle and a non-inflammable gas for anaesthesia, in the present case nitrous oxide. During the second phase ether, an inflammable gas, was scheduled for use. The explosion occurred during the first part of the operation.

Both the majority and the dissenting justices agreed that the plaintiff made out a good case of *res ipsa loquitur*.¹⁰ Upon all the testimony only four possible causes of the explosion were shown: the needle ignited (1) ether, (2) nitrous oxide contaminated by unclean apparatus, (3) nitrous oxide contaminated previously by the hospital, or (4) nitrous oxide contaminated at the time of purchase. The defendants introduced evidence to contravene negligence on the first two points. No definite evidence was produced on points three or four, although some testimony was adduced of general care in the operating room.

⁷Bohlen, *Studies in the Law of Torts* (1926) 646: "There is no reason why the risk of persuasion should be shifted and that the defendant... should be forced to convince the jury that the facts as proved establish a preponderance of probability in favor of his innocence." 38 Am. Jur. 1008: "The doctrine does not have the effect of shifting the burden of proof, as distinguished from the burden of evidence, or... the burden of proof in the sense of the risk of non-persuasion, as distinguished from the burden of going forward with the evidence; all the defendant need do is produce exculpatory evidence of equal weight."

⁸Carpenter, *The Doctrine of Res Ipsa Loquitur* (1937) 10 So. Calif. L. Rev. 166, 186. For evidence that disagreement on this matter extends to the writers as well as the courts, see the heated discussion of Professors Carpenter and Prosser in (1937) 10 So. Calif. L. Rev. 166, 459 and 467.

⁹188 P. (2d) 12 (Cal. 1947).

¹⁰The court here relied on *Ybarra v. Spangard*, 25 Cal. (2d) 486, 154 P. (2d) 687, 162 A. L. R. 1258 (1944) (personal injuries received during operation).

The jury returned a verdict for the defendant, but the Supreme Court's decision in effect held that the trial court should have directed a verdict for the plaintiff on the ground that the defendant will not be held blameless unless he shows either: (1) a satisfactory explanation of the accident and his lack of fault, or (2) such care in all respects that the accident could not have happened from want of care but must have been due to some unpreventable cause, although the exact cause is unknown. The care shown must be satisfactory in the sense that it covers all causes which due care on the part of the defendant might have prevented.¹¹

The dissenting justices argued that since the explosion might have resulted from causes other than negligence, and since the jury was convinced that the defendants used due care, defendants had sustained the burden imposed on them. They also point out that evidence on the third possible cause would be difficult if not impossible to ascertain, so that in effect, the court is compelling the defendant to prove the actual cause of the accident to escape liability.¹²

Under this decision, then, the burden on the defendant is to prove either (1) the cause of the accident and his non-negligence, or (2) his due care in regard to every possible cause of the accident. If he does not do both, a verdict is to be directed against him.

The lack of agreement among the courts on this question is indicated by comparing a strikingly similar case¹³ in which the same anaesthetic was being used and an explosion occurred when an electric cauterizer was applied. As in the *Dierman* case, the defendant was unable to explain the cause of the explosion, introducing only general evidence of due care on some of the possible causes. The jury rendered a verdict for the plaintiff. The appellate court conceded that "the cause of the explosion is left largely to conjecture and speculation. Defendants made no effort to explain the explosion, but contented themselves by showing that proper machines were being used, . . . and the operation carried on in proper manner, . . . and that they did not know why the explosion occurred."¹⁴ Nevertheless, the judgment for the plaintiff was reversed, and defendant was held to be entitled to a directed verdict. The court reasoned that "To say . . . that defendants were under the obligation to see that the gases contained in these re-

¹¹*Dierman v. Providence Hospital et al.*, 188 P. (2d) 12, 15 (Cal. 1947), citing *Bourguignon v. Peninsular Ry. Co.*, 40 Cal. App. 689, 181 Pac. 669 (1919).

¹²*Dierman v. Providence Hospital et al.*, 188 P. (2d) 12, 17 (Cal. 1947).

¹³*Wilt v. McCallum*, 214 Mo. App. 321, 253 S. W. 156 (1923).

¹⁴*Wilt v. McCallum*, 214 Mo. App. 321, 253 S. W. 156, 159 (1923).

ceptacles did not contain any foreign substance, would be placing upon the defendants the burden of exercising more than ordinary care."¹⁵

Neither of these decisions seems satisfactory. One imposes an extremely severe burden of proof on the defendant, where proof is virtually unavailable. The other practically bars the plaintiff from the benefits of *res ipsa loquitur*, excusing the defendant on a mere showing that he employed the usual methods.¹⁶

The difficulty in obtaining any real "rule" for such situations has two bases: first, it is difficult to tell which of the three effects of *res ipsa loquitur* the court follows, since there is frequently a split of opinion within a jurisdiction;¹⁷ and, second, there seems to be a growing inclination, based on public policy, to impose liability somewhat easily when the defendant is insured,¹⁸ as is nearly always the case with hospitals and carriers, two frequent sources of negligence actions.

This tendency apparently has influenced the California court in the *Dierman* case. Although the original ground for *res ipsa loquitur* was that proof of what happened was more available to the defendant than to the plaintiff so that he should come forward, this court extends the doctrine to a case in which proof is practically unavailable to either party. Thus, in the present case there were four possible causes of the accident. The first two were eliminated by the evidence. On the third possibility only general and vague testimony was offered; the facts were such as could not be discovered by the plaintiff and could be produced only with the greatest difficulty on the part of the defendant. On the fourth possibility, for which, if it was the cause, defendants would not be liable, no evidence was introduced.

The court holds that since no definite evidence was produced on the third possibility, nearly impossible and highly dubious as it would be, the court will presume it would have been adverse to the defen-

¹⁵*Wilt v. McCallum*, 214 Mo. App. 321, 253 S. W. 156, 160 (1923). The implications of this decision were expressly espoused by a Canadian court which held that the doctrine of *res ipsa loquitur* is inapplicable in an explosion case during an operation, in the absence of evidence establishing how a burn was caused and the extent of the defendant's liability. The underlying theory seems to be that a person being operated upon submits himself to the risk of danger from complicated machinery, and that the surgeon is not an insurer of the patient's safety. *McFadyen v. Harvie*, (1941) 2 D. L. R. 663, (1941) Ont. L. R. 90.

¹⁶*Pendergraft v. Royster*, 203 N. C. 384, 394, 166 S. E. 285, 290 (1932). Other cases on this point are collected in Note (1930) 65 A. L. R. 1028.

¹⁷See note 3, *supra*.

¹⁸Prosser, *Torts* (1941) 305; James, *Accident Liability: Some Wartime Developments* (1946) 55 Yale L. J. 365.

dant,¹⁹ and thus require a directed verdict against him. Such a view ignores the chance that the accident was caused by the fourth possibility, for which defendant is not responsible.

The explanation for the result reached in this case may well be due to a growing tendency to impose liability without fault in extra hazardous undertakings,²⁰ the feeling being that the defendants are usually in a better position to pay for damage caused. Whatever the independent merits of such a trend, it would be much less confusing to take the matter of absolute liability out of the already bewildering law of presumptions.

The lengths to which a court will go in requiring evidence from the defendant, and indeed, the choice of which of the three general effects of *res ipsa loquitur* to apply, frequently depends on what appear to be the probabilities of the case.²¹ If from the plaintiff's evidence the probabilities of negligence are strong, the doctrine will be applied without hesitation and the court is inclined to give it the effect of a presumption, even shifting the burden of non-persuasion if there is the additional factor that public policy would so be served.²² If, on the other hand, the probabilities are not as strong, should *res ipsa loquitur* even be used, the court is more likely to give it the effect of a mere inference.

It is submitted that if such a rule were adopted, in time negligence cases would become classified²³ as to the formula of *res ipsa loquitur*

¹⁹*Dierman v. Providence Hospital et al.*, 188 P. (2d) 12, 14 (Cal. 1947).

²⁰In this connection, Bohlen takes notice of "a growing tendency to . . . compromise between the modern theory of tort liability as based exclusively on fault and the more modern renaissance of the ancient concept that every one must answer for the harm done even by his most innocent acts, by not only raising the presumption of negligence upon the mere fact of harm done, but by holding that such presumption requires the defendant to rebut it by proving that he has done all that is possible to prevent the harm that his activities has caused." Bohlen, *Studies in the Law of Torts* (1926) 647.

²¹For a similar conclusion, see Note (1935) 3 U. of Chi. L. Rev. 126, 131.

²²"Courts should and do get all the light they can on the questions of probability. They are not likely to invoke the rule unless there seems a fair chance that the probabilities are as they assume. But the initial decision must often be made without much light, and the real problems are who should have the burden of shedding whatever light is available, and whether defendant's enterprise or its victims should bear the cost of injury from unexplained accidents The California courts have been keen to recognize this and to invoke the doctrine without much regard to the matter of probability where the policy of the situation was felt to demand it." James, *Accident Liability: Some Wartime Developments* (1946) 55 Yale L. J. 365, 390.

²³However, James thinks there is no way of setting a scientific standard as to "probability," and that it is "a matter of dealer's choice, and the court is the dealer."

to be applied, according to the probabilities generally present in such cases. This would be a valuable aid to both trial courts and attorneys involved in *res ipsa loquitur* situations.

O. T. KAYLOR, JR.

TRUSTS—ALLOCATION OF LIQUIDATING DIVIDENDS BETWEEN LIFE BENEFICIARY AND REMAINDERMEN. [Kentucky]

In the common type of trust agreement providing that the income shall be paid to one beneficiary for life and that, on his death, the principal shall be paid to other beneficiaries, a problem arises as to the distribution of extraordinary dividends on corporate stock constituting the corpus of the trust. Whether these dividends are to be treated solely as principal, solely as income, or are to be allotted proportionately between income and principal, has long been a subject of debate. In regard to extraordinary dividends declared from accumulated earnings of a corporation as a going concern, there have arisen in American courts three clearly conflicting rules.

First, there is the *Massachusetts Rule*,¹ which seems to be growing in favor in America today.² Under this rule an extraordinary dividend is allotted to corpus if it is in the corporation's own stock, but is allotted to income if it is in cash, the stock of another corporation, or if the trustee has the alternative of taking stock or cash.³ This rule is also

James, *Accident Liability: Some Wartime Developments* (1946) 55 *Yale L. J.* 365, 388. Perhaps the result would not be so arbitrary if the courts frankly admitted that such a classification was followed.

¹The Massachusetts rule was developed in the case of *Minot v. Paine*, 99 *Mass.* 101 (1868).

²Scott, *Trusts* (1939) § 236.3; 4 *Bogert, Trusts* (1935) § 857; *Notes* (1935) 11 *Ind. L. J.* 175; (1941) 130 *A. L. R.* 492, 522; (1936) 101 *A. L. R.* 1379, 1382; (1931) 72 *A. L. R.* 981, 982; (1928) 56 *A. L. R.* 1287, 1289.

The Massachusetts rule has also been incorporated into § 5 of the Uniform Principal and Income Act which had, in 1946, been adopted with some changes in fourteen states, including the state of Pennsylvania, where the Pennsylvania rule had its inception, 20 *Pa. Stat. Ann.* (Purdon, 1930) § 3475; and the state of Maryland which was previously committed to the Pennsylvania rule, *Md. Code Ann.* (Flack, 1939) Art. 75B §§ 1-10. However, in Pennsylvania in 1947, many sections of the Act, including the section adopting the Massachusetts rule, were repealed, and because of this substantial change, the remaining sections were entitled the "Principal and Income Act of 1947" rather than the "Uniform Principal and Income Act." It would seem very likely, therefore, that the courts of Pennsylvania will again return to the rule of apportionment which they developed.

³*Minot v. Paine*, 99 *Mass.* 101, 108 (1868): "A trustee needs some plain principle to guide him; and the *cestuis que trust* ought not to be subjected to the expense of going behind the action of the directors, and investigating the concerns of the

essentially in line with the modern English rule.⁴

Second, there is the *Pennsylvania Rule*,⁵ which was formerly the majority American rule; however, today the jurisdictions adhering to the Massachusetts rule are probably about equal in number.⁶ The courts following this rule have set up a system of apportionment between principal and income, whereby that portion of the extraordinary dividend, whether it be in cash or stock, which was earned subsequent to the commencement of the life estate is declared income to the life beneficiary, and that portion of the dividend which was earned prior to the inception of the life estate is considered principal.⁷

Third, there is the *Kentucky Rule*,⁸ which is followed only by the courts of Kentucky and in principle by the courts of Delaware.⁹ Here no inquiry is made as to when the earnings accrued in relation to the beginning of the trust, and all dividends paid from accrued earnings are allotted to income payable to the life beneficiary without regard

corporation, especially if it is out of our jurisdiction. A simple rule is, to regard cash dividends, however large, as income, and stock dividends, however made, as capital."

As stated in a later Massachusetts case, *D'Ooge v. Leeds*, 176 Mass. 558, 560, 57 N. E. 1025 (1900): "Everything is made to turn upon the action of the corporation."

⁴In England prior to 1887, all extraordinary dividends were held to be capital; however, *Bouch v. Sproule*, L. R. 12 A. C. 385, 57 L. T. (N.S.) 345 (1887) adopted a rule which is very similar to the Massachusetts rule, holding that the purpose of the corporation is the controlling factor as to whether the dividend is to be income or capital.

⁵This rule was clearly set out for the first time in *Earp's Appeal*, 28 Pa. St. 368 (1857).

⁶2 Scott, *Trusts* (1939) § 236.3, where it is asserted that there was formerly a preponderance of authority in favor of the Pennsylvania rule, but that the trend is toward the Massachusetts rule. However, the Pennsylvania rule is adopted by the Restatement, *Trusts* (1935) § 236, with the provision that stock rights are to be treated as principal whether exercised or sold. For a very exhaustive treatment as to the relative authority in support of each of the three rules, see Notes (1941) 130 A. L. R. 492; (1936) 101 A. L. R. 1379; (1933) 83 A. L. R. 1261; (1931) 72 A. L. R. 981; (1929) 59 A. L. R. 1532; (1928) 56 A. L. R. 1287; (1927) 50 A. L. R. 375; (1923) 24 A. L. R. 9.

⁷A later Pennsylvania court stated that the object of the rule is "to preserve the value of the corpus as it was at the date of the death of the testator, or, to use a more convenient term, to preserve the intact value of the estate." In *re Nirdlinger's Estate*, 290 Pa. 457, 139 Atl. 200, 203 (1927).

⁸This rule was laid down by the Kentucky court in *Hite's Devisees v. Hite's Ex'r*, 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173 (1892).

⁹*Bryan v. Aikin*, 10 Del. Ch. 446, 86 Atl. 674 (1913), where the court, after a consideration of the English, Massachusetts and Pennsylvania rules, reached a result in accord with the Kentucky rule even though that rule was not expressly adopted. For later Delaware cases following the Bryan case, see note 10, *infra*.

to whether these dividends be in stock or cash, or whether they be ordinary or extraordinary.¹⁰

There has been a considerable shifting from one rule to another by a number of the state courts and legislatures,¹¹ indicating that none of the three rules has proved entirely satisfactory. The Pennsylvania rule appears to be the most fair and equitable, but it runs into many obstacles in practice,¹² especially in the field of stock rights. Also, apportionment of the income of a large modern corporation in reference to its being earned before a certain date may involve complex accounting research with great expense and delay, and if the trustee does not go to such length, he runs the risk of improper payment. On the other hand, the Massachusetts rule, while it is easily applied and does achieve some apportionment, embodies a standard which is arbitrary and irrelevant to the issue of whether the life beneficiary or remainderman is entitled to the dividend. The Kentucky rule is perhaps the most vulnerable to attack, in that it is purely arbitrary and its application often results in a serious reduction of the trust corpus and dissipation of the remainderman's interest. This is especially true if the rule is applied to liquidation dividends.

