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CASE COMMENTS

CONSTITUTIONAL LAW—SCOPE OF FIFTEENTH AMENDMENT PROTECTION AGAINST ATTEMPTS TO RESTRICT FRANCHISE OF NEGROES. [United States Supreme Court]

Though the Fifteenth Amendment\(^1\) to the Constitution of the United States has been subjected to varying interpretations since its adoption in 1870, the definite trend has been to enlarge the scope of the protection afforded by the Amendment against racial discrimination in the exercise of the franchise. In the recent case of *Terry v. Adams*,\(^2\) the Supreme Court of the United States has provided fresh confirmation of this trend by bringing within the ban of the Amendment, discrimination against Negroes practiced by a local "Democratic association" in its pre-primary preference poll to select Democratic candidates for the primary elections.

While the Fifteenth Amendment did not directly confer upon anyone the right of suffrage,\(^3\) it nevertheless imposed restrictions on the traditional power of the state to prescribe the qualifications of voters.\(^4\) These restrictions, however, are applicable only to actions "by the United States or by any State." The various plans to effectuate discrimination against certain classes of voters have, therefore, taken the form of attempts to make the discriminatory election procedure

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\(^1\)U. S. Const. Amend. XV, § 1: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

\(^2\)§ 2: "The Congress shall have power to enforce this article by appropriate legislation."

\(^3\)345 U. S. 461, 73 S. Ct. 809, 97 L. ed. 745 (1953).

\(^4\)Ex parte Yarborough, 110 U. S. 651, 665, 4 S. Ct. 152, 159, 28 L. ed. 274, 278 (1884): "While it is quite true, as was said by this court in *United States v. Reese*, 92 U. S. 214, that this article gives no affirmative right to the colored man to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others, it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slave-holding States had not removed from their constitutions the words 'white man' as a qualification for voting, this provision did, in effect, confer on him the right to vote..."

\(^5\)United States v. Reese, 92 U. S. 214, 218, 23 L. ed. 563, 564 (1876): "It follows that the amendment [Fifteenth] has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude."
appear to emanate from private action rather than state authority. The Texas aspects of this maneuvering began when the legislature in 1923 passed an act denying Negroes the right to vote in a Democratic party primary election. The Supreme Court in *Nixon v. Herndon* hold this statute to be unconstitutional as a denial of the "equal protection of the laws" guaranteed by the Fourteenth Amendment. Immediately after the announcement of that decision, the legislature of Texas passed another statute authorizing the State Executive Committee of any political party to determine the qualifications for party membership. When the Democratic State Executive Committee denied party membership to Negroes, the Supreme Court held the second act to be unconstitutional, declaring that when "agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become the organs of the State itself, the repositories of official power." However, three years later in *Grovey v. Townsend*, the Supreme Court held that the action of the Texas State Democratic Convention in denying Negroes the right to vote in party primaries was not state action within the purview of the Fourteenth and Fifteenth Amendments on the reasoning that the Democratic party of the state was a voluntary political association which, by acting through its legitimate governing body, had the power to determine who should be eligible for membership therein.

This restrictive view of what constitutes state action persisted for some years, but the ground for the overruling of the *Grovey* case was laid when the Court decided in *United States v. Classic* that a primary

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6U. S. Const. Amend. XIV, § 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Herndon case was decided on the grounds of the Fourteenth rather than the Fifteenth Amendment because: "As the selection of candidates by primary elections became general, the denial of the right to vote in the primary assumed dominant importance. For many years the Court hesitated to hold that party primaries were elections within the purview of the Constitution. During that period the equal protection clause was relied upon to invalidate discrimination against Negroes. Under the clause, it is necessary to find that inequality is perpetrated by the state." The Constitution of the United States of America (Government Printing Office, 1953) 1164.
9313 U. S. 299, 61 S. Ct. 1031, 85 L. ed. 1568 (1941). Appellees were Commissioners of Elections who had been indicted under the Federal Criminal Code for fraud
election was included within the protection of the United States Constitution and statutes as one of the federal rights which they were intended to secure. Shortly thereafter, in *Smith v. Allwright* it was held, in expressly overruling *Grovey v. Townsend*, that discrimination by a political party in its primary election was sufficiently state action to invoke the protection of the Fifteenth Amendment, inasmuch as the primary was made an integral part of the state election machinery as discussed in the *Classic* case. The doctrine of the *Allwright* case was further extended in two cases from South Carolina in which the Court of Appeals for the Fourth Circuit held: (1) that discrimination against Negroes by the Democratic party of South Carolina in its primaries constituted state action even though the legislature had repealed all mention of primaries from the statute books, and (2) that the same would be true where the discrimination was practiced by Democratic "clubs" in South Carolina, if the result was to select candidates for the general election.

In connection with a congressional primary in the state of Louisiana. The federal district court sustained appellees' demurrer to counts 1 and 2, and the case went to the Supreme Court on direct appeal. The case presented the issue of whether or not the right to vote in a primary election was one which was within the protecting power of the federal government under the Constitution, and it was held that where the primary was made an integral part of the election machinery of the state, the federal government could step in and regulate it insofar as congressional elections were involved.


[122 U. S. 619, 64 S. Ct. 757, 88 L. ed. 987 (1944).]

