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RECENT CASES

"ATTRACTIVE NUISANCE" DOCTRINE—NEGLIGENCE. [Federal]

In a recent California case, *Kataoka v. May Department Stores*,¹ the plaintiff, a child of four, accompanied by his mother, entered defendant's store and gained access to the upper floor by means of an escalator. While the mother was talking to a salesman, plaintiff wandered off to play on the steps of the escalator. As the steps revolved his fingers were caught between their tread and the protective plate at the top of the landing. Defendant's manager, unable to pull plaintiff's hand out, reversed the escalator. Plaintiff suffered the partial loss of two fingers. In an action to recover damages, plaintiff relied on the character of the escalator as an attractive nuisance, and on the alleged negligence of defendant's manager in the manner in which he extricated plaintiff's hand. Recovery was denied on the grounds that the escalator had none of the characteristics of an attractive nuisance; that, without impairing its operation, the escalator could not have been constructed in such a manner that the small fingers of a child of four could not be stuck into the openings; and that the defendant's manager, acting in an emergency, was guilty of no negligence.

Plaintiff urged the court's reliance upon a Missouri case, *Hillbrand v. May Mercantile Co.*,² which allowed recovery on a similar fact situation. In that case, while playing on an escalator in the defendant's store, plaintiff, a child of three who had accompanied her mother to the store, got her arm caught between the revolving banister and the floor box from which the protective covering had been left. The court held that while the escalator was not dangerous to adults, considering the ways of children it was very likely that some child would be attracted into playing with the rail and thus getting its hand caught in the floor box; that a person of ordinary prudence should have anticipated and guarded against the risk thus created.

In order to evaluate the principal case, it is necessary to examine the principles upon which the doctrine of attractive nuisances was founded.

Prior to the decision of the United States Supreme Court in *Railroad Co. v. Stout*³ little impetus was given by the courts of this country

¹28 F. Supp. 3 (S. D. Cal. 1939).

²141 Mo. App. 122, 121 S. W. 326 (1909).

³*Sioux City & P. Rd. v. Stout*, 17 Wall. 657, 21 L. ed. 745 (U. S. 1874).

to the theory propounded by the English case of *Lynch v. Nurdin*,⁴ the pioneer case in the field.⁵ In the *Stout* case, the Court, applying general negligence principles, established the so-called turntable doctrine, by which liability was imposed upon the owner of an improperly guarded turntable in an action brought by a child who was injured while playing thereon. The defendant, reasoned the Court, should have anticipated the plaintiff's presence and should have taken the simple precaution of locking the turntable.

It has been the effort to bring the humane doctrine announced in the early cases⁶ into harmony with the common law rule that land owners owe trespassers only the duty of refraining from wilful and wanton acts of aggression, that has led to confusion and misinterpretation by the courts in establishing the attractive nuisance doctrine. An inability satisfactorily to define and delimit it has induced many courts to abandon the doctrine entirely,⁷ or to seek fictional and tenuous bases for its maintenance.⁸

⁴1 Q. B. 29 (1841).

⁵For a criticism of the basis of the case see *Bottum v. Hawks*, 84 Vt. 370, 79 Atl. 858 (1911); cases collected (1925) 36 A. L. R. 49.

⁶Harper, *The Law of Torts* (1933), § 93: ". . . risks that are particularly dangerous to life and limb which are incidental to artificial structures on the land and which are likely to attract children thereto and the dangerous character of which are not likely to be recognized, must be reasonably guarded to protect children actually attracted thereby, although they may be trespassers on the land."

⁷*Van Almen v. Louisville*, 180 Ky. 441, 202 S. W. 880 (1918); *Friedman v. Snare & Triest Co.*, 71 N. J. L. 605, 61 Atl. 401, 403 (1905): ". . . there are fundamental, and, as we think insuperable, difficulties standing in the way of adopting the rule that the mere attractiveness of private property gives to the person attracted rights against the owner. One difficulty is that the rule pro tanto ignores the distinction between *meum* and *teum*. . . . Another and very practical difficulty that confronts the attempt to lay down any legal rule that depends for its limitations upon the attractiveness of objects to children of tender years lies in the extreme improbability that any man, however prudent, will be able to foresee what may or what may not be attractive to children."; *Dobbins v. Missouri, K. & T. Ry. Co. of Texas*, 91 Tex. 60, 41 S. W. 62 (1897), 38 L. R. A. 573 (1898). The doctrine has been abandoned in the following jurisdictions: *Rastorello v. Stone*, 89 Conn. 286, 93 Atl. 529 (1915); *Nelson v. Burnham & M. Co.* 114 Maine 213, 95 Atl. 1029 (1915); *Baltimore v. DePalma*, 137 Md. 179, 112 Atl. 277 (1920); *Holbrook v. Aldrich*, 168 Mass. 16, 46 N. E. 115 (1897); *Ryan v. Tower*, 128 Mich. 463, 87 N. W. 644 (1901); *Devost v. Twin State Gas & Elec. Co.*, 79 N. H. 411, 109 Atl. 839 (1920); *Turess v. N. Y., S. & W. Rd.*, 61 N. J. L. 314, 40 Atl. 614 (1898); *Walsh v. Fitchburg Rd.*, 145 N. Y. 301, 39 N. E. 1068 (1895); *Thompson v. B. & O. Ry.*, 218 Pa. 444, 67 Atl. 768 (1907); *Bishop v. Union Rd.*, 14 R. I. 314, 51 Am. Rep. 386 (1884); *Bottum v. Hawks*, 84 Vt. 370, 79 Atl. 858 (1911); *Walker v. Potomac, F. & P. Rd.*, 105 Va. 226, 53 S. E. 113 (1905); *Ritz v. Wheeling*, 45 W. Va. 267, 31 S. E. 993 (1898).

⁸Bases that have been adopted: (1) Implied invitation. *United Zinc & Chem. Co. v. Britt*, 256 U. S. 268, 42 S. Ct. 299, 66 L. ed. 615 (1922), 36 A.L.R.28 (1925); *Wilmes v. Chicago G. W. Rd.*, 175 Iowa 101, 156 N. W. 877 (1916), L. R. A. 1917F, 1024 (1917);

English law refuses to regard children as a class separate from contractors, invitees, licensees or trespassers:⁹

"They must be reckoned under one or another of these. The only respect in which a child differs from an adult is that what is reasonably safe for an adult may not be reasonably safe for a child, and what is a warning to an adult may be none to a child."¹⁰

The attractive nuisance doctrine should not be conceived of as an exception to the rule concerning trespassers, but rather part and parcel of that rule. Immunity is not granted the landowner, upon whose premises an adult trespasser has been injured, because the trespasser is a wrongdoer, but because his presence is not to be anticipated and hence, there is no duty to take precautions for his safety.¹¹ Liability should be imposed upon the landowner for an injury to a child when the child's presence in the neighborhood together with his inclination to pry into and intrude upon objects there found, is or should be recognized; and the landowner, as a reasonable man, should realize that such ac-

Morrison v. Phelps Stone Co., 203 Mo. App. 142, 219 S. W. 393 (1920); *Fuselman v. Yellowstone Valley Land & Irrigation Co.*, 53 Mont. 254, 163 Pac. 473 (1917). For criticism see notes and cases collected (1925) 36 A. L. R. 116.

(2) *Sic utere tuo ut alienum non laedas*. *Polk v. Laurel Hill Cemetery Ass'n.*, 37 Cal. App. 624, 174 Pac. 414 (1918); *Gandy v. Copeland*, 204 Ala. 366, 86 So. 3 (1920). But see: *Walker v. Potomac, F. & P. Rd.*, 105 Va. 226, 233, 53 S. E. 113, 115 (1905): "There is one conclusive answer to the argument based on that maxim, and that is, that it refers only to acts of the landowner, the effects of which extend beyond the limits of his property."; *Holmes, Privilege, Malice, and Intent* (1894) 8 Harv. L. Rev. 1, 3; *Smith, Liability of Landowners to Children Entering Without Permission* (1898) 11 Harv. L. Rev. 349, 434 at 440.

(3) *Trap or pitfall*. *Faylor v. Great Eastern Quick Silver Mining Co.*, 45 Cal. App. 194, 187 Pac. 101 (1919); *Kelly v. Benas*, 217 Mo. 1, 116 S. W. 557 (1909).

⁹*Hardy v. Central London Ry.*, [1920] 3 K. B. 459, 36 T. L. R. 843, 150 L. T. J. 71; Defendant owned a station in which was located an escalator. Children of the neighborhood frequently played upon it while the station guard was attending other duties. Plaintiff, a child of five, one of such a group, stuck his hand upon an unguarded drive belt of the escalator and was injured. Recovery was denied upon the ground that the plaintiff was a trespasser. "Alurement," said the court, "is a material element in considering whether under all of the circumstances leave and license is to be inferred. . . . where leave and license is distinctly negatived the fact ceases to be relevant." Had a license or an invitation been made out it was thought that recovery would have been allowed since the defendant failed to protect the plaintiff from a temptation to play with the moving machinery; but inasmuch as the plaintiff was a trespasser there was no liability upon the landowner for an injury caused by an object legitimately upon his land and used in the course of his business.

¹⁰*Winfield, A Text Book of the Law of Tort* (1937) § 170.

¹¹*Johnson v. Atlas Supply Co.*, 183 S. W. 31, 33 (Tex. 1916): "The law will not imply anticipation by the owner of an appearance or presence of a trespasser upon his premises and hence he owes no duty to care for his protection, and where no duty exists negligence cannot arise."; *Restatement, Torts* (1934) § 333, comment b.

tivity will result in bodily harm to the intruder unless due care be taken to insure its safety.¹²

Lack of agreement as to the instrumentalities to which the doctrine is applicable has been as widespread as the lack of agreement upon the principles which underlie the doctrine. The courts have widely held that it should not be extended to objects naturally upon the land,¹³ or to common objects used in the ordinary course of business,¹⁴ but only to those objects which the landowner knows, or ought to know, to be dangerous and attractive to children and located in a place where children usually gather, provided the utility of the dangerous condition does not outweigh the risk to the children.¹⁵

Inadvisedly, statements have crept into some opinions to the effect that the attractive nuisance doctrine is applicable to child licenses and

¹²Restatement, Torts (1934) § 339: "The duty which the rule stated in this section imposes on the possessor of land is based on the well known tendency of children to trespass upon the land of others and the necessity of protecting them, even though trespassers, from their childish lack of attention and judgment."; 1 Street, Foundations of Legal Liability (1906) 160: "Liability in the turntable cases is frequently put upon the ground of implied invitation to children to come upon the premises in order to play there, the invitation being supposed to arise from the attractive nature of these dangerous engines. This hypothesis is hatched up to evade the obstacle which arises from the fact that the plaintiff is a trespasser. But it is as unnecessary as it is inadequate and artificial. Liability is to be ascribed to the simple fact that the defendant, in maintaining a dangerous agent from which harm may, under particular conditions, be expected to come, has the primary risk, and must answer in damages unless a counter assumption of risk can be imposed upon those who go there to play."; (1936) 22 Wash. U. L. Q. 141; (1934) 9 Wis. L. Rev. 431.

¹³Beeson v. City of Los Angeles, 115 Cal. App. 122, 300 Pac. 993 (1931); Peters v. Bowman, 115 Cal. 349, 47 Pac. 113, 598, 46 Am. St. Rep. 106 (1896); Smith, Liability of Landowners to Children Entering Without Permission (1898) 11 Harv. L. Rev. 349, 434.

¹⁴Salomon v. Red River Lumber Co., 56 Cal. App. 742, 206 Pac. 498 (1922); Shea v. Gurney, 163 Mass. 184, 39 N. E. 996 (1895); Holbrook v. Aldrich, 168 Mass. 15, 46 N. E. 115, 36 L. R. A. 493, 60 Am. St. Rep. 364 (1897): Plaintiff, an infant who had accompanied her father to the defendant's store, stuck her finger in a coffee grinder. In denying recovery for the lost finger Justice Holmes reasoned that, at the moment of the accident, plaintiff was not within the scope of the defendant's implied invitation, hence she was entitled to no protection against such possibilities of harm to herself. "As the common law is understood by most competent authorities, it does not excuse a trespass because there is a temptation to commit it, or hold property owners bound to contemplate the infraction of the property right because the temptation to untrained minds to infringe them might have been foreseen."

¹⁵McKiddy v. Des Moines Electric Co., 206 N. W. 875 (Iowa 1926), and the cases therein cited; Raeside v. Sioux City, 229 N. W. 216 (Iowa 1930); Wilmes v. Chicago, G. W. Rd., 175 Iowa 101, 156 N. W. 877 (1916), L. R. A. 1917F, 1024 (1917); Union Light, Heat & Power Co. v. Lunsford, 189 Ky. 785, 225 S. W. 741 (1920); O'Malley v. St. Paul, M. & M. Rd., 43 Minn. 289, 45 N. W. 440 (1890); Chicago, B. & Q. Rd. v. Krayenbuhl, 65 Neb. 889, 91 N. W. 880 (1902), 59 L. R. A. 920 (1903); Restatement, Torts (1934) § 339, comment f; Hudson, The Turntable Cases in Federal Courts (1923) 36 Harv. L. Rev. 826, 843-853.

invitees.¹⁶ A careful consideration will show that this is an undersirable tendency. The doctrine had for its purpose the desire of some courts to recognize that a trespassing child, who because of his childish instincts was injured upon the premises in a foreseeable manner, was owed the duty of due care. Courts which hold that the doctrine is applicable to invitees and licensees apparently fail to distinguish a very elementary consideration. If a child invitee be injured by an improperly guarded "attractive" instrumentality, under circumstances in which, were he a trespasser, the attractive nuisance doctrine might well be invoked, recovery should be allowed on the basis that the landowner has failed to exercise due care towards the plaintiff invitee.¹⁷

In view of the principles set out above, the decision in the *Kataoka* case¹⁸ is a desirable one, although the court has apparently gone out of its way to deny the applicability of the attractive nuisance doctrine.¹⁹ The defendant violated no duty which it owed the plaintiff; due care had been taken to construct and maintain the escalator as safely as was practicable. It is in this particular that the case is differentiated from the *Hillerbrand* decision²⁰ upon which the plaintiff based his claim. In the latter case there had been a violation of the duty to take reasonable precautions for the infant plaintiff's safety.²¹ It cannot be said that the

¹⁶*Central Coal and Coke Co. v. Porter*, 170 Ark. 498, 280 S. W. 12 (1926). *Contra*: *Capp v. City of St. Louis*, 251 Mo. 345, 158 S. W. 616 (1913).

¹⁷*Branan v. Wimsatt*, 298 Fed. 833 (App. D. C. 1924); *Alabama By-Products Corp. v. Cosby*, 217 Ala. 144, 115 So. 31 (1927); *Hayko v. Colorado & Utah Coal Co.*, 77 Colo. 143, 235 Pac. 373 (1925); *Ramsey v. Tuthill Building Material Co.*, 295 Ill. 395, 129 N. E. 127 (1920), 36 A. L. R. 23 (1925); *Swan v. Riverside Bathing Beach*, 132 Kan 61, 294 Pac. 902 (1931); *Jones Savage Lumber Co. v. Thompson*, 233 Ky. 198, 25 S. W. (2d) 373 (1930); *Gulf Refining Co. v. Moody*, 172 Miss. 377, 160 So. 559 (1935); *Garis v. Eberling*, 18 Tenn. App. 1, 71 S. W. (2d) 215 (1934); *Armstrong v. Adair*, 112 Tex. 439, 247 S. W. 843 (1923); *Restatement, Torts* (1934) § 341.

In establishing the standard of care one must bear in mind that the tender age of the child necessitates a greater exercise of precaution. *Hillerbrand v. May Mercantile Co.*, 141 Mo. App. 122, 121 S. W. 326, 328 (1909): "This doctrine is but one phase of the wider doctrine that an owner must keep his premises reasonably safe for the use of people whom he invites to come on them—an application of the general doctrine with special reference to the nature of children, and in accordance with the principle that what constitutes due care in a given instance depends upon the degree of danger to be apprehended."

¹⁸*Kataoka v. May Department Stores*, 28 F. Supp. 3 (S. D. Cal. 1939).

¹⁹The infant plaintiff is a business visitor. *Restatement, Torts* (1934) § 332, comment d.

²⁰*Hillerbrand v. May Mercantile Co.*, 141 Mo. App. 122, 121 S. W. 326 (1909).

²¹*Hillerbrand v. May Mercantile Co.*, 141 Mo. App. 122, 121 S. W. 326, 328 (1909): "This criticism [of the attractive nuisance doctrine] does not concern us in the present case, as the plaintiff was in the store by invitation, and it is the unquestioned law that a person who invited children on his property is liable if he has not used due care to provide for their safety."

two decisions represent divergent interpretations of the doctrine under discussion.

Unfortunate is the previously mentioned conflict regarding the interpretation and applicability of the attractive nuisance doctrine²² for this leads to its present delimitation and rejection.²³ A better understanding will obtain only by a recognition of its real basis. The attractive nuisance doctrine should not be regarded as an exception to any general rule which could be formulated to describe the duty of a landowner to others. Liability should be imposed in those cases where there has been a failure to use due care for the safety of trespassing children, recognizing, in defining the standard of care: (1) the probability of the child's presence; (2) the probability that his childish instincts will lead him to use this potentially dangerous object in a manner threatening injury; (3) the degree to which adequate precautions will impair the utility of the dangerous instrumentality, together with the total economic benefits which might arise from its maintenance; (4) the duty of the child's guardians to teach him to understand and avoid common dangers.

EMERY COX, JR.

EMINENT DOMAIN—RIGHT OF RESTRICTIVE COVENANTEE TO COMPENSATION FOR TAKING OF PROPERTY OF COVENANTOR. [Georgia]

The recent case of *Anderson v. Lynch*¹ involved a suit in equity by owners of lots in a residential subdivision against another lot owner and county authorities for an injunction to restrain the defendants from violating certain covenants and building restrictions. Property owners in this area held under deeds in which the following covenants were included: (1) the property was not to be used in any manner which would constitute a nuisance, or injure the value of any of the neighboring lots; (2) the property was not to be used for store, cemetery, hospital, or sanitarium purposes, but for residential purposes only; (3) the grantor reserved the right to lay and maintain or to authorize property improvements and public utilities, without compensation to any lot owner; (4)

²²This can be explained as arising in part from the opinions of the various courts as regards the liberality with which such a rule should be applied, which liberality in turn is influenced by the wide variations of the several fact situations, and the industrial practicability of increasing burdens upon the landowners.

²³Notes: (1925) 36 A. L. R. 34; (1925) 39 A. L. R. 486; (1926) 45 A. L. R. 98; (1928) 53 A. L. R. 1344; (1929) 60 A. L. R. 1444.

¹3 S. E. (2d) 85 (Ga. 1939).

the grantor, or assigns, and any lot owner was to have the right in event of violation of any of the restrictions, to enforce full compliance therewith by legal proceedings, costs to be borne by the violating party. The county, under its right of eminent domain, was about to take a lot in this residential subdivision for the construction of a public road. These proceedings were instituted to prevent such action.

The court refused to grant injunctive relief and decided further that the adjoining owners had no such property interest in the lot condemned as would entitle them to compensation. In arriving at this conclusion it was held that the restrictive covenants conveyed no property interest;² and that the covenants, if construed as restricting the right of the county to acquire and use any of the property for the purpose of establishing a public road, would be contrary to public policy.³

The Fourteenth Amendment of the Constitution of the United States, declaring that no state shall deprive any person of his property without due process of law, has been construed to prevent the taking of private property for public use without just compensation;⁴ and most state constitutions contain a clause requiring that compensation be paid for any private property taken for public use.⁵ Admittedly there was a taking in the principal case, for which the defendant, who was owner of the lot actually to be used for the road, received ample recompense. But the first issue before the court was whether or not the plaintiffs, the adjoining property owners holding under the restrictive covenants, had such property interest in the condemned lot as would entitle them to compensation.

According to an early view, only a personal interest was created by the restrictive covenant.⁶ While there is a difference of opinion on the issue, the majority of the courts appear to hold that the covenants create

²In *Hancock v. Gumm*, 151 Ga. 667, 107 S. E. 872, 16 A. L. R. 1003 (1921), restrictive agreements were called reciprocal negative easements or covenants.

³The court also held that no emergency, as the complainants had contended, was necessary to give the county authority to establish the public road. This contention was decided by an earlier Georgia case, *Barnard v. Durrence*, 22 Ga. App. 8, 95 S. E. 372 (1918), which held that the proposed alteration need not be a public necessity, as it was sufficient to show the improvement to be of public utility.

⁴*Chicago, B. & Q. Ry. v. City of Chicago*, 166 U. S. 266, 17 S. Ct. 581, 41 L. ed. 979 (1879).

⁵For example, Ill. Const. Art. II, § 13: "Private property shall not be taken or damaged for public use without just compensation." Similar provisions appear in Conn. Const. Art. First, § 11; Fla. Const. Art. I, § 14; Mass. Const. Part First, § X; Va. Const. Art. I, § 6, and Art. IV, § 58.

⁶*Tulk v. Moxhay*, 2 Ch. 774 (1848); Pound, *The Progress of the Law* (1919) 33 *Harv. L. Rev.* 813.

such an interest in land as comes under the Statute of Frauds.⁷ By the weight of American authority in eminent domain cases a property right is acquired, and owners of land for whose benefit the restrictions were imposed are entitled to receive remuneration.⁸ The English rule similarly grants compensation for property taken under the Land Clauses Consolidation Act.⁹

Yet the decision of the Georgia court in the present instance has an imposing body of authority in support of it. The court relied to a large extent upon the federal case of *United States v. Certain Lands*.¹⁰ But

⁷*Marsh v. Cheeseman*, 221 Ala. 390, 128 So. 796 (1930); *Scheuer v. Britt*, 217 Ala. 196, 115 So. 237 (1928); *Sprague v. Kimball*, 213 Mass. 380, 100 N. E. 622, Ann. Cas. 1914A 431, 45 L. R. A. (N. S.) 962 (1913); *Pepper v. West End Development Co.*, 211 N. C. 166, 189 S. E. 628 (1937); *Moore v. Shore*, 206 N. C. 699, 175 S. E. 117 (1934); *Davis v. Robinson*, 189 N. C. 589, 127 S. E. 697 (1925); *Miller v. Babb*, 263 S. W. 253 (Tex. Comm. App. 1924), 3 Tex. L. Rev. 101; *Florsheim v. Reinberger*, 173 Wis. 150, 179 N. W. 793 (1920). Contra: *Thornton v. Schobe*, 79 Colo. 25, 243 Pac. 617 (1925); 24 Mich. L. Rev. 854; *Hall v. Solomon*, 61 Conn. 476, 23 Atl. 876 (1892); *Hegna v. Peters*, 199 Ia. 259, 201 N. W. 803 (1925). Some cases enforce the oral covenants without noticing the possibility of a Statute of Frauds question: See *Allen v. City of Detroit*, 167 Mich. 464, 133 N. W. 317 (1911) 36 L. R. A. (N. S.) 890 (1912).

⁸*Town of Stamford v. Vuono*, 108 Conn. 359, 143 Atl. 245 (1928) (complainant's property was adjacent to that condemned by the city for construction of a school; court held that a governmental agency might use the land in violation of the restrictive covenant, but that the complainant was given a right to compensation); *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 242, 117 N. E. 244 (1917), L. R. A. 1918B 55; *Ladd v. City of Boston*, 151 Mass. 585, 24 N. E. 858 (1890) (adjoining owner was entitled to damages from the city for the taking of property subject to the easement and erecting buildings thereon near his lot, contrary to the provisions of the agreement); *Johnstone v. Detroit, G. H. & M. Ry.*, 245 Mich. 65, 222 N. W. 325 (1928) (owners of property in subdivision where property was restricted to residences of certain requirements, were qualified for recompense on the taking of part of such subdivision for railroad purposes); *Allen v. City of Detroit*, 169 Mich. 464, 133 N. W. 317 (1911), 36 L. R. A. (N. S.) 890 (1912) (building of fire station on restricted lots entitled adjoining owners to compensation); *Peters v. Buckner*, 288 Mo. 618, 232 S. W. 1024 (1921), 17 A. L. R. 543 (1922) (where lots were sold subject to building restrictions, the rights conferred by such restrictions were property rights which could not be taken without just compensation being paid therefor); *Hayes v. Waverly & P. Ry.*, 51 N. J. Eq. 345, 27 Atl. 648 (1893) (owners were granted an injunction for restraint of prohibited use by railroad); *Flynn v. New York, W. & B. Ry.*, 218 N. Y. 140, 112 N. E. 913, 914-915 (1916) (court held: "These restrictive covenants create a property right and make direct and compensational the damages which otherwise would be consequential and noncompensational. . . . The right of a property owner is measured by the depreciation in value which his land sustains, including such depreciation as will be sustained by reason of the use to which the railroad puts its property, the difference in value between his land with and without the railroad in operation.")

⁹*Warr & Co. v. London City Council* [1904] 1 K. B. 713; *Long Eaton Recreation Grounds Co. v. Midland Ry. Co.* [1902] 2 K. B. 574, 18 T. L. R. 743; *Kirby v. School Board for Harrogate* [1896] 1 Ch. 437. These cases indicate that in England a restrictive covenant is regarded as a right in land.

¹⁰112 Fed. 622 (C. C. D. R. I. 1899). Lots were conveyed by deeds containing pro-

the Circuit Court in that case did not definitely negative the majority view that the adjoining land owners are possessed of a property interest. It merely stated that the use for which the government condemned the land was not contrary to the restriction imposed, conceding that the adjoining owners had a right in the nature of an easement.¹¹ California courts have assumed a more rigid stand concerning equitable servitudes than did the federal court, denying that a building restriction is a positive easement or right in land, and defining it merely as a right enforceable in equity as between the parties to the contract.¹² In like manner courts in Texas have said that the restrictions conveyed no affirmative rights.¹³ There is other authority in accord with the principal case, supporting the view that no property interest is created.¹⁴

In some cases the courts have avoided the necessity of taking a definite position on the question of property interest, by holding that the use to which the condemning party intended to put the property was not really in conflict with the covenant.¹⁵

In the light of these conflicting authorities, the formation of a uniform rule concerning the nature of the interest involved appears un-

hibitions of their use for certain purposes, such as the maintenance of a slaughter house, smith shop, steam engine, distillery, brewery, saloon, etc. The United States condemned a portion of such lots as a site for a sea coast fortification. The court was of the opinion that the future possibility of the government's erecting any slaughter house or steam engine did not constitute a present invasion of any rights of the other lot owners, whose property was not taken. It further held that such restrictive conditions could be construed as applying only to the use of property by private individuals for private purposes.

¹¹New Jersey, in *Hayes v. Waverly & P. Ry.*, 51 N. J. Eq. 345, 27 Atl. 648, 650 (1893), held that the restriction "is the right of amenity in the land . . . in the nature of an easement or servitude, appurtenant to the remaining land." Missouri has likewise identified the interest as an easement: *Peters v. Buckner*, 288 Mo. 618, 232 S. W. 1024 (1921), 17 A. L. R. 543 (1922).

¹²*Werner v. Graham*, 181 Cal. 174, 183 Pac. 945 (1919); *Friesen v. City of Glendale*, 79 Cal. 498, 288 Pac. 1080 (1930), 19 Cal. L. Rev. 58.

¹³*City of Houston v. Wynne*, 279 S. W. 916 (Tex. Civ. App. 1926). It is interesting to note that the same court two years earlier had held that the restrictive covenants raised an interest in land within the meaning of the Statute of Frauds. See *supra*, note 7.

¹⁴*Hazen v. Moses*, 69 F. (2d) 842 (App. D. C. 1934); *Sackett v. Los Angeles School District*, 118 Cal. App. 254, 5 P. (2d) 23 (1931); *Cook v. Murlin*, 202 App. Div. 552, 195 N. Y. S. 793 (1922); *Ward v. Cleveland Short Line Ry.*, 92 Ohio St. 471, 112 N. E. 507 (1915); *Doan v. Cleveland Short Line Ry.*, 92 Ohio St. 461, 112 N. E. 505 (1915); *Raleigh Court Corp. v. Faucett*, 140 Va. 126, 124 S. E. 433 (1924).

¹⁵*United States v. Certain Lands*, 112 Fed. 622 (C. C. D. R. I. 1899) (possibility that the government might in the future erect and maintain some forbidden structure did not constitute a present invasion); *Friesen v. City of Glendale*, 79 Cal. 498, 288 Pac. 1080 (1930) (construction of a city street was not inconsistent with "residential purposes").

likely. But it does seem only just, regardless of whether he acquires a so-called "property interest" or not, that the covenantee-owner of property should be recompensed for the taking of an interest (and clearly there is an interest of some sort) that he has in the land of another by reason of such covenants. The power of eminent domain is said to authorize the taking of "property" for public use. If it also covers rights in land not technically considered "property," the portion of eminent domain power authorizing "just compensation" should similarly extend to those rights.

For present purposes, it seems clear that the interest created by restrictive covenants is similar to that acquired in easements for light or air. Concerning the latter, the Supreme Judicial Court of Massachusetts in *Ladd v. City of Boston* said:

"The right to have land unbuilt upon for the benefit of light, air, etc., of neighboring land, may be made an easement, within reasonable limits, by deed."¹⁶

Such an easement may be created by words of covenant as well as by words of grant.¹⁷ *Allen v. City of Detroit*¹⁸ held a building restriction to be in the nature of an easement, building on a city as well as an individual. The Michigan court's position is made clear by the following language:

"Building restrictions are private property, an interest in real estate in the nature of an easement, go with the land, and a property right of value, which cannot be taken for public use without due process of law and compensation therefor; the validity of such restriction not being affected by the character of the parties in interest."¹⁹

As is indicated, owners of air and light easement rights in land are concededly entitled to compensation when the servient estate is taken under an eminent domain power. In view of the recognized similarity of the rights of the easement holder and of the restrictive covenantee, the latter should be accorded the same protection.

The second issue before the court was that of public policy and its relation to the issues. In the opinion rendered, a covenant burdening the free right of the county to acquire and use the property was said to be contrary to public interest and void. As far as acquiring the prop-

¹⁶151 Mass. 585, 24 N. E. 858, 859 (1890).

¹⁷Hogan v. Barry, 143 Mass. 538, 10 N. E. 253 (1887).

¹⁸167 Mich. 464, 133 N. W. 317 (1911), 36 L. R. A. (N. S.) 890 (1912).

¹⁹Allen v. City of Detroit, 167 Mich. 464, 133 N. W. 317, 320 (1911), 36 L. R. A. (N. S.) 890, 894 (1912).

erty is concerned, a government's absolute right of eminent domain is well established, and no covenant can overcome it.²⁰ Covenants are valid as between the parties holding under them, but cannot bar the sovereign's power. However, they may make condemnation utterly impracticable by materially increasing the damages, if damages be allowed. Yet, if value may be added by improvements even to the point of hindering the operation of eminent domain, it would logically follow that this may also be done by covenants. The authority as to whether public policy demands a refusal of compensation to covenantees is varied and conflicting.²¹ In reason, however, in contradiction to the present construction, a holding denying one compensation when he has been damaged in the use of his own property by the actual taking of his covenantor's land would seem not only contrary to policy but also to both federal and state constitutions. For one to acquire, through additional expenditure, land in a restricted area and then have the value of his property decreased by condemnation proceedings giving rise to a subsequent forbidden use on nearby lots, appears to be a violation of the protection which the constitutions afford.

Aside from the technical controversy of whether or not a property interest is created by restrictive covenants, it is conceivable that the courts which are in accord with the instant decision have refused to admit the creation of a property interest because of the additional burden which would be placed upon both the condemning governmental agency and also the court. Undoubtedly a holding to the contrary would produce an increasing number of compensatory demands for the taking of other supposed interests. However, if the constitutions demand that every kind of right in land must be compensated for, the courts should as far as possible assume the numerous administrative difficulties which arise in the deciding of eminent domain cases.

FRANK C. BEDINGER, JR.

²⁰All property is subject to eminent domain. *United States v. Land in Pendleton County, W. Va.*, 11 F. Supp. 311 (D. W. Va. 1935); *In re Forsstrom*, 44 Ariz. 472, 38 P. (2d) 878 (1934); *Brimmer v. City of Boston*, 102 Mass. 19 (1869).

²¹*United States v. Certain Lands*, 112 Fed. 622 (C. C. D. R. I. 1899) (decision refusing compensation was largely founded on public policy; but the case was reviewed by the Circuit Court of Appeals in *Wharton v. United States*, 153 Fed. 876 (C. C. A. 1st, 1907), which ignored the public policy ground completely); *Sackett v. Los Angeles School District*, 118 Cal. App. 254, 5 P. (2d) 23, 25 (1931) ("Public policy has been denominated as a vague and uncertain guide at best, . . . but instances arise that call for its application"). *Flynn v. New York, W. & B. Ry.*, 218 N. Y. 140, 112 N. E. 913 (1916) (restrictive building covenants are not invalid as against public policy). *Doan v. Cleveland Short Line Ry.*, 92 Ohio St. 461, 112 N. E. 505 (1915).

INSURANCE—CONSTRUCTION OF TERMS “PARTICIPATE IN AVIATION OR AERONAUTICS” AND “ENGAGE IN AVIATION OR AERONAUTICS” IN INSURANCE POLICIES. [Federal]

In *Massachusetts Protective Association v. Bayersdorfer*,¹ the insured was killed in the crash of a commercial plane in which he was a passenger. An insurance policy had been issued to him in 1933 containing a clause which read: “This policy does not cover death . . . sustained as the result of participation in aviation, aeronautics. . . .” In a suit upon the policy the District Court² rejected the insurance company’s contention that decedent’s death resulted from participation in aviation or aeronautics and held that the company was liable. On appeal the decision was affirmed, the Circuit Court of Appeals holding that “participation in aviation or aeronautics” meant having something to do with controlling the flight of the plane, and that the insured as a passenger had no such part in the flight.

The first cases in this field were decided early in the 1920’s before the growth of commercial aviation.³ In each of these the policy sued on contained a clause which provided that it did not cover death “sustained as a result of participation in aeronautics or aviation.” Contrary to the view adopted in the principal case the courts held that the clause prevented recovery by the beneficiary of a person who had been killed while a passenger in the plane.⁴ Any person flying in a plane was said to be participating in aeronautics or aviation, whether he exercised any control over the plane or not. This must have been the insurer’s intention, the courts concluded, because even the casual rider was in such danger that he was too great a risk for insurance. During the later 1920’s, however, a different result was reached in several suits upon policies which exempted from coverage “death sustained while the insured was engaged in aviation or aeronautics.”⁵ In allowing the beneficiary to

¹105 F. (2d) 595 (C. C. A. 6th, 1939).

²20 F. Supp. 489 (S. D. Ohio 1937).

³*Travelers Ins. Co. v. Peake*, 82 Fla. 128, 89 So. 418 (1921); *Meredith v. Business Men’s Acc. Asso. of America*, 213 Mo. App. 688, 252 S. W. 976 (1923); *Bew v. Traveler’s Ins. Co.*, 96 N. J. L. 533, 112 Atl. 859, 14 A. L. R. 983 (1921).

⁴See cases cited supra, n. 3. See *Vance on Insurance* (2d ed. 1930) 901: “If the policy excepts the risk of the insured, ‘while participating in aeronautics,’ his injury or death on account of riding as a passenger in an airplane is generally held to be within the exception, but not so if the language of the exception is ‘while engaged in aviation.’”

⁵*Gits v. N. Y. Life Ins. Co.*, 32 F. (2d) 7 (C. C. A. 7th, 1929), cert. denied, 280 U. S. 564, 50 S. Ct. 24, 74 L. ed. 618 (1927); *Benefit Ass’n. of Railroad Employees v. Hayden*, 175 Ark. 565, 299 S. W. 995 (1927), 57 A. L. R. 622 (1928); *Price v. Prudential Life*

recover in these latter cases, the courts held that to engage in aviation involves something more than riding as a passenger in an airplane. A person is not "engaged in aviation," they reasoned, unless he is taking an active part in the operation of the plane, or unless there is an indication of an intended continuous and occupational relationship.

Again during the present decade there have been several cases in which the beneficiary has been denied recovery for the insured passenger's death or injury in an airplane crash. In one of these cases⁶ the policy contained a clause which exempted the insurer from payment if the loss resulted from "participation in aeronautics." The court, in this case, was content to rely on the authority of the earlier cases.⁷ Recovery was denied in three other cases⁸ on the basis of the additional policy phrase "as a passenger or otherwise." Properly enough it was said that this provision clears up the ambiguity and shows that the exemption was intended to exclude from coverage one who was a passenger as well as one who takes an active part in the operation of the plane.

In the middle of the 1930's, the courts, however, made an abrupt about-face. Thus, in 1935 a federal court allowed the beneficiary to recover double indemnity on a policy which contained the provision that the company should not be liable for double indemnity for death resulting from "participation in aeronautics."⁹ The court said:

"Aeronautics is defined in the New Century dictionary as 'the science or art of aerial navigation'. . . . But one who rides in the plane for the sole purpose of going some place, of being transported by it as a passenger, is not, we think, in the absence of specific words requiring such construction, participating in aeronautics. . . . Now, one may know nothing of the science or art, have no interest in the mechanism, and no control over it, but may utilize it as a means of transportation. The terms must be

Ins. Co. of America, 98 Fla. 1044, 124 So. 817 (1929); Masonic Acc. Ins. Co. v. Jackson, 200 Ind. 472, 164 N. E. 628, 61 A. L. R. 840 (1929); Flanders v. Benefit Ass'n. of Railroad Employees, 226 Mo. App. 143, 43 S. W. (2d) 973 (1931); Peters v. Prudential Life Ins. Co., 133 N. Y. Misc. 780, 233 N. Y. S. 500 (1929).

Italics in quoted policy provision were supplied.

⁶Sneddon v. Mass. Protective Ass'n., 39 N. M. 74, 39 P. (2d) 1023 (1935).

⁷Travelers Ins. Co. v. Peake, 82 Fla. 128, 89 So. 418 (1921); Bew v. Travelers Ins. Co., 95 N. J. L. 533, 112 Atl. 859 (1921).

⁸Goldsmith v. N. Y. Life Ins. Co., 69 F. (2d) 273 (C. C. A. 8th, 1934), cert. denied, 292 U. S. 650, 54 S. Ct. 860, 78 L. ed. 1500 (1933); Head v. N. Y. Life Ins. Co., 43 F. (2d) 517 (C. C. A. 10th, 1930); Beveridge v. Jefferson Standard Life Ins. Co., 197 S. E. 721 (W. Va. 1938).

⁹Gregory v. Mutual Life Ins. Co. of N. Y., 78 F. (2d) 522 (C. C. A. 8th, 1935), cert. denied, 296 U. S. 635, 56 S. Ct. 157 (1935).

considered in the light of these known revolutionary changes and developments in the art."¹⁰

The conclusion reached was that the insurance company, by failing to make a clear expression as to whether a passenger was intended to be covered, left an ambiguity in the policy, which must be construed most strongly against the insurer. The preceding year the Supreme Court of Arkansas decided this question in the same manner.¹¹ In five later cases, involving the same issue ¹² the clause in the policy denied recovery for "participation in aeronautics," and in all of these cases the beneficiary was allowed to recover. Four of these cases either expressly or in effect followed *Gregory v. Mutual Life Ins. Co. of N. Y.*,¹³ the decision representing the first change of opinion in the federal courts, thus resting their holdings on the proposition that "participation in aeronautics" involves some control over the operation of the plane. The other decision laid more stress on the reasoning that the clause was an artificial one of ambiguous content, the court proceeding to resolve the ambiguity in favor of the insured.¹⁴ The court pointed out that since the number of persons who navigate planes is very few in comparison to the number of passengers carried, and since it is reasonable to believe that the insurance companies will solicit the potential passengers for insurance, the insurer may very well not have meant to exclude passengers from coverage.¹⁵ The court deemed it significant that the word "passenger" was left out of the policy, as this omission was indicative of a desire of the companies not to cut down the number of persons to whom they could sell insurance. If the word "passenger" had been present, the court would have known that the company did not want to insure any people who use planes as passengers and thus the present ambiguity would have been removed.

¹⁰78 F. (2d) 522, 523-524 (C. C. A. 8th, 1935), cert. denied, 296 U. S. 635, 56 S. Ct. 157 (1935).

¹¹Missouri State Life Ins. Co. v. Martin, 188 Ark. 907, 69 S. W. (2d) 1081 (1934); Martin v. Mutual Life Ins. Co. of N. Y. 189 Ark. 291, 71 S. W. (2d) 694 (1934).

¹²Mutual Ben. Health & Acc. Ass'n. v. Bowman, 99 F. (2d) 856 (C. C. A. 8th, 1938); Marks v. Mutual Life Ins. Co. of N. Y., 96 F. (2d) 267 (C. C. A. 9th, 1938); Swasey v. Mass. Protective Soc., 96 F. (2d) 265 (C. C. A. 8th, 1938); Mutual Ben. Health & Acc. Ass'n. v. Moyer, 94 F. (2d) 906 (C. C. A. 9th, 1938); Chappell v. Commercial Casualty Ins. Co., 197 S. E. 723 (W. Va., 1938).

¹³78 F. (2d) 522 (C. C. A. 8th, 1935), cert. denied, 296 U. S. 635, 56 S. Ct. 157 (1935).

¹⁴Mutual Ben. Health & Acc. Ass'n. v. Moyer, 94 F. (2d) 906 (C. C. A. 9th, 1938).

¹⁵The same general idea appears more casually in *Gregory v. Mutual Life Ins. Co. of N. Y.*, 78 F. (2d) 522, at 524 (C. C. A. 8th, 1935), cert. denied, 269 U. S. 635, 56 S. Ct. 157 (1935), wherein the court makes mention of the fact that nearly a million passengers were then being carried yearly in commercial planes, and that insurance companies know that the policy holders will be included among person so carried.

A comparative consideration of the policy phrases "participate" or "engage" in "aeronautics" or "aviation" reveals no true distinction between the meanings of the terms.¹⁶ In the Arkansas case of *Missouri State Life Ins. Co. v. Martin*, already mentioned, a concurring justice expressed a sound opinion as to the meaning of these words when he said:

"The distinction thought by the court to exist between 'engage in aeronautics' and 'participation in aviation' may be apparent to, and approved by, those learned in the niceties of the language and accustomed to its precise use, but it is to be doubted whether these hairsplitting and subtle distinctions would occur to, or be understood by, the majority of the thousands of persons who seek insurance against the many hazards to life and limb which are likely to occur to the most prudent and fortunate. Words and phrases used in insurance policies should be construed by their meaning as used in the ordinary speech of the people and not as understood by scholars."¹⁷

Thus, whichever words the policy happens to use, the process of interpretation and the result reached should be the same.

Before the 1920's, because flying was so dangerous, the insurance companies did not want to take the risk of insuring people riding in planes in any capacity. Therefore the words "participate" and "engage" were not ambiguous, as the companies must have meant to exclude everybody hazarding airplane riding in any manner, and the public should have so understood. By the 1930's, however, flying had become so much safer that the companies were no longer required to take materially greater risks in insuring people merely riding occasionally in planes. Thus, whether in the policies issued during this era the insurers intended to exclude passengers from coverage is doubtful, and the words "participate" and "engage" become ambiguous. The terms in the policies being ambiguous, the courts following general insurance law should construe them against the insurers. This interpretation works no great hardship on the companies for if they want to exclude passengers, the policies should expressly so provide.¹⁸ In fact, since 1934 the

¹⁶See discussion in *Swasey v. Massachusetts Protective Ass'n.*, 96 F. (2d) 265 at 266 (C. C. A. 9th, 1938). This conclusion is further borne out by the fact that the late cases interpret "participate" to include some measure of control or operation of the plane, which is the same meaning attached to "engage" by the earlier cases, cited *supra*, n. 5.

¹⁷188 Ark. 907, 69 S. W. (2d) 1081, 1084 (1934). This was dictum when first delivered, but was later adopted verbatim in *Martin v. Mutual Life Ins. Co. of N. Y.*, 189 Ark. 291, 71 S. W. (2d) 694, 695 (1934). See *Recent Cases* (1939) 28 Ky. L. J. 92, n. 9.

¹⁸Many insurance companies are now using clauses which specifically state that a

results reached by the courts accord with this reasoning, but the above proposed rationale for arriving at the conclusion has not been clearly recognized. For the courts appear to take the time of suit as determinative of whether the terms used should include passengers or not, whereas the proper time standard for determining the meaning of the words would seem to be the date of issuance of the policy.¹⁹ In many of the opinions, the date of policy is not even mentioned. What the company intended by the insertion of words in a policy in 1920 can only be deduced by considering the meaning of those words under 1920 conditions. Where such a rapidly developing activity as aviation is concerned, the application of 1939 concepts to 1920 statements can, to say the least, hardly be regarded as sound judicial interpretation. G. MURRAY SMITH, JR.

LIBEL AND SLANDER—PRIVILEGE—WORDS SPOKEN TO PLAINTIFF, OVERHEARD BY PERSON HAVING NO INTEREST. [England]

The overwhelming majority of cases, both in this country and in England, hold that even though a qualifiedly privileged defamatory remark be unavoidably or incidentally communicated to a third person, the privilege is not lost, provided such transmission is made without malice and as an incident of the ordinary course of business.¹

passenger is covered by the policy only when: (1) he is riding as a paying passenger, (2) he rides in a licensed plane, (3) the plane is owned by an incorporated passenger carrier, (4) the plane is operated by a licensed pilot, and (5) the plane is operated over routes between definitely established airports. See *Recent Cases* (1939) Ky. L. J. 92, n. 10.

¹⁹In *Marks v. Mutual Life Ins. Co. of N. Y.*, 96 F. (2d) 267 (C. C. A. 9th, 1938), the defendant Insurance Company apparently proposed some such basis for a decision in its favor. However, the court, while considering the argument, decided against the insurer because the policy was issued in 1928, at which date "the time for reconsideration of the earlier views [denying liability under 'participate in aeronautics' clauses] had already arrived." The court's reasoning, though not entirely clear of expression, seems to approximate the approach to the issue recommended by this recent case discussion.

In the closing paragraph of the opinion in the principal case, the progress of modern aviation is pointed out at some length, but the writing judge does not make plain just what significance this fact has in the decision at hand. The concluding observation, "Words, after all, are but labels whose content and meaning are continually shifting with the time", is of course indisputable. But the court is apparently well satisfied to place the current meaning on the words, regardless of whether the contract of the parties which uses the words was entered into recently or remotely. The court's own parting truism is a conviction of such a procedure.

¹*Kroger Grocery and Baking Co. v. Yount*, 66 F. (2d) 700 (C. C. A. 8th, 1933); *Montgomery Ward and Co. v. Watson*, 55 F. (2d) 184 (C. C. A. 4th, 1932); *Walgreen*

The case of *White v. J. and F. Stone Lighting and Radio, Limited*,² decided in 1939 by the English Court of Appeal, however, makes a radical departure from this rule. One of the defendant's directors accused the plaintiff, a manager of a branch office, of taking funds belonging to the company thereby causing a shortage in his accounts. This accusation was overheard by an employee. Later, the director was also heard by another employee to accuse the plaintiff of a shortage. The plaintiff brought an action for wrongful dismissal and slander. The court denied the defendant the right to set up the defense of qualified privilege. The ruling was based upon the proposition, that to be privileged, the publisher must have a legal, social, or moral interest or duty in making the defamatory statement and the person to whom it is made must have a corresponding interest or duty to receive it. Since neither of the employees who overheard the remarks had an interest or duty to receive them, a qualified privilege, it was held, did not exist.

Such a holding does violence to more soundly reasoned decisions. The Court of Appeal based its holding upon the necessity of reciprocity of interest or duty, and required that this reciprocity exist between the publisher and anyone who might hear the defamatory statement, thus making it unnecessary to decide the question whether there was a privilege between the plaintiff and defendant. Other cases, however,

v. Cochran, 61 F. (2d) 357 (C. C. A. 8th, 1932); New York and Porto Rico S. S. Co. v. Gracia, 16 F. (2d) 734 (C. C. A. 1st, 1926); Parr v. Warren—Lamb Lumber Company, 58 S. D. 389, 236 N. W. 291 (1931); Toogood v. Spyring, 1 Cr. M. & R. 181, 193-4, 149 Eng. Rep. 1044, 1050 (1834): "If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits. . . . I am not aware that it was ever deemed essential to the protection of such a communication that it should be made to some person interested in the inquiry, alone, and not in the presence of a third person. If made with honesty of purpose to a party who has any interest in the inquiry . . . the simple fact that there has been some casual bye-stander cannot alter the nature of the transaction. The business of life could not well be carried on if such restraints were imposed upon this and similar communications, and if, on every occasion in which they were made, they were not protected unless strictly private. In this class of communications is, no doubt, comprehended the right of a master bona fide to charge his servant for any supposed misconduct in his service, and to give him admonition and blame; and we think that the simple circumstance of the master exercising that right in the presence of another, does by no means of necessity take away from it the protection which the law would otherwise afford."; Edmondson v. Birch and Co. Ltd. and Horner [1907] 1 K. B. 371; Roff v. British and French Chemical Mfg. Co. and Gibson [1918] 2 K. B. 677; Osborn v. Thomas Boulter and Son [1930] 2 K. B. 226; Harper, Torts (1933) § 252; Salmond, Torts (8th ed. 1934) § 113; Restatement, Torts (1938) § 604, comment c. Notes: (1909) 20 L. R. A. (N. S.) 364; L. R. A. 1915 E. 131, (1922) 18 A. L. R. 776.

²White v. J. and F. Stone Lighting and Radio Limited, 55 T.L.R. 949 (C.A. 1939).

seem not to hold that reciprocity must exist between the publisher and the casual auditor, but that it is sufficient if such is found between the publisher and the person directly addressed.³

In reaching the novel result of the principal case, the court attempted to distinguish the earlier case of *Toogood v. Spyring*,⁴ decided by the Court of Exchequer. It will be remembered that in the *Toogood* case, the defendant, the Earl of Devon's tenant, charged the plaintiff with breaking open a cellar door with a chisel, and with getting drunk. The accusation was made in the presence of a person named Taylor. The court held that the statement made to the plaintiff, though in the presence of Taylor, fell within the class of communications called privileged. The Court of Appeal in the instant case seems to distinguish the earlier decision on the ground that the principle set out in that case did not apply to its facts; and while the principle was sound, neither did it govern in the case at bar on similar facts.⁵ It is exceedingly difficult to follow the court's attempted distinction. The decision is in fact a departure from *Toogood v. Spyring*, although the opinion expressly states that ". . . it would need more than this occasion to overrule so famous a case as that. . . ."⁶

It is difficult to reconcile the decision in the principal case with the demands of normal business practice. In fact the court in the *Toogood* case must have had such considerations in mind when it said that: "The business of life could not well be carried on if such restraints were im-

³*Montgomery Ward and Co. v. Watson*, 55 F. (2d) 184 (C. C. A. 4th, 1932); *Walgreen v. Cochran* 61 F. (2d) 357 (C. C. A. 8th, 1932); *New York and Porto Rico S. S. Co. v. Gracia*, 16 F. (2d) 734 (C. C. A. 1st, 1926); *Edmondson v. Birch and Co., Ltd. and Horner*, [1907] 1 K. B. 371; *Roff v. British and French Chemical Mfg. Co. and Gibson*, [1918] 2 K. B. 677; *Osburn v. Thomas Boulter and Son*, [1930] 2 K. B. 226.

⁴*Toogood v. Spyring*, 1 Cr. M. & R. 181, 149 Eng. Rep. 1044 (1834).

⁵*White v. J. and F. Stone Lighting and Radio Limited*, 55 T. L. R. 949, 950 (C. A. 1939): "The only reason for suggesting that 'the person to whom it is made' can include the plaintiff rests on the facts of the old case of *Toogood v. Spyring*. . . . I do not think that it has ever been pointed out, as Mr. Gallop has pointed out to us here, that, in fact, so far as one can see, the person to whom one of the statements complained of was published in that case was not the person to whom the speaker had a duty to communicate or the person who had an interest in receiving that communication, and it may be that the only person who had such an interest was the plaintiff who was complaining of the words used. For that reason it may be—I do not say that it is, because it would need more than this occasion to overrule so famous a case as that—that the general statement of the law, which has been approved over and over again in subsequent cases, when applied to the actual facts of that case on the question of privileged occasion did not, upon those facts, arise. That does not make the general statement of the principle of law any less accurate or any less deserving than it has been found to be by subsequent quotation and approval."

⁶*White v. J. and F. Stone Lighting and Radio Limited*, 55 T. L. R. 949, 950 (C. A. 1939).

posed upon this and similar communications, and if, on every occasion in which they were made, they were not protected unless strictly private."⁷ Further, it would seem that sufficient protection is presently accorded the employee's interest by the rule which imposes a liability upon the employer if he gives undue notoriety to his remarks.⁸ For these reasons, it is unlikely that the principal case will be followed by other courts.

FORREST WALL

NEGOTIABLE INSTRUMENTS—EFFECT OF CONFESSION OF JUDGMENT CLAUSE ON NEGOTIABILITY. [Federal]

In the case of *United States v. Nagorney*,¹ the Federal District Court held a note negotiable which contained an acceleration clause, and a clause authorizing confession of judgment. This last provision read: "And to secure payment of said amount, we . . . authorize, irrevocably, any attorney of any court of record to appear for us in such court, in term time or vacation, at any time hereafter and to confess a judgment without process in favor of the holder of this note for such amount as may appear to be unpaid thereon, together with costs and reasonable attorney's fees. . . ." It was contended that this clause authorizing confession of judgment, "any time hereafter," rendered the note non-negotiable because the Kansas Negotiable Instruments Law² only authorized a confession of judgment after maturity. The court, however, by a process of judicial construction held the note negotiable. The theory of the ruling was that the words, "for such amount as may appear to be unpaid thereon" so qualify the words, "at any time hereafter and to confess a judgment," that the clause, as a whole, constitutes a power to confess judgment only upon condition that it is not paid at maturity, the provisions thus falling within the express approbation of the Kansas statute.

⁷Toogood v. Spyring, 1 Cr. M. & R. 181, 194, 149 Eng. Rep. 1044, 1050 (1834).

⁸Sheftall v. Central of Ga. Ry., 123 Ga. 589, 51 S. E. 646, 648 (1905): "To make the defense of privilege complete in an action of slander or libel, good faith, an interest to be upheld, a statement properly limited in its scope to this purpose, a proper occasion and publication in a proper manner and to proper parties only, must appear. The absence of any one or more of these constituent elements will, as a general rule prevent the party from relying upon the privilege.;" Ivins v. Louisville & N. R. Co., 37 Ga. App. 684, 141 S. E. 423 (1928); Restatement, Torts (1938) § 604, comment a.

¹28 F. Supp. 298 (D. Kan. 1939).

²Kan. Gen. Stat. (Corrick, 1935) c. 52 § 205 (2). This subsection of the Kansas statute is identical with subsec. 5 (2) of the Negotiable Instruments Law set out hereafter.

Some few courts have held, as did this one, that a clause authorizing confession of judgment "at any time hereafter" does not defeat negotiability,³ but the general holding has been that such a provision destroys the negotiability of the instrument.⁴ The courts have reached the latter conclusion by a literal interpretation of section 5 (2) of the Uniform Negotiable Instruments Law. Section 5 reads:

"An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which (1) authorizes the sale of collateral securities in case the instrument be not paid at maturity; or (2) authorizes a confession of judgment if the instrument be not paid at maturity; or (3) waives the benefit of any law intended for the advantage or protection of the obligor; or (4) gives the holder an election to require something to be done in lieu of payment of money. But nothing in this section shall validate any provision or stipulation otherwise illegal."

This strict interpretation of section 5 (2) proceeds on the theory that any promise to do anything in addition to the payment of money renders the note non-negotiable unless the additional promise falls within the expressed exceptions authorized by section 5 of the Act. It is submitted that this strict interpretation of section 5 has led either to a destruction of the negotiability of many otherwise negotiable notes or to a questionable process of construction in order to uphold the negotiable character of the instruments. Unless the courts are obliged to adhere absolutely to the literal wording of a declaratory statute, without regard to the purposes of the Act as disclosed by reading the whole statute together, it is believed that the unfortunate results flowing from such a construction can be obviated. Realizing the obvious need in our commercial world for paper that moves without impediment it is believed that section 5 should be interpreted with the broad general purposes of the Act in view. The types of additional promises which are expressly approved by that section should be taken as examples of permissible "luggage" rather than as an exclusive list of valid promises. In other words, promises which are not foreign to the object of the note but which are incidental to its normal life and tend to make its payment

³Stewart v. Public Industrial Bank, 85 Colo. 546, 277 Pac. 782 (1929); Jones v. Turner, 249 Mich. 403, 228 N. W. 796 (1930); McDonald v. Mulkey, 32 Wyo. 144, 231 Pac. 662 (1924). In Beard v. Baxter, 258 Ill. App. 340 (1930) such a clause was held not to defeat negotiability under a peculiar wording of the Illinois statute.

⁴For collected cases see Brannon, Negotiable Instruments Law (Beutel's ed. 1938) 151; note (1938) 117 A. L. R. 673.

more certain should be approved under section 5. Although it would be absurd to hold negotiable a promise to pay money which carries an additional promise to paint a fence, plow a garden, or deliver cotton, because such promises are completely unrelated to the main purpose of the note, yet promises to deposit additional security if original security depreciates, or to pay taxes, costs, or attorney's fees are all ancillary obligations which are inherent in a note and facilitate its collection. The latter type of promises should be held to be impliedly approved by section 5. Their omission should not be held to imply disapproval. By such an interpretation it would make no difference in the question of negotiability whether the confession of judgment was to take place "at any time hereafter" or only in case of default. Such a view does not insinuate that all jurisdictions should hold all confession of judgment clauses to be enforceable. The negotiability of the note having been saved, the courts could treat the confession of judgment clauses as they see fit in each case, as is done with the provisions to pay attorney's fees.⁵ If a particular clause is found to be objectionably harsh to the debtor, it can be held either wholly or partially unenforceable, the negotiability of the note at the same time being upheld. This matter should be recognized as going to the question of *legality* rather than *negotiability*.

The federal court in the case under consideration has arrived at a desirable conclusion in upholding the negotiability of the instrument, but the result has proceeded from a questionable and roundabout mode of construction. The court made its own difficulty by a narrow construction of section 5 (2). It would seem that the same result could have been reached by simply interpreting section 5 as setting forth an exemplary rather than an exclusive list of permissible promises.

EDWIN J. FOLTZ

PARENT AND CHILD—TORT ACTION BY ADOPTED CHILD AGAINST ADOPTIVE PARENT. [Arkansas]

The case of *Brown v. Cole*,¹ decided recently by the Arkansas Supreme Court, presents a situation in which an adopted son is suing his

⁵The following cases have held void stipulations for attorney's fees but have upheld the negotiability of the note: *Bank of Holly Grove v. Sudbury*, 121 Ark. 59, 180 S. W. 470 (1915), Ann. Cas. 1917D 373; *Leach v. Urshel*, 112 Kan. 629, 212 Pac. 111 (1923); *Commerce Trust Co. v. Snelling* 113 Kan.-272, 214 Pac. 882 (1923); *Commercial Credit Co. v. Nisen*, 49 S. D. 303, 207 N. W. 61, 51 A. L. R. 287 (1926).

The following cases have upheld reasonable attorney's fees: *Adolph Ramish Inc. v. Woodruff*, 2 Cal. (2d) 190, 40 P. (2d) 509, 96 A. L. R. 1146 (1934); *National Park Bank of New York v. American Brewing Co.*, 79 Mont. 542, 257 Pac. 436 (1927).

¹129 S. W. (2d) 245 (Ark. 1939).

adoptive father (both through their administrators) for injuries resulting from a tort inflicted upon the son by the father. In the case it appeared that on the death of his mother, the boy was adopted by his step-father. Some six years after his adoption, the boy began suffering intense pain and a few days later died of strychnine poisoning. An administrator appointed for his estate brought an action against the adoptive father for pain and suffering endured by the son as a result of the poisoning. A few days after the suit was filed the father committed suicide. The court concluded that sufficient evidence had been introduced to prove that the father was guilty of poisoning his son, and despite the relationship of adoptive parent and child, allowed recovery of damages from the father's estate.

The general rule is that a natural child may not maintain an action to recover damages from a parent for a tort inflicted by the parent upon the child.² Although this view has been departed from occasionally in the last few years,³ it is still adhered to by the majority of courts.⁴ The rationale of the principle denying tort liability is to be found in the conviction of the courts that to hold otherwise would promote dissension within the family:

"The family is a social unit. . . . The family fireside is a place of repose and happiness. . . . [Society] has a deep interest in maintaining in its integrity and stability the natural conception of the family unit. This imputes authority to the parent and requires obedience of the child. To question the authority of the parent or to encourage the disobedience of the child is to impair the peace and happiness of the family and undermine the wholesome influence of the home. To permit a child to maintain an action in tort against the parent is to introduce discord and con-

²Trudell v. Leatherby, 212 Cal. 678, 300 Pac. 7 (1931); Mesite v. Kirchenstein, 109 Conn. 77, 145 Atl. 753 (1929); Bulloch v. Bulloch, 45 Ga. App. 1, 163 S. E. 708 (1932); Elias v. Collins, 237 Mich. 175, 211 N. W. 88, 52 A. L. R. 1118 (1926); Lund v. Olson, 183 Minn. 515, 237 N. W. 188 (1931); Reingold v. Reingold, 115 N. J. L. 532, 181 Atl. 153 (1935); Canen v. Kraft, 41 Ohio App. 120, 180 N. E. 277 (1931); Matarese v. Matarese, 47 R. I. 131, 131 Atl. 198, 42 A. L. R. 1360 (1925); Kelly v. Kelly, 158 S. C. 517, 155 S. E. 888 (1930); Roller v. Roller, 37 Wash. 242, 79 Pac. 788, 68 L. R. A. 893 (1905). See, Tort Actions Between Persons in Domestic Relations (1939) 1 Wash. & Lee L. Rev. 89.

³Niemi v. Boston & Maine Ry., 87 N. H. 1, 175 Atl. 245 (1934); Dunlap v. Dunlap, 84 N. H. 352, 150 Atl. 905, 71 A. L. R. 1055 (1930). See, Tort Actions Between Persons in Domestic Relations (1939) 1 Wash. & Lee L. Rev. 89.

⁴Madden, Persons and Domestic Relations (1931) 449.

Of course, parents are criminally liable for injuries inflicted upon their children. Johnson v. State, 2 Humph. 283, 36 Am. Dec. 322 (Tenn. 1837); Commonwealth v. Coffey, 121 Mass. 66 (1876); State v. McDonie, 96 W. Va. 219, 123 S. E. 405 (1924).

tion where the laws of nature have established peace and obedience."⁵

In the principal case the Arkansas court was bound by a statute which provided that: "An adopted child is invested with every legal right, privilege, and obligation . . . as if born to the adopting parents in legal wedlock."⁶ But the court refused to hold that the statute compelled it to apply the general rule forbidding suit for personal injuries between parent and child, saying:

" . . . in these statutes no attempt is made to invest either the child or the adopting parents with natural affections existing between blood relations, so the reason for the rule that prevents natural children from suing natural parents for voluntary torts committed upon them does not exist between adopted children and adoptive parents. We, therefore, hold that an adopted child may sue an adoptive father for torts committed upon it which causes him suffering and pain."⁷

Cases considering the situations of adopted children in other respects, however, do not make such a distinction, for it has been generally held that adopted children occupy exactly the same position in the family as natural children.⁸ Thus, in matters of inheritance the Arkansas court treats adopted children no differently from natural children.⁹ Courts of other states assume the same attitude.¹⁰ In regard to maintenance and duty to support, no difference of obligation is found.¹¹ And as regards services due from a child to his parent, no distinction is made between adopted and natural children.¹² In the words of one court:

" . . . it is just as much the duty, under the law, of an adopting parent to protect, educate, and maintain his adopted child as if

⁵Wick v. Wick, 192 Wis. 260, 212 N. W. 787, 52 A. L. R. 1113, 1114 (1927).

⁶Brown v. Cole, 129 S. W. (2d) 245, 247 (Ark. 1939).

⁷Brown v. Cole, 129 S. W. (2d) 245, 248 (Ark. 1939).

⁸Shaver v. Nash, 181 Ark. 1112, 29 S. W. (2d) 298, 73 A. L. R. 961 (1930); In Re Johnson's Estate, 200 Cal. 299, 252 Pac. 1049 (1927); Scott v. Peters, 87 Ind. App. 1, 158 N. E. 490 (1927); Calhoun v. Bryant, 28 S. D. 266, 133 N. W. 266 (1911); Rogers v. Baldrige, 18 Tenn. App. 300, 76 S. W. (2d) 655 (1934); Stickle v. Reichardt, 203 Wis. 579, 234 N. W. 728 (1931). See cases collected in 2 C. J. S. 446.

⁹Shaver v. Nash, 181 Ark. 1112, 29 S. W. (2d) 298, 73 A. L. R. 961 (1930).

¹⁰In Re Biehn's Estate, 41 Ariz. 403, 18 P. (2d) 1112 (1933); Church v. Lee, 102 Fla. 478, 136 So. 242 (1931); Eggimann-Eckard v. Evans, 220 Iowa 762, 263 N. W. 328 (1935); Bakke v. Bakke, 175 Minn. 193, 220 N. W. 601 (1928); Brown v. Shwinogee, 128 Okla. 149, 261 Pac. 920 (1927).

¹¹In Re Ballou's Estate, 181 Cal. 61, 183 Pac. 440 (1919); Commonwealth v. Kirk, 212 Ky. 646, 279 S. W. 1091, 44 A. L. R. 816 (1926); Wertz v. Wertz, 125 Ore. 53, 263 Pac. 911 (1928).

¹²Buttrey v. West, 212 Ala. 321, 102 So. 456 (1924); Rogers v. Baldrige, 18 Tenn. App. 300, 76 S. W. (2d) 655 (1934).

he were the natural parent, and as a corollary, he is entitled, under the law, just as the natural parent is, to the custody, control, and services of the child."¹³

In the principal case the court bases its result on the premise that an adopted child does not have the same status as a natural child within the family unit. But a search of the cases fails to reveal any precedents for such a holding. Surely an adopted child is an integral part of the family that adopted him. It is beyond belief that the Arkansas court intends to maintain that, though the policy of the courts under the general rule is to encourage family harmony between a child and his natural parent, the law is not interested in this aim whenever the adoptive status exists. Yet it is not difficult to carry the reasoning of *Brown v. Cole* to this conclusion.

In view of the shocking fact situation in the principal case which shows clearly that the family solidarity had been disrupted beyond repair prior to the suit, the court was justified in allowing the adoptive child to recover from the parent. However, in such a situation, recovery should be allowed by a natural child as well. Therefore, the court's reasoning, based on a distinction between natural and adoptive children, seems unsound. Undoubtedly the court was influenced by the realization that in this instance the family unit was not merely disrupted but actually destroyed and thus beyond any possible need of legal protection. Recovery should be allowed both where the family is actually destroyed by the death of the members who are the parties to the suit, and where the parties are alive but the family unit is completely disrupted.

STANFORD SCHEWEL

PROCEDURE—DISMISSAL FOR FAILURE TO PROSECUTE. [Rhode Island]

The plaintiff in the case of *Sayles v. McLaughlin*,¹ brought an action of trespass *quare clausum fregit* in 1914 against the defendant. After the pleadings were completed, plaintiff demanded a jury trial which was set for January, 1915. However, the case was not tried at that time, nor was it tried subsequently. The defendant died testate in 1917 and executors were appointed the same year. The plaintiff's claim of pending action was filed against the estate in 1918 and was disallowed. The executors of the defendant's estate resigned, and an administrator was

¹³*McDonald v. Texas Employers' Insurance Association*, 267 S. W. 1074, 1075 (Tex. Civ. App. 1924).

¹⁷ A. (2d) 779 (R. I. 1939).

appointed. The plaintiff in October, 1938, filed a motion demanding that the administrator be summoned to defend the action. The administrator then moved to dismiss the action for want of prosecution. This motion was granted in the Superior Court, and the case came to the Supreme Court of Rhode Island upon the plaintiff's exception to the dismissal. There, the plaintiff's exception was sustained, the court holding that since the defendant himself could have forced the case to a trial but had been content to let it remain untried, the plaintiff could not properly be penalized for a lack of diligence in prosecuting the action.

At early common law, actions at law were not dismissible, the term "dismiss" being applied to suits in equity alone. It was according to the equitable doctrine of laches that suits were dismissible if the plaintiff failed to prosecute with diligence.² The term has been borrowed from equity and is now used in common law proceedings.³ By statute and under the codes, as well as by rule of court, the power to dismiss is now recognized in law and equity. In England and in many American states the power is exercised for failure to prosecute,⁴ and rests in the inherent discretion of the court,⁵ independent of statute or rule of court.

In the principal case there was no statute granting the power to dismiss, nor had there been an amalgamation of law and equity which would permit the use of the doctrine of laches, and the Rhode Island court saw only the one possibility—to decide against the dismissal. Other courts have taken the same position.⁶ The Rhode Island court based its conclusion on a District of Columbia case,⁷ in which jurisdiction, as in Rhode Island, neither statute nor rule of court dealt with the subject of dismissal. The position taken by the District of Columbia court was that, if the defendant himself could have forced the case to trial, but

²Gray v. Times-Mirror Co., 11 Cal. App. 155, 104 Pac. 481, 484 (1909): "It is the policy of the law to favor and to encourage a prompt disposition of litigation. . . . The doctrine of laches as a bar to the assertion of stale claims and statutes of limitations rests upon the same reasons or principle."

³Bullock v. Perry, 2 Stew. and P. 319 (Ala. 1832).

⁴Mowry v. Weisenborn, 137 Cal. 110, 69 Pac. 971 (1902); McAuley v. Orr, 97 S. C. 214, 81 S. E. 489 (1914); Robinson v. Chadwick, 7 Ch. D. 878 (1876). See collected cases, 18 C. J. 1191.

⁵Colorado E. Ry. v. Union Pac. Ry., 94 Fed. 312 (C. C. A. 8th, 1899); Wisnom v. McCarthy, 48 Cal. App. 697, 192 Pac. 337 (1920). See Epley v. Epley, 328 Ill. 582, 160 N. E. 113, 114 (1928); Waring v. Pennsylvania R. Co., 176 Pa. 172, 35 Atl. 106, 107 (1896). See cases cited in 18 C. J. 1192; 17 Am. Jur. 88.

⁶Carter's Heirs v. Cooper, 111 Va. 602, 69 S. E. 944 (1911) (in Virginia the equitable doctrine of laches has never been applied to common law actions; the practice is to require that the defendant file a motion to speed the cause before a dismissal).

⁷Meloy v. Keenan, 17 App. D. C. 235 (1900).

was content to let the matter rest, he could not complain if the plaintiff finally took steps toward prosecuting his action.

On the other hand, in the absence of statute many courts have granted dismissals, relying on their "inherent" power to do so.⁸ In California, the practice of dismissing actions at law for failure to prosecute diligently is well established. Although dismissals are provided for by code in that state, it has been held that the power exists independently of statute.⁹ It would appear, therefore, that the California cases would have been adequate authority for the Rhode Island court to rely upon had it dismissed the action because of plaintiff's inactivity.

There is merit in the rule of the District of Columbia case and in the court's argument to support it.¹⁰ Especially where there has been no prejudice to the defendant by the delay, there seems to be a fair basis for denying the motion to dismiss.¹¹ The defendant's long continued failure to seek dismissal of the prosecution may be said to show acquiescence in the plaintiff's delay. However, the California decisions are based on what appears to be the better rule. This would postulate that it is the plaintiff alone of whom initiative is to be expected, since he is the originator of the suit and the cause of the defendant's presence in court. The defendant's position is an involuntary one; he is put to a defense only, and can be charged with no neglect for failing to do more than to meet the plaintiff step for step. The plaintiff is the party charged with diligence in prosecuting the action.¹²

As a practical matter the decision in the principal case would seem to be correct, because a dismissal would not bar a subsequent action by the plaintiff. It is generally held in the absence of statute that *res adjudicata* would not be a bar to a subsequent action since a dismissal is

⁸*Daly v. Chicago*, 295 Ill. 276, 129 N. E. 139 (1920). See *Kubli v. Hawsett*, 89 Cal. 638, 27 Pac. 57 (1891) and cases therein cited.

⁹*People ex rel. Stone v. Jefferds*, 126 Cal. 296, 58 Pac. 704 (1899); *Hassey v. South San Francisco Association*, 102 Cal. 611, 36 Pac. 945 (1894).

¹⁰*Meloy v. Keenan*, 17 App. D. C. 235 (1900); *Carter's Heirs v. Cooper*, 111 Va. 602, 69 S. E. 944 (1911) (an inactive defendant is not given the privilege of a dismissal when the plaintiff fails to prosecute seasonably).

¹¹*Overholt v. Matthews*, 48 App. D. C. 482 (1919); *Wright v. Howe*, 46 Utah 588, 150 Pac. 956 (1915), L. R. A. 1916 B., 1104; accord *Sayre v. Detroit, G. H. and M. Ry.*, 199 Mich. 414, 165 N. W. 859 (1917) (even though the delay had caused harm to defendants and rendered them less ready for trial, their motion for dismissal was not allowed to stand).

¹²*Mowry v. Weisenborn*, 137 Cal. 110, 69 Pac. 971 (1902); *Oberkotter v. Spreckels*, 64 Cal. App. 470, 221 Pac. 698 (1924); *Yampa Valley Coal Co. v. Velotta*, 83 Colo. 235, 253 Pac. 717 (1928); *Biddle v. Girard Bank*, 109 Pa. 349 (1885). See *Farbstein v. Woulfe*, 265 Pac. 973, 975 (Cal. App., 1928) (dissenting opinion).

not an adjudication on the merits.¹³ In Virginia, provision is made by statute to insure the plaintiff another day in court after his suit has been dismissed for want of prosecution.¹⁴ Although the result achieved may be practical, because upon dismissal plaintiff would have started a new suit, it does not follow that justice has been done in the principal case. Over the years the original defendant has died, witnesses may have died or removed from the jurisdiction, and evidence may have been lost. Inasmuch as the courts are not able to prevent such unfairness, remedial legislation¹⁵ should be passed which would make dismissal for want of prosecution an absolute bar to future action.¹⁶

JOHN E. PERRY

TORTS—PERMISSIBLE CHARACTER OF CONDUCT OF CREDIT AGENCY TOWARD DEBTOR; PLEADING—SCOPE OF DEMURRER. [District of Columbia]

In the case of *Clark v. Associated Retail Credit Men of Washington D. C.*,¹ the plaintiff, owner and operator of a dry-cleaning establishment in the District of Columbia, sued the defendant, an incorporated credit agency, to recover for injuries allegedly sustained by reason of letters²

¹³*Pueblo De Taos v. Archuleta*, 64 F. (2d) 807 (C. C. A. 10th, 1933); *Colorado E. Ry. v. Union Pac. Ry.*, 94 Fed. 312 (C. C. A. 8th, 1899); *Jernigan v. Pfiefer Bros.*, 177 Ark. 145, 5 S. W. (2d) 941 (1928); *McDonough v. Blosson*, 109 Maine 141, 83 Atl. 323 (1912); *Philpott v. Brown*, 16 Neb. 387, 20 N. W. 288 (1884).

¹⁴Va. Code Ann. (Michie 1936) § 6172: "Any court in which is pending a case wherein for more than two years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket; and it shall thereby be discontinued. . . . Any such case may be reinstated, on motion, within one year from the date of such order, but not after. . . ."

¹⁵See Federal Rules of Civil Procedure (1938) Rule 41 (b): ". . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

¹⁶It may be interesting to speculate whether in Rhode Island a subsequent action would be barred by a statute of limitations objection. See *Pesce v. Mondare*, 30 R. I. 247, 74 Atl. 913 (1910); *Sullivan v. White and Son*, 36 R. I. 488, 90 Atl. 738 (1914); 18 C. J. 1191-2.

¹105 F. (2d) 62 (App. D. C. 1939).

²Letters are as follows:

October 2, 1937

Dear Mr. Clark: The member of this Association whose name is shown above, has reported your account to us with the information that he has not been able to collect it.

We are members of a nation-wide organization, owned and operated by the retail interests of the country, with members and branch credit bureaus in every locality in the United States. In its files are kept accurate up-to-date credit reports of the millions of customers of its members.

Probably you haven't realized that this unpaid account may jeopardize your

sent to the plaintiff in an attempt to collect a debt. The complaint alleged that plaintiff was suffering from arterial hypertension and had lost

credit standing. We do not want to enter it against your record if we can help it—so before taking other steps, we are giving you this opportunity to keep your credit record clear by paying this bill within the next ten days.

If it is not paid within that time, we will have to proceed with collection, according to our member's instructions.

But we earnestly suggest that you protect your credit and avoid needless expense by making immediate arrangements with our members or prompt and definite settlement of his account.

Sincerely,

P. S. To avoid delay, make all payments and address all communications direct to the member whose name is shown above. Use the enclosed addressed envelope.

October 12, 1937

Dear Mr. Clark: Your failure to respond to our last letter about the above account is disappointing. You have had the utmost consideration and leniency from our member and from us, and yet you have not responded to his requests, nor to ours, for a settlement.

Do You Realize How Your Continued Neglect of This Account is Going to Affect Your Credit Standing?

As we told you in our last letter, we are members of a mutual, nation-wide Association, owned and operated by the retail credit grantors throughout the country. Its purpose is to give our members full protection against credit losses—protection backed by law and the power and prestige of our entire membership.

At the same time it is our desire to protect you, too, against the embarrassment that follows a "poor pay" record. But you must do your part!

Remember your credit record is the measuring line by which all merchants—all credit grantors—judge you. Wherever you go, whatever you do, a bad credit record will follow you like a shadow. Isn't it important for you, then, to keep your record clear?

Your future credit standing depends on your prompt payment of this account. Further neglect on your part will necessitate drastic action by the member. Mail your payment now—direct to the member whose name is shown above—in the addressed envelope enclosed.

Yours very truly,

October 23, 1937

Dear Mr. Clark: We've been lenient with you—but we haven't even received the courtesy of a reply to our letters. Now it's up to you!

This is your final notice!

This Account Must be Paid by Saturday, October 30th.

You are hereby given our Last and Final Notice that Unless this account is paid or satisfactorily adjusted on or before the above date, we will return the claim to the creditor who will no doubt refer it to their attorney, who will take action to secure judgment, with lawful interest together with all costs and disbursements of the action.

The said attorneys then, without delay, will resort to whatever remedies are offered creditors, such as garnishment or attachment of any salary, funds or property that may belong to you or that may be due you.

Yours truly,

P. S. Time, expense and trouble will be avoided by making immediate payment to the member whose name is shown above, using the addressed envelope enclosed.

but was slowly regaining his sense of sight, and that it was necessary to its recovery that he avoid excitement and worry; that the defendant had knowledge of plaintiff's illness; that the letters were sent to the plaintiff "without any right or color of right, and without justification, . . . for the purpose and with the intent of injuring his business and rendering him unable to conduct it properly"; that by reason of the letters plaintiff's condition was aggravated and he was caused to suffer a severe attack of arterial hypertension and "mental and physical agony."

The Court of Appeals for the District of Columbia overruled the demurrer to the complaint, and sent the case back for a trial on the merits. The majority of the court confined the case to the single proposition that since defendant by its demurrer admitted that it sought to cause not merely mental harm but physical harm as well, and since physical harm actually resulted, a case of intentional aggression was made out. The dissenting justice, however, pointed out that the case contained another point essential to the decision which the majority had overlooked, namely, a consideration of the proper scope of a demurrer—what was admitted by defendant when the demurrer was interposed. The statement in the declaration that the letters were written "without any right or color of right, and without justification," the dissent pointed out, was a pleader's conclusion of law, and its correctness was not admitted by demurrer. Therefore, the dissenting justice thought it necessary that the court on demurrer examine the letters to see "whether, in any event, they were sufficient to cause actionable injury to the plaintiff."³

The text authorities,⁴ as well as the cases,⁵ indicate that the dissent-

³Though the precise grounds for the holding of the dissent are not clearly defined, the approach employed seems to represent common sense and business expediency. In the first part of the dissenting opinion, Mr. Justice Vinson said that the problem presented involved a determination of whether the letters were written "without any right or color of right, and without justification," thus posing the problem as one of intentional aggression but of a privileged nature because of the proper character of the letters. However, there is language elsewhere in the dissent which seems to show that it was not believed that there was any intent to cause harm at all, but merely an intent to collect a debt. For in the last paragraph of the opinion, the dissent states that an agency may send these letters to collect a debt in a proper manner, "though perchance, the debtor may have high blood pressure and that fact is known to the creditor or his agent."

⁴Williams, *Burks Pleading and Practice* (3rd ed. 1934) § 197, p. 323: "That a demurrer does not admit the pleader's inferences or conclusions of law, such as an allegation that the defendant's acts are 'without right.' . . . The court will determine for itself the effect of the facts alleged." 1 Chitty, *Pleading* (16th Am. ed. 1883) 963 (e), 964: "It should, however, be remembered that the demurrer admits facts pleaded, (i. e. well pleaded) and merely refers the question of their legal sufficiency to the de-

ing judge had the proper approach in considering what was admitted by the demurrer. The allegation that the letters were sent without any right or color of right, and without justification, is merely the plaintiff's conclusion of law and thus not conceded by defendant. The demurrer admits only facts well pleaded: that the letters were written intentionally for the purpose of collecting the debt; that an unfavorable credit report would be turned in against the defendant if the debt was not paid; that suit by the creditor would probably be maintained if the bill was not paid. Even knowledge of the plaintiff's condition would be admitted, but the demurrer would not admit that the letters were of such a nature as to have caused the injury, or to have been written without any right or color of right, or without justification.

The majority opinion, having concluded that the defendant had confessed being an intentional aggressor without right, then examined his legal responsibility in such position. Mr. Justice Edgerton, for the court, adopted the view that while a creditor need not use care to avoid shocking his debtor, and may intentionally cause him some worry and concern, nevertheless, he should refrain from conduct intended or likely to produce physical illness. On this point the majority cited and discussed a number of cases. The cases referred to, however, support the rule as stated only because the conduct of the defendants therein was clearly without right or color of right, or without justification, and was intended and very likely to cause physical illness. For example, in *Barrett v. Collection Service Co.*,⁶ the defendant knew that the widow's wages were exempt, yet he sent her a series of threatening letters promising to "bother" plaintiff's employer, "until he is so disgusted with you he will throw you out the back door." The plaintiff was allowed recovery for mental pain and suffering because defendant had no legally enforceable claim and was merely trying to frighten plaintiff into making payment, conduct which the law has never tolerated. Again, in *La-Salle Extension University v. Fogarty*,⁷ defendant over a period of two years sent plaintiff some thirty-seven letters which varied from moderate

cision of the court." 6 Ency. of Pleading and Practice (1896) p. 336, b., "While a demurrer admits traversable facts, it does not admit inferences from them, or conclusions of law."

⁶St. Louis K. & S. E. R. Co. v. United States, 267 U. S. 346, 45 S. Ct. 245, 69 L. ed. 649 (1925); *Hobson v. McArthur*, 3 McLane (Fed.) 241, Fed. Cas. No. 6, 554 (1843); *Johnson v. Roberts*, 102 Ill. 655 (1882); *Minnesota Rd. v. Hiams*, 53 Iowa 501, 5 N. W. 703 (1880); *Williams v. Mathewson*, 73 N. H. 242, 60 Atl. 687 (1905); *Pratt v. Lincoln County*, 61 Wis. 62, 20 N. W. 726 (1884).

⁷214 Iowa 1303, 242 N. W. 25 (1932).

⁸125 Neb. 457, 253 N. W. 424, 91 A. L. R. 1491 (1934).

reminders of an unpaid balance to accusations of dishonesty and moral turpitude. Since the debt was wholly void by virtue of a specific statutory provision, the defendant's conduct was unjustified, and the plaintiff was allowed recovery for worry, humiliation, and loss of sleep. Further, in *Wilkinson v. Downton*,⁸ the famous English case relied on by the majority, the defendant well knowing the true facts and realizing that his statement was of the grossest type of practical joke and easily calculated to cause extreme shock and worry, told the plaintiff that her husband had been injured in an accident. Plaintiff recovered for the shock because defendant's action was intentional and was knowingly based on a complete falsehood. The court discussed a number of other cases, but in none could the conduct of the defendant be compared in degree with that of the defendant in the instant case, since the acts of the defendants in the cases cited were unwarranted and of a reprehensible nature.⁹

On the other hand the dissent asserted that the pleading in this case does not show as a matter of law that the letters violated any legal right of the plaintiff. Comparing the actions of the instant defendant with what the cases hold regarding the propriety of other methods of collec-

⁸[1897] 2 K. B. 57.

⁹Great Atlantic & Pacific Tea Company v. Roch, 160 Md. 189, 153 Atl. 22 (1931) (a dead rat was placed by defendant in a wrapper supposed to contain bread, and the sight of such shocked the plaintiff greatly; recovery was allowed for the shock as it was intentional and without right); Johnson v. Sampson, 167 Minn. 203, 208 N. W. 814 (1926), 46 A. L. R. 772 (1927) (defendant in a violent outburst, accused plaintiff of being unchaste, the statement being false, as defendant knew; plaintiff was allowed recovery for mental anguish and nervous shock, with resulting impairment of health); Gadbury v. Bleitz, 133 Wash. 134, 233 Pac. 299 (1925), 44 A. L. R. 425 (1926) (defendant unjustifiably refused to cremate the plaintiff's son, in order to induce the plaintiff to pay for the previous funeral of a son-in-law; recovery was allowed for the shock and worry caused the plaintiff by defendant's unlawful conduct); Engle v. Simmons 148 Ala. 92, 41 So. 1023 (1906), 7 L. R. A. (N. S.) 96 (1907), 121 Am. St. Rep. 59, 12 Ann. Cas. 740 (defendant, after being requested by plaintiff not to do so, unlawfully entered plaintiff's house to collect a debt from plaintiff's husband in his absence; threats were made by the defendant which threw plaintiff into a state of nervous excitement, and resulted in a premature child-birth with physical disability, for which recovery was allowed); Stockwell v. Gee, 121 Okla. 207, 249 Pac. 389, 390 (1926) (defendant, landlord of the plaintiff, came to the premises and in a loud and threatening manner demanded possession; recovery was allowed, because the acts of the defendant were "unwarranted, unauthorized, and unlawful"); Patapsco Loan Company v. Hobbs, 129 Md. 9, 98 Atl. 239 (1916) (defendant, while unlawfully on property of plaintiff made such emphatic and threatening demands on the plaintiff for payment of a debt, that plaintiff was frightened and suffered physical illness for which recovery was allowed); May v. Western Union Telegraph Company, 157 N. C. 416, 72 S. E. 1059 (1911), 37 L. R. A. (N. S.) 912 (1912) (though defendant had a right to enter the land of the plaintiff, he acted in such a boisterous and lewd manner that plaintiff was made ill and recovery was allowed for the illness).

tion applied by creditors and their agencies, the conclusion of the dissenting justice seems sound. Because the methods employed in attempting to collect debts vary to a great extent, both in their nature and in their general effect upon the debtor, it is difficult to formulate a general rule that will cover the cases. It is rather generally held that a method used in attempting to obtain payment of a debt, which tends publicly to impute dishonesty to the debtor,¹⁰ or to expose him to disgrace or ridicule,¹¹ or to invade his right of privacy,¹² gives the debtor a right of action for damages against the person employing such a method. But a mere threat¹³ to sue on a note and foreclose a lien, on the maker's failure to perform the obligation, would not amount to duress to support an action. And in *McCreavy v. Schneer's*,¹⁴ where a creditor sent a letter to his debtor demanding payment of money or a return of merchandise, the court said: "A creditor still has the right to ask his debtor to pay what he owes without being subject to any action for libel." Both opinions in the principal case quoted with approval the following statement by Professor Magruder:

"We would expect then the gradual emergence of a broad principle somewhat to this effect: That one who, without just cause or excuse and beyond all bounds of decency, purposely causes a disturbance of another's mental and emotional tranquility of so acute a nature that harmful physical consequences might be not unlikely to result, is subject to liability in damages for such mental and emotional disturbance even though no demonstrable physical consequences actually ensue."¹⁵

It would appear difficult to put the letters in the principal case in any milder terms and still hope to get any response from the debtor. There was nothing vindictive in these letters as in the *Barrett* case.¹⁶ Neither was there a charge of dishonesty or moral turpitude, as in *Bur-*

¹⁰*Ferdon v. Dickens* 161 Ala. 181, 49 So. 888 (1909); *Tyres v. Chambers*, 144 La. 723, 81 So. 265 (1919); *McClain v. Reliable Ins. Co.*, 150 S. C. 459, 148 S. E. 478 (1929); *Burton v. O'Neill*, 6 Tex. Civ. App. 613, 25 S. W. 1013 (1894); *Wolfenden v. Giles*, (1892) 2 B. C. 279; *Green v. Minnes*, 22 Ont. Rep. 177 (1891).

¹¹*Thompson v. Adelberg & Breman*, 181 Ky. 487, 205 S. W. 558 (1918), 3 A. L. R. 1594 (1919); *Axton Fisher Tobacco Company v. Evening Post Company*, 169 Ky. 64, 183 S. W. 269 (1916), L. R. A. 1916E. 667, Ann. Cas. 1918B 560; *Zier v. Hoffin*, 33 Minn. 66, 21 N. W. 862, 55 A. L. R. 973, 53 Am. Rep. 9 (1885).

¹²*Gault v. Babbitt*, 1 Ill. App. 130 (1890); *Brent v. Morgan*, 22 Ky. 765, 299 S. W. 967 (1927), 55 A. L. R. 964 (1928). Note (1928) 41 Harv. L. Rev. 1070. On improper methods of collecting debts, see notes: (1928) 55 A. L. R. 971; (1937) 106 A. L. R. 1453.

¹³*Shelton v. Lack* (Tex. Civ. App.) 19 S. W. (2d) 124 (1929).

¹⁴47 Ga. App. 703, 171 S. E. 391, 392 (1933).

¹⁵Magruder, *Mental Disturbances in Torts* (1936) 49 Harv. L. Rev. 1033, 1058.

¹⁶214 Iowa 1303, 242 N. W. 25 (1932).

ton v. O'Niell.¹⁷ The only statement savoring of threat was the one regarding the report to the creditor as to "poor pay" if the debt were not paid. This, however, violates no right of the plaintiff since "such agencies are privileged to supply their customers with what is believed to be an accurate credit rating of mercantile houses."¹⁸ As to the merits of plaintiff's claim, the problem of the principal case may be reduced to the following: May one who is employed to collect a debt for another and who has knowledge of the condition of the debtor's health, request payment even though such request causes physical injury to the debtor, if the manner in which the request is made is within the "bounds of decency"¹⁹ because not vindictive nor defamatory nor invasive of privacy? Recognition of such a privilege to include the principal case has much to commend it, for it unquestionably accords with good business practice fortified by common sense.

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¹⁷6 Tex. Civ. App. 613, 25 S. W. 1013 (1894).

¹⁸Bohlen, *Law of Torts* (1933) § 249, p. 536 and n. 90.

¹⁹Magruder, *Mental Disturbances In Torts* (1936) 49 *Harv. L. Rev.* 1033, 1058.