¹⁰Cox v. Sellers, 28 A. (2d) 679 (Del. Ch. 1942) [reversed on appeal on the ground that the testator by his will had manifested an intention that his interest in the corporation should be held intact for ten years, Cox v. Sellers, 33 A. (2d) 548 (Del. 1943)]; Ortiz v. Fidelity-Philadelphia Trust Co., 18 Del. Ch. 439, 159 Atl. 376 (1931); Du Pont v. Peyton, 15 Del. Ch. 255, 136 Atl. 149 (1927); Bryan v. Aikin, 10 Del. Ch. 446, 86 Atl. 674 (1913); Hublely v. Wolfe, 259 Ky. 574, 82 S. W. (2d) 830, 101 A. L. R. 1359 (1935); Lightfoot v. Beard, 230 Ky. 488, 20 S. W. (2d) 90 (1929); Goff v. Evans, 217 Ky. 664, 290 S. W. 490 (1927); Cox v. Gaulbert, 148 Ky. 407, 147 S. W. 25 (1907); 2 Scott, Trusts (1939) § 236.3.

¹¹For example, New York first followed the Kentucky rule, In re Kernochan, 104 N. Y. 618, 11 N. E. 149 (1887), then later the Pennsylvania rule, In re Osborne, 209 N. Y. 450, 103 N. E. 723 (1913). But in 1926, by statute, it adopted the Massachusetts rule in reference to stock dividends, N. Y. Laws 1926, c. 843, N. Y. Personal Property Law § 17a.

Also, in Rhode Island it is held that extraordinary stock dividends are always principal under the Massachusetts rule, but that extraordinary cash dividends are apportionable under the Pennsylvania rule. Rhode Island Hospital Trust Co. v. Tucker, 51 R. I. 507, 155 Atl. 661, 83 A. L. R. 1253 (1931). On a reargument of the same case, 52 R. I. 277, 160 Atl. 465 (1932), the court instructed the trustee to sell stock in a corporation which had declared only stock dividends and no cash dividend, and to reinvest in a proper trust investment. Rhode Island Hospital Trust Co. v. Peckham, 42 R. I. 365, 107 Atl. 209 (1919); 2 Scott, Trusts (1939) §§ 236.3, 236.4.

¹²The complexity of apportionment in some cases is shown by the decision of In re Nirdlinger's Estate, 290 Pa. 457, 139 Atl. 200 (1927), where the court held that the lower court erred in awarding to the life tenants 3,110,868/30,330,647ths instead of 3,110,868/6,060,800ths of the \$855 dividend paid to the trust.

The weakness of the Kentucky rule, and its inefficiency as a tool to cope with the problem presented where liquidation dividends are declared on stock held in trust is brought out in the recent Kentucky case of *Laurent v. Randolph*.¹³ The testator, who had died in 1935, had established a testamentary trust under which his widow was to receive a life interest, and upon her death there was a life interest to his children with an absolute remainder over to the heirs of the children. Among the assets of the trust was a block of bank stock with a par value of \$100 per share and a paid-in surplus of \$20 per share. In 1946, the bank decided voluntarily to liquidate its assets and discontinue business, and the assets were ordered sold for distribution to stockholders. The trustee, who was also the first life beneficiary, brought this suit as trustee and in her own name for a declaratory judgment as to the proper distribution of the dividends. The chancellor adjudged that the trustee took \$120 per share, representing the original paid-in capital and surplus, as corpus of the trust, and that she took in her own right, as life beneficiary, all the proceeds in liquidation which may exceed \$120 per share. At the time of suit, \$225 had already been paid on each share and the liquidation was not yet complete. This appeal was prosecuted by the remaindermen to reverse the judgment.

The Kentucky Court of Appeals affirmed the chancellor's judgment, but it is interesting to note that this affirmance was made not entirely on the basis of the Kentucky rule. In writing the opinion for the court, Justice Knight stated a strong preference for the Pennsylvania rule as the most fair and equitable of the three, but indicated that the court would not be required to decide whether it should depart from the Kentucky rule because "the life tenant would be entitled to the distribution referred to under any of the three rules . . ."¹⁴

The courts of America are not only in conflict as to which of the above mentioned rules should be applied generally, but there is also a disagreement among them as to whether they will apply their particular rule to liquidation dividends. These jurisdictions which follow the Pennsylvania rule¹⁵ or the Kentucky rule¹⁶ usually do apply these

¹³306 Ky. 134, 206 S. W. (2d) 480 (1947).

¹⁴*Laurent v. Randolph*, 306 Ky. 134, 206 S. W. (2d) 480, 483 (1947).

¹⁵*McKeown's Estate*, 236 Pa. 78, 106 Atl. 189 (1919); *Lewis' Estate*, 44 D. & C. 413 (Pa. 1942); *Estate of Mathews*, 210 Wis. 109, 245 N. W. 122 (1932); *Estate of Gerlach*, 177 Wis. 251, 188 N. W. 94 (1922).

¹⁶*Hubley v. Wolfe*, 259 Ky. 574, 82 S. W. (2d) 830, 101 A. L. R. 1359 (1935); *DuPont v. Peyton*, 15 Del. Ch. 255, 136 Atl. 149 (1927). See, however, *Ortiz v. Fidelity*

principles to liquidating dividends the same as they apply them to dividends from the corporation as a going concern, but, as will be pointed out, the jurisdictions committed to the Massachusetts rule do not.

On one phase of the broad problem of the allotment of extraordinary dividends the courts are fairly well agreed—i.e., that a dividend which is not declared from earnings past or present, but which represents capital assets, must be awarded to corpus, rather than to income.¹⁷ This would seem to be in accord with the general capital fund doctrine in the law of corporations,¹⁸ and in the instant case accounts for the award of the \$120 value of each share to trust corpus regardless of which rule the court applied.

The allotment to the life beneficiary of the amount in excess of \$120 per share does not seem so clearly explained. Instead of investigating the source of the earnings represented by the bank's assets, the court took judicial notice of the fact that during the period of 1929 to 1935, the banks of this country were in poor financial condition and that this bank, like others, accumulated the greater portion of its assets after 1935, the date of the testator's death and the beginning of the life estate. Having established in this summary manner that the excess over \$120 per share accrued subsequent to the inception of the trust, the court could have correctly allotted it to the life beneficiary by an application of the Pennsylvania rule.¹⁹ However, the court appears to be mistaken as to the application of the Massachusetts rule to this case. In states which follow that rule as to extraordinary dividends from a corporation as a going concern, it is generally held that where the corporation sells part or all of its property, and distributes the proceeds among its shareholders, such proceeds, when received by the trustee, even though paid in cash, are to be allotted wholly to principal. In other words, liquidation dividends are payable entirely to the corpus of the trust, and are not treated as other extraordinary

Philadelphia Trust Co., 18 Del. Ch. 439, 159 Atl. 376 (1931), where the court in awarding part of a stock dividend to income, emphasized the point that the dividend was not in liquidation.

¹⁷DuPont v. Peyton, 15 Del. Ch. 255, 136 Atl. 149 (1927); Hite's Devises v. Hite's Ex'r, 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173 (1892); Gray v. Hemenway, 268 Mass. 515, 168 N. E. 102 (1929); In re Trust Under Will of Koffend, 218 Minn. 206, 15 N. W. (2d) 590 (1944); Nirdlinger's Estate, 290 Pa. 457, 139 Atl. 200, 56 A. L. R. 1303 (1927); Welch v. Welch, 235 Wis. 282, 290 N. W. 758, 293 N. W. 150 (1940).

¹⁸12 Fletcher, Corporations (Perm. ed. 1932) § 5422; Stevens, Corporations (1936) §§102, 178, 185, 186.

¹⁹Earp's Appeal, 28 Pa. St. 368 (1857); In re Nirdlinger's Estate, 290 Pa. 457, 139 Atl. 200, 56 A. L. R. 1303 (1927).

cash dividends, even though they might, in fact, be found to represent in part accumulated earnings.²⁰ As the statement of facts in the instant case shows this to be a liquidation dividend,²¹ it seems that a court applying the Massachusetts rule to these facts would have awarded the entire amount to the corpus of the trust and not have awarded all accumulated earnings to income as the Kentucky court did.

When stock in a corporation constitutes a substantial portion of a trust estate, and that corporation is liquidated, it would seem that injustice can be avoided only by apportionment of the dividend earnings between income and corpus with reference to the value of the stock at the inception of the life estate. The Kentucky rule usually results in injustice to the remainderman,²² and the Massachusetts rule, in the case of liquidating dividends, breaks down entirely as far as

²⁰*Bulkeley v. Worthington Ecclesiastical Society*, 78 Conn. 526, 63 Atl. 351, 12 L. R. A. (N.S.) 785 (1906); *Anderson v. Bean*, 272 Mass. 432, 172 N. E. 647, 72 A. L. R. 959 (1930) (assets liquidated included surplus); *Gifford v. Thompson*, 115 Mass. 478 (1874); 2 *Scott, Trusts* (1939) § 236.10; *Notes* (1931) 72 A. L. R. 981, 996; (1923) 24 A. L. R. 9, 106.

It is provided in § 5 (3) of the Uniform Principal and Income Act that "Where the assets of a corporation are liquidated, amounts paid upon corporate shares as cash dividends declared before such liquidation occurred or as arrears of preferred or guaranteed dividends shall be deemed income; all other amounts paid upon corporate shares on disbursement of the corporate assets to the shareholders shall be deemed principal."

In Massachusetts it has been held that a cash dividend in partial distribution of the corporate assets which does not impair the capital will be regarded as income. *Old Colony Trust Co. v. Aymar*, 317 Mass. 66, 56 N. E. (2d) 889 (1944); *Creed v. McAleer*, 275 Mass. 353, 175 N. E. 761, 80 A. L. R. 1117 (1931); *Gray v. Hemenway*, 268 Mass. 515, 168 N. E. 102 (1929); *Old Colony Trust Co. v. Jameson*, 256 Mass. 179, 152 N. E. 52, 50 A. L. R. 372 (1926).

²¹The court states that "the Deposit Bank referred to herein decided to voluntarily liquidate its assets and discontinue the banking business, and in March of 1946, pursuant to a vote of its stockholders and directors, the entire assets of the bank were ordered sold for distribution among its stockholders." *Laurent v. Randolph*, 306 Ky. 134, 206 S. W. (2d) 480, 482 (1947).

²²Apparently the court in the principal case considered the par value plus the paid-in surplus as representing as much, if not more, than the book value of the stock at the beginning of the life estate. Assuming this to be true, then the application of the Kentucky rule in this case is not subject to the usual criticism that it results in a dissipation of the trust corpus, for all income did accrue during the life estate. However, in the more typical case, a settlor who places stock in a trust fund is inclined to use stock which he considers a stable investment, and this is often reflected in the fact that the book value of the stock is much higher than its par value (plus paid-in surplus, if any). If the assets of such a corporation are liquidated, and liquidating dividends are paid to the trustee, the operation of the Kentucky rule results in the payment of all of the accumulated earnings to the life beneficiary, and strips away the intended margin of security, leaving only the skeleton—the par value. For an extreme application of the Kentucky rule, see *Huble v. Wolfe*, 259 Ky. 574, 82 S. W. (2d) 830, 101 A. L. R. 1359 (1935).

apportionment is concerned,²³ with consequent injustice to the life beneficiary. The principle of the Pennsylvania rule appears to provide the only means of reaching a settlement fair to all parties; and should its application become too complicated for the individual trustee, the court of equity, with its ever-increasing ability to cope with complicated problems, stands ready at his call to provide guidance.

The Kentucky court in the principal case senses the injustices which can arise from the operation of its rule, and thus, makes an effort to test the result by an application of all three rules to the same facts. Justice Knight's statement of preference for the Pennsylvania rule may prove to be a significant straw in the wind, and at least indicates that this court would probably not have gone to the extreme pursued by an earlier Kentucky court²⁴ which considered itself so bound by *stare decisis* that it applied the Kentucky rule even when the effect was to award about four-fifths of the trust corpus to the life beneficiary.²⁴ It is therefore quite possible that this decision foreshadows the ultimate death of the already weak Kentucky rule, and the adoption by the courts of Kentucky of a view better calculated to obtain fair and equitable results.

JAMES A. QUISENBERRY

UNAUTHORIZED PRACTICE—DRAFTING OF LEGAL INSTRUMENTS INCIDENTAL TO BUSINESS AS PRACTICE OF LAW BY REAL ESTATE AGENCY. [Virginia]

In an effort to check the rising incidence of unauthorized practice of law, Bar Associations are joining in a concerted postwar campaign against unlicensed practitioners who were able to expand the scope of their activities because of the shortage of legal manpower during the war.¹ Representative of this development is the recent effort in Virginia to check the unauthorized practice of law by real estate agencies. Unauthorized practice controversies arising in this state are now decided under rules and regulations defining the practice of law,² which

²³See cases cited in note 20, *supra*.

²⁴*Hubley v. Wolfe*, 259 Ky. 574, 82 S. W. (2d) 830, 101 A. L. R. 1359 (1935).

¹11 *Unauth. Prac. News*, Third Quarter, 37 (1945).

²171 Va. XVII "Generally, the relation of attorney and client exists, and one is deemed to be practicing law, whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill.

"Specifically, the relation of attorney and client exists, and one is deemed to be practicing law, whenever—

"(1) One undertakes for compensation, direct or indirect, to advise an-

were drawn up by a committee on The Integration of The Virginia State Bar and adopted by the Supreme Court of Appeals in 1938, pursuant to legislative authority.³ Their first application in the courts was made in the recent decision of *Commonwealth of Virginia and The Virginia State Bar Association v. Jones & Robbins, Inc.*⁴ The state, at the instance of the Council of the Virginia State Bar, instituted suit against the defendant, a real estate brokerage corporation, alleging that the corporation habitually prepared deeds, deeds of trust, mortgages and deeds of release in connection with the sale of real estate and closing of real estate loans, and in doing so was engaged in the practice of law. The defendant contended that since the court's rules defining the practice of law expressly provided that the drafting of "contracts incidental to the regular course of conducting a licensed business" was not within the prohibited activity, the realty company was not guilty of illegal practice of law, as all instruments prepared by it were incidental to its business.

The Supreme Court of Appeals in holding that the drafting of the documents in question constituted the practice of law, rejected this contention, pointing out that, "technically speaking, deeds of bargain and sale, release deeds and deeds of trust (and the notes secured thereby) are 'contracts.' But they are not contracts ordinarily incident to the business of a realtor. They are extraordinary contracts and are muniments of title to real estate."⁵ The court recognized the necessity of according protection to the public by requiring that these instruments be prepared by lawyers who by proper training and experience are in better position to perform this important duty.

Inasmuch as the Virginia State Bar Committee had specifically

other, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires.

(2) One, other than a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.

(3) One undertakes, with or without compensation, to represent the interest of another before any tribunal,—judicial, administrative, or executive,—otherwise than in presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions, by an employee regularly and *bona fide* employed on a salary basis, or by one specially employed as an expert in respect to such facts and figures when such preparation by such employee or expert does not involve the examination of witnesses or preparation of pleadings."

³Va. Acts of Assembly (1938) c. 410, p. 771.

⁴186 Va. 30, 41 S. E. (2d) 720 (1947).

⁵186 Va. 30, 35, 41 S. E. (2d) 720, 723 (1947).

decided that the drafting of deeds constitutes the practice of law, the court in the instant case had positive assurance that it was following the intent of the framers of the rules.⁶ In most cases the meaning of the term "unauthorized practice" is not so positively determined, and the courts must work out their own specific interpretations of a generally stated precept for application to each situation.⁷ All courts are agreed that the practice of law is to be broadly defined as covering a wide range of activities.

"The practice of law is not limited to the conduct of cases in court In a larger sense it includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be pending in court."⁸

And though lip service is paid to the idea that laymen should not be allowed to draft legal instruments, most courts are reluctant to prohibit realtors from preparing such documents where the drafting is incidental to the business in which they are engaged. This situation is exemplified by *In re Eastern Idaho Loan & Trust Co.*, where the court declared:

"... where an instrument is to be shaped from a mass of facts and conditions, the legal effect of which must be carefully determined by a mind trained in the existing laws in order to insure a specific result and guard against others, more than the knowledge of the layman is required"⁹

Despite this language, the court went on to decide that where such drafting was incidental to the business in which the drafter engaged, it did not constitute the practice of law. Though this is probably the most common reasoning advanced for sanctioning quasi-legal practice by realty agencies,¹⁰ the need of protection of the public from un-

⁶See 186 Va. 30 at 37, 41 S. E. (2d) 720 at 724.

This intention of the drafters was correctly followed, as the rules of the construction of court rules are the same as for the construction of statutes. *Chiricahua Ranches Co. v. State*, 44 Ariz. 559, 39 P (2d) 640 (1934); *Helbush v. Helbush*, 209 Cal. 758, 290 Pac. 18 (1930).

"... the determination of any issue that presents this question [unauthorized practice] must be left to the facts of each particular case." *Creditors' Service Corp. v. Cummings*, 57 R. I. 291, 190 Atl. 2, 9 (1937).

⁸*Seawell v. Carolina Motor Club*, 209 N. C. 624, 184 S. E. 540, 544 (1936). *Paul v. Stanley*, 168 Wash. 371, 12 P. (2d) 401, 404 (1932): "A person . . . does work of a legal nature, when the instruments he prepares either define, set forth, limit, terminate, specify, claim or grant legal rights."

⁹49 Idaho 280, 288 Pac. 157, 159 (1930). The court did hold that where the defendant prepared legal instruments for the public, it was the practice of law.

¹⁰*In re Loeb*, 315 Mass. 176, 52 N. E. (2d) 27 (1943); *Cowern v. Nelson*, 207

authorized practice seems the same whether the realtor drafts the instrument as incidental to his business or as an independent service to anyone who might care to employ him to draw up legal documents.¹¹

Other contentions have been advanced by the realty companies to justify the drafting of legal instruments, but the legal profession has sought to persuade the courts that business expediency should not be held to legalize the practice of law by non-lawyers.¹²

The contention that real estate agencies should be allowed to write *simple* instruments, where such are ancillary to the business in which they are engaged, while accepted by some courts, was adequately refuted by Judge Pound in his concurring opinion in *People v. Title Guarantee and Trust Co.*:

"... I am unable to rest any satisfactory test on the distinction between simple and complex instruments. The most complex are simple to the skilled, and the simplest often trouble the inexperienced."¹³

The similar argument of the realtors that no unauthorized practice is involved in merely filling in blank spaces on standard forms was repudiated by the Ohio court in *In re Gore*:

"The selecting, by a real estate broker, of the appropriate form of contract blank for others or the filling out of such blank by others, in the furtherance of a real estate transaction, constitutes the practice of law, and such person must be duly licensed to practice law to legally perform such acts."¹⁴

The discretion exercised to choose the correct blank to use in a particular transaction may require as much knowledge of the law as is required to draft a complete instrument. The realtor is in effect giving

Minn 642, 290 N. W. 795 (1940); *People v. Title Guarantee and Trust Co.*, 227 N. Y. 366, 125 N. E. 666 (1919); *Cain v. Merchants National Bank and Trust Co. of Fargo*, 66 N. D. 746, 268 N. W. 719 (1936); *Childs v. Smeltzer*, 315 Pa. 9, 171 Atl. 883 (1934).

In the following cases this contention was made but was rejected by the court: *Hobson v. Kentucky Trust Co. of Louisville*, 303 Ky. 493, 197 S. W. (2d) 454 (1946); *In re Gore*, 58 Ohio App. 79, 15 N. E. (2d) 968 (1937); *R. I. Bar Ass'n v. Automobile Service Ass'n*, 55 R. I. 122, 179 Atl. 139 (1935); *Hexter Title and Abstract Co., Inc. v. Grievance Committee, Fifth Congressional District, State Bar of Texas*, 142 Tex. 506, 179 S. W. (2d) 946 (1944); *Paul v. Stanley*, 168 Wash. 371, 12 P. (2d) 401 (1932).

¹¹13 *Unauth. Prac. News, Third Quarter*, 5 (1947).

¹²Houck, *Drafting of Real Estate Instruments: The Problem from the Standpoint of the Bar* (1938) 5 *Law. and Contemp. Prob.* 66.

¹³227 N. Y. 366, 125 N. E. 666, 670 (1919). The majority of the court held that where the preparation of legal instruments was ancillary to the everyday business in which the drafter was engaged, it was not the practice of law.

¹⁴58 Ohio App. 79, 15 N. E. (2d) 968 (1937).

advice in choosing the correct form to carry out the legal purpose desired by the parties.¹⁵ The language to be used to carry out the intent of the parties in creating various interests in land is extremely technical, and comprehension of it can be acquired only through intensive study. It cannot be picked up casually by real estate agents in the course of their business activities.

The distinction made by some courts¹⁶ in saying that drafting instruments does not constitute practice of law unless consideration passes for the service is entirely unconvincing. As stated by one court:

“... It might as well be said that a surgeon who performs, without fee or reward, a tonsillectomy or appendectomy is not practicing surgery.”¹⁷

In the first place, it is impossible in many cases to determine whether any charge is made for drafting. In most real estate transactions a percentage commission is charged, and there is no means of proving that this fee does not also include the cost of drafting the necessary instruments. This problem becomes even more intricate when intangible forms of consideration come into play. The Wisconsin Bar Association recently notified bankers of that state that “consideration” might be so strictly construed as to make the good will gained through the preparation of legal instruments sufficient consideration to make such drafting the illegal practice of law.¹⁸

Furthermore, the “consideration” test misses the main point in restricting the practice to trained lawyers. The purpose of preventing laymen from writing legal instruments is not to protect the legal profession as a closed shop, but to protect the public from unskilled and unreliable practitioners.¹⁹ The losses likely to arise from employing un-

¹⁵13 Unauth. Prac. News, Third Quarter, 5 (1947).

¹⁶Cowern v. Nelson, 207 Minn. 642, 290 N. W. 795 (1940); Cain v. Merchants National Bank and Trust Co. of Fargo, 66 N. D. 746, 268 N. W. 719 (1936); Childs v. Smeltzer, 315 Pa. 9, 171 Atl. 883 (1934); Paul v. Stanley, 168 Wash. 371, 12 P. (2d) 401 (1932).

¹⁷State ex rel. Wright v. Barlow, 131 Neb. 379, 268 N. W. 95, 96 (1936). See also Hexter Title and Abstract Co. Inc. v. Greivance Committee, Fifth Congressional District, State Bar of Texas, 142 Tex. 506, 179 S. W. (2d) 946, 952 (1944).

¹⁸12 Unauth. Prac. News, Second Quarter, 27 (1946).

¹⁹“The gravity of the consequences to society resulting from abuses of this relation demands that those assuming to advise or to represent others shall be properly trained and educated, and be subject to a peculiar discipline. That fact, and the necessity for protection of society in its affairs and in the ordered proceedings of its tribunals, have developed the principles which serve to define the practice of law.” 171 Va. XVII.

“It is of importance to the welfare of the public that these manifold customary

authorized practitioners go far beyond the mere waste of fees paid; much more significant are the losses arising from failure to obtain the legal rights which were intended to be secured but which were in fact lost through faulty preparation of the documents.²⁰

In rebuttal, the real estate agencies point out that they also must be licensed by the state, and in some instances are required to show their fitness to engage in the real estate business.²¹ However, it can hardly be argued that these statutory standards are such as to assure that the realtor will be competent to engage in practices which require the skill of a person with legal training.

Furthermore, the realtor's self-interest in completing the transaction so as to obtain his commission may, consciously or unconsciously, outweigh his concern for protecting the interests of vendee or vendor.²² The construction which may be put on the instrument by a court years thereafter is in no way connected with his duty to his principal, which ends when the deal is closed.²³

The saving to clients has been pointed out as another reason why realtors should be allowed to do all the work necessary to complete the transaction between the parties. However, to the average man the purchase of a home is the most important real estate transaction of a lifetime. A small extra cost at the outset for competent legal services is of

functions be performed by persons possessed of adequate skill, of sound moral character, and acting at all times under the heavy trust obligation to clients which rests on attorneys." In re Opinion of The Justices, 289 Mass. 607, 194 N. E. 313, 317 (1935).

²⁰"It was a matter of common knowledge among the members of the bar and the judges of our courts that many deeds which had been prepared by real estate agents and other laymen were defective and often resulted in costly litigation. This no doubt was due to the fact that most of these parties did not know or appreciate the legal effect of a deed. Titles to real property at times have been upset and in some cases the owner either lost his property or was compelled to fight a costly lawsuit all because of a defective deed prepared by an untrained layman." *Commonwealth v. Jones & Robbins, Inc.*, 186 Va. 30, 36, 41 S. E. (2d) 720, 724 (1947).

²¹E.g., N. Y. Stat. (1935) c. 160, Subd. 1 (d).

²²Houck, *Drafting of Real Estate Instruments: The Problem from the Standpoint of the Bar* (1938) 5 *Law and Contemp. Prob.* 66, 71.

²³"He [the real estate dealer] owes no affirmative duty to his client, is not liable to him for negligence or failure, and may recede from his employment at will, without notice." *Carsten v. McReavy*, 1 Wash. 359, 25 Pac. 471 (1890).

It is in no sense necessary for the realtor to draft the instrument which consummates the dealings of the parties: "Courts almost unanimously unite in holding that in case of an ordinary employment to sell, when he has procured a party able and willing to buy, upon terms demanded by his principal, and has notified him of the purchaser's readiness to buy, the agent's work is ended and he is entitled to his commission." 25 Pac. 471. See also *Halsey v. Monteiro*, 92 Va. 581, 583, 24 S. E. 258, 259 (1896).

slight significance compared to the ultimate loss which might result from a faultily drawn deed.

Though none of these arguments for justifying the doing of quasi-legal work by realtors is convincing, various courts have on occasion been favorably influenced by them. The attempts of Bar Associations to serve as enforcement agencies to prosecute unauthorized practitioners has been rendered ineffectual by this lack of a clear understanding among courts as to what constitutes the practice of law. Further, such policing duties have embarrassed the legal profession because the appearance is created that actions of the bar are motivated by the selfish desire to maintain a monopoly in rendering quasi-legal services. On the other hand, legislative attempts to codify the scope of permitted and prohibited activities result in vague definitions which require interpretation by the courts. The constructions placed upon the general precepts may bring about the desired result as in *Commonwealth of Virginia and The Virginia State Bar Association v. Jones & Robbins, Inc.*, but may just as often bring about the opposite result. Attempts have been made in several states to draw up agreements between Bar Associations and Real Estate Associations, limiting the scope of the activities of each group to their particular fields. A recent survey indicates, however, that this plan has met with only limited success.²⁴

Legislatures, courts and Bar Associations can, at best, furnish only piecemeal answers to the problem of unauthorized practice. The ultimate solution must lie in education of members of the public to an understanding that it is to their interest to have fully qualified legal practitioners render these services. The legal profession can promote this understanding by maintaining such high standards of service to clients that it becomes obvious that the small initial cost is far more than offset by the advantage of greater assurance in the validity of the instruments prepared.

HENRY C. CLARK

²⁴13 Unauth. Prac. News, Second Quarter, 20 (1947). In this survey conducted by the Washington State Bar Ass'n, of the four states reporting agreements, one state (New Jersey) reported its agreement was only partly successful, two (Oregon & Pennsylvania) reported theirs had been unsuccessful, and one (Wisconsin) reported theirs had been helpful.