[124 U. S. 515, 53 S. Ct. 622, 79 L. ed. 1292 (1933).]

[Rice v. Elmore, 165 F. (2d) 387 (C. C. A. 4th, 1947), cert. denied 323 U. S. 875, 68 S. Ct. 905, 92 L. ed. 1151 (1948). The basis for this decision was the fact that "Elections in South Carolina remain a two step process, whether the party primary be accounted a preliminary of the general election, or the general election be regarded as giving effect to what is done in the primary; and those who control the Democratic Party as well as the state government cannot by placing the first of the steps under officials of the party rather than of the state, absolve such officials from the limitations which the federal Constitution imposes... Having undertaken to perform an important function relating to the exercise of sovereignty by the people, they may not violate the fundamental principles laid down by the Constitution for its exercise." 165 F. (2d) 387, 391 (C. C. A. 4th, 1947).]

[Baskin v. Brown, 174 F. (2d) 391 (C. A. 4th, 1949). Both this case and the Rice case were cited with approval in the principal case, *Terry v. Adams*, 345 U. S. 461, 465, 73 S. Ct. 809, 811, 97 L. ed. 745, 749 (1953). The Court of Appeals here buttressed its decision in the Rice case, and added that, "When the organization of the party and the primary which it conducts are so used in connection with the general election that the latter merely registers and gives effect to the discrimination which they have sanctioned, such discrimination must be enjoined to safeguard the election itself from giving effect to that which the Constitution forbids." 174 F. (2d) 391, 394 (C. A. 4th, 1949).]
The "three-step" election procedure in the principal case of *Terry v. Adams* presents a further attempt to avoid the restrictions imposed on the states by the Fifteenth Amendment. As the first step in this procedure the Jaybird Democratic Association of Fort Bend County, Texas, held a preference poll among its membership, which consisted of all of the qualified voters of the county except Negroes, to determine whom the Association would support in the regular Democratic primary. The winners of this poll would then file as candidates for office in the Democratic primary although the Association did not require them to do so. For over sixty years in Fort Bend County, the winner in every general election contest was the Jaybird nominee who was chosen initially in a poll from which Negro voters were excluded. No mention of the Jaybird preference poll was ever made in any Texas statute, and there was no evidence of any official connection between the Jaybird Democratic Association or its poll and the state.

Plaintiffs were Negroes who brought suit in federal district court for a decree declaring them and others similarly situated entitled to vote in the Association's elections, and to enjoin defendants from refusing to allow plaintiffs to vote. The United States District Court for the Southern District of Texas rendered a decree favorable to plaintiffs, and defendants appealed. The Court of Appeals for the Fifth Circuit reversed, and plaintiffs brought certiorari. In confirming the finding of the district court that the combined Jaybird-Democratic-general election machinery had deprived plaintiffs of the right to vote on account of their race and color, the Supreme Court found state action to exist in this situation. Although eight Justices concurred in the judgment of the Court, three opinions were written to explain the reasons for the decision.

Justice Black, writing the opinion for the Court, held that "It violates the Fifteenth Amendment for a state, by such circumvention [the three-step election process], to permit within its borders the use of any device that produces an equivalent of the prohibited election." It would thus appear that Justice Black would find state action to exist in mere "nonfeasance" as compared to misfeasance—that is, in the passive act of a state in simply permitting the existence of private practices that result in discrimination at the polls. Active participation by the state in the discrimination is not necessary under

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193 F. (2d) 600 (C. A. 5th, 1952).
Justices Douglas and Burton joining.
345 U. S. 461, 469, 73 S. Ct. 809, 813, 97 L. ed. 745, 751 (1953) [italics supplied].
this approach. In his dissent, Justice Minton critically declared that Justice Black "would have this Court redress the wrong even if it was individual action alone." Study of Justice Black's opinion, however, does not support that conclusion; he recognized the necessity for showing state action under the Fifteenth Amendment, but was content to hold that under these circumstances mere inaction by the state would so affect the results of the election process as to meet this requirement.

Justice Frankfurter, in a concurring opinion, laid greater stress than did Justice Black on the necessity for state action, observing that "The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored." He then proceeded to find that the probable participation of state-appointed county election officials in the activities of the Jaybird Democratic Association would suffice to meet the state action requirement. In dissent, Justice Minton pointed out that "it seems clear to me that everything done by a person who is an official is not done officially and as a representative of the State. . . . I find nothing in this record that shows the state or county officials participating in the Jaybird primary." While it seems that Justice Frankfurter was not satisfied to find state action in mere inaction as was done by Justice Black, he was content to rest the decision on the presumed participation of state election officials in the Jaybird primary. It would appear that this is clearly a strained attempt to justify finding state action to be present and, therefore, is vulnerable to Justice Minton's criticism.

Justice Clark, in his concurring opinion, found the Jaybird Democratic Association to be a political organization and "the decisive power in the county's recognized electoral process." Therefore, he concluded, "when a state structures its electoral apparatus in a form which devolves upon a political organization [the Jaybird Democratic Association] the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play." It would

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2No other Justices joined in this opinion.
23In which Chief Justice Vinson and Justices Reed and Jackson joined.
2445 U. S. 461, 484, 73 S. Ct. 809, 821, 97 L. ed. 745, 758 (1953).
2545 U. S. 461, 484, 73 S. Ct. 809, 821, 97 L. ed. 745, 758 (1953) [italics supplied].
appear on the surface that Justice Clark is holding that the state had here positively cast its electoral machinery so as to produce a desired discrimination—i.e., that he found misfeasance as compared to Justice Black's idea of nonfeasance. Thus, the two opinions seem to be based on different grounds, but the difference is only one of emphasis. Justice Clark's attempt to distinguish his basis for decision from that of Justice Black seems to rest only upon the fact that by choosing words of positive ("structures," "devolves") rather than of negative ("permits") effect, he has forced the reader of the opinion to translate inaction into action before finding a violation to exist. Justice Black makes the transition for the reader by holding inaction to be action; Justice Clark, to the contrary, leaves the transition for the reader to make, by describing the inaction as though it were action.

This case offers clear support for the conclusion that seven of the Justices of the Supreme Court now consider mere inactivity in this field to be sufficiently state action to bring the Fifteenth Amendment into play. There can be little reason to doubt the outcome of future discrimination cases, regardless of the disguise under which the prohibited discrimination is affected. The Supreme Court of the United States has evidently placed upon the states the ultimate responsibility for the conduct of all phases of the election process within their borders.

The result of this decision will be to usher in a new era in the field of state election procedure. Prior to this decision, the history of the Fifteenth Amendment had been "largely a record of belated judicial condemnation of various attempts by States to disfranchise the Negro either overtly through statutory enactment, or covertly through inequitable administration of their electoral laws or by toleration of discriminatory membership practices of political parties." The supreme law of the land is now being effectively applied to wipe out local laws, customs, and attitudes that have as their goal the restriction of Negro suffrage. In the words of one writer, "There has been a resurgence in interest in our basic constitutional rights since World War II. It is accentuated by a realization that in the present international situation, our ideals of human rights constitute our strongest weapon."

WILLIAM M. BAILEY

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26See Murray, States' Laws on Race and Color (1950), for an outline of the laws of the various states on this subject.
28See Berger, Equality by Statute (1952) c. 5.
DAMAGES—PROPRIETY OF JURY’S CONSIDERING PLAINTIFF’S INCOME TAX
LIABILITIES IN COMPUTING DAMAGES FOR PERSONAL INJURIES. [Illinois]

In personal injury actions the basic items recoverable and the
general rules for measuring the amount of the recovery are well estab-
lished. It is generally recognized that the injured party should be made
financially “whole,” by receiving the monetary equivalent of the harm
sustained by him, including his medical expenses, pain and suffering,
past loss of earnings, and, where a permanent injury is inflicted, his
future losses due to impaired earning capacity.\footnote{1}

In determining the financial worth of the decrease in his earning
capacity the court is seeking to award the injured party that sum he
would have earned during his lifetime had there been no injury, less
that sum he may yet earn in his injured condition, with the remainder
reduced to its present value.\footnote{2} The formula is recognized to be sound,
but its application is fraught with many complexities, a recent addition
to which arises from the problems presented by the case of \textit{Hall v. Chicago & N. W. Ry. Co.},\footnote{3} regarding the income tax implications in
the damages measurement process.

Two significant tax problems appear:

(1) Should the jury be allowed to increase the injured party’s
award in order to anticipate and offset the effects of possible liability
for income taxes on the sum awarded? Or, expressed negatively,
should the jury be instructed not to add an additional amount to the
verdict to offset the effect of income taxes upon the damages award,
since in fact it is exempt from income taxes?

(2) In computing the injured party’s prospective loss of earnings,
should the amount he would have received had there been no injury be
calculated on the basis of his probable “gross earnings” before taxes
or upon his probable “net earnings” after taxes?

In the \textit{Hall} case, an action brought under the Federal Employer’s
Liability Act, the plaintiff sought to recover damages in the amount of
$285,000 for injuries alleged to have been sustained by him while
employed by the defendant railway company as a brakeman. Near the

\footnote{1}{McCormick, \textit{Damages} (1935) §§ 86-90.}
\footnote{2}{Gulf, C. \& S. F. R. Co. v. Moser, 275 U. S. 133, 48 S. Ct. 49, 72 L. ed. 200 (1927)
(judgment reversed because of the trial court’s failure to instruct the jury that the
award should equal the present value only for loss of future benefits); Borcherding
v. Eklund, 156 Neb. 196, 53 N. W. (2d) 643 (1952); Johnson v. Seaboard Air Line
R. Co., 163 N. C. 431, 79 S. E. 690 (1913); McCormick, \textit{Damages} (1935) § 86; 15
Am. Jur., \textit{Damages} § 380.}
\footnote{3}{349 Ill. App. 175, 110 N. E. (2d) 654 (1953).}
close of the trial, defendant's counsel, in his final remarks to the jury, made the following argument:

"I say again if you believe... that the defendant is guilty of negligence... then you are going to have to award [the plaintiff] a verdict, and whatever amount he receives by way of a verdict in this case is not subject to Federal income tax."\(^4\)

Counsel for the plaintiff excepted to this remark, and the trial court ordered it stricken. The jury, after receiving final instructions, retired and returned with a verdict which awarded the plaintiff $50,000. Plaintiff's counsel moved for a new trial, citing among other reasons, the impropriety of defendant's counsel's statement concerning the federal income tax. The trial court required both parties to submit briefs on that point and after a hearing granted plaintiff's motion for a new trial.\(^5\) The Appellate Court of Illinois apparently interpreted the trial court's action as a finding of law in favor of the plaintiff on this single issue,\(^6\) and, concluded that the trial court had committed error in ordering the new trial, set aside that order and reinstated the earlier verdict.

It was reasoned that the remark concerning the income tax was not improper, since "defendant is not asking that the amount of damages

\(^4\)349 Ill. App. 175, 110 N. E. (2d) 654, 656 (1953).

\(^5\)In ruling on plaintiff's motion, the trial court declared: "This court feels [that] in persisting in his remarks, making remarks in regard to the deductions in reference to normal income tax returns, [the defendant committed]... prejudicial error and therefore this court feels that it is his duty to grant a motion for a new trial in this matter." 349 Ill. App. 175, 110 N. E. (2d) 654, 656 (1953) [italics supplied]. Thus it appears that the reasons assigned by the trial court for granting the new trial cut across both problems noted earlier. Either the Appellate Court failed to recognize this fact, or chose to ignore all but the narrow issue presented by defendant's remark to the jury which was to the effect that they were to add nothing to the award for the payment of income tax. The trial court's language seems to indicate that it believed that defendant had failed to observe the stipulation made by it prior to the actual trial that any award would be calculated on the basis of "gross earnings" and not "net earnings." Yet if this be true, then the trial court contradicted itself when, while requiring both counsel to submit briefs upon the propriety of defendant counsel's statement to the jury that they were to add nothing to the award for the payment of income taxes, it stated: "That is the only part of the case I am interested in. So far as the rest of it is concerned, I think both sides had a very fair trial. I am only interested in this one particular phase." 349 Ill. App. 175, 110 N. E. (2d) 654, 656 (1953).

"It thus appears that the only ground or reason for the granting of a new trial was counsel's remarks to the jury that the amount plaintiff received by way of a verdict was not subject to Federal income tax." 349 Ill. App. 175, 110 N. E. (2d) 654, 656 (1953).
should be reduced or mitigated,7 but is asking only that nothing be added to the total amount of damages"8 to cover income taxes, inasmuch as the award is in fact exempt from income taxation.9 Further, the court observed that the defendant's statement was a correct paraphrase of the applicable Internal Revenue Code provision and "it is difficult to perceive how the law is distorted by advising the jury of a simple and concise provision of a statute,"10 especially since statutes "are frequently set forth, when applicable, for the enlightenment of the jury."11 Recognizing the fact that verdicts are handed down by tax-conscious jurors in an age of unprecedentedly high taxes, the Illinois court pointed out that in the absence of proper instruction there is danger of "padded verdicts" resulting from a misconception of the income tax law.12 Informing the jury of the tax-exempt status of any award which might be granted, whether done by defendant in his summation to the jury or by the trial court upon its own motion, would "'at once and for all purposes take the subject of income taxes out of the case,' and that is as it should be."13

Though plaintiff argued that "strange avenues would be opened" if the income tax factor were injected into the jury's considerations, the court concluded that no more confusion would arise from allowing a defendant to remind the jury that awards of this nature are not subject to federal income tax, than from allowing a plaintiff to urge the depreciation of the dollar, which "is common practice." While the analogy thus drawn is a valid one, since in both instances the danger of confusing the jury by introducing speculative and conjectural

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7This would seem to imply that had defendant sought to introduce evidence of net earnings (after taxes) for the purpose of reducing the amount of damages payable, it would have been considered improper by the appellate court.
8349 Ill. App. 175, 110 N. E. (2d) 654, 659 (1953).
9Internal Revenue Code, 26 U. S. C. A. § 22 (b) (5) (1948). While the award itself is not taxable as income, should the sum awarded be invested, any interest or dividend realized from the investment is taxable as ordinary earned income. See Notes (1951) 51 Col. L. Rev. 782; (1952) 7 Miami L. Q. 171, 178.
10349 Ill. App. 175, 110 N. E. (2d) 654, 659 (1953).
11349 Ill. App. 175, 110 N. E. (2d) 654, 659 (1953).
12In reaching their decision, the jury in all likelihood will consider how much of an award the plaintiff will actually get net, not an amount from which income taxes will have to be deducted. If the jury determine that $50,000 is the correct amount, they will presumably award that sum if they feel there will be no income tax; on the other hand, if they believe there is to be an income tax paid on that amount under the law, they will award a much larger sum in the hope that after the tax has been paid, plaintiff will still be able to retain $50,000. In the circumstances, the jury are entitled to be reminded, or informed, of these facts." 349 Ill. App. 175, 110 N. E. (2d) 654, 661 (1953).
matter is the basis for arguing that the factors should not be considered,\textsuperscript{14} there is little authority in the reported cases to support the proposition that the depreciation of the dollar is a proper factor to be considered by the jury in assessing damages for personal injuries. While there are several cases containing language which favors such practice,\textsuperscript{15} apparently there is only one reported decision which squarely sustains it, and that case was decided by a divided court with a vigorous dissent.\textsuperscript{16} It is true that there are numerous cases in which the depreciation of the dollar has been considered at the appellate level where the issue was whether the verdict was excessive,\textsuperscript{17} and still others in which both the depreciation of the dollar and the high cost of living have been the subject of judicial notice.\textsuperscript{18} The procedures followed in

\textsuperscript{14}Halloran v. New England Tel. & Tel. Co., 95 Vt. 273, 115 Atl. 143, 148 (1921) (dissent): “To say that damages may be assessed according as a jury may view the purchasing power [of the dollar] is...a position...so fundamentally unsound, and so dangerous to the just rights of parties, as not to be sanctioned.

“Under the holdings of the majority, ‘what a door’ is opened to a jury to speculate, conjecture, and guess!”

\textsuperscript{15}Tennessee River Nav. Co. v. Woodward, 18 Ala. App. 34, 88 So. 364 (1930) (wherein trial court’s refusal to give defendant’s requested instruction was not error where instruction read: “In determining the amount expended by the plaintiff for doctor’s bills and medicines, you should not consider any difference, if any, between the purchasing power of a dollar at the time plaintiff expended it and at the present time.” The court said that defendant’s requested instruction “does not correctly state the law”). See: Missouri Pac. R. Co. v. Elvins, 176 Ark. 737, 4 S. W. (2d) 528, 533 (1928); Louisville & N. R. Co. v. Scott, 188 Ky. 99, 220 S. W. 1066, 1068 (1920).

\textsuperscript{16}Halloran v. New England Tel. & Tel. Co., 95 Vt. 273, 115 Atl. 143, 144 (1921): “So it is that, at least so far as those elements of damages properly classed as pecuniary losses—like loss of time, loss of earning power, expenses and the like—are concerned, it is proper for the jury to take into consideration the fact, known to everybody, that the purchasing power of money is at present seriously impaired.” Counsel for plaintiff was allowed to urge in his argument the present impaired purchasing power of the dollar, and the court instructed the jury that they might properly consider this argument. Held: no error (2 Justices dissenting).


\textsuperscript{18}Butler v. Allen, 73 Cal. App. (2d) 856, 167 P. (2d) 488, 490 (1946) (“The courts will take judicial notice that the purchasing power of the dollar is sixty cents or less compared with ten years ago...and the cost of living is greater.”); Atlantic Coast Line R. Co. v. Wells, 52 S. E. (2d) 496, 503 (Ga. App. 1949) (“When we keep in mind...the fact that the value of the dollar is approximately fifty per cent of what it was...of which we...take judicial cognizance, we cannot hold that the verdict...is excessive.”); Ernhart v. Elgin J. & E. Ry. Co., 377 Ill. App. 56, 84 N. E. (2d) 868 (1949); P. Lorillard Co. v. Clay, 127 Va., 734, 104 S. E. 384 (1920); Sherrill v. Olympic Ice Cream Co., 135 Wash. 99, 297 Pac. 14 (1928).
appellate courts in this respect, however, are not necessarily proper practices for juries. The appellate court, in determining whether a verdict is excessive, may consider damages awarded for similar injuries many years previously, so that there is a great time differential in which substantial changes in the value of the dollar may have occurred. On the other hand, the jury in the individual case could consider only the relatively short period between the date of the injury and the date of the trial, during which only comparatively minor fluctuations would have taken place in dollar values. Furthermore, there is little likelihood that appellate court judges would become confused by such considerations, whereas the jurors, since they are not trained and experienced in the process of calculating damages, would be much more likely to fall into error in attempting to take account of the appreciation or depreciation of the value of money.

It was necessary for the Illinois court to rely largely on analogy, since there appears to be only one other decision directly passing on the specific issue of the Hall case. In Dempsey v. Thompson, the problem presented was similar to that of the Hall case in that in a person injury action under the F. E. L. A., defendant excepted to the trial court’s refusal to charge the jury that any award it might give plaintiff for impairment of his earning capacity would be exempt from taxation; and, in addition, defendant alleged that the trial court committed error in refusing to allow him to argue that loss of future earnings should be computed on net earnings—i.e., earnings after tax deductions. On the latter point, The Missouri Supreme Court concluded that there was no error, but as to the former, the court held

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99However, the majority opinion in the Halloran case, 95 Vt. 273, 115 Atl. 143 (1921) cited a number of appeal cases as support for its decision, arguing that these cases were not distinguishable in principle.

10In determining whether a particular verdict is excessive, courts often have recourse to verdicts handed down on similar fact situations many years earlier for comparison, and in making a comparison the cost of living and changed economic conditions become relevant. See Hazebrigg Trucking Co. v. DuVall, 261 P. (2d) 204, 209 (Okla. 1953). Clearly, “excessive” is not a determination as to whether the verdict is merely large, but whether, when compared with other verdicts of a like nature, it is so disproportionately large as to be unjust.

22Actually two cases have been considered the specific point (see note 22, infra), but since the earlier case was decided and overruled by the same court that decided the later case, there is, practically speaking, only one case passing upon the issue.

that defendant’s requested instruction was proper and should have been given.\textsuperscript{23} In reversing the position it had taken earlier,\textsuperscript{24} the court noted that “most citizens, most jurors, are not only conscious of, but acutely sensitive to, the impact of income taxes,” and further that “it is reasonable to assume the average juror would believe the award involved in this case to be subject to such taxes.”\textsuperscript{25} Believing that such an instruction was not only proper but was also desirable, the court formulated an instruction that might be used for this purpose.\textsuperscript{26}

Considering the \textit{Dempsey} case as “well reasoned and precisely in point,” the Illinois Appellate Court endorsed its reasoning, and stated that “we have no hesitancy in holding that if it is proper for the court to so instruct the jury, as we think it is, it logically follows that it is proper for counsel to remind the jury of the law, regardless of whether an instruction is given by the court.”\textsuperscript{27}

The second tax problem\textsuperscript{28} concerns the manner in which prospective loss of earnings is to be computed in case of a permanently disabling injury, as a basis for the award for impairment of earning capacity. By use of mortality tables, plaintiff’s approximate life expectancy can be ascertained; and this figure multiplied by a sum representing the average annual loss of earnings will produce a somewhat inaccurate but usable estimate of plaintiff’s total prospective loss of earnings. The concern here is, which is the proper figure to represent prospective earnings: the “gross earnings” before taxes or the “net earnings” after taxes?

Since the function of tort damages is to provide a payment which will, as far as possible, restore the injured party to the financial pos-

\begin{footnotesize}
\begin{enumerate}
\item[Hilton v. Thompson, 360 Mo. 177, 227 S. W. (2d) 675 (1950).]
\item[251 S. W. (2d) 42, 45 (Mo. 1952).]
\item[“Surely, the plaintiff has no right to receive an enhanced award due to a possible and, we think, probable misconception on the part of a jury that the amount allowed by it will be reduced by income taxes.” 251 S. W. (2d) 42, 45 (Mo. 1952).]
\item[“You are instructed that any award made to the plaintiff as damages in this case, if any award is made, is not subject to Federal or State income taxes, and you should not consider such taxes in fixing the amount of any award made plaintiff, if any you make.” 251 S. W. (2d) 42, 45 (Mo. 1952).]
\item[349 Ill. App. 175, 110 N. E. (2d) 654, 661 (1953).]
\item[“Actually this tax problem would arise first in the consideration of a case since it involves the actual calculation of the award, whereas the other problem arises after these preliminary calculations and is concerned with whether anything is to be added for possible income tax. But because of the fact that it is involved only inferentially in the principal case, it is dealt with at this point.]\end{enumerate}
\end{footnotesize}
tion he was in prior to the injury, the defendant tortfeasor may logically argue that the amount awarded the plaintiff for loss of earning capacity should be calculated on the basis of his net income, since that represents his actual financial loss. Some courts have recognized the logic of using "net earnings" as the basis for computing plaintiff's actual loss, yet have deemed it more expedient to compute loss on the basis of gross earnings. The explanation of this view lies in the great difficulty in making a reasonably accurate estimate of one's future net income. The ever-changing provisions of the Internal Revenue Code regarding deductions, exemptions and tax rates, and the possibility of changes in one's marital status and in the number of one's dependents, obviously make any calculations as to the effect of taxes on a person's future net income unreliable.

In order to obtain the largest possible award, the injured party contends that "gross earnings" is the only figure the court should be concerned with in assessing damages, since it represents actual earning capacity. Furthermore, the fact that a portion of his earnings is payable to the government is of no concern to the defendant tortfeasor, who should not be allowed to rely upon plaintiff's relations with a third party for the purpose of diminishing the damages consequences of his own wrong. Thus, an English court has observed: "The amount of tax he might have to pay might differ from year to year; but with all these things the defendants certainly have nothing to do, and are

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21Thus, if plaintiff's earning capacity is $5,000 per year, out of which $920 is devoted to the payment of income taxes, his net pay is but $4,080; therefore, the tortfeasor contends, should the plaintiff be considered totally disabled and unable to work, his loss due to his injury is the "net" figure of $4,080 per annum, and loss of prospective earnings should be calculated on that basis. See Note (1953) 32 Neb. L. Rev. 491, 492.
22Southern Pac. Co. v. Guthrie, 186 F. (2d) 926, 927 (C. A. 9th, 1952) (rehearing reversing its position taken in 180 F. (2d) 295, 302-305 (C. A. 9th, 1949): "In the former opinion the court expressed the view that due regard for the principle of compensation required recognition that a plaintiff should not be in better position financially than he would have been if he had continued to work and that, hence some consideration of tax deductions is proper.

"We think the court's view that the net take home pay after taxes, would represent the actual loss, is correct; but we are now convinced that we cannot tell how much this would be."
23Smith v. Pennsylvania R. Co., 99 N. E. (2d) 501, 504 (Ohio App. 1950): "Such taxes are too speculative to be considered by the jury."
24It is generally recognized that a tortfeasor cannot minimize his wrong by putting plaintiff's relations with third parties in issue. Perrott v. Shearer, 17 Mich. 47 (1868); Jeffords v. Florence County, 165 S. C. 15, 162 S. E. 574 (1932); McCormick, Damages (1935) 146, n. 76; Note (1932) 81 A. L. R. 320.
equally certainly not entitled to say that, as wrongdoers they should receive an abatement of the damages they ought to pay by deducting tax, solely for their benefit.\(^3\)

While the problem of whether gross or net earnings should be used in computing prospective loss of earnings has been considered to some extent by American courts,\(^3\) it has received more intensive treatment in English\(^3\) and Scottish\(^3\) decisions, and the authority, both here and abroad, is overwhelmingly in favor of the use of "gross earnings" as the proper figure for this purpose.\(^3\)

It would appear that the Illinois Appellate Court has correctly decided the instant case both as to its holding on the propriety of bringing to the attention of the jury the tax-exempt status of the award and as to its implied approval of the use of "gross earnings" in computing the damages for the impairment of future earning capacity. In an age of great and growing emphasis on income taxation, such words as "earnings" and "income" immediately become associated in the mind of the average juror with the word "tax," and it is highly improbable that the jury will fail to wonder whether the award will be subject to income tax liability. It is at this point that the instruction suggested by the Missouri court in \textit{Dempsey v. Thompson} and adopted by the Il-

\(^{35}\)Billingham v. Hughes [1949] 1 K. B. 643, 655; Fine v. Toronto Transp. Comm., (1946) 1 D. L. R. 221 (Ont.): "If by reason of having received these wages he is compelled to pay a certain amount for income tax, that is a matter between him and the Crown.... Whether or not these earnings would or would not be subject to income tax is entirely outside the scope of the Court's consideration."


\(^{38}\)Also supporting the "gross earnings" figure: Blackwood v. Andrea, SC 333 (Scot. 1947). Contra: M'Daid v. Clyde Navigation Trustees, SC 426 (Scot. 1946). The ruling of this case was summarized as follows: "Where loss of earnings becomes a factor in assessing an award... his earnings should be taken at a figure arrived at after an application of the standard rates of tax allowances to what he would have earned...." Eng. & Emp. Dig. (1948, 2d Cum. Supp.) Master and Servant, p. 29.

However, the effect of this case was lessened when a subsequent court in Scotland refused to follow it in deciding Blackwood v. Andrea and especially so because of the decision of Billingham v. Hughes [1949] 1 K. B. 643. See Note (1950) 9 A. L. R. (2d) 320.

\(^{39}\)See Note (1951) 51 Col. L. Rev. 782.
Illinois court in the principal case would serve the ends of justice by simply informing the jury that the award is not subject to federal income tax.

While conceivably the *Dempsey v. Thompson* type of instruction might be unnecessary, it will hardly be productive of any injustice to either party, as it will prevent the awarding of unwarranted damages. While the practical difficulties in computing loss of earning capacity on the basis of future net earnings probably justifies the imposition of a greater damages burden on the defendant by use of the gross earnings measure, he should be required to pay still more because a tax-conscious jury has erroneously assumed that plaintiff's award would be subject to a federal income tax.40

Kimber L. White

**Equity—Jurisdiction To Grant Injunction To Protect Status of Person Within Religious Organization. [Pennsylvania]**

Modern equity courts are confronted with two self-imposed restraints on authority when they are asked to interfere in a controversy among members of a religious organization in order to protect the status of some person within the organization.1 Under the doctrine of *Gee v. Pritchard*, equity jurisdiction does not extend to the protection of purely personal rights, but rather is limited to those cases where

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39If the jury is not tax-conscious, then it will add nothing to the verdict to off-set income tax, and since the Internal Revenue Code provides that such an award is tax exempt, the sum received by the plaintiff will be exactly the amount the jury intended.

40Critics of the ruling of the Missouri court's decision in *Dempsey v. Thompson* have apparently failed to note that there are two problems, each of which requires separate treatment, or else have concluded that the jurors are not tax-conscious and that the only effect of such an instruction is to confuse the jury. Notes (1953) 32 Neb. L. Rev. 491; (1953) 33 B. U. L. Rev. 114.

41In the case of *Gee v. Pritchard*, 2 Swanst. 402, 36 Eng. Rep. 670 (1818), Lord Eldon laid down the rule that equity jurisdiction extends only to those situations where a property right is involved and that no power to protect purely personal rights is inherent in the scope of equitable jurisdiction.

The second phase of this dual restraint is set forth in a statement of the Missouri court: "...the rule is firmly established...to the effect that matters of faith and belief, matters affecting church discipline and government, the relation of the church to its members, and its pastors and priests, the origin and end of such relations, belong exclusively to the church and its appointed tribunals; that civil tribunals hold aloof from controversies in ecclesiastical bodies, except where such controversies involve property rights." Hynes v. Lillis, 183 Mo. 190, 170 S. W. 396, 399 (1914).
property rights are involved which are capable of being protected through equitable intervention.\(^2\) However, it was held in the same case that such a property right may consist of either a real or a personal interest.\(^3\) Though still widely in force at the present time, this doctrine has no logical justification, and can be attributed only to the historical evolution of the powers exercised by courts of equity.\(^4\) A second restraint bearing upon the authority of equity is the general rule that civil courts will not interfere with ecclesiastical proceedings unless a property right is adversely affected by an arbitrary exercise of church authority in the conduct of such proceedings.\(^5\) In either type of case, if the court finds a property right to protect, it may intervene and assume jurisdiction over so much of the proceedings as directly affect that right.\(^6\)

In the recent Pennsylvania case of Kaminski v. Hoynak,\(^7\) the court acknowledged the existence of these dual limitations upon its authority to intercede, but circumvented their effect and enjoined church officials from preventing a pastor from performing his duties and maintaining his position as pastor of the church. The case arose upon a bill filed by the bishop of the diocese to enjoin the pastor from conducting services in the local church and from living in the quarters maintained for pastors on church property. Previously a petition signed by members of the local church requesting the dismissal of defendant had been forwarded directly to plaintiff, who, without recourse to the mode of removal procedure provided for by


\(^4\) Pound, Equitable Relief Against Defamation and Injuries to Personality (1916) 29 Harv. L. Rev. 640 at 647.

\(^5\) In granting injunctive relief to restore a deposed pastor to his former position in the church, the Alabama court declared: “The civil courts will not take jurisdiction of a controversy arising out of the removal of a minister if the right to the position is merely spiritual or ecclesiastical. But if he has a civil or a property right in his position, the civil courts will protect that right.” Odoms v. Woodall, 246 Ala. 427, 20 S. (2d) 819, 851 (1945). Also, Kompier v. Thegza, 213 Ind. 542, 13 N. E. (2d) 229 (1938).

\(^6\) Commenting on the extent of intervention, the Supreme Court of the United States in Watson v. Jones, 80 U. S. 679, 20 L. ed. 666 (1869) affirmed a holding of the Court of Appeals of South Carolina that: “…when a civil right depends upon an ecclesiastical matter, it is the civil court and not the ecclesiastical which is to decide. But the civil tribunal tries the civil right, and no more, taking the ecclesiastical decisions out of which the civil right arises as it finds them.” Harmon v. Dreher, 1 Specer’s Eq. 87, 122 (S. C. 1843).

\(^7\) 373 Pa. 194, 95 A. (2d) 548 (1953).
the church constitution, had summarily ordered defendant to resign his position. Defendant refused to comply, and plaintiff appealed to the civil courts for judicial enforcement of his order, whereupon defendant filed a cross-bill to enjoin interference with his pastoral activities. The trial court denied plaintiff's request and granted the relief sought by defendant. Plaintiff appealed on the ground that civil courts have no jurisdiction to intervene in controversies of a purely ecclesiastical nature (thus assuming the anomalous position of attacking the authority of the court whose jurisdiction he had invoked initially), but the Supreme Court of Pennsylvania affirmed the decree. Equity's authority to grant relief was based on the finding that the right of a pastor to live in church quarters and earn his salary constitutes a property right, and that the matter is neither purely personal nor purely ecclesiastical if a property right is in issue. With the affirmative resolution of this problem, the court found itself able to intervene and grant full relief with regard to the personal right which was inextricably interwoven with the concurrent property interest. The court observed: "It is true that civil courts do not have jurisdiction to entertain purely ecclesiastical matters such as those concerning church government, doctrine or discipline...[but] a court of equity does have jurisdiction to protect property rights and...the fact that the dispute arose within a church organization will not prevent a court of equity from acting to protect those property rights."8

While still professing to be subject to the traditional limitations on equity jurisdictions, modern equity courts show a genuine desire to accord protection to the individual against the infringement of his purely personal rights. When justice demands it, a liberal view has been taken of what constitutes a property right which will admit of equitable jurisdiction;9 and once this right is discovered, the full

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9McCreery v. Miller's Grocerteria, 99 Colo. 499, 64 P. (2d) 803 (1956) (court found a property right in an express contract not to use a picture for commercial purposes; it was intimated in the opinion that even an implied contract would constitute such a right); Reed v. Carter, 268 Ky. 1, 103 S. W. (2d) 663 (1937); Vanderbilt v. Mitchell, 72 N. J. Eq. 910, 67 Atl. 97 (1907).

In granting an injunction to prevent a jilted lothario from interfering in the personal life of his former sweetheart, the Texas court observed: "The rule that equity will not afford relief by injunction except where property rights are involved is known chiefly by its breach rather than by its observance; in fact, it may be regarded as a fiction, because courts with greatest uniformity have based their jurisdiction to protect purely personal rights nominally on an alleged property right, when, in fact, no property rights were invaded." Hawks v. Yancey, 265 S. W. 293, 297 (Tex. Civ. App. 1924).
measure of "incidental protection" to the personal right engendered in the controversy can be awarded.\textsuperscript{10} A property interest meriting the protection of equity has been discovered in the rights of a person in his private correspondence,\textsuperscript{11} personal photographs,\textsuperscript{12} individual names,\textsuperscript{13} and in the damage to economic interests brought about by injury sustained to a business name by adverse criticism of products sold thereunder.\textsuperscript{14} Perhaps the most intangible form of recognized property right has been found in cases in which courts hold that membership in a stock exchange\textsuperscript{15} or fraternal association\textsuperscript{16} or union\textsuperscript{17} constitutes a property interest that admits of equitable intervention. In contrast, equity has been reluctant to recognize the existence of a property right which merits protection in situations where there is

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  \item Blanton v. Blanton, 163 Ga. 361, 136 S. E. 141 (1926) (court found a property right involved in wife's claims for alimony and enjoined wife from deliberately hunting out husband and interfering with his personal life around the home by banging doors and also jeopardizing his job by applying for numerous passes on the railroad for which he worked); Menard v. Houle, 298 Mass. 546, 11 N. E. (2d) 436 (1937); Edison v. Edison Polyform Mfg. Co., 73 N. J. Eq. 136, 67 Atl. 392 (1907).
  \item Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68 (1905); Edison v. