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Landlord And Tenant-Liability Of Tenant For Rent After Condemnation Under Eminent Domain Of Entire Leased Premises For Temporary Purpose. [Illinois]

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CASE COMMENTS

CONSTITUTIONAL LAW—VALIDITY OF STATE STATUTE REQUIRING RACIAL SEGREGATION OF PASSENGERS IN INTERSTATE COMMERCE. [United States Supreme Court]

In the recent decision of *Morgan v. Commonwealth of Virginia,*[1] the Supreme Court of the United States held unconstitutional, as a violation of the Commerce Clause,[2] a Virginia statute[3] requiring segregation according to color of interstate passengers on motor vehicles moving in interstate commerce.[4] Although the precise point determined was one of first impression, the holding of the Supreme Court was not unexpected.[5] There were dicta to the effect that such segregation was invalid,[6] and lower federal courts[7] and the highest courts of various states[8] had held statutes requiring race segregation of interstate passengers unconstitutional. That these decisions were not pushed to a final conclusion would seem to indicate that neither the carriers nor

[1]66 S. Ct. 1050 (1946).

[2]U. S. Const. Art. I, § 8.

[3]Va. Code Ann. (Michie, 1942) §§ 4097z—4097dd. 4097z—Requires motor carrier to segregate by designating seats or a portion of the bus which each race shall occupy Fine for non-compliance. 4097aa—Quality or convenience of the accommodation shall be the same. 4097bb—Driver may change seat designation in accordance with requirements. 4097dd—Passengers failing to comply are guilty of misdemeanor.

[4]A colored passenger was enroute from Gloucester, Va. to Baltimore, Md. on a Greyhound bus, when removed for failure to comply with driver's request to move to rear seat so that white passengers could be seated. Passenger was convicted and fined for resisting arrest and violation of § 4097dd of the Code (supra, note 3). Morgan v. Commonwealth of Virginia, 184 Va. 24, 34 S. E. (2d) 491 (1945).

[5]The Supreme Court's ruling was predicted in a recent note on the Virginia Supreme Court of Appeals' decision of this case. Note (1946) 32 Va. L. Rev. 668, 675. For a contrary statement of the law see 9 Am. Jur. 487.

[6]Chief Justice Stone lists among forbidden state action, "police power regulating the segregation of colored passengers in interstate trains." Southern Pacific Co. v. Arizona, 325 U. S. 761. 780, 65 S. Ct. 1515, 1526, 89 L. ed. 1915 (1945). Cases indicate probability of unconstitutionality if segregation law were to apply to interstate passengers. Chiles v. Chesapeake & O. Ry., 218 U. S. 71, 76, 30 S. Ct. 667, 669, 54 L. ed. 936 (1910); Louisville, N. O. & T. Ry. v. Mississippi, 133 U. S. 587, 10 S. Ct. 348, 349, 33 L. ed. 784 (1890).

[7]Washington, B. & A. E. Ry. v. Waller, 53 App. D. C. 200, 289 Fed. 598, 30 A. L. R. 50 (1923) (passenger interstate, carrier intrastate); Anderson v. Louisville & N. Ry., 62 Fed. 46 (C. C. Ky. 1894).

[8]State ex rel. Abbott v. Hicks, 44 La. Ann. 770, 11 So. 74 (1892); Hart v. State, 100 Md. 595, 60 Atl. 457 (1905). Contra: Southern Ry. v. Norton, 112 Miss. 302, 73 So. 1 (1916); Smith v. State, 100 Tenn. 494, 46 S. W. 566 (1898), dismissed on motion of counsel, 21 S. Ct. 917 (1900).

the states were anxious to have the nation's highest court render a decision on this issue. The Supreme Court itself had on several past occasions avoided this determination by accepting the decisions of the state courts as to the scope of their statutes,[9] and by assuming, in the absence of a different interpretation, that a contested statute did not apply to interstate commerce.[10] When the *Morgan* case[11] was before the Supreme Court of Appeals of Virginia, however, the ultimate issue was posed squarely by the affirmance of the conviction of an interstate passenger for violation of the state statute when travelling on an interstate carrier.

A study of the opinions of various members of the Court in the principal case necessarily involves a brief review of judicial principles formulated in determining the permissible extent of local regulation of interstate commerce. Chief Justice Marshall regarded the power to regulate commerce as lying exclusively in Congress, but recognized that local exercise of police power could affect that commerce.[12] Chief Justice Taney, taking an objective view, considered the power concurrent, and thus state action could only be invalidated by the expressed will of Congress.[13] In 1851, *Cooley v. Board of Wardens*[14] set up a judicial standard to test the validity of state action. The power to regulate those "subjects," which "are in their nature national or admit only of one uniform system or plan of regulation" was said to reside exclusively in Congress, while the state in the silence of Congress, could legislate on those "subjects" which, because of a diversity

[9]Statute construed to apply to interstate trains but not interstate passengers, Chesapeake & O. Ry. v. Kentucky, 179 U. S. 388, 21 S. Ct. 101, 45 L. ed. 244 (1900); Louisville, N. O. & T. Ry. v. Mississippi, 133 U. S. 587, 10 S. Ct. 348, 33 L. ed. 784 (1890). Statute construed to apply to neither interstate trains nor interstate passengers, Plessy v. Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. ed. 256 (1896); Chiles v. Chesapeake & O. Ry., 218 U. S. 71, 30 S. Ct. 667, 54 L. ed. 936 (1910).

[10]McCabe v. Atchison, T. & S. F. Ry., 235 U. S. 151, 35 S. Ct. 69, 59 L. ed 169 (1914).

[11]Morgan v. Commonwealth of Virginia, 184 Va. 24, 34 S. E. (2d) 491 (1945).

[12]Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23 (1824) and Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678 (1827) are generally cited supporting this view. Dowling, Interstate Commerce and State Power (1940) 27 Va. L. Rev. 1, 2-4. In Wilson v. Blackbird Creek Marsh Co., 2 Pet. 245, 7 L. ed. 412 (1829) Marshall upheld a state regulation authorizing the building of a dam on a "small navigable creek."

[13]License Cases, 5 How. 504, 12 L. ed. 256 (1847). Dowling, Interstate Commerce and State Power (1940) 27 Va. L. Rev. 1, 2-4. Taney's views discussed by Frankfurter, Taney and the Commerce Clause (1936) 49 Harv. L. Rev. 1286, 1288-1289.

[14]12 How. 299, 13 L. ed. 996 (1851). It has been pointed out that this case marks a change in approach from the "nature of the power" over commerce to the "subjects of the power." Ribble, State and National Power over Commerce (1937) 52.

of conditions, were better handled by a diversity of regulations. The formula of the *Cooley* case is still adhered to[15] with the modification that Congress may expressly authorize local regulations to operate on "national" subjects as to which, Congress being silent, state action is prohibited.[16]

The Court has condemned state action not only on the ground that one uniform rule of regulation is required, but also because the state law "regulates"[17] or "operates directly on"[18] interstate commerce, or because it "burdens"[19] that commerce, either with or without some qualifying term such as "directly,"[20] "unduly,"[21] or "unconstitutionally."[22] By looking to the "purpose of the commerce clause" which was "to prevent discrimination and the erection of barriers or obstacles to the free flow of commerce, interstate or foreign," Chief Justice Stone attempted to induce the Court to use more significant language.[23] Thus, in recent cases a prerequisite of validity has been that the local

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[15]Recent decisions cite Cooley case with approval. Southern Pacific Co. v. Arizona, 325 U. S. 761, 767, 65 S. Ct. 1515, 1519, 89 L. ed. 1915 (1945); Duckworth v. Arkansas, 314 U. S. 390, 393, 62 S. Ct. 311, 312, 86 L. ed. 294 (1941); California v. Thompson, 313 U. S. 109, 114, 61 S. Ct. 930, 932, 85 L. ed. 1219 (1941). "...it may fairly be said that the present Court is committed to the doctrine of the *Cooley* case in ascertaining the permissible extent of state regulation of commerce." Dowling, Interstate Commerce and State Power (1940) 27 Va. L. Rev. 1, 10.

[16]Leisy v. Hardin, 135 U. S. 100, 10 S. Ct. 681, 34 L. ed. 128 (1890); In Re Rahrer, 140 U. S. 545, 11 S. Ct. 865, 35 L. ed. 529 (1891); Clark Distilling Co. v. Western Md. Ry., 242 U. S. 311, 37 S. Ct. 180, 61 L. ed. 326 (1917); Whitfield v. Ohio, 297 U. S. 431, 56 S. Ct. 532, 80 L. ed. 778 (1936). In Southern Pacific Co. v. Arizona, Chief Justice Stone cites cases using language that the commerce clause itself strikes down prohibited state action and other cases that it is based on an implied Congressional negative. But then says "Congress has undoubted power to redefine the distribution of power over interstate commerce." 325 U. S. 761, 768-9, 65 S. Ct. 1515, 1520, 89 L. ed. 1915 (1945). It has been said that this language indicates the whole question is predicated on the will of Congress. Dowling, Constitutional Developments in Five War Years (1946) 32 Va. L. Rev. 461, 474.

[17]Pennsylvania v. West Virginia, 262 U. S. 553, 597-8, 43 S. Ct. 658, 665, 67 L. ed. 1117 (1923).

[18]Sherlock v. Alling, 93 U. S. 99, 102, 23 L. ed. 819 (1876).

[19]Sherlock v. Alling, 93 U. S. 99, 102, 23 L. ed. 819 (1876).

[20]Hall v. DeCuir, 95 U. S. 485, 488, 24 L. ed. 547 (1878).

[21]Hicklin v. Coney, 290 U. S. 169, 173, 54 S. Ct. 142, 144, 78 L. ed. 247 (1933).

[22]Atlantic Lumber Co. v. Commissioner, 298 U. S. 553, 554, 56 S. Ct. 887, 80 L. ed. 1328 (1936). This varying terminology differs little in meaning. Ribble, State and National Power over Commerce (1937) 220-1. "A state law...which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce—a prohibited interference." Pennsylvania v. West Virginia, 262 U. S. 553, 596-7, 43 S. Ct. 658, 665, 67 L. ed. 1117 (1923).

[23]DiSanto v. Pennsylvania, 273 U. S. 34, 43, 47 S. Ct. 267, 271, 71 L. ed. 524 (1927) (dissenting opinion).

regulation "does not materially restrict the free flow of commerce across state lines."[24]

Behind this varied terminology of the Court, one consideration which has loomed large in determining the validity of a state statute affecting interstate commerce is whether the benefit accruing to the state overbalances the detriment to interstate commerce.[25] This approach is openly utilized in a recent case[26] testing the validity of an Arizona law limiting the length of interstate trains under the guise of a safety regulation. Only after showing by facts and statistics that the regulation would cause more accidents than it would prevent, does the Court conclude that the impediment to interstate commerce renders the statute invalid. This balancing of state and national interest has resulted in the condoning of very substantial interferences with interstate commerce when the advantage to the state was sufficiently great.[27]

Nor has the *Cooley* case classification been used to obscure, by a formalistic division of "subjects," this balancing of state and national interests. What constitutes a "subject" is uncertain,[28] and seldom is the thing regulated so fundamentally tied up with the national interest that the Court will categorically declare what the precise subject is which no local regulation can effect. A particular local regulation affecting interstate commerce may be upheld while a more stringent regulation of the same thing may be invalidated.[29]

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[24]Southern Pacific Co. v. Arizona, 325 U. S. 761, 770, 65 S. Ct. 1515, 1521, 89 L. ed. 1915 (1945). Court looks to see whether the state statute was "materially obstructing the free flow of commerce:" Duckworth v. Arkansas, 314 U. S. 390, 394, 62 S. Ct. 311, 313, 86 L. ed. 294 (1941); California v. Thompson, 313 U. S. 109, 113, 61 S. Ct. 930, 932, 85 L. ed. 1219 (1941).

[25]"Yet if one is not blinded by the deference to ritual, an obvious consistency will appear.... There is an apparent balance of the value to the home state against the value of other states." Ribble, State and National Power over Commerce (1937) 220; see also 201. See Rottshaefer, Constitutional Law (1939) 283-4.

[26]Southern Pacific Co. v. Arizona, 325 U. S. 761, 65 S. Ct. 1515, 89 L. ed. 1915 (1945).

[27]Smith v. St. Louis & S. W. Ry., 181 U. S. 248, 21 S. Ct. 603, 45 L. ed. 847 (1901) (Upheld Texas exclusion of Louisiana livestock when anthrax was said to have affected them); Sligh v. Kirkwood, 237 U. S. 52, 35 S. Ct. 501, 59 L. ed. 835 (1915) (State may forbid shipment of green citrus fruit); South Carolina State Highway Dept. v. Barnwell Bros., 303 U. S. 177, 58 S. Ct. 510, 82 L. ed. 734 (1938) (Trucks on state highways required to conform to load limit of 20,000 lbs. and a width of 90 in.).

[28]"There is nowhere presented a controlling definition of a 'subject.'" Ribble, State and National Power over Commerce (1937) 205.

[29]Southern Ry. v. King, 217 U. S. 524, 30 S. Ct. 594, 54 L. ed. 868 (1910) (Upheld right of state to regulate trains approaching certain crossings); Seaboard Airline Ry. v. Blackwell, 244 U. S. 310, 37 S. Ct. 640, 61 L. ed. 1136 (1917) (Declared

In its decision in the *Morgan* case,[30] the Virginia court decided that the statute of the state was one of the class of regulations that is permitted until Congress speaks to the contrary. It was argued that this was a legitimate exercise of the state's police power, as race segregation was the settled policy of the state and does not, if the treatment accorded is equal, violate the Fourteenth Amendment.[31] Therefore, as no "direct or unreasonable interference with interstate commerce" was shown, the state law was regarded as valid.

The majority of the Supreme Court of the United States,[32] however, concluded that this was not a permissible "subject" for state regulation because "seating arrangements for the different races in interstate motor travel require a single,uniform rule to promote and protect national travel."[33] In reaching this conclusion the Court does not look to the necessity or value of the regulation to Virginia. The contention that the statute was "an exercise of the state's police power to avoid friction between the races" is quickly disposed of by the assertion that a state cannot unduly burden interstate commerce " 'by simply invoking the convenient apologetics of the police power.' "[34]

To support the conclusion that a single, uniform rule is needed, the Court indicates two aspects in which interstate commerce is burdened: the passenger moving interstate is required to make the seat changes, and the interstate carrier is required to effect the changes. The hardship of requiring interstate passengers to change seats, the diversity of state laws as to segregation, and the different definitions of a colored person emphasize the inconvenience and hardship imposed upon an interstate passenger of the colored race. These considerations would seem to show that the effect on interstate passengers is the principal objection. But the decision mainly relied for support on *Hall v. DeCuir*,[35] in which the passenger was merely travelling between two

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invalid a more onerous regulation of crossings). See notes 16 and 17 of principal case for citation of cases holding "statutes or orders dealing with safety of regulations" and "local train service" valid and invalid. 66 S. Ct. 1050, 1054-5.

[30]184 Va. 24, 34 S. E. (2d) 491 (1945).

[31]See, infra, note 42.

[32]Mr. Justice Reed delivered the opinion of the Court with Justices Douglas and Murphy concurring. Mr. Justice Rutledge concurred in the result. Justices Black and Frankfurter delivered separate concurring opinions, and Mr. Justice Burton dissented. Mr. Justice Jackson was not present at the hearings.

[33]66 S. Ct. 1050, 1058.

[34]66 S. Ct. 1050, 1055, quoting from Kansas City So. Ry. v. Kaw Valley Drainage Dist., 233 U. S. 75, 79, 34 S. Ct. 564, 565, 58 L. ed. 857 (1913).

[35]95 U. S. 485, 24 L. ed. 547 (1877).

points in Louisiana. The Court, nevertheless, there held that a Louisiana statute which forbade segregation could not validly be applied so as to cause the interstate carrier to place colored passengers in a cabin reserved for white persons. That portion of this precedent is quoted which emphasizes that an interstate carrier should not have to comply with this type of regulation.[36] Whether these considerations, namely, the burden on the interstate passenger and the burden on the interstate carrier, require the conclusion reached may be questioned. However, the Court seems to consider interstate commerce so burdened in either aspect that race segregation must be deemed a subject which demands national rather than local treatment.

Mr. Justice Frankfurter in a brief concurring opinion rests his conclusion on the burden upon the interstate carrier. Relying solely on *Hall v. DeCuir,* he points out that "the imposition upon national systems of transportation of a crazy-quilt of State laws would operate to burden commerce unreasonably."[37] His belief is clearly that "racial commingling or racial segregation" in interstate commerce is to be handled exclusively by Congress until that body decides to the contrary.

Mr. Justice Burton, dissenting, astutely belabours the weaknesses in the majority opinion. He believes that "uniformity of treatment is appropriate where a substantial uniformity of conditions exist," and the fact that ten states have statutes requiring segregation, eighteen forbid it, and twenty have no statute applicable,[38] coupled with the fact that Congress has three times taken no action on bills introduced on this subject[39] indicates there is no such requirement today. He conceded that in a particular situation, as in *Hall v. DeCuir,* a state segregation statute might so burden commerce as to be unconstitutional.[40] But balancing the state against the national interest, he would not strike down the regulation where there is no "factual" showing that the burden on commerce outweighs the local benefit gained.[41]

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[36]Included are the phrases that "Commerce cannot flourish in the midst of such embarrassments" and "uniformity... from one end to the other in his route is a necessity in his business." 66 S. Ct. 1050, 1057, quoting from 95 U. S. 485, 489.

[37]66 S. Ct. 1050, 1059.

[38]Citations of state statutes are at 66 S. Ct. 1050, 1056.

[39]Citations to the Congressional Records are given at 66 S. Ct. 1050, 1062, n. 6.

[40]66 S. Ct. 1050, 1062, n. 5.

[41]Mr. Justice Burton quotes in italics from Southern Pacific Co. v. Arizona, 325 U. S. 761, 770, 65 S. Ct. 1515, 1521, 89 L. ed. 1915 (1945) that "state laws will not be invalidated without the support of relevant factual material which will 'afford a sure basis' for an informed judgment." 66 S. Ct. 1050, 1061. The dissent relies for

Perhaps the majority has overemphasized the detriment to interstate commerce and failed to give due regard to state interest, but there are additional considerations which support the expediency of the majority opinion. If the *Morgan* case had been decided on a narrower basis—namely, on a balance between the national interest in the "free flow of commerce" as against Virginia's interest in requiring segregation to avoid race friction—the decision could not have been used categorically as a precedent for other local regulations on this subject. This unpleasant issue is eliminated by the Court's decision that states may not deal with this subject until Congress has spoken. Further, although it is well established that separate but equal treatment does not violate the 14th Amendment,[42] the tendency of the Court in modern cases is to obliterate, whenever possible, any difference in treatment accorded to citizens because of their color.[43] It would have been at least a step to the oblique if the Virginia statute had been upheld. Finally, while the desirability and wisdom of invalidating such a statute when it represents the established policy of the state may be honestly debated,[44] there is a strong moral argument that in a democracy all such differences in treatment should ultimately be abolished.[45]

Though the decision in the *Morgan* case is limited on its facts to

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its approach on the Southern Pacific Co. case. See discussion indicated by note 26, infra.

[42]Plessy v. Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. ed. 256 (1896). "Race segregation . . . is not per se an abridgement of any constitutional right secured to the citizen." Henderson v. U. S., 63 F. Supp. 906, 913 (D. Md. 1945). 10 Am. Jur., Civil Rights § 13.

[43]"The Fourteenth Amendment, adopted as it was with special solicitude for the equal protection of members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color." Mr. Justice Cardozo in Nixon v. Condon, 286 U. S. 73, 89, 52 S. Ct. 484, 487, 76 L. ed. 984 (1932) (Held State Executive Committee of Democratic Party could not exclude Negroes from voting in the primary); Smith v. Allwright, 321 U. S. 649, 64 S. Ct. 757, 88 L. ed. 987 (1944) (Political party cannot exclude voting in primary because of color); Norris v. Alabama, 294 U. S. 587, 55 S. Ct. 579, 79 L. ed. 1074 (1935) (Error to exclude persons from jury duty because of color); Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 59 S. Ct. 232, 83 L. ed. 208 (1938) (Upheld right of colored student to attend University of Missouri Law School); Railway Mailing Ass'n v. Corsi, 326 U. S. 88, 65 S. Ct. 1483, 89 L. ed. 2072 (1945) N. Y. law sustained forbidding "labor organization" to exclude members because of color). See Note (1946) 32 Va. L. Rev. 668.

[44]See State ex. rel. Corp. Com. v. Transportation Committee, 198 N. C. 317, 151 S. E. 648, 66 A. L. R. 1197 (1930).

[45]See Mr. Justice Harlan's dissent in Plessy v. Ferguson, 163 U. S. 537, 552, 16 S. Ct. 1138, 1144, 41 L. ed. 256 (1896). Note (1946) 32 Va. L. Rev. 668, 675 points out "Nazi concept of racial superiority" is a factor in present opposition to race segregation.

a statute requiring race segregation of interstate passengers on buses making interstate journeys, the broad scope of the decision indicates other possible implications. Obviously, similar state laws which apply to interstate passengers on trains or other types of carriers in interstate commerce will be invalid.[46] If the carrier is moving interstate, the state law will be ineffective even if the passenger is travelling only intrastate. Earlier Supreme Court decisions hold that an interstate train may be required to couple on additional cars to comply with state laws requiring segregation of intrastate passengers,[47] but it is submitted that the effect of the *Morgan* case is to prohibit all race segregation in interstate commerce. If the carrier operates intrastate only, but the passenger is on the leg of an interstate journey, then he is engaged in interstate commerce and the state segregation statute could not apply to him.[48] However, the right of a state to require separate if equal treatment or to forbid separate treatment of intrastate passengers on an intrastate carrier is not affected,[49] and the carrier by its own regulations may still require race segregation in interstate commerce, if it desires to do so to conform to state policy.[50] However, absent a breach of the peace, removal from the vehicle would be the passenger's only penalty for non-compliance, as the state would have no power to authorize a criminal prosecution.

As the power to deal with the "subject" under discussion is now

[46]Hall v. DeCuir, relied on by the Court, involved a steamboat; principal case involved a bus; and cases cited in support involved trains, 66 S. Ct. 1050, 1058, n. 31.

[47]Louisville, N. O. & T. Ry. v. Mississippi, 133 U. S. 587, 10 S. Ct. 348, 33 L. ed. 784 (1890); Chesapeake & O. Ry. v. Kentucky, 179 U. S. 388, 21 S. Ct. 101, 45 L. ed. 244 (1900); South Covington & Cincinnati St. Ry. v. Kentucky, 252 U. S. 399, 40 S. Ct. 378, 64 L. ed. 631 (1920). None of these cases were referred to by the Court except the South Covington case and the Court explained, "Probably what was meant by the opinions was that under the Kentucky act the company with wholly intrastate milage must operate cars with separate compartments for intrastate passengers." 66 S. Ct. 1050, 1058, n. 30. The unequivocal reliance on Hall v. DeCuir indicates the Court is in sympathy with Mr. Justice Harlan's dissent in Louisville, N. O. & T. Ry. v. Mississippi. He was unable to distinguish between segregation on an interstate steamboat and an interstate train.

[48]Most of the burdens on interstate commerce in the principal case were on the interstate passenger. Cases cited in notes 6, 7, and 8, supra, considered segregation invalid when applied to interstate commerce.

[49]No objection other than that based on the Commerce Clause was interposed. See note 42, supra.

[50]Chiles v. Chesapeake & O. Ry., 218 U. S. 71, 30 S. Ct. 667, 54 L. ed. 936 (1910). The basis for Hall v. DeCuir was that the carrier should be able to traverse its whole run in conformity with its own rules as to this matter. If carrier's regulation provides unequal treatment it is invalid. Henderson v. U. S., 63 F. Supp. 906 (D. Md. 1945); Mitchell v. U. S., 313 U. S. 80, 61 S. Ct. 873, 85 L. ed. 1201 (1941).

exclusively in Congress, state statutes forbidding segregation theoretically are unconstitutional;[51] but where state policy is against such segregation, carriers are not likely to raise the issue by trying to invoke the practice.

The Supreme Court has clearly indicated that the field is open to Congress for a uniform law covering this matter, but it does not seem probable that one will be forthcoming.[52] It is even less likely that Mr. Justice Frankfurter's reminder, that Congress could set the national policy without requiring uniformity, will be followed.[53]

JOHN L. DORSEY, JR.

COURTS—RETROACTIVE OPERATION OF OVERRULING DECISION TO INVALIDATE INTERESTS ACQUIRED IN RELIANCE ON OVERRULED CASE. [Arkansas]

When a court is confronted with a previous decision which it now conceives to have been wrongly decided, a nice problem is presented in achieving a balance between the desire to prevent the perpetuation of an erroneous rule of law and yet to avoid disturbing interests established under the previous pronouncement of the law. This problem is particularly acute when the issue involves title to real property and one of the present litigants claims his interest on the basis of the questioned decision. A more precise demonstration of this difficulty could hardly be found than that which has arisen in the course of three decades of litigation in Arkansas. The substantive point at issue in this series of cases was whether a reservation of mineral rights in the habendum clause of a deed is so repugnant to the provisions of the granting clause conveying a fee simple as to be invalid and of no effect.

In a line of cases dating back at least to 1855, the Arkansas court had adhered to the general rule of construction that "if there is a clear repugnance between the nature of the estate granted and that limited in the habendum, the latter yields to the former."[1] In 1917, in the de-

[51]This effect of declaring that the "subject" needs one uniform rule is pointed out by Mr. Justice Burton, 66 S. Ct. 1050, 1060, 1062 n. 5

[52]Three such bills have been introduced but have not reached a vote. Note 39, supra.

[53]See note 16, supra. It is believed a majority of states that are opposed to such practice would never sanction a law authorizing it.

[1]3 Washburn, Real Property (6th ed.) § 2360. Scull v. Vaguine, 15 Ark. 695 (1855); Whetstone v. Hunt, 78 Ark. 230, 93 S. W. 979 (1906); Carllee v. Ellsberry, 82 Ark. 209, 101 S. W. 407 (1907).

cision of *Cole v. Collie*,[2] this rule was applied to invalidate a provision in the habendum clause reserving mineral rights, the reservation being held repugnant to the grant of the fee simple estate. In 1940, however, *Beasley v. Shinn*[3] expressly overruled the *Cole* case and established the view that such reservations would be enforced where the intentions of the parties as gathered from the entire deed were clearly that the mineral rights were to remain in the grantor.

Some doubt remained, however, as to the status of persons who, previous to the *Beasley* case and relying on the *Cole* decision, invested in property which some predecessor in title had purchased subject to a mineral rights reservation.[4] This was the question which the Arkansas court was called upon to decide in the recent case of *Carter Oil Co. v. Weil*.[5] In 1921, the Four States Lumber Company had conveyed a forty acre tract of land by warranty deed to Harvey. Following the habendum clause in the deed was an express reservation of one-half undivided interest in all oil and mineral rights. Sometime before 1940, Collins, one of the present defendants, purchased the land from Harvey, relying on the specific advice of a leading member of the Arkansas bar that the mineral rights reservation in the Lumber Company's deed to Harvey was void under *Cole v. Collie*, and that therefore Harvey owned and could convey the oil and mineral rights with the fee. Plaintiffs, grantees of the rights reserved by the Lumber Company, now sue to cancel the conveyance under which Harvey's grantees claim

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[2]131 Ark. 103, 198 S. W. 710 (1917). This decision and the precedents on which it rested were expressly approved in Mason v. Jackson, 194 Ark. 236, 106 S. W. (2d) 610 (1937) (two justices dissenting).

[3]201 Ark. 31, 144 S. W. (2d) 710, 713, 131 A. L. R. 1234, 1238 (1940): "Reservations of mineral rights are so often attempted to be expressed in the habendum that it is not just to apply the technical rule of apparent limitation on the prior grant where mineral interests are excluded by subsequent language. Rather, consideration should be given the intentions of the parties as gathered from the entire document." The overruling was thus specifically restricted to cases involving mineral reservations—which would include Cole v. Collie and Mason v. Jackson. An earlier decision in the same year, Luther v. Patman, 200 Ark. 853, 141 S. W. (2d) 42 (1940) had weakened the Cole case by refusing to apply the rule set out therein, though the precedent was not mentioned in the opinion.

[4]In Beasley v. Shinn, 201 Ark. 31, 144 S. W. (2d) 710, 131 A. L. R. 1234 (1940) the parties who contested the validity of the mineral rights reservation were not in position to claim that they had purchased in reliance on the nullity of the reservation. Shinn was the original grantee of the deed reserving the minerals, and the other contesting parties claimed under a deed from Shinn in which a clause was inserted recognizing that "the mineral rights in and under said land has been retained by a former grantor [Beasley]." The court in the principal case, however, could see no basis for distinguishing the Beasley case.

[5]192 S. W. (2d) 215 (Ark. 1946).

and to have an accounting for oil and gas produced from the land. On the authority of the *Beasley* case that such mineral rights reservations are valid, the Supreme Court of the state, in a four-to-three decision, granted plaintiffs the relief sought.

No member of the court disputed the wisdom of the rule of the *Beasley* case. The disagreement rested on whether that decision should be given effect only as to deeds executed since it was handed down in 1940 or applied to all deeds, whenever executed. The four justices constituting the majority chose the latter alternative, apparently believing this action necessary to protect the power of a court to overrule erroneous precedents as a means of avoiding the interminable perpetuation of bad law.[6] The *Cole* case had set up an undesirable rule in that it denied to a grantor an interest the parties intended should be reserved to him and gave the grantee an interest the parties did not intend him to have. Since persons have no vested right to have decision forever sustained,[7] it was proper for the court to overthrow this unjust rule, and in doing so in the *Beasley* case, the justices had not indicated that they meant their decision to have only prospective effect.[8]

Logical though this reasoning may appear, it does not obviate the disturbing fact bluntly expressed by the dissent: "the Arkansas Supreme Court is today saying that an investor who, in buying land, implicitly relies on an unequivocal declaration by this court that such a conveyance as he is obtaining will vest in the purchaser good title to the property he is paying for, must lose his investment if, years afterwards, this court decides to overrule the decision on which the invest-

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[6]192 S. W. (2d) 215, 217-8 (Ark. 1946): "It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error." Along with this seemingly irrelevant declaration, the court quoted Chancellor Kent and Blackstone to prove that the doctrine of *stare decisis* is not to be taken as a prohibition against overruling erroneous decisions. Inasmuch as the court in the principal case was not being called upon to overrule any decision and, as no party was questioning the power of a court to overrule a precedent, it is not clear why this matter was discussed in the opinion.

[7]Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 53 S. Ct. 145, 77 L. ed. 360 (1932); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 50 S. Ct. 451, 74 L. ed. 1107 (1930); Tidal Oil Co. v. Flanagan, 263 U. S. 444, 44 S. Ct. 197, 68 L. ed. 382 (1924); Taliafero v. Barnet, 47 Ark. 359, 1 S. W. 702 (1886); State v. Bell, 136 N. C. 674, 49 S. E. 163 (1904).

[8]The element of reliance on the rule of Cole v. Collie was not present in the Beasley case, and it is improbable that the court there had any occasion to consider whether the overruling should be given retroactive effect.

or properly, and necessarily, relied."[9] In order to avoid creating such a situation, the minority of the court contended that the rule validating mineral rights reservations in fee simple conveyances must not be given retroactive effect so as to operate on deeds drawn before the rule was proclaimed as the law of the state. The majority justices, however, felt themselves bound by precedent to give full effect to the overruling of the *Cole* case, though it was with "great reluctance" that they reached a conclusion which would "disturb rights which apparently had vested."[10]

It appears that the underlying power which forced the majority reluctantly down its course of unrelenting logic is the classical notion of the effect of overruling a precedent—that the overruled case was not merely bad law, but *never was law* at all.[11] "A judicial decision is but evidence of the law. An overruling decision does not change law but impeaches the overruled decision as evidence of law. Adopting the theory that courts merely declared pre-existing law it logically follows that an overruled decision operates retroactively."[12] The doctrine of the overruling case has always been the law "in some Utopia beyond the ken of mortals."[13] In the words of Mr. Justice Cardozo, this is an "ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning."[14] In this view,

[9]Carter Oil Co. v. Weil, 192 S. W. (2d) 215, 220 (Ark. 1946). This decision appears to be a qualification of Mr. Justice Cardozo's observation: "The picture of the bewildered litigant lured into a course of action by the false light of a decision, only to meet ruin when the light is extinguished and the decision overruled, is for the most part a figment of excited brains." Cardozo, The Growth of the Law, 121-2.

[10]Carter Oil Co. v. Weil, 192 S. W. (2d) 215, 219 (Ark. 1946).

[11]"When ... a decision is overruled, it does not become bad law; it never was the law and the overruled decision is regarded as if it never had existed and the reconsidered or new decision is regarded as the law from the beginning. Consequently, it is obvious that an overruled decision operates retroactively." Lawrence-Cedarhurst Bank v. Ruth, 162 Misc. 82, 87, 294 N. Y. Supp. 810, 815 (1937). Jackson v. Harris, 43 F. (2d) 513 (C. A. A. 10th, 1930); Mickel v. New England Coal & Coke Co., 132 Conn. 671, 47 A. (2d) 187 (1946); Donohue v. Russell, 264 Mich. 217, 249 N. W. 830 (1933); People ex rel. Rice v. Graves, 242 App. Div. 128, 273 N. Y. Supp. 582 (1934), aff'd., 270 N. Y. 498, 200 N. E. 288 (1936); Wilkinson v. Wallace, 192 N. C. 156, 134 S. E. 401 (1926); Mason v. Nelson, 148 N. C. 492, 62 S. E. 625 (1908); Falconer v. Simmons, 51 W. Va. 172, 41 S. E. 193 (1902).

[12]People ex rel. Rice v. Graves, 242 App. Div. 128, 131-2, 273 N. Y. Supp. 582 (1934). Allen v. Allen, 95 Cal. 184, 30 Pac. 213 (1892).

[13]Carter Oil Co. v. Weil, 192 S. W. (2d) 215, 222 (Ark. 1946).

[14]Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 365, 53 S. Ct. 145, 148-9, 77 L. ed. 360, 85 A. L. R. 254, 261 (1932).

the reservation clause in the Lumber Company's deed of the fee to Harvey had always been valid in Arkansas, and no subsequent owner of the fee could escape the effect of the reservation on the myth of the *Cole* case law.

Though highly respected authority can be cited to sustain this concept,[15] its effect of infringing on what were reasonably considered to be established legal rights has prompted a gradual curtailment of the operation of the "ancient dogma" in modern times.[16] The Constitutions, State and Federal, expressly prohibit ex post facto legislation and laws impairing the obligation of existing contracts.[17] The majority of the Arkansas court regarded the legislative practice as irrelevant to the effect of a judicial overruling of an earlier precedent, inasmuch as "courts do not make the law. Their function is to declare what is law . . . ."[18]

It was conceded, however, that if the case to be overruled had been based on the construction of a statute or constitutional provision, its

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[15] 1 Blackstone, Commentaries 70: "For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law; that is, that it is not the established custom of the realm, as has been erroneously determined." Salmond, Jurisprudence (8th ed.) 197; Fleming v. Fleming, 264 U. S. 29, 44 S. Ct. 246, 68 L. ed. 547 (1924); Ruppert v. Ruppert, 134 F. (2d) 497 (App. D. C. 1942); Metzen v. Department of Revenue, 31 Mich. 622, 17 N. W. (2d) 860 (1945); 14 Am. Jur. 345; and cases cited in Note 11, supra.

[16] Even courts which adhere to the classical rule sometimes admit difficulty in reconciling legal theory and practical expediency. Lawrence-Cedarhurst Bank v. Ruth, 162 Misc. 82, 86, 294 N. Y. Supp. 810 (1937) "[Overrulling a case] does not result in a legal change in the substantive law, although the practical effect may be the same." Allen v. Allen, 95 Cal. 184, 30 Pac. 213, 215-6 (1892): "Every one is conclusively presumed to know the law, although the ablest courts in the land often find great difficulty and labor in finally determining what the law is."

[17] U. S. Const. Art. I. § 10: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts." Ark. Const. (1874) Art. II, §17: "No bill of attainder, ex post facto law . . . or law impairing the obligation of contracts shall ever be passed." Ohio Const. (1891) Art. 11, § 28: "The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligations of contracts."

Such provisions apply only to statutes concerning substantive rights, and not to remedial legislation. State ex rel. Slaughter v. Industrial Commission, 132 Ohio 537, 9 N. E. (2d) 505 (1937).

[18] Carter Oil Co. v. Weil, 192 S. W. (2d) 215, 218 (Ark. 1946). See Salmond, Jurisprudence (8th ed.) 197. But see Campbell v. Campbell, 46 Ohio App. 197, 188 N. E. 300 (1933) holding that the impairment of contract clause in the Ohio constitution (see note 17, supra) prohibits the courts from modifying a divorce decree so as to lower alimony payments, where the decree had incorporated an agreement by the parties setting the amounts to be paid. That this is not the effect of the corresponding clause in the Federal Constitution, see Fleming v. Fleming, 264 U. S. 29, 44 S. Ct. 246, 68 L. ed. 547 (1924).

holding would have established a rule of property, and so the overthrow of the case would not be allowed to disturb rights secured in reliance on it.[19] Within that category, then, a judicial change of the law is accorded only the same kind of prospective operation as would apply to a legislative alteration.[20] The refusal to extend this principle to the overruling of a decision based on the application of the common law seems to rest more on considerations of academic niceties than of practicable justice.[21] In either situation, the consequence of giving retroactive effect to the overruling of a precedent may be to overthrow established property or contract interests, and there seems to be no more virtue in the interest holder who relied on a decision interpreting statute law than in the one who relied on an application of a common law rule.[22] The act of one would seem as prudent and as reasonable as the act of the other.

A number of jurisdictions have rejected that distinction and adopted the practice of giving only prospective effect to the overruling of previous decisions, if necessary to sustain acts done in reliance on

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[19]Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 53 S. Ct. 145, 77 L. ed. 360 (1932); Farrior v. New England Mortgage Security Co., 92 Ala. 176, 9 So. 532 (1891); Haskett v. Maxey, 134 Ind. 182, 33 N. E. 358, 19 L. R. A. 379 (1893); Payne v. City of Covington, 276 Ky. 380, 123 S. W. (2d) 1045, 122 A. L. R. 321 (1938); Continental Supply Co. v. Abell, 95 Mont. 148, 24 P. (2d) 133 (1933); Mason v. Nelson, 148 N. C. 492, 62 S. E. 625 (1908); Kelley v. Rhoades, 7 Wyo. 237, 51 Pac. 593 (1898); 7 R. C. L. 1010. This position is not necessary to avoid violation of constitutional guaranties, as the United States Supreme Court has definitely ruled that a change of construction of a statute by the courts does not violate the impairment of contracts clause. Fleming v. Fleming, 264 U. S. 29, 44 S. Ct. 246, 68 L. ed. 547 (1924); Tidal Oil Co. v. Flanagan, 263 U. S. 444, 44 S. Ct. 197, 68 L. ed. 382 (1924). Several state courts seem to have mistakenly accepted a statement in Douglass v. County of Pike, 101 U. S. 677 at 687, 25 L. ed. 968 (1879) as holding the contrary. See Haskett v. Maxey and Farrior v. New England Mortgage Security Co., above. But later Supreme Court cases have not justified this assumption. Snyder, Retrospective Operation of Overruling Decisions (1940) 35 Ill. L. Rev. 121, 134.

[20]Farrior v. New England Mortgage Security Co., 92 Ala. 176, 9 So. 532 (1891); 7 R. C. L. 1010.

[21]World Fire & Marine Ins. Co. v. Tapp, 279 Ky. 423, 130 S. W. (2d) 848, 852 (1939): "But there should be no distinction, for the ideal ought not to be permitted to destroy the practical or the actuality."

[22]"The alternative is the same whether the subject of the new decision is common law...or statute." Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 365, 53 S. Ct. 145, 149, 77 L. ed. 360 (1932). "But it is difficult to perceive why the 'call of justice' is not as loud in a case of change of construction of the common law as in a case of change of construction of a statute. Certainly the injury occasioned may be as great. It is reasonable to presume that the construction of the common law, announced in the decisions, was in the minds of the parties and entered and formed a part of the contract. It is just as important that the common law be definite and certain. Disrespect for the courts and court decrees is

the earlier pronouncement of the law.[23] Thus, the Kentucky court in 1939 declared: "Adhering to that fundamental principle [prohibition of ex post facto and contract impairment legislation] and preventing the unjust result which would follow an outright retraction of a judicial declaration and, as well, avoiding the overruling of cases upon faith of which contracts have been made, we have recently adopted the policy of holding such existing contracts not to be affected by the new conclusion, and making a declaration in futuro to the effect that a change of opinion will affect only contracts made subsequent thereto."[24] Not only is unwarranted prejudice to established interests thus avoided, but also a salutary quality of reliability is accorded to the law.[25] At-

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engendered as much by its change." Freeman, The Protection Afforded against the Retroactive Operation of an Overruling Decision (1918) 18 Col. L. Rev. 230, 244.

[23]Jones v. Woodstock Iron Co., 95 Ala. 551, 10 So. 635 (1892) (previous decision holding that equity decree is in error in attempting to vest legal title to land was repudiated but held to be rule of property for benefit of parties who had relied on decision to institute proceedings to procure legal title); Florida Forest & Park Service v. Strickland, 154 Fla. 472, 18 So. (2d) 251 (1944) (overruled previous decision allowing appeal to court from order of deputy commissioner of Industrial Commission, but allowed present appeal from such order to be made); World Fire & Marine Ins. Co. v. Tapp, 279 Ky. 423, 130 S. W. (2d) 848 (1939) (overruled former decisions invalidating iron safe clause, but held that insured suing here on policy should not be barred from recovery by his failure to comply with that clause in his policy); Bank of Philadelphia v. Posey, 130 Miss. 825, 95 So. 134 (1923) (decisions holding that judgment liens obtained in certain manner are invalid was overruled, but not with retroactive effect which would make such lien valid against land in hands of purchaser from the judgment debtor); State v. Simanton, 100 Mont. 292, 49 P. (2d) 981 (1935) (counsel allowed to rely on prior decision which did not require him to raise a later objection to admission of evidence once objected to, though court might now change this rule as to future cases); Hill v. Brown, 144 N. C. 117, 56 S. E. 693 (1907) (decision that a party to partition suit who later acquired interest in the land of persons not party to the partition would not be estopped by the partition decree was overruled, but not so as to apply to the party in present case who had acquired such interest under previous rule). Numerous decisions announce in dicta that an overruling decision will not be given retroactive effect if it would upset obligations of contracts entered into or vested rights acquired in reliance on former holding. See Warring v. Colpoys, 122 F. (2d) 642, 645 (App. D. C. 1941); Jackson v. Harris, 43 F. (2d) 513, 516 (C. C. A. 10th, 1930); Donohue v. Russell, 264 Mich. 217, 249 N. W. 830, 831 (1933); Metzen v. Department of Revenue, 310 Mich. 622, 17 N. W. (2d) 860, 863 (1945); State v. Bell, 136 N. C. 674, 49 S. E. 163, 164 (1904). For a comprehensive discussion of the classifications of the exceptions which have been established to the principle of retrospective operation, and the limitations and bases for these exceptions, see Snyder, Retrospective Operation of Overruling Discussions (1940) 35 Ill. L. Rev. 121, 130-153; Freeman, The Protection Afforded against the Retroactive Operation of an Overruling Decision (1918) 18 Col. L. Rev. 230.

[24]World Fire & Marine Ins. Co. v. Tapp, 279 Ky. 423, 130 S. W. (2d) 848, 852 (1939).

[25]See Warring v. Colpoys, 122 F. (2d) 642, 646 (App. D. C. 1941) "...law loses

torneys are afforded the opportunity to advise clients with more assurance as to the future of their rights, and business men are in positions to make investments with greater safety. The contrary view, taken by the majority of the Arkansas justices, not only defeats the rights of the individuals directly affected, but also tends generally to undermine popular respect for the decisions of the highest court of the state.[26]

In the principal case, actual and deliberate reliance on the *Cole* case rule as to mineral rights reservations was clearly shown. However, courts adopting the policy of prospective application to protect previous investors should not require proof of such reliance. Since persons are bound to know the current rules of the law, reliance may be presumed.[27] "The right here, as with retrospective legislation, is the right to be judged by what one might have discovered, when he acted, and then observed if he would."[28]

Rejection of the classical concept of retroactive operation in this situation does the further service of allaying the reluctance of courts to overrule erroneous precedents. Saved from the embarrassment of infringing on apparently vested rights, judges can be more alert to free the body of the law from undesirable rules rooted in decisions no longer considered proper.[29] The majority judges of the Arkansas court were impressed with this necessity of overruling cases "rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error."[30]

Whatever the historical basis for the view that an overruled case

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its vital meaning if it is not correlated to the organic society in which it lives...; that law is more for the parties than for the courts, that people will rely upon and adjust their behavior in accordance with all the law be it legislative or judicial or both."

[26]"Any principle or rule which deprives a person of property acquired by him, or the benefit of a contract entered into, in reliance upon and strict compliance with the law in all respects as interpreted and promulgated by the court of last resort at the time of the transaction, and no fault can be imputed to him unless it be held a fault not to foresee and provide against future alterations in the construction of the law, must be radically wrong. Such a principle or rule of law would... destroy all confidence in the decisions of the supreme court of the state." Farrior v. New England Mortgage Security Co., 92 Ala. 176, 181, 9 So. 532, 533 (1891).

[27]Bank of Philadelphia v. Posey, 130 Miss. 825, 95 So. 134 (1923); Continental Supply Co. v. Abell, 95 Mont. 148, 24 P. (2d) 133 (1933).

[28]Snyder, Retroactive Operation of Overruling Decisions (1940) 35 Ill. L. Rev. 121, 147.

[29]See Carpenter, Court Decisions and the Common Law (1917) 17 Col. L. Rev. 593 at 606-7.

[30]Carter Oil Co. v. Weil, 192 S. W. (2d) 215, 218 (Ark. 1946).

was never the law, authorities are in complete agreement that a court has the power to reject this principle and restrict overruling decisions to prospective effect only.[31] And since retroactive operation appears to be out of accord with considerations of both business expediency and practical justice, it is to be regretted that the Arkansas court has not availed itself of the opportunity to align itself with the several American courts which have turned away from the "ancient dogma" that refuses to recognize any interest acquired in reliance on a decision subsequently overruled.

DIBREL C. MAYES*

LANDLORD AND TENANT—LIABILITY OF TENANT FOR RENT AFTER CONDEMNATION UNDER EMINENT DOMAIN OF ENTIRE PREMISES FOR TEMPORARY PURPOSE. [Illinois]

When leased property is taken under eminent domain, interdependent problems arise as to the best means of compensating both landlord and tenant, and of resolving their tenancy relationship. The landlord must be given just compensation for the loss of property, and the tenant for the loss of his leasehold. But before it can be determined what constituent elements go to make up "just compensation," it must be decided whether the tenant is to be held to his liability to pay rents under the lease.

Where the entire leased premises are taken by eminent domain, nearly all the courts agree that the tenant is discharged entirely from the obligation to pay rent.[1] The estates of both landlord and tenant

[31]Great Northern R. Co. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 364, 53 S. Ct. 145, 148, 77 L. Ed. 360 (1932): "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions.... never has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted." See cases cited in notes 19 and 23, supra.

*Written in collaboration with the editors.

[1]U. S. v. Alderson, 49 F. Supp. 673 (S. D. W. Va. 1943) (applying W. Va. Statute); Pasadena v. Porter, 201 Cal. 381, 257 Pac. 526 (1927); O'Brien v. Ball, 119 Mass. 28 (1875); Kafka v. Davidson, 135 Minn. 389, 160 N. W. 1021 (1917) (applying Minn. Statute); Levee Com'rs, v. Johnson, 66 Miss. 248, 6 So. 199 (1889); Biddle v. Hussman, 23 Mo. 597 (1856); Hudson County v. Emmerich, 57 N. J. Eq. 535, 42 Atl. 107 (1898); Dyer v. Wightman, 66 Pa. 425 (1870); Mason v. Nashville, 155 Tenn. 256, 291 S. W. 1074 (1927). See cases collected: Notes (1926) 43 A. L. R. 1176, (1928) 53 A. L. R. 686; 10 R. C. L., Eminent Domain § 120; 32 Am. Jur., Landlord and Tenant § 491. Contra: Foote v. Cincinnati, 11 Ohio 408 (1942).

are extinguished and consequently the lease relationship is terminated.[2] This view has been aptly stated by the Illinois Supreme Court: "We think that, while the condemnation proceeding may not amount to a technical eviction, ... by virtue of such proceeding, whatever title the tenant has in the land passes to the state, ... and precisely the same is true of the landlord's estate or interest .... It is, in effect, eviction by paramount right, and has all the force of an eviction by a paramount title."[3]

Inasmuch as the tenant is relieved of his duty to pay rent, he is awarded only the profit margin of the leasehold, measured by the difference in the total value of the remaining term of the leasehold estate and the total amount of rent covenanted to be paid during the remainder of the lease.[4] The landlord is allowed the present market value of the fee, less the value of the leasehold as awarded to the tenant.[5] Thus, by adoption of the theory that the lease is terminated, the value of the land which is represented by the prospective rent payments is awarded directly to the landlord.

Where only part of the leased premises is taken by the power of eminent domain, the majority of the American courts hold the lease is not extinguished, and the tenant is still liable for the full amount of the rent which was to be payable for the entire tract under lease.[6] An

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[2]Barclay v. Pickles, 38 Mo. 143 (1866). See 3 Tiffany, Real Property (3d ed. 1939) 576.

[3]Corrigan v. Chicago, 144 Ill. 537, 33 N. E. 746, 747, 21 L. R. A. 212, 218 (1893). Tiffany approves the application of this general rule of property to eminent domain cases: "an eviction by one claiming by force of the assertion of the paramount power of the state may well be regarded as an eviction under paramount title, or at least so analagous there to as to be governed by the same principles." 3 Tiffany, Real Property (3d ed. 1939) 567.

[4]John Hancock Mutual Ins. Co. v. U. S., 155 F. (2d) 977 (C.C.A. 1st, 1946); U. S. v. Alderson, 49 F. Supp. 673 (S. D. W. Va. 1943); Corrigan v. Chicago, 144 Ill. 537, 33 N. E. 746 (1893); Des Moines Laundry Co. v. Des Moines, 197 Iowa 1083, 198 N. W. 486 (1924); Bales v. Wichita Midland Valley Ry. Co., 92 Kan. 771, 141 Pac. 1009 (1914); Mayor of Baltimore v. Gamse & Bro., 132 Md. 290, 104 Atl. 429 (1918); In re Widening of Michigan Ave., 280 Mich. 539, 273 N. W. 798 (1937); Pierson v. H. R. Leonard Furniture Co., 268 Mich. 507, 256 N. W. 529 (1934); Kafka v. Davidson, 135 Minn. 389, 160 N. W. 1021 (1917); Newark v. Cook, 99 N. J. Eq. 527, 133 Atl. 875 (1926); Matter of City of N. Y., 120 App. Div. 700, 105 N. Y. S. 779 (1907); 18 Am Jur., Eminent Domain § 296.

[5]U. S. v. Alderson, 49 F. Supp. 673 (S. D. W. Va. 1943); Newark v. Cook, 99 N. J. Eq. 527, 133 Atl. 875 (1926); Matter of City of N. Y., 120 App. Div. 700, 105 N. Y. S. 779 (1907); Matter of City of N. Y., 196 App. Div. 451, 188 N. Y. S. 197 (1921).

[6]Pasadena v. Porter, 201 Cal. 381, 257 Pac. 526 (1927); Stubbings v. Evanston, 136 Ill. 37, 26 N. E. 577 (1891); Yellow Cab Co. v. Stafford-Smith Co., 320 Ill. 294, 150 N. E. 670, 43 A. L. R. 1173 (1926); Gluck v. Mayor of Baltimore, 81 Md. 315, 32 Atl. 515

early Massachusetts decision advanced this reasoning: "The lessee takes his term... subject to the right and power of the public to take it or a part of it, for public use... Such a right is no encumbrance; such a taking is no breach of the covenant of the lessor for quiet enjoyment. The lessee then holds and enjoys exactly what was granted him, as a consideration for the reserved rent, which is the whole use and beneficial enjoyment of the estate leased, subject to the sovereign right of eminent domain on the part of the public."[7]

Although most courts accept this position, it is not clear why exactly the same reasoning does not apply in the case of a complete taking of the land, requiring that the tenant be held liable for rent there also. A few of the courts seem to have recognized the incompatibility of the reasoning supporting the established rules in total and partial takings: "It is difficult to perceive how the quantity of the estate taken can vary the relations of the parties, since in the one case as the other, the act is the act of the state."[8] These courts achieve consistency by releasing the tenant from liability for rent on the part of the leasehold which was condemned.[9] New York,[10] Louisiana,[11] and Rhode Island[12] have arrived at the same result by aid of statutes.

Under the majority view the compensation awarded to the landlord is the value of his reversion in the parcel of the land taken, while the tenant is allowed the value of the leasehold on the part taken plus the amount of rent to be paid on that part.[13] The difficulties of this system

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(1895); W. M. McDonald Co. v. Hawkins, 287 Mass. 71, 191 N. E. 405 (1934); Dyer v. Wightman, 66 Pa. 425 (1870); Oslo Land Co. v. Alki Park Co., 63 Wash. 521, 115 Pac. 1083 (1911). See cases collected: Note (1926) 43 A. L. R. 1176.

[7]Parks v. Boston, 15 Pick. 198, 205 (Mass. 1834).

[8]Levee Com'rs v. Johnson, 66 Miss. 248, 6 So. 199, 201 (1889).

[9]Levee Com'rs. v. Johnson, 66 Miss. 248, 6 So. 199 (1889); Biddle v. Hussman, 23 Mo. 597 (1856); Kingsland v. Clark, 24 Mo. 24 (1856); 3 Tiffany, Real Property (3d ed. 1939) § 904. See dissent, Pasadena v. Porter, 201 Cal. 381, 257 Pac. 526, 530 (1927) citing Lewis, Eminent Domain (3d ed.) § 718; Taylor, Landlord and Tenant (8th ed.) § 386; 1 Tiffany, Landlord and Tenant 1184-1186, as authority for pro rata reduction of rental liability of the tenant.

[10]United Cigar Stores Co. v. Norwood, 124 Misc. 488, 208 N. Y. Supp. 420 (1925); Gillespie v. Thomas, 15 Wend. 464 (N. Y. 1836).

[11]Hinricks v. New Orleans, 50 La. Ann. 1214, 24 So. 224 (1898).

[12]See Rhode Island Trust Co. v. Hayden, 20 R. I. 544, 40 Atl. 421, 42 L. R. A. 107 (1898).

[13]See John Hancock Mutual Ins. Co. v. U. S., 155 F. (2d) 977, 978 (C. C. A. 1st, 1946); Pasadena v. Porter, 201 Cal. 381, 257 Pac. 526, 528 (1927); Gluck v. Mayor of Baltimore, 81 Md. 315, 32 Atl. 515, 516 (1895); Corrigan v. Chicago, 144 Ill. 537, 33 N. E. 746, 747 (1893); Parks v. Boston, 15 Pick. 198 (Mass. 1834); 3 Tiffany, Real Property (3d ed. 1939) § 904. This is the compensation granted in respect to the part of the land actually taken. In addition, the award must cover the decreased value of the

are at once apparent and have been pointed out by authority favoring the minority rule.[14] There is no assurance to the landlord that he will ever get the compensation money paid to the tenant as rent, since he will have to depend only on the personal credit of the tenant.[15] Furthermore, considerable uncertainty will be involved in attempting to determine such speculative amounts as the value of the part of the leasehold condemned and the lessened value to the lessee of the part remaining. Final settlement of the transaction is delayed for however long the lease still has to run, as the landlord must continue to collect rent from the tenant for the full length of the lease term. In the minority rule jurisdictions, the courts are able to avoid these embarrassing problems by applying the rules of compensation for the complete taking.[16]

The wartime need of the government for additional property on which to conduct temporary emergency activities has given rise to unusual land condemnation situations which the established rules of compensation were not designed to cover. *Leonard v. Auto Car Sales & Service Co.*[17] is one such case, which presents a question of law that

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part not taken, such decrease arising from the inconvenient and inappropriate partition. Both the landlord and the tenant may have claims of this nature, the former for the decrease in value of the remaining land itself and the latter for the decrease of the value of the remaining leasehold.

[14]See cases cited, note 9. Note (1946) 40 Ill. L. Rev. 558, 561: "Thus, while such a portion of the premises, or term, may have been taken that the purpose for which the premises had been leased is clearly destroyed, the lease will continue to bind the parties. Clearly it was not the intention of the parties that such was to be so; yet... the courts have continued the application of a rule which rests on a principle that is without the concept or purpose of the modern lease."

[15]See Pasadena v. Porter, 201 Cal. 381, 257 Pac. 525, 530 (1927); Stubbings v. Evanston, 136 Ill. 37, 26 N. E. 577, 578 (1891); Gluck v. Mayor of Baltimore, 81 Md. 315, 32 Atl. 515, 517 (1895).

Such remedies as may be theoretically available to the landlord to protect his interest in the rent compensation money paid to the tenant seem artificial and inadequate. See Note (1946) 40 Ill. L. Rev. 558, 561.

[16]Where nearly all of the leased property is taken, some courts, which would normally employ the majority rule, have applied the rule for a total taking of the premises, thus making at least a tacit admission that the rules for partial takings are so complicated of application as to be undesirable in any case. See Baltimore v. Latrode, 101 Md. 621, 61 Atl. 203, 209 (1905): "The amount taken from this lot is such as to radically change the uses that can properly be made of it, and nothing short of an apportionment can do full justice to all persons concerned." In this case three-fourths of the leasehold was taken by the right of eminent domain. The court allowed apportionment of the rent due although recognizing that it was bound by the decision in Gluck v. Mayor of Baltimore, 81 Md. 315, 32 Atl. 515 (1895), which held the tenant liable for the full amount of the rent on partial taking of the premises.

[17]392 Ill. 182, 64 N. E. (2d) 477 (1945), noted in (1946) 40 Ill. L. Rev. 558; (1946) 34 Ill. B. J. 402.

apparently had never been passed upon by an American court of record.[18] In reaching its decision, the Illinois Supreme Court attempted to apply the old concepts concerning complete and partial condemnations to a situation in which there was a complete taking in sense of area covered and a partial taking in respect to time covered. The defendant had leased premises in Chicago for a term of twenty years, to end on November 30, 1946. On March 11, 1943, an order was entered in favor of the War Department declaring the temporary use of the entire property condemned for a term ending June 30, 1943, with the right to extend the term for additional yearly periods at the election of the Secretary of War. The lessee moved out and bought another building in which to conduct its automobile sales, service and storage business, and has refused to pay any rent from that time. Within a month, the Secretary of War served notice of his election to extend the term for an additional yearly period. On January 7, 1944, the lessors brought this action to recover the stipulated rental provided in the lease since April 1, 1943.[19]

The Illinois court, in allowing recovery of the rent demanded, chose to apply the rules of partial taking under the majority view, because "The appropriation of its [the leased premises] temporary use by the United States for a period from March 11, 1943, to June 30, 1944, merely carved out of appellant's long-term lease a short-term occupancy... and destroyed neither the property not appellant's lease-hold

[18]See Leonard v. Auto Car Sales & Service Co., 325 Ill, App. 375, 60 N. E. (2d) 457, 459 (1945).

[19]No case was cited in the Illinois Supreme Court's opinion involving this type of fact situation, and the Appellate Court had indicated that no American tribunal had ever decided such a case. The lower court noted several English cases which were in point, holding that the tenant's liability to pay rent under the original lease continued. Whitehall Court, Ltd. v. Ettlinger [1920] 1 K. B. 680; Curling v. Matthey [1920] 3 K. B. 608; Swift v. Macbean [1942] 1 K. B. 375. In the Whitehall case, the court ruled, without citing authority: "But I am not satisfied that this was an eviction at law. When the tenant moved away from the flats he did so by force of circumstances—that is, by order of the Government authorities. I do not think however that it could be said that he was evicted by title paramount." [1920] 1 K. B. 680, 685. The other two decisions were based on the precedent of the Whitehall case, both as to the point quoted above and as to the ruling that the doctrine of "commercial frustration" was inapplicable.

Two recent United States Supreme Court cases arose on very similar situations, but the points of issue were not the same. In U. S. v. General Motors Corp., 323 U. S. 373, 65 S. Ct. 357, 89 L. ed. 311 (1944) the controversy was whether the tenant should be allowed compensation for the fixtures taken and for the cost of removing his equipment to another building. U. S. v. Petty Motor Co., 66 S. Ct. 596 (1946) also presented the question of compensation for costs of moving and relocation.

estate therein."[20] And by the tests set out in earlier Illinois decisions, "in order for a tenant to be excused from the payment of rent because of the condemnation of the demised premises, it is essential that the estate of the landlord be extinguished by the condemnation proceedings."[21]

Corrigan v. Chicago, on which both parties relied for support, involved a condemnation which resulted in a complete taking of the premises leased by one tenant but only a partial taking of the premises held by another lessee. In holding that the second tenant was still liable for rentals on his original leasehold, the court had applied the rule that "when a portion, only, of the land is taken, and a portion remains which is *susceptible of occupation under the lease,*... the tenant is bound by his covenant to pay the full rent..."[22] Upon this language, the tenant in the instant case based his argument that since no part of the land here remained susceptible of occupation, the lease was abrogated and his liability for rent ended. Further examination of the *Corrigan* case opinion, however, revealed that the court, in laying down the rules for computing the compensation for the first tenant, whose leasehold was taken completely, had indicated that when the estate of landlord and tenant are both extinguished by the condemnation, the tenant is discharged from liability to pay rent.[23] In adopting the lessor's contention in the principal case, the Illinois court chose to

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[20]Leonard v. Auto Car Sales & Service Co., 392 Ill. 182, 64 N. E. (2d) 477, 480 (1945). The Illinois rule for cases of partial takings was established by Stubbings v. Evanston, 36 Ill. 37, 26 N. E. 577 (1891) which was stated by a later case to have ruled that the tenant's liability for rent continues *"when a portion, only, of the land is taken,* and a portion remains which is susceptible of occupation under the lease." Corrigan v. Chicago, 144 Ill. 537, 33 N. E. 746, 747 (1893). (Italics supplied). In the Leonard case, the entire tract of land was admittedly taken, and by virtue of the first clause quoted above it would seem that the rule requiring the tenant to pay rent is by its very terms inapplicable to the facts of the instant case.

[21]Leonard v. Auto Car Sales & Service Co., 392 Ill. 182, 64 N. E. (2d) 477, 483 (1945).

John Hancock Mutual Ins. Co. v. U. S., 155 F. (2d) 977 (C. C. A. 1st, 1946) appears to have arisen from a condemnation similar to that of the principal case. The District Court instructed the jury to award compensation to the lessee only if the market rental value of the premises exceeded the rent called for in the lease. This instruction could be correct only if the lessee's liability to pay rent had been terminated, and the Circuit Court of Appeals refused to uphold the lessee's objection against it because there had been no showing that he was under a continuing obligation to pay rent. The appellate court indicated that the liability for rent may have been terminated by special agreement between the lessor and the condemnor.

[22]Corrigan v. City of Chicago, 144 Ill, 537, 33 N. E. 746, 747 (1893) (Italics supplied).

[23]Corrigan v. City of Chicago, 144 Ill. 537, 33 N. E. 746, 749 (1893): "therefore

ignore the considerations of susceptibility of occupation and to apply the test of the extinguishment of the landlord's estate. Having made this choice, and having recited at length the general rules dealing with landlord-tenant relationships in complete and partial condemnation takings, the court concluded: "therefore, it necessarily follows that the taking by the United States of the temporary use, only, of the premises in question does not affect the liability of appellant for the payment of rent."[24]

It appears that the court either failed to recognize or chose to evade consideration of the novel problems presented in this case: whether a temporary taking of the entire premises constitutes a complete or partial taking of the property in regard to the tenant's liability for rent payments.

Inasmuch as the landlord would ultimately receive the property back at the end of the government's usage, his estate was not extinguished. In this sense the taking was partial and the landlord is, of course, not entitled to compensation for a loss of a fee interest. But from the standpoint of the possibility of possession and use of the property by the tenant, the taking was complete for however long the government might choose to remain in occupation. The fact that the property might be turned back to the private owner before the end of the lease term constituted no advantage to the lessee, since his need was for premises which he could occupy immediately and continuously. In fact, this element created an additional hazard for the tenant because it hampered his efforts to make arrangements for new premises on which to operate his business. If he is to be able to obtain the advantage of making a purchase or long-term lease of other property,

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that, where the title of the landlord is extinguished in the whole estate during the term, the liability of the tenant to pay rent also ceases, and that, in an action brought by the landlord for the rent accrued after the termination of his estate, the tenant may plead such termination in defense. We are of the opinion that the better rule is that where the estate of the landlord in the whole of the demised premises, as well as that of the tenant, is extinguished by the condemnation proceeding, the liability of the tenant to pay rent ceases, upon the termination of such estates."

[24]Leonard v. Auto Car Sales & Service Co., 392 Ill. 182, 64 N. E. (2d) 477, 483 (1945).

The case was also argued on the doctrine of "commercial frustration" on the theory that a condition excusing performance is implied to fulfill the unexpressed intention of the contracting parties, when "changed conditions,, not existing when the contract was entered into rendered performance of the contract impossible and its purpose thwarted." The Illinois court denied the applicability of this doctrine, 392 Ill. 182, 64 N. E. (2d) 477, 480 (1945), though it has been suggested that the "commercial frustration" theory was an appropriate approach to the problem and would have given a better result. See Note (1946) 40 Ill. L. Rev. 558.

he must run the risk of having the original leasehold made available again, thus being burdened with the expense of an extra and now unneeded space. The possibility of his ultimately recovering compensation for these expenses as part of his damages arising from the condemnation is doubtful, in view of the established rules of the measure of such damages. And this settlement is too much in the indefinite future to be a comfort to the tenant attempting to find a new operating site.

Because the duration of the taking is uncertain, the loss being suffered by both lessor and lessee will be indeterminable until the condemnor's possession is ended, and the amount of compensation due cannot be computed and awarded until then. The Illinois court's ruling requires the tenant to bear virtually the full burden of the seizure during the continuance of the lease term, since the landlord will continue to receive the full rental value and will ultimately have the full ownership of the property restored to him. If the tenant's contention that the lease is extinguished had been adopted, the burden of the loss of taking during the term would be shared by both parties. The tenant would lose the profit margin of the remainder of the leasehold while the landlord would lose the market value of the use of the land.

Rather than approaching the problem with a view to determining what result would be most fair and expedient under the unusual circumstances of this particular case, the court has taken the more automatic means of reaching a decision by applying ready-made rules of thumb which, unfortunately, were not made for this type of fact situation. There was no need for overthrowing established precedents or principles of law. There was a need, however, for a more careful consideration of the appropriateness of these precedents and principles to the case at hand. In failing to make this consideration, the court has reached a decision which is questionable both as to the validity of its reasoning and the fairness of its result.

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*Written in collaboration with the editors.

PROPERTY—EFFECT OF CHANGE OF NEIGHBORHOOD ON ENFORCEABILITY OF COVENANTS RESTRAINING ALIENATION TO NEGROES. [North Carolina]

The problems of partial restraints on alienation have been brought into focus in recent years in cases dealing with the validity of covenants forbidding the sale or lease of land to Negroes. There is a sharp conflict of authority on this question, but the majority of the courts seems prone to uphold such covenants on the ground that they are reasonable.[1] A study of the cases produces the idea that the underlying reason for upholding these covenants is the social policy, manifested in the growth of public opinion favoring zoning and city planning, that the principles of the free use of land should give ground before the expediency of preserving a particular neighborhood as a white or Negro settlement.

Ruling the convenants against sale to Negroes valid at inception, however, does not always put the controversy at rest. It frequently occurs that such changes in conditions develop in the area surrounding the restricted tract as to raise the question of whether the original reasonable character of the restriction has not been undermined and the enforceability of the covenant therefore terminated. Thus, the North Carolina court, in the recent case of *Vernon v. R. J. Reynolds Realty Co.*[2] was called upon to decide whether changes outside of, but immediately adjacent to the burdened land rendered such covenants unenforceable. In this case, the plaintiffs and defendants were the owners of all property within Skyland, a residential section of Winston-

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[1]Mayes v. Burgess, 147 F. (2d) 869 (App. D. C. 1945); Grady v. Garland, 67 App. D. C. 73, 89 F. (2d) 817 (1937); Corrigan v. Buckley, 299 Fed. 899 (App. D. C. 1924); Wyatt v. Adair, 215 Ala. 363, 110 So. 801 (1926); Chandler v. Ziegler, 88 Colo. 1, 291 Pac. 822 (1930); Dooley v. Savannah Bank & Trust Co., 199 Ga. 353, 34 S. E. (2d) 522 (1945); Clark v. Vaughan, 131 Kan. 438, 292 Pac. 783 (1930); Queensborough Land Co. v. Cazdeaux, 136 La. 724, 67 So. 641 (1915); Koehler v. Rowland, 275 Mo. 573, 205 S. W. 217 (1918); Ridgway v. Cockburn, 163 Misc. 511, 296 N. Y. Supp. 936 (1937); Lyons v. Wallen, 191 Okla. 567, 133 P. (2d) 555 (1942).

But a well recognized minority denies that such covenants are valid and refuses to enforce them on the ground that they constitute an unreasonable restraint on alienation. Los Angeles Inv. Co. v. Gray, 181 Cal. 680, 186 Pac. 596 (1919) (controlled by § 711 of the Civil Code); Porter v. Barrett, 233 Mich. 373, 206 N. W. 532 (1925); White v. White, 108 W. Va. 128, 150 S. E. 531 (1929). It is interesting to note that the California court was willing to enforce a covenant against use and occupation by Negroes, but not a covenant against sale or lease to Negroes. Such a position is anomalous for it allows one to own land without being permitted the primary incident of property ownership, namely occupancy.

[2]226 N. C. 58, 36 S. E. (2d) 710 (1946).

Salem, North Carolina. Skyland had been divided and sold under a uniform plan of development which included restrictive covenants inserted in all deeds, expressly prohibiting the sale or lease of land to Negroes for a period of fifty years. When Skyland was first developed, all property immediately surrounding and adjacent to it was owned, occupied and used by white people only. There had been no reason to suppose the situation would change, but in recent years, the surrounding area for a depth of one-quarter of a mile had been acquired by, and is now owned, used, and occupied by Negroes. This change in the conditions outside the restricted area has made the further sale of Skyland property to white people impossible, except at greatly reduced prices. The plaintiff sought equitable relief on the grounds that the covenants were burdensome, causing irreparable damage, and constituting a cloud on plaintiff's title. It was held, however, that those who purchase property subject to restrictive covenants must assume the burdens as well as enjoy the benefits, and that changed conditions outside the development covered by the restrictive covenants do not justify relief.

Evaluation of the instant decision requires a preliminary review of the law governing restrictive covenants.[3] Determination of the validity of covenants in deeds restricting the manner in which the grantee, or sub-grantees, may use or dispose of the land requires a balancing of two conflicting philosophies of property ownership. One argues that the holder of title to land should be able to exploit his proprietorship as he sees fit, including the imposition of any desired restrictions on subsequent ownership which he may find a purchaser willing to accept. The other contends that society as a whole has such a vital concern in the proper use of land wealth that restrictions on future use should never be allowed to diminish the employment of the property for the welfare of the community. Somewhere between these two extremes, the courts attempt to fashion a policy which gives due regard both to the rights of owners and the interests of society.

Restrictions preventing all alienation are held invalid. The law views such complete restraints as repugnant to the estate granted, in that the grant of a fee simple absolute carries with it the highest type of ownership known, and such ownership embodies the right to the

[3]This discussion will deal only with restrictive covenants inserted in deeds by individuals, and not with restrictions imposed by municipal ordinances, since the latter have been considered unconstitutional. Buchanan v. Warley, 245 U. S. 60, 38 S. Ct. 16, 62 L ed. 149 (1917).

greatest possible use of the land.[4]

A different position is taken in the cases of partial restraints upon alienation. The majority of courts conclude that such covenants are valid if reasonable, but invalid if unreasonable. No case has been found in which a definition of reasonable or unreasonable has been made, and the meaning of the terms can only be drawn from the type of restrictions sustained or struck down in specific cases. Some courts have held reasonable, and therefore valid, covenants that the grantor shall not convey before making stipulated improvements,[5] that one joint tenant shall not sell without consent of the other joint tenant,[6] that a grantee shall not sell before the grantor's death and that if the grantee die first, he shall leave his land to a stipulated person.[7] On the other hand, covenants forbidding sale to anyone other than heirs of the grantor,[8] providing that land could not be alienated during the grantee's life,[9] forbidding sale until the grantee reaches a certain age,[10] and providing for a right to repurchase[11] have been held unreasonable and hence invalid. It appears that there is no general test of reasonableness. The basis of decision would seem to be a balancing in each particular case of the wishes of the grantor against the social policy in support of free alienation.[12]

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[4]5 Tiffany, Real Property (3d ed. 1939) § 1343. However, this concept of invalid repugnancy is not entirely convincing. Before the statute Quia Emptores it was possible for a feoffer to provide against alienation by the feoffee. See Co. Litt. 223a and extracts from Bracton and Britton in Gray, Restraints on Alienation §§ 16, 17, in which Professor Gray has observed that "the conception of a condition against alienation attached to a legal fee simple estate presents no logical difficulties."

[5]Grigg v. Landis, 21 N. J. Eq. 494 (1870).

[6]Hicks v. Cochran, 4 Edw. Ch. 107 (N. Y. 1842).

[7]McWilliams v. Nisly, 2 Serg. & R. 507 (Pa. 1816).

[8]Chappell v. Chappell, 119 S. W. 218 (Ky. App. 1909).

[9]Cropper v. Bowles, 150 Ky. 393, 150 S. W. 380 (1912).

[10]Christmas v. Winston, 152 N. C. 48, 67 S. E. 58 (1910).

[11]Harcy v. Galloway, 111 N. C. 519, 15 S. E. 890 (1892).

[12]Minor, Real Property (2d ed. 1928) § 555. The distinction in what is reasonable and what is unreasonable turns on the degree of restraint, and like so many other tests in which degree is involved, there are numerous twilight cases which preclude the formation of definite tests. Thus, if the restraint merely excluded certain designated persons as alienees, it is valid; but if the condition excludes all except a certain specified person, it is bad. Between these extremes lie the difficult twilight cases which must be decided upon the equities of each case by balancing the desire of the grantor in upholding covenants entered into, against the hardship such restraints will impose upon the community. The rule that covenants will be upheld so long as they do not materially impair the beneficial enjoyment of the estate has been advocated in Wakefield v. Van Tassell, 220 Ill. 41, 66 N. E. 830 (1903); 8 R. C. L. 1115. But it will be readily discerned that what constitutes beneficial enjoyment is as elusive as what is reasonable. The view of Restatement, Prop-

Litigation in which relief from restrictive covenants is sought generally arises in equity. As a rule, equity will not enforce covenants if changes render impossible the attainment of the purposes for which the restrictions were originally imposed. So, where business houses substantially encroached on a residential area, the changes in the character of the neighborhood were held to have made it unjust and inequitable to enforce a covenant against using premises for commercial purposes.[13] A covenant against sale to Negroes, where colored residents had moved into the immediate neighborhood, has been refused enforcement.[14] However, where the argument was advanced against enforcement of a non-business usage restriction, that streets around the residential area had become important traffic arteries,[15] or that the lots would be much more valuable as business property because of the change in the neighborhood,[16] courts have held that the changes did not vitiate the validity of the covenants.

One of the leading cases dealing with the problems of covenants restricting the right to convey to Negroes is *Grady v. Garland*,[17] which held that change of circumstances arising from the occupation of surrounding land by Negroes did not defeat enforcement of the covenant as to the land covered by the restriction. The court observed that "the restriction is for the protection of the property to which it applies, and is not affected by similar conditions, which may arise in adjoining property.... The object of the restriction was to prevent the invasion of the restricted property by colored people, not the invasion of the property surrounding it."[18] This position is supported by the argument that if covenants were to lose their vitality by changes in conditions outside the restricted land, all that would be necessary to defeat the restriction would be the settlement of colored families in the immediate vicinity of the restricted area. It is also a recognition of the

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erty (1944) § 406, comment L, is that "the restraint is reasonable and hence valid if the area involved is one reasonably appropriate for such exclusion and the enforcement of the restraint will tend to bring about such exclusion.... This is true even though the excluded group of alienees is not small and includes so many probable conveyees that there is an appreciable interference with the power of alienation."

[13]Overton v. Ragland, 54 S. W. (2d) 240 (Tex. Civ. App. 1932); Kaminsky v. Barr, 106 W. Va. 201, 145 S. E. 267 (1928).

[14]Hundley v. Gorewitz, 132 F. (2d) 23 (App D. C. 1942).

[15]Continental Oil Co. v. Fennemore, 38 Ariz. 277, 299 Pac. 132 (1931).

[16]Reed v. Hazard, 187 Mo. App. 547, 174 S. W. 111 (1915).

[17]67 App. D. C. 73, 89 F. (2d) 817 (1937), cert. denied, 302 U. S. 694, 58 S. Ct. 13, 82 L. ed. 536 (1937).

[18]89 F. (2d) 817, 819 (App D. C. 1937).

fact that unless the covenants are upheld, the original property owner has no means of protecting the land against sale to Negroes, inasmuch as he obviously could not impose restrictions on adjacent land he did not own. The North Carolina court's decision in the instant case supports the position taken in the *Grady* case. As stated in the opinion, the court believed that it was "bound to give effect to the contract unless changed conditions *within* the covenanted area, acquiesced in by the owners to such an extent as to constitute a waiver or abandonment, is made to appear."[19]

Despite these logical contentions, it seems that so long as the changes in conditions, be they *within* or *without* the designated area, so materially change the character of the neighborhood that the basic purpose of the covenants as originally entered into cannot be accomplished, the covenants should not be enforced. It is believed this is the better test, and that the burden of proof is only made easier in the cases in which the change in conditions occur within the restricted area.

Application of this line of reasoning requires that the intended purpose of the covenants be determined. In a typical situation like that presented in the instant case, two obvious conclusions appear. The function of the covenants may have been to maintain a high selling price of the land, in which case the changes outside have certainly destroyed the purpose behind the formation of the covenants. On the other hand, the reason for entering the restrictive covenants may have been to ensure a white settlement. If this be true, then in a narrow, technical sense, conditions have not changed so as to make the purpose of the covenants impossible of fulfillment, as there has been no purchase, leasing or occupation of premises within Skyland by Negroes. However, in a broader sense, the purpose of achieving physical and social segregation of the races in practical measure has failed, because Skyland has become a white island in a Negro community. All substantial considerations seem to argue that the conditions have so changed as to warrant a court of equity's refusing to enforce the covenants.

Even had the court refused to enforce the covenants, complete relief would not have been given the plaintiff, for so long as the covenants remain a matter of record in the deeds to the land, purchasers would be reluctant to buy lots in Skyland. Certainly Negroes would be hesitant to purchase the land so long as the covenants remained a

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[19]226 N. C. 58, 36 S. E. (2d) 710, 712 (1946). [Italics supplied]

part of the record, for the only assurance they have that they can legally purchase is the decision of one court of equity that the covenants against sale to a Negro will not be enforced by that particular court.

Rather than leave the marketability of the land in such an unsettled state, the North Carolina court in the instant case could well have granted the plaintiff the relief he asked for in removing the covenants as a cloud on title. It is admitted that such a procedure might meet with a serious obstacle in the general rule that unless the instrument which is alleged to be a cloud on title will support a judgment in ejectment for recovery of the land, it does not constitute a cloud.[20] This rule has been criticized by writers,[21] and has been expressly rejected in some jurisdictions.[22] In a Virginia case,[23] the court has held that the true test ought to be whether in fact the outstanding instrument does cloud the title—that is, does it interfere with the free sale or mortgage of the land. Following such liberal views, courts of New York[24] and Massachusetts[25] have given relief against restrictive covenants contained in the deeds under which the plaintiff claimed, after changes in the character of the neighborhood had rendered the covenants unenforceable. In New Jersey, a similar result was reached in a case dealing with the reservations in a conveyance.[26] It is submitted that where a court of equity denies enforcement of a restrictive covenant, it thus can and should take the additional step of providing affirmative relief by removal of the restriction as a cloud on title.

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[20]Domin v. Brush, 174 Ga. 32, 161 S. E. 809 (1931), note (1932) 16 Minn. L. Rev. 710.

[21]4 Pomeroy, Equity Jurisprudence (5th ed. 1941) § 1399; Howard, Bills to Remove Cloud from Title (1918) 25 W. Va. L. Q. 109.

[22]Glos v. Gurman, 164 Ill. 585, 45 N. E. 1019 (1897); Day Land & Cattle Co. v. State, 68 Tex. 526, 4 S. W. 865 (1887); Gilbert v. McCreary, 87 W. Va. 56, 104 S. E. 273 (1920).

[23]Virginia Coal & Iron Co. v. Kelly, 93 Va. 332, 24 S. E. 1020 (1896).

[24]St. Stephens Protestant Episcopal Church v. Rector of Church of the Transfiguration, 201 N. Y. 1, 94 N. E. 191 (1911).

[25]McArthur v. Hood Rubber Co., 221 Mass. 372, 109 N. E. 162 (1915).

[26]Renwick v. Hay, 90 N. J. Eq. 148, 106 Atl. 547 (1919).

TORTS—IMPUTATION OF NEGLIGENCE OF DRIVER TO PASSENGER AS BAR TO RECOVERY AGAINST NEGLIGENT THIRD PARTY. [Michigan]

With the decision in *Bricker v. Green*,[1] handed down early in 1946, Michigan became the last state to repudiate the doctrine of imputing the negligence of an automobile operator to his passengers or guests.[2] The action for damages under the Death Act was instituted by the administrator of Mrs. Bradshaw, who was killed in a highway accident caused by the concurrent negligence of her husband, operator of the automobile in which she was riding, and the defendant's intestate, operator of the other vehicle. The trial court at the close of all the evidence, permitted the negligence of Bradshaw to be imputed to his wife, and directed a verdict for the defendant in accordance with the then existing Michigan rule.[3]

The Supreme Court of the state, in a well-reasoned opinion, set aside the judgment of no cause of action and ordered a new trial, declaring: "The rule of imputed negligence as announced and applied in *Lake Shore & Michigan Southern Railroad Co. v. Miller*, 25 Mich. 274, is overruled, so far as pending and future cases are concerned."[4] Thereby the Michigan court renounced a repeatedly reaffirmed but basically indefensible doctrine of 74 years' standing.[5]

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[1]313 Mich. 218, 21 N. W. (2d) 105 (1946).

[2]Bricker v. Green, 313 Mich. 218, 21 N. W. (2d) 105, 109, 110 (1946); "...the doctrine of imputed negligence has been repudiated everywhere except in Michigan...." "We remain alone in applying the rule and our position is predicted upon stare decisis." See Prosser, Torts (1941) 417-418. For cases in many jurisdictions rejecting the doctrine, see 5 Am. Jur., Automobiles § 494.

[3]The rule became law in Michigan due to the dictum in Lake Shore & Michigan Southern R. Co. v. Miller, 25 Mich. 274 (1872). It was then followed until the principal case was decided in 1946. Schindler v. Milwaukee, Lake Shore & Western Railway Co., 87 Mich. 400, 49 N. W. 670 (1891); Mullen v. Owosso, 100 Mich. 103, 58 N. W. 663, 23 L. R. A. 693 (1894); Brady v. Pere Marquette R. Co. 248 Mich. 406, 227 N. W. 737 (1929); Clark v. Jackson, 286 Mich. 355, 282 N. W. 175 (1938).

[4]313 Mich. 218, 21 N. W. (2d) 105, 111 (1946). The significance of the repudiation of this rule in Michigan is indicated by the fact that within three months following the principal decision, five cases came before the state Supreme Court in which judgments for defendants had to be reversed because the trial courts had given instructions to the juries embodying the imputed negligence doctrine. Husted v. McIntosh, 313 Mich. 507, 21 N. W. (2d) 833 (1946); Moore v. Rety, 314 Mich. 52, 22 N. W. (2d) 68 (1946); Ansaldi v. Detroit, 314 Mich. 73, 22 N. W. (2d) 77 (1946); Major v. Southwestern Motor Sales, 314 Mich. 122, 22 N. W. (2d) 96 (1946); Simons v. Rubin, 314 Mich. 183, 22 N. W. (2d) 264 (1946).

[5]The court did not favor the rule, however, and seized upon various pretexts to limit its application. See Donlin v. Detroit United R. Co., 198 Mich. 327, 164 N. W. 447 (1917); Lachow v. Kimmich, 263 Mich. 1, 248 N. W. 531, 90 A. L. R. 626 (1933); dissent, Mullen v. Owosso, 100 Mich. 103, 58 N. W. 663, 23 L. R. A. 693, 694 (1894).

While it may now be said that the rule of *Thorogood v. Bryan*,[6] originated in England in the middle of the 19th Century, no longer has a place in Anglo-American jurisprudence, further investigation into the field of tort law indicates that the general doctrine of imputed negligence, posing under different names, still has vitality.[7] It takes but a slight variation from the relationship of driver and passenger or host and guest to bar the recovery of the injured plaintiff, who is personally free from negligence, from the negligent third party. Where the plaintiff and his negligent driver are "identified" with each other by the effect of some legal principle on the particular fact situation, recovery is frequently denied because in law the plaintiff becomes, in practical result, a joint tort-feasor with his driver. Though the plaintiff has been guilty of no intentional or negligent misconduct, he is made a wrongdoer by operation of law.

Thus, under common law principles, the negligence of the operator of the vehicle may be imputed to the non-negligent plaintiff-rider so as to bar recovery against a negligent third party who concurrently contributed to the injury sustained, where the plaintiff-rider is:

1. the spouse of the driver,[8]

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[6]8 C. B. 115, 137 Eng. Rep. 452 (1849), an unfortunate decision in which the passenger of an omnibus was deemed to be in "control" of the driver since he selected the mode of conveyance. This "identity" with the driver made the latter's negligence attributable to the passenger. This decision was overruled in England in The Bernina, 13 A. C. 1, 12 Prob. Div. 58. (1887), but not before the docttrine had been transplanted in the United States.

[7]Within five months after the decision in the principal case, the Michigan court found it necessary to point out that the renouncing of the imputed negligence doctrine in that decision did not mean that the driver's negligence could not be imputed to the passenger where the driver was "under the control" of the passenger. But it was carefully explained that "Doubtless in such cases use of the term 'imputed negligence' is somewhat lacking in accuracy, and ordinarily might more fittingly be designated as direct contributory negligence of the passenger." Parks v. Pere Marquette Ry. Co., 315 Mich. 38, 23 N. W. (2d) 196, 198 (1946). The only evidence of "control" over the driver lay in the fact that the passenger was the owner of the car and had requested the other party to drive. In Gamet v. Beazley, 159 P. (2d) 916 (Wyo. 1945) the owner was barred from recovering from a negligent third party, even though asleep in the back seat when the accident occurred.

[8]At common law, the imputation of negligence between spouses rested on the legal identity of husband and wife. Since the passage of Married Women's Acts by all states, whereby each spouse is given separate legal identity, very few decisions still turn on the old rule. Wisconsin & Arkansas Lumber Co. v. Brady, 157 Ark. 449, 248 S. W. 278 (1923) is sometimes cited as applying that rule, but a later Arkansas case interprets this decision as not resting on the identity of spouses but as meaning that since the husband owned the car and was riding with his wife, she was acting as his agent in the operation of the car, and the doctrine of *respondeat superior* therefore applied. Under this view, the negligence of the driver would be

2. the owner of the car driven by another,[9]
3. the master or principal of the servant or agent driver,[10]
4. engaged in a joint enterprise with the driver.[11]

While these rules of imputation of negligence are not invariably applied in all jurisdictions, there appear to be only two situations in which the plaintiff-rider seeking recovery from a negligent third-party can in all states be assured of escaping the bar of his driver's concurrent fault:

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imputed to the owner-rider whether the parties were husband and wife or not. Johnson v. Newman, 168 Ark. 836, 271 S. W. 705 (1925).

In community property states, negligence may still be imputed to a spouse, since a recovery by one would inure to the benefit of the other. Pacific Const. Co. v. Cochran, 29 Ariz. 554, 243 Pac. 405 (1926); Giorgetti v. Wollaston, 83 Cal. App. 358, 257 Pac. 109 (1927); Missouri Pac. Ry. v. White, 80 Tex. 202, 15 S. W. 808 (1891).

The great weight of authority, however, is against the imputation of negligence between spouses. Knoxville Ry. & Light Co. v. Vangilder, 132 Tenn. 487, 178 S. W. 1117 (1915); Brubaker v. Iowa County, 174 Wis. 574, 183 N. W. 690 (1921); Restatement, Torts (1934) § 487; Note (1932) 80 U. of Pa. L. Rev. 1123, 1128.

[9]Though the owner's mere presence in the automobile will not preclude his recovery, it may be evidence that the driver is the servant, agent or joint entrepreneur of the owner or that the owner controlled the operation of the car. See 5 Am. Jur., Automobiles § 496; Restatement, Torts (1934) § 491 comment h; Johnson v. Newman, 168 Ark. 836, 271 S. W. 705 (1925); Grover v. Sharp & Fellows Contracting Co., 66 Cal. App. (2d) 736, 153 P. (2d) 83 (1944); Brown v. Pennsylvania Ry. Co., 76 Ohio App. 171, 61 N. E. (2d) 163 (1945); Gamet v. Beazley, 159 P. (2d) 916 (Wyo. 1945).

[10]This is the usual case of vicarious liability. See Prosser, Torts (1941) § 63, p. 473, for a general statement of the master's liability for the servant's torts. 5 Am. Jur., Automobiles § 499: "the rule is too well settled to need support of authority that the negligence of the agent or servant is imputable to the principal or master and will prevent his recovery against a third person." Note (1932) 80 U. of Pa. L. Rev. 1123, 1126.

[11]Dorris v. Stevens' Adm'r., 266 Ky. 602, 99 S. W. (2d) 755 (1936); Hofrichter v. Kiewit- Condon-Cunningham, 22 N. W. (2d) 703 (Neb. 1946); 5 Am. Jur., Automobiles § 500.

The problem in these cases is not whether negligence will be imputed between joint entrepreneurs, but rather what constitutes a joint enterprise. One line of authority seems to rule that a common purpose among the persons using the automobile is sufficient: Louisville & N. R. Co. v. Revlett, 65 N. E. (2d) 731 (Ind. 1946); Jensen v. Chicago, M. & St. P. Ry. Co., 133 Wash. 208, 233 Pac. 635 (1925). But more courts require that the party being classed as a joint entrepreneur with the driver must also have the right to control the operation of the car: Stearns v. Lindow, 70 F. (2d) 738 (App. D. C. 1934); Sortino v. Lonevak, 153 P. (2d) 428 (Cal. App. 1945); Greenwell's Adm'r. v. Burda, 298 Ky. 255, 182 S. W. (2d) 436 (1945). "Joint enterprise" is sometimes distinguished from "joint adventure," the latter being a true business undertaking with profit sharing anticipated. Stogdon v. Charleston Transit Co., 32 S. E. (2d) 276, 279 (W. Va. 1944); Prosser, Torts (1941) 492. It has been suggested that no imputation of negligence should be made except where the parties are in "a relation akin to partnership." Kokesh v. Price, 136 Minn. 304, 161 N. W. 715, 717 (1917); Prosser, Torts (1941) 498.

1. where the plaintiff is a paying passenger, as in a taxicab, bus, or or vehicle serving a similar function for hire;[12]
2. where the plaintiff is a mere guest.[13]

The reason for refusing to allow the driver's negligence to bar the plaintiff's recovery in these two situations is said to be that the imputed negligence doctrine "prefers the wrongdoer" over one free of wrongdoing.[14]

It is difficult to see why this very same reason is not equally applicable to the four situations listed above in which recovery is barred. Where the operator is guilty of negligence and the plaintiff free from contributory negligence, can it be said that the plaintiff as spouse, owner, master, principal or point entrepreneur is guilty of any wrongdoing? The difference apparently lies in the fact that, where one of the described relationships exists, the operation of some other principle of law—e.g., *respondeat superior*—supplies the medium by which the negligence of the driver is imputed to the plaintiff, while in the case of a passenger or mere guest, the negligence can only be factually imputed to the plaintiff.

This analysis is borne out by the Restatement of Torts, wherein it is declared that "... a plaintiff [rider] is barred from recovery by the negligent act or omission of a third party [driver] if, but only if, the relation between them is such that the plaintiff would be liable as defendant for harm caused to others by such negligent conduct of the third person."[15] In defining the scope of this rule as applied by modern courts, the Restatement has excluded a number of situations in which a relationship existed at common law which would operate to defeat the action by the non-negligent plaintiff against the negligent third party. It categorically declares that negligence shall not be imputed on the basis of the relationship itself, between spouses,[16] bailor

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[12]Little v. Hackett, 116 U. S. 366, 6 S. Ct. 391, 29 L. ed. 652 (1886); Thompson v. Los Angeles & S. D. Ry. Co., 165 Cal. 748, 134 Pac. 709 (1913); Morris v. La Bahn, 194 Iowa 377, 189 N. W. 797 (1922); Adams v. Hitton, 270 Ky. 818, 110 S. W. (2d) 1088 (1937); Funderburk v. Powell, 181 S. C. 424, 187 S. E. 742 (1936). The passenger's lack of control over the driver, generally assumed rather than proved, is indicated as the reason for refusal to impute the driver's negligence.

[13]Startup v. Pacific Elec. Ry. Co., 171 P. (2d) 107 (Cal. App. 1946); Olson v. Kennedy Trading Co., 199 Minn. 493, 272 N. W. 381 (1937); Bush v. Harvey Transfer Co., 67 N. E. (2d) 851 (Ohio 1946); Holzhauser v. Portland Traction Co., 169 P. (2d) 127 (Ore. 1946); Klas v. Fenske, 248 Wis. 534, 22 N. W. (2d) 596 (1946).

[14]Bricker v. Green, 313 Mich. 218, 21 N. W. (2d) 105, 109 (1946).

[15]Restatement, Torts (1934) § 485.

[16]Restatement, Torts (1934) § 487, cited with approval in Von Cannon v. Philadelphia Transp. Co., 148 Pa. Super. 330, 341, 25 A. (2d) 584, 589 (1942).

and bailee,[17] owner and operator,[18] parent and child,[19] and passenger or guest and carrier or host.[20] The general doctrine of imputed negligence as it operated against a person who was made a joint tort-feasor by operation of law has thus suffered many inroads.[21]

Only in the situations where the operator and the plaintiff-rider are "identified" in law as master-servant, principal-agent or as joint entrepreneurs are the courts uniform in imputing the negligence of the operator to the plaintiff to bar his recovery against a third party *whether that third party is negligent or free from negligence.*[22]

Why is such a rule found in the law which makes the master, principal or joint entrepreneur liable for the negligent conduct of his driver in inflicting injury on an innocent third party, and, conversely, prevents his recovery from a negligent third party who has concurred in negligent harm with his driver against himself? The answer seems to be that the courts have become so imbued with the doctrine of "identification" of those standing in these commercial relationships as to allow this factor to nullify the character of the conduct of the third party.

In its affirmative application—i.e., where the third party is non-negligent and is himself the plaintiff—the theory of *respondeat superior* is beyond question.[23] The master controls or at least has the right to control the servant. It is his direction or instigation that sets the servant in motion. But for the master, the servant would not be so situated. It is an easy step to "identify" them; and such is the rationale. The economic justification for the rule lies in the fact that the servant is usually impecunious to the extent that he cannot adequately compensate the innocent injured party for the wrong done; therefore the

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[17] Restatement, Torts (1934) § 489, cited with approval in Hornstein v. Kramer Bros. Lines, Inc., 133 F. (2d) 143, 147 (C. C. A. 3d, 1943). See Secured Finance Co. v. Chicago, R. I. & P. Ry., 207 Iowa 1105, 224 N. W. 88 (1929).

[18] Restatement, Torts (1934) § 491 Comment h, cited with approval in Riggs v. F. Strauss & Son, 2 S. (2d) 501, 503 (La. App. 1941). See Graham v. Cleveland, 58 Ga. App. 810, 200 S. E. 184, 185 (1938).

[19] Restatement, Torts (1934) § 488, cited with approval in Constantine v. Pennsylvania R. Co., 114 F. (2d) 271 274 (C. C. A. 7th, 1940).

[20] Restatement, Torts (1934) § 490, cited with approval in Valera v. Reading Co., 349 Pa. 123, 127, 36 A. (2d) 644, 646 (1944).

[21] Prosser, Torts (1941) 417; MacIntyre, The Rationale of Imputed Negligence (1944) 5 U. of Toronto L. J. 368.

[22] Note (1932) 80. U. of Pa. L. Rev. 1123, 1124; Restatement, Torts (1934) §§ 486, 491.

[23] The same policy considerations which apply to these situations are of equal effect where the relationship is that of joint entrepreneurs in a business undertaking.

master, more favorably endowed with assets, properly should bear the burden since he, by his control, made possible the injury. From the social standpoint the risk is better absorbed, for the loss is assumed by the master, or his insurance company, and the prospects of the injured becoming a ward of the state are materially reduced. The operation of the rule has the practical effect of causing the master to be more select in the hiring of careful servants, especially when they are automobile operators.

But in its negative application—i.e., where the negligence of the driver is imputed to the master to bar his recovery against a negligent third party—the rule is unsound. Invoking the rule relentlessly under the "identification" theory brings the impolitic result of immunizing a wrongdoer from answering for his tort against an injured faultless party.

It is illogical to assume that, since the commercial relationship demands that one party must pay for injuries inflicted by another on an innocent third person, it so identifies the parties for all purposes of determining rights and liabilities. The application of *respondeat superior* in its affirmative aspect to place liability on a master in favor of an innocent third party may be perfectly sound from a social and economic viewpoint and the doctrine of "identification" may be a justifiable vehicle to accomplish that end. But this conclusion does not require or justify the application of the principle in a negative way to prevent the master from recovering from a negligent third party. The two situations present the third party in an entirely different light, and the results should be based on the strength or weakness of the third party's case in each situation, not on the coincidental existence of a particular relationship existing between the other party to the suit and his driver.

It is submitted that one of two courses is open to halt the negative application of the rules of law preventing the master, principal or joint entrepreneur from recovery against the negligent third party—one, for the courts themselves to correct this illogical extention of such rules by applying the "identification" doctrine only in the affirmative sense; two, for the various legislatures by clearly defined statutes to impose liability on the master, principal and joint entrepreneur when, and only when, the third party is free of negligence.

The courts, as a practical matter, are precluded by *stare decisis* from altering the present rule. But the legislature is under no such compulsion. By an appropriate statutory enactment the interests of society and economy that underlie the affirmative application of the

present rule could be preserved, and the anomalous result of having the law used as an instrument for law-breaking under the negative application of the present rule could be avoided.

In recent years the imputation of negligence has been extended by statutory enactments whereby the owner of a vehicle who has consented to its use by another is made liable for the negligent conduct of the operator, regardless of the owner's presence.[24] These "Owners' Statutes," while expressly imposing liability in a situation where a reasonable basis for sustaining vicarious responsibility may well exist, do not by their terms differentiate between liability to a negligent and a non-negligent third party. For this reason, some courts have been led to make the same illogical negative interpretation as they have done under common law rules of *respondeat superior* and agency.[25] Proper judicial construction of the statutes should not "identify" the owner with the operator for all purposes. This point has been recognized by at least two courts which correctly apply the acts to impose liability on the owner in favor of injured third parties not barred by their own negligence, but not to impute the operator's negligence to the owner so as to deny his recovery from a negligent third party.[26]

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[24]Cal. Veh. Code (1943) § 402 (a): "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages." Iowa, Michigan, New York, Rhode Island, Virginia, Wisconsin, Minnesota, New Jersey and District of Columbia are among the jurisdictions having statutes of similar effect. See Notes (1934) 8 A. L. R. 174, (1938) 112 A. L. R. 416, (1941) 135 A. L. R. 481. The justification for these statutes is said to lie in the policy of "protecting the public." Note (1943) 147 A. L. R. 875; MacIntyre, The Rationale of Imputed Negligence (1944) 5 U. of Toronto L. J. 368, 377.

[25]Secured Finance Co. v. Chicago, R. I. & P. Ry. Co., 207 Iowa 1105, 224 N. W. 88, 89, 61 A. L. R. 855, 858 (1929): "It naturally follows that if this statute creates the relation of principal and agent, then the rule is too well settled to need support of authority that the negligence of the agent is imputable to the principal." As authority for barring the owner's recovery against a negligent third party, the Iowa court then cites a case in which an injured third party was suing the owner for damages—a cause of action which the statute expressly creates, of course. The same view is adopted in Milgate v. Wraith, 19 Cal. (2d) 297, 121 P. (2d) 10 (1942) and DiLeo v. DuMontier, 195 So. 74 (La. App. 1940). Several lower New York courts have taken the same position. Darrohn v. Russell, 154 Misc. 753, 277 N. Y. S. 783 (1935); Renza v. Brennan, 165 Misc. 96, 300 N. Y. S. 221 (1937). But the present New York rule seems to be to the contrary. See Note 30, infra.

[26]Christensen v. Hennepin Transp. Co., 215 Minn. 394, 10 N. W. (2d) 406, 417 (1943): "The very reason for holding the consenting owner liable for negligence of the operator of his automobile, that of furnishing financial responsibility to an injured party, is completely absent in the owner's action to recover for damages sus-

Another modern statutory development is the Guest Statute, which precludes a gratuitous rider from recovery against his negligent host.[27] Since these acts might be regarded as imputing the host's negligence to the guest, the danger of the illogical application of the law to suits by the guest against a negligent third party is present here also.[28] Thus far, however, the courts seem not to have so acted. Since at common law no relationship allowing vicarious liability existed between a mere guest and his host, the "identification" doctrine has not provided the vehicle for imputing the host's negligence to the guest in actions against a third party.[29]

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tained by him as a result of the concurrent negligence of the operator and the third party. Therefore, it is a non sequitur to say that, because the policy of the statute is to impose liability against the bailor, it also is its policy to impute to him the contributory negligence of his bailee." Mills v. Gabriel, 259 App. Div. 60, 18 N. Y. S. (2d) 78 (1940), aff'd without opinion, 284 N. Y. 751, 31 N. E. (2d) 512 (1940) established the present New York rule. See Note (1941) 135 A. L. R. 481, 491. This view is approved in MacIntyre, The Rationale of Imputed Negligence (1944) 5 U. of Toronto L. J. 368, 378 and Note (1931) 17 Corn. L. Q. 158.

[27]Va. Code Ann. (Michie, 1942) § 2154 (232): "No person transported by the owner or operator of any motor vehicle as a guest without payment for such transportation..., shall be entitled to recover damages against such owner or operator for death or injuries ... resulting from the operation of such motor vehicle, unless such death or injury was caused or resulted from the gross negligence or willful and wanton disregard of the safety of the person ... being so transported ..." See Ill. Rev. Stat. (1941) C. 95½, par 58 a; Iowa Code (1939) § 5037. 10; Ohio Code Ann. (Baldwin's Throckmorton, 1940) § 6308-6; Wash. Rev. Stat. (Remington) par. 6360-121, for similar enactments. See White, The Liability of an Automobile Driver to A Non-paying Passenger (1934) 20 Va. L. Rev. 326, n. 5, listing seventeen such statutes. MacIntyre, The Rationale of Imputed Negligence (1944) 5 U. of Toronto L. J. 368, 371 indicates two reasons for the passage of such legislation: (1) hardship on a generous driver, (2) possibility of collusive suits against driver's insurer.

[28]Under the Ontario statute, the guest is identified with his host in actions against third parties. Statutes of Ontario (1935) c. 26 § 2. See MacIntyre, The Rationale of Imputed Negligence (1944) 5 U. of Toronto L. J. 368 371. The statutes in the United States, however, do not expressly purport to impute negligence or identify guest with host. Rather, they set up a direct prohibition against the recovery of damages by guest against host. See note 31, supra.

[29]States having Guest Statutes recognize the right of the guest to recover against a negligent third party, the host's negligence not being imputed to a mere guest in this regard, but only if such a relationship as agency, joint enterprise, etc., exists. Stingley v. Crawford, 219 Iowa 509, 258 N. W. 316 (1935); Cleveland Ry. Co. v. Owens, 51 Ohio App. 53, 199 N. E. 607 (1935); Denny v. Power, 159 Wash. 465, 293 Pac. 451 (1930).

*Written in collaboration with the editors.

TORTS—LIABILITY OF HOTEL KEEPER FOR REFUSING DINING SERVICE TO PERSON NOT LODGING IN HOTEL. [Virginia]

Recent litigation dealing with the liabilities of hotels and restaurants to their clientele calls for a re-examination of the long-standing common law principles governing the duties of innkeepers. Due to the revolutionary advancements in travel and commerce and the growth of a large hotel industry, considerable difficulty arises in applying these fixed common law rules based on commercial concepts of past centuries to current litigation arising under modern conditions.

This difficulty is aptly illustrated in the case of *Alpaugh v. Wolverton*,[1] decided in 1946 by the Virginia Supreme Court of Appeals, holding that a hotel with restaurant combined was not liable to a patron of the restaurant only, for refusing service. The plaintiff, a member of the local Kiwanis Club and Chamber of Commerce of Manassas, Virginia, had made previous arrangements for weekly luncheon meetings at the defendant's hotel for both organizations. Upon appearing at the hotel for these meetings with his club members, the plaintiff was refused service although the remaining members were served. As the alleged liability of defendant was not based on contract, the court considered only the common law duties of the hotel management, and reached the conclusion that while the dining room was an integral part of the hotel, the hotel keeper was merely a restauranteur in this instance and the plaintiff merely a patron. In this capacity, the defendant had the privilege of choosing whom he would serve, rather than being under an innkeeper's common law duty to serve any guest who might legitimately apply. The court's unanimous view was that where there is a restaurant and hotel combined, the question of whether the man who came to dinner only is a hotel "guest" or a restaurant "patron" is to be determined by the intent, and that the intention to have a single meal with nothing more is not sufficient to bring the diner under the privileges of a guest.

While this position seems not to be in accord with the weight of older authorities holding that one who stops at an inn for a single meal becomes a guest,[2] yet it is probable that the Virginia court's de-

[1] 184 Va. 943, 36 S. E. (2d) 906 (1946).

[2] Dove v. Lowden, 47 F. Supp. 546 (W. D. Mo. 1942); Kopper v. Willis, 9 Daly 460 (N. Y. 1871); McDonald v. Edgerton, 5 Barb. 560 (N. Y. 1849); Matter of Kinzel, 28 Misc. 622, 59 N. Y. Supp. 682 (1889); Hill v. Memphis Hotel Co., 124 Tenn. 376, 136 S. W. 997, 34 L. R. A. (N. S.) 420 (1911); Read v. Amidon, 41 Vt. 15, 98 Am. Dec. 560 (1868); Armstrong v. Yakima Hotel Co., 75 Wash. 477, 135 Pac. 233 (1913); Aria

cision is a more sensible recognition of the actual business situation, in that the modern hotel dining room or coffee shop is just another restaurant, and therefore its proprietor should have a restauranteur's duties and liabilities as to a patron for a single meal.

It is well settled that an innkeeper has a duty to provide accommodations for all travelers who are able to pay, conduct themselves properly, and desire the accommodations for legitimate purposes.[3] No one becomes a guest who uses the accommodations for unlawful purposes,[4] though this is obviously a dictate of public policy rather than a logical exception. The requirement that a guest be a traveler has been disregarded in more modern cases, and now he may be from the immediate neighborhood as long as he meets the other requisites.[5]

The innkeeper-guest relationship is said to be established by the use of any of the normal hotel facilities with intent to become a bona fide guest.[6] The intention must be manifested by some overt act, although it need not be communicated to the hotel keeper.[7] Registering is clearly not a requisite although it shows intent.[8] On the other hand,

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v. Bridge House Hotel, 137 L. T. R. (N. S.) 299, 16 B. R. C. 538 (1927); Bennett v. Mellor, 13 E. R. C. 118, 5 T. R. 273 (K. B. 1793); Orchard v. Bush and Co., [1898] 2 Q. B. 284; Williston, Contracts (Rev. ed. 1936) § 1067: "Undoubtedly resort to an inn by a traveller even for a single meal makes him a guest." Brown, Personal Property (1936) § 104: "A traveler who partakes of accommodations... whether it be food alone... occupies the status of guest." Cf. Strauss v. County Hotel and Wine Co., 12 Q. B. D. 27, 13 E. R. C. 121 (1883). See Fairchild v. Bentley, 30 Barb. 147, 153 (N. Y. 1858). Contra: Gastenhofer v. Clair, 10 Daly 265 (N. Y. 1881); Cake v. District of Columbia, 33 App. Cas. 272, 17 Ann. Cas. 814 (App. D. C. 1909).

[3]Jackson v. Hot Springs Co., 213 Fed. 969 (C. C. A. 4th, 1914); Hervey v. Hart, 149 Ala. 604, 42 So. 1013, 9 L. R. A. (N. S.) 213 (1906); Odom v. East Avenue Corp., 178 Misc. 363, 34 N. Y. S. (2d) 312, aff'd, 264 App. Div. 985 (1942); 3 Cooley, Torts (4th ed. 1932) § 462. See opinion of Justice Harlan in the Civil Rights Cases, 109 U. S. 3, 40, 3 S. Ct. 18, 43, 27 L. ed. 835 (1883).

[4]Curtis v. Murphy, 63 Wis. 4, 22 N. W. 825, 53 Am. Rep. 242 (1885). See Note (1922) 16 A. L. R. 1388.

[5]Walling v. Potter, 35 Conn. 183 (1868); Hart v. Mills Hotel Trust, 144 Misc. 121, 258 N. Y. Supp. 417 (1932); Curtis v. Murphy, 63 Wis. 4, 22 N. W. 825, 53 Am. Rep. 242 (1885); Brown, Personal Property (1936) § 104; 28 Am. Jur., Innkeepers § 22; 43 C. J. S., Innkeepers § 3 (b).

[6]Freudenheim v. Eppley, 88 F. (2d) 280 (C. C. A. 3d, 1937); Burton v. Drake Hotel Co., 237 Ill. App. 76 (1926). Cf. Baker v. Bailey, 103 Ark. 12, 145 S. W. 532, 39 L. R. A. (N. S.) 1085 (1912); Parker v. Dixon, 132 Minn. 367, 157 N. W. 583, L. R. A. 1916E 534 (1916) to effect that gratuitous use of lobby does not establish guest relationship.

[7]Hill v. Memphis Hotel Co., 124 Tenn. 376, 136 S. W. 997, 34 L. R. A. (N. S.) 420 (1911).

[8]Freudenheim v. Eppley, 88 F. (2d) 280 (C. C. A. 3d, 1937); Moody v. Kenny, 153 La. 1007, 97 So. 21, 29 A. L. R. 474 (1923); Hill v. Memphis Hotel Co., 124 Tenn. 376, 136 S. W. 997, 34 L. R. A. (N. S.) 420 (1911).

registering with no intent to become a guest does not establish the relationship.[9] The courts have generally reasoned that the service of meals is one of the accommodations furnished by an inn, and that resort to any of the hotel's accommodations is enough to constitute one a guest. However, the courts have made a distinction between accommodations which provide revenue and are the type expected in hotels, and those which are merely incidental facilities or are accommodations for special occasions. Thus, it seems that mere resort to a hotel lobby as a resting or meeting place, use of the restrooms or of any other hotel facility which is open to the public but not revenue-producing is not sufficient to make the user a guest.[10] The distinction between the normally provided accommodations and those for special occasions is exemplified by cases holding that attending a banquet or a ball does not constitute one a guest even though meals are purchased,[11] and in one case even where a room was rented.[12] The duties imposed on the inn were originally to provide food, lodging, and shelter for a traveler's baggage. The innkeeper was also liable for the safety of guests and their goods.[13]

Restaurants, on the other hand, have never been brought under the

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[9]Cake v. District of Columbia, 33 App. Cas. 272, 17 Ann. Cas. 814 (App. D. C. 1909) decided under a statute making it illegal for an inn to serve liquor to anyone except guests, and holding that the registration to qualify as a guest in order solely to procure liquor and thereby evade the law did not constitute a bona fide innkeeper-guest relationship.

[10]Baker v. Bailey, 103 Ark. 12, 145 S. W. 532, 39 L. R. A. (N. S.) 1085 (1912); Parker v. Dixon, 132 Minn. 367, 157 N. W. 583, L. R. A. 1916E 534 (1916).

[11]Carter v. Hobbs, 12 Mich. 52 (1863); Mowers v. Fethers, 61 N. Y. 34 (1874); Ingalsbee v. Wood, 36 Barb. 452 (N. Y. 1862).

[12]Amey v. Winchester, 68 N. H. 447, 39 Atl. 487, 39 L. R. A. 760 (1896). This distinction between normal accommodations and special accommodations is broader than the application to a single hotel. In a particular hotel it applies when the hotel provides some facility for an occasion which is not normally offered by that particular hotel. In the whole field of hotels the distinction should apply where one hotel provides a facility unusual to the normal services of the general run of hotels. To illustrate, where modern hotels have drug stores, florist shops, haberdasheries, gift shops, and such additional facilities not customarily furnished by hotels, no innkeeper-guest relationship should be established by resort to such facilities alone, although they are an integral part of the hotel.

[13]A discussion of these points is beyond the scope of this note other than to point out the fact that while there is conflict as to the degree of responsibility of the innkeeper as to both persons and property, in case of property the innkeeper's liability clearly exceeds that of the restauranteur under either view. 28 Am. Jur., Innkeepers § 66 et seq. But in case of injuries to persons, under the modern view there seems to be little difference between the liability of a restaurant or inn, both being based on tort liability of owners of premises to invitees or business guests. 28 Am. Jur., Innkeepers § 52 et seq.

law of innkeepers. They have been considered of entirely different nature and more often compared to the shopkeeper with privilege under the common law to serve whom they please and turn away others.[14] Once the restaurant has undertaken to serve a customer, tort or contract liabilities may, of course, be imposed for injuries from unwholesome food, and in some jurisdictions liability may rest on warranty.[15] The restaurant is also liable in tort to invitees for any injury due to defects in the premises, but is not an insurer of personal belongings of patrons and only has the bailee's duty of reasonable care when such belongings are checked in provided places.[16]

The difficulty in applying these recognized rules in situations like those presented in the principal case lies in determining the status of the defendants. The modern hotel includes the facilities and carries on the business of both inn and restaurant. Undoubtedly the person who becomes a guest by taking a room in the hotel remains a guest when he takes meals in the dining room and is therefore entitled to have dining service under the hotel keeper's common law duties.[17] However, whether the hotel proprietor shall be held to the duties of innkeeper to guest when the person is merely using dining facilities and not seeking lodging or other accommodations, presents a different problem. A considerable number of cases seem to have imposed these duties where the question arose over the hotel's liability either for injuries to the guest upon

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[14]Sheffer v. Willoughby, 61 Ill. App. 263 (1895), aff'd, 163 Ill. 518, 45 N. E. 253, 34 L. R. A. 464 (1896); State v. Brown, 112 Kan. 814, 212 Pac. 663 (1923); Kister v. Hildebrand, 9 B. Monroe 72, 48 Am. Dec. 416 (Ky. 1848); Davidson v. Chinese Republic Restaurant Co., 201 Mich. 389, 167 N. W. 967, L. R. A. 1918E 704 (1918); Kelly v. N. Y. Excise Commissioners, 54 How. Prac. 327 (N. Y. 1877); People v. Jones, 54 Barb. 311 (N. Y. 1863); Carpenter v. Taylor, 1 Hilt. 193 (N. Y. 1856); Noble v. Higgins, 95 Misc. 328, 158 N. Y. Supp. 867 (1916); Appeal of Wellsboro Hotel Co., 336 Pa. 171, 7 A. (2d) 334, 122 A. L. R. 1396 (1939); Ford v. Waldorf System, Inc., 57 R. I. 131, 188 Atl. 633 (1936); Nance v. Mayflower Tavern, Inc., 106 Utah 517, 150 P. (2d) 773, 776 (1944); Story, Bailments (9th ed. 1878) § 475; Williston, Contracts (Rev. ed. 1936) § 1066. Clearly, under the common law the restaurant had the privilege of discriminating between patrons, but in the states having the common civil rights statutes, this privilege is lost and the restaurant will be liable in damages to any person refused service because of discrimination as prohibited by statute.

[15]Friend v. Childs Dining Hall Co., 231 Mass. 65, 120 N. E. 407, 5 A. L. R. 1100 (1918); Smith v. Carlos, 247 S. W. 468 (Mo. App. 1923); Williston, Sales (2d ed. 1924) § 242 (b); Vold, Sales (1931) 477, 478.

[16]See note 13, supra. Holmes v. Ginter Restaurant, 54 F. (2d) 876 (C. C. A. 1st, 1932); Curran v. Olson, 88 Minn. 307, 92 N. W. 1124, 60 L. R. A. 733 (1903); Ultzen v. Nicols, [1894] 1 Q. B. 92; Harper, Torts (1933) § 98; Note (1902) 13 E. R. C. 124, 130; 43 C. J. S., Innkeepers § 22 (b) (1); 28 Am. Jur., Innkeepers § 120.

[17]Odom v. East Avenue Corp., 178 Misc. 363, 34 N. Y. S. (2d) 312, aff'd, 264 App. Div. 985, 37 N. Y. S. (2d) 491 (1942).

the premises,[18] or loss of personal belongings left in the custody of the management.[19] Case authority is scarce and less conclusive on the question of whether hotels are under the common law duty to afford dining service to casual diners having no other connection with the hotel. Some decisions follow the pattern of the personal injury and property loss cases, holding that the person merely coming into the dining room for a single meal is a guest, and so entitled to the common law privilege to be served.[20] Though these cases may constitute the weight of authority,[21] the principal decision, in holding such a diner not to have a guest's right to service, represents what is here regarded as a welcome departure and a view more in accord with practical realities of the present-day hotel business.

Hotel dining rooms and coffee shops in general have no distinguishing features from separate restaurants serving the same class of patrons. The public considers the hotel as merely an alternative place to have a meal, and its eating facilities are as commonly frequented by local residents as by lodging guests of the hotel. To impose one measure of responsibility for service on a restaurant under hotel management and a lesser duty on a restaurant not connected with a hotel, where the person demanding service comes to either as a casual diner, is to discriminate between competing businesses which the general public patronizes with the same intent.

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[18]Dove v. Lowden, 47 F. Supp. 546 (W. D. Mo. 1942); Armstrong v. Yakima Hotel Co., 75 Wash. 477, 135 Pac. 233 (1913).

[19]McDonald v. Edgerton, 5 Barb. 560 (N. Y. 1849); Hill v. Memphis Hotel Co., 124 Tenn. 376, 136 S. W. 997, 34 L. R. A. (N. S.) 420 (1911); Read v. Amidon, 41 Vt. 15, 98 Am. Dec. 560 (1868); Avia v. Bridge House Hotel Ltd., 137 L. T. R. (N. S.) 299, 16 B. R. C. 538 (1927); Orchard v. Bush and Co., [1898] 2 Q. B. 284; Bennett v. Mellor, 13 E. R. C. 118, 5 T. R. 273 (K. B. 1793).

[20]See cases cited in note 2, supra.

[21]In connection with the majority view, note the lack of recent cases on this specific point and the fact that most of the cases establishing this authority are decisions around the middle of the last century. The few cases which are in accord with the principal case can hardly be said to constitute a respectable minority due to the peculiar circumstances in each. Gastenhofer v. Clair, 10 Daly 265 (N. Y. 1881) holding that a person having a meal in a hotel as a guest of a bona fide registered guest of the hotel was not a guest of the hotel and no duties extended to him. Cake v. District of Columbia, 33 App. Cas. 272, 17 Ann. Cas. 814 (App. D. C. 1909) holding that a person is not a guest who buys liquor, sandwich, and registers; but this was proceeding under local statute forbidding hotels from serving liquors to any except bona fide guest and court held the purchase of sandwich and the registering were merely subterfuges to evade law. Carpenter v. Taylor, 1 Hilt 193 (N. Y. 1856) holding that a guest for a meal does not incur common law relationship of innkeeper-guest; but decision here turned on fact that court found the defendant a restaurant as distinguished from an inn.

No legal difficulty should result from viewing the hotel restaurant as dealing with persons in two legal categories, one constituted of hotel guests entitled to meal service and one of restaurant patrons whom the proprietor can serve or reject, as desired.[22] The distinction is based naturally on the fact that the former have other connections with the hotel management in its fundamental undertaking as an innkeeper while the latter are diners only. Such an approach would place the occasional patron of the hotel restaurant in exactly the same position as the patron of other restaurants in respect to rights to service and protection from personal injury and loss of property, while giving the hotel lodger the broader privileges against the hotel proprietor which the original common law innkeeper-guest relationship was intended to afford.[23]

RICHARD B. SPINDLE, III

WORKMEN'S COMPENSATION—BASIS OF COMPENSATION WHERE PREVIOUS AND SUBSEQUENT PERMANENT PARTIAL INJURIES RESULT IN PERMANENT TOTAL DISABILITY. [Virginia]

During the comparatively short life of the Workmen's Compensation Acts,[1] courts have been called upon frequently to define the rights and liabilities arising under this new segment of the law. One notable instance of conflict involves the basis of compensation when a previous and a subsequent permanent partial injury have together resulted in

[22]Consider the analogy of inns serving in a dual capacity of innkeeper-guest and landlord-tenant. 28 Am. Jur., Innkeepers § 8: "There is nothing inconsistent or unusual in a house of public entertainment having a double character, being simultaneously a boarding house and an inn or hotel. In respect to those who occupy rooms and are entertained under special contract it may be a boardinghouse; and in respect to transient persons, who, without a stipulated contract, remain from day to day, it is an inn, tavern, or hotel."

[23]See Brown, Personal Property (1936) 446-7: "At the present time hotels frequently operate restaurants and bar rooms which are resorted to not only by the travelling public but by local residents as well. It would seem to the writer that a person who resorts to the hotel only for the purposes of meals or refreshment at the bar should not be entitled to protection as a guest, unless he be indeed a traveller in the common acceptance, stopping at the hotel for some other purpose than merely for food or drink. Just as a hotel keeper may depart from his usual business and become a caterer or ballroom proprietor, may he not also depart from such business and become a restaurant or bar room proprietor?"

[1]Workmen's Compensation statutes were first passed in 1911, when 10 states adopted such legislation. See Whitebook, Permanent Partial Disability Under the Workmen's Compensation Acts (1942) 28 Iowa L. Rev. 37, 38.

permanent total disability.[2] The employee having received remuneration for the partial disability of the first injury, shall he now, upon suffering the second injury and becoming completely incapacitated, receive the full amount provided in the statute for total disability? Or shall a reduction be made in the second award to make allowance for the money already received for the first injury?

The view most frequently adopted is that the employee shall receive the full compensation for permanent total disability following the second injury, regardless of when, where or how the previous partial injury was incurred.[3] This ruling is sometimes dictated by specific statutory provision, but is often based on judicial construction of the general provisions of the Acts.[4] It appears to be in full accord with the principle of liberal interpretation in favor of employees, and to serve the social purpose of helping to save society from the burden of supporting its incapacitated members.[5] However, it may be earnestly argued that rather than benefiting workmen and society, this rule brings the opposite result because it tends to make employers reluctant to hire partially disabled workers.[6] Not only is such a handicapped

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[2]See Notes (1930) 67 A.L.R. 794, (1938) 98 A.L.R. 734.

[3]Saddlemine v. American Bridge Co., 94 Conn. 618, 110 Atl. 63 (1920); Fair v. Hartford Rubber Works, 95 Conn. 350, 111 Atl. 193 (1920); McNeil v. Panhandle Lumber Co., 34 Idaho 773, 203 Pac. 1068 (1921); Superior Coal v. Industrial Commission, 321 Ill. 533, 152 N.E. 535 (1926); Wabash Railway Co. v. Industrial Commission, 286 Ill. 194, 121 N.E. 569 (1918); Jennings v. Mason City, Etc., 187 Iowa 967, 174 N. W. 785 (1919); Moore v. Western C. and M. Co., 124 Kan. 214, 257 Pac. 724 (1927); Congoleum Nairn v. Brown, 158 Md. 285, 148 Atl. 220, 67 A.L.R. 780 (1930); Riboletti v. United Engineers and Constructors, 18 N.J. Misc. 219, 12 A. (2d) 251 (1940); Schwab v. Emporium Forestry Co., 216 N. Y. 712, 111 N. E. 1099 (1915); Nease v. Hughes Stone Co., 114 Okla. 170, 244 Pac. 778 (1925); Notte v. Rutland Ry., 112 Vt. 512, 28 A. (2d) 378 (1942); McDaniel v. Workmen's Compensation Appeal Board, 118 W. Va. 596, 191 S.E. 362 (1937).

[4]Congoleum Nairn v. Brown, 158 Md. 285, 148 Atl. 220, 67 A.L.R. 780 (1930); Asplund Construction Co. v. State Industrial Commission, 185 Okla. 171, 90 P. (2d) 642 (1939).

[5]The following decisions are in accord with such purposes, though they are not always expressed in the opinions: Raymond v. Industrial Commission, 354 Ill. 586, 188 N.E. 861 (1934); Squibb v. Elgin, J. and E. Ry. Co., 19 Ind. App. 136, 190 N.E. 879 (1934); Johnson's Case, 318 Mass. 741, 64 N.E. (2d) 94 (1945); Saari v. Dunwoody Iron Mining Co., 21 N.W. (2d) 94 (Minn. 1945); Baker v. Industrial Commission, 44 Ohio App. 539, 186 N.E. 10 (1933); Martin v. Silvertown Garage, 54 R.I. 388, 173 Atl. 352 (1934); Raven Red Ash Coal Corp. v. Absher, 153 Va. 332, 149 S. E. 541 (1929); Virginia Electric and Power Co. v. Place, 150 Va. 562, 143 S.E. 756 (1928).

[6]The following decisions by their results seem to represent this point of view: Lente v. Lucci, 275 Pa. 217, 119 Atl. 132 (1922); Niemi v. Asplundh Tree Expert Co., 154 Pa. Super. 600, 36 A. (2d) 851 (1944); Catlett v. Chattanooga Handle Co., 165 Tenn. 343, 55 S.W. (2d) 257 (1932); Gilmore v. Lumbermen's Reciprocal Assoc., 292 S.W. 204 (Tex. App. 1927).

person more likely to suffer further injury, but also if the later injury leaves him totally disabled he must be paid the largest of all sums awarded under the compensation system.[7] With a view to removing this unwarranted penalty from the employer and thereby abating his reluctance to use partially disabled workmen, several jurisdictions have limited the payments following the second injury to something less than the amount of a total disability award.

In a few states, the extreme view has been taken that the worker incapacitated by two contributing injuries shall receive compensation for the second injury only in accordance with the regular schedule of awards for single partial injuries.[8] This system ignores the hard reality of the previous accident and final total disability of the employee, resulting normally in an unjust under-compensation. A similar but less severe system is to allow the worker after the second injury to collect only a fixed percentage of the compensation which would be awarded for a case of total disability from one accident.[9] The purpose is not only to save the employer from being charged with too great a sum, but also to prevent a worker totally incapacitated by two accidents from getting greater compensation than one so injured in a single mishap.

Still another method used to reconcile the conflicting interests of workmen and employers is to award the injured person full compensation for total disability, while charging the employer with compen-

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[7]The employer may not make the payment directly to the employee, but rather the award will be given by the Workmen's Compensation Commission out of the funds paid by the employers. However, the payment may work prejudice on the employer indirectly as the rate at which the employer must pay into the state fund is dependent in some measure on his safety record. One court has pointed out that the dangers to employers in having partially disabled workmen is not so great as it seems because of the fact that the partially disabled employee was hired as a man of limited capacity only and received wages as such, and thus would receive a lower compensation award. Wabash Railway Company v. Industrial Commission, 286 Ill. 194, 121 N.E. 569 (1918).

Some statutes allow the employer to obtain a waiver from the permanently partially disabled employee before he is hired, thus releiving the employer of liability for total disability. See Paul v. Glidden Company, 184 Md. 114, 39 A. (2d) 544 (1945).

[8]Generally these decisions are made under peculiar statutory provisions, which are of a sort not ordinarily found in the Workmen's Compensation Statutes. Calumet Foundry and Machine Co. v. Morz, 79 Ind. App. 305, 137 N. E. 627 (1922); Pappas v. North Iowa Brick and Tile Co., 201 Iowa 607, 206 N.W. 146 (1926); Weaver v. Maxwell Motor Co., 186 Mich. 588, 512 N. W. 993 (1915); Knoxville Knitting Mills Co. v. Gaylon, 148 Tenn. 228, 255 S. W. 41, 30 A. L. R. 976 (1923).

[9]Paterson v. Wiesner, 218 Ala. 137, 117 So. 663 (1928) (three-fourths); Goebel v. Missouri Candy Co., 227 Mo. App. 112, 50 S.W. (2d) 741 (1932) (two-thirds).

sation for the second partial disability only, the balance of the award being made up from a special fund which is created for that specific purpose by payments from all employers under the act.[10] This system seems to give the best solution, inasmuch as the needs of the injured worker are more fully met without prejudicing any employer's safety record so as to create an aversion to hiring partially incapacitated workmen.

Several statutes provide that the award following the second injury shall be computed on the basis of a total disability but from this sum a deduction shall be made to allow for previous compensation received for the first injury.[11] Though these statutes purport to set up a complete answer for the exact situation referred to, they have not freed the matter from controversy, because the provisions directing the deduction are often not sufficiently detailed and definite. The complexity of the statutory construction problem presented to the courts in such situations is demonstrated in the case of *Morris v. Pulaski Veneer Corp.*,[12] decided last year in Virginia.

In 1935, petitioner A. J. Morris, working for the Pulaski Veneer Corp., sustained an injury which resulted in the loss of his left hand. He was awarded compensation of $7.77 a week for 150 weeks for the loss of the hand. Ten years later, while under the same employer, he suffered another accident, injuring his right hand so as to cause permanent total disability. The Industrial Commission, on its interpretation of two relevant sections of the Virginia Workmen's Compensation statute,[13] awarded the claimant $14.90 (55% of the worker's

[10]McDonald v. State Treasurer, 52 Idaho 535, 16 P. (2d) 988 (1932); Panther Creek Mines, Inc. v. Industrial Commission, 342 Ill. 68, 173 N.E. 818 (1930); Hebron's Case, 247 Mass. 427, 142 N.E. 60 (1924); Peterson v. Halvorson, 200 Minn. 253, 273 N.W. 812 (1937); Lehman v. Schmahl, 179 Minn. 388, 229 N.W. 553 (1930); Addotta v. Blunt, 114 N.J. L. 85, 176 Atl. 105 (1934); State Industrial Commission v. Newman, 222 N. Y. 363, 118 N. E. 794 (1918); Eagle v. Reading Co., 148 Pa. Super. 218, 24 A. (2d) 683 (1942).

[11]See statutes applied in: Bennett v. White Coal Co., 288 Ky. 827, 157 S.W. (2d) 73 (1941); Combs v. Hazard Blue Grass Coal Corp., 207 Ky. 242, 268 S.W. 1070 (1925); McDaniel v. Engle Coal Co., 99 Mont. 309, 43 P. (2d) 655 (1935).

[12]184 Va. 424, 35 S.E. (2d) 342 (1945).

[13]Va. Code Ann. (Michie, 1942) § 1887 (30): Where the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid, as hereinafter povided, to the injured employee during such total incapacity, a weekly compensation equal to fifty-five per centum of his average weekly wages, but not more than eighteen dollars, nor less than six dollars a week; and in no case shall the period covered by such compensation be greater than five hundred weeks, nor shall the total amount of all compensation exceed seven thousand dollars.

§1887 (36): If an employee receives a permanent injury as specified in section

average weekly earnings, as the statute directs) for a period of 350 weeks, or a sum of $5,215 for the second injury. The restriction of the award to 350 weeks was thought to be required by mandate in the statute that compensation for permanent total disability shall not exceed $7000 or 500 weeks based on an average weekly wage. The sum total of the awards to the claimant received for both injuries thus represented the full 500 weeks of payment, but amounted to only $6,380.50.

The petitioner contended that the Commission had wrongly applied the provision of the Act which is specifically directed to the cumulative injuries situation. Under the general total disability Section—1887(30)—had petitioner been incapacitated by a single injury, he would have been awarded $14.90 per week for 500 weeks; but since this would have amounted to $7450, the specific maximum limitation of $7000 would have operated to restrict the total award. Section 1887(36), expressly covering the case of successive injuries, directs that "compensation shall be payable for permanent total disability," but that "payments made for the previous injury shall be deducted from the total payment of compensation due." The petitioner had received $1,165.50 for the previous injury, and this deducted from the $7000 total would leave a final award of $5834.50—$619.50 more than was given under the Commission's order.

Despite the logic of the petitioner's argument, the Virginia Supreme Court of Appeals, with two justices dissenting, upheld the Industrial Commission's award. The court decided that the petitioner's formula for computing the compensation would violate the limitation in Section 1887 (30) that payments for total disability should not exceed 500 weeks, and that this restriction on the number of payments necessitated limiting petitioner's remuneration for the second injury to 350 weeks. It was conceded that the 500 weeks provision did not appear in the part of Section 1887(36) which specifically refers to such a case as petitioner presented, but a necessity of reading that term into the section was seen as a means of construing all provisions of the statute to-

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thirty-two, after having sustained another permanent injury in the same employment, he shall be entitled to compensation for both injuries, but the total compensation shall be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding five hundred weeks.

When the previous and subsequent permanent injuries received in the same employment result in total disability, compensation shall be payable for permanent total disability, but payments made for the previous injury shall be deducted from the total payment of compensation due.

gether to determine the true legislative intent. Further reading of the two sections, however, raises doubts as to the accuracy of this interpretation and as to the fairness of the resulting award of compensation.

Inasmuch as no total disability was present in this case until after the petitioner's second injury, the 500 week statutory maximum should apply only to the number of payments necessary to pay the amount awarded following that injury. Under the petitioner's plan, at $14.90 per week, the $5834.50 total would be paid off in some 390 weeks. Further, if the legislature intended the 500 weeks maximum to cover payments for both previous and subsequent injuries, why was that limitation not set out in the papagraph which was enacted specifically to control cases of two successive injuries? The fact that the provision appears in the section covering total disability suflered in a single injury and in another connection in the first paragraph of the section covering successive injury cases, but was omitted from the paragraph directly relevant to the case at bar, would seem to indicate that the legislature did not intend the week-limitation to apply to both parts of the awards for the two injuries.

Most significant of all is the fact that, under the pressure of trying to bring one section within a limitation expressed in the previous section, the court had to do violence to the unambiguous language of the subsequent section. The legislature directed in Section 1887(36) that "payments made for the previous injury shall be deducted from the total payment of compensation due." In order to apply the 500 weeks maximum as it thought proper, the court had to amend this provision to read *"the number of weeks of* payment for the previous injury shall be deducted from the total *number of weeks of* payment of compensation due." Had the legislators intended to make the deduction on this basis, they could quite simply have made the statute read in that manner.[14] No direct authority was available to sustain the Commission's view of the operation of Section 1887(36) because the Virginia court had never before passed on the point. Since the Virginia Workmen's Compensation Act was closely modeled after the Indiana statute, reference was made in some detail to two Indiana decisions which were thought to support the view adopted in the

[14]That there is no recognized impropriety in giving an employee the largest possible award under the statute even though he has already received payments for previous injuries is evidenced by the fact that courts do award full compensation for total disability in slightly different circumstances: where the second injury

instant case.[15] However, neither of these cases was in point on its facts, because neither involved successive partial injuries resulting in permanent total disability, and therefore did not call for an application of the section of the Indiana statute analogous to Virginia Section 1887(36).[16]

To furnish a practical argument in refutation of the petitioner's interpretation, the court outlined a hypothetical case in which that application of the act would provide an employee with a less favorable total award than would the view adopted by the Commission.[17]

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would have caused total disability independent of the first injury—see Hollerback v. Blackfoot Coal Corp., 113 Ind. App. 614, 49 N. E. (2d) 973, 974, 975 (1943); and where the second cumulative injury is suffered while the workman is serving a different employer than at the time of the first injury—see Nease v. Hughes Stone Co., 114 Okla. 170, 144 Pac. 778 (1925). In the latter situation, the Virginia statute specifically directs that the second injury shall entitle the employee to compensation only for the degree of incapacity which would have resulted from the second injury had the first never occurred. Va. Code Ann. (Michie, 1942) § 1887 (34).

[15]It could not be contended that the Virginia legislature had purported to accept the rulings in these cases, however, because they were not decided until after the Virginia Compensation Act was adopted. Va. Acts of Assembly (1918) c. 399, p. 636.

[16]Hollerback v. Blackfoot Coal Corp., 113 Ind. App. 614, 49 N.E. (2d) 973 (1943) was not in point because it involved a previous permanent partial disability and a subsequent temporary total disability caused by an injury of an entirely different nature. The Indiana court held that the amount recovered for the first injury was not deductible in any form from the compensation due for the second injury. It was specifically pointed out that the section of the Indiana statute from which section 1887 (36) of the Virginia Act was copied was not applicable to the situation being passed upon. Thereafter, in the form of purest dictum and without referring to any authority, the Inidana court said that section provided that, in case of successive partial disabilities of the same nature resulting in total incapacity, the number of weeks of payments received for the first injury should be deducted from the 500 weeks maximum of payments for the second injury. Not only was this dictum, but the statement was not made in refutation to such a contention as the petitioner expressed in the instant Virginia case, but rather to disprove the obviously invalid argument that if the loss of one eye was worth an award of 150 weeks of payments, then the loss of the other would be worth merely another 150 weeks of payments. In re Swartz, 77 Ind. App. 277, 133 N.E. 506 (1922) did not involve any similarity to the Virginia case either as to the facts involved or the legal principles applicable. Only one injury was suffered and that resulted in 50 per cent disability. The question was presented as to whether the employee should be limited to 50 per cent of the statutory maximum award for total disability. The Indiana appellate court held that he was not so limited, on the ground that the maximum payment provision "was not intended to serve as a primary basis for the determination of the compensation to be paid under any of the provisions of said act, but was intended to serve as a limitation only." Though the Virginia court implied at one point in the opinion that the petitioner was attempting to claim a $7000 total award as a matter of right, this was in no sense the basis for his claim to greater recovery than the Industrial Commission allowed.

[17]If at the time of the first accident the compensation rate had been $18, he

It appears that the plan urged by the petitioner would never give a higher total award where the partially disabled worker is receiving a lower wage at the time of the second injury than when he was first injured. But if the later wage is greater than the former, that plan would often give the worker greater compensation, and never less, than the court's system.[18] As is exemplified by the instant case, the court's assumption that workmen with any sort of permanent partial disability will not in subsequent years attain a wage rate higher than that received prior to the injury is not always correct. This petitioner, though he had lost a hand in the first accident, was earning nearly twice his old wage at the time of the second injury. Radical changes in wage levels between depression and boom periods and differences in pay rates for unskilled, skilled and supervisory employment produce many instances of greater earnings after partial disabilities are incurred.[19] The fact that the reverse situation also occurs frequently is hardly a justification for denying to the present petitioner in the case actually at bar the more beneficial application of the statute which is based on a reasonable construction of its terms.[20]

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would have received $2700. Suppose the rate at the time of the second accident to have been $10. Five hundred weeks at $10 per week would amount to $5000, from which must be subtracted the $2700 received previously. Thus, under petitioner's plan, the employee would receive only $2300 for the second accident. On the other hand, if the number of weeks form of computation were used, he would receive $3500 for the 350 weeks.

[18]In this situation, the total compensation received would be greater under the petitioner's construction of the statute until the wages reached a rate which would give the maximum $7000 remuneration under either manner of computation.

[19]This is especially true, of course, where the first injury does not result in such a serious disability as the loss of a hand. The workman who loses a finger or a toe may readily return to his work with sufficient proficiency to achieve an eventual increase in pay; yet the Commission's formula will apply to this case as well as to those in which more serious injuries may prevent the employee from earning as high a wage as before.

[20]The Virginia court is surely not concerned over the possibility of workmen recovering too much compensation after becoming permanently totally disabled, because the $7000 absolute maximum for total incapacity prevents any unreasonable enrichment. Further, the court apparently does not think that the receipt for total incapacity after a second injury is *ipso facto* over compensation. This is demonstrated by its quoting with approval from the dictum of the Indiana court that "if the same employee, having lost the sight of an eye in an accident and received compensation for 150 weeks therefor, later return to the same employment and lose both feet in another accident, he would be entitled to compensation for 500 weeks without any deduction on account of the previous injury, since he has received injuries resulting in total permanent disability in the later accident independent of the former and not as a result of the two." Hollerback v. Blackfoot Coal Corp., 113 Ind. App. 614, 49 N.E. (2d) 973, 974, 975 (1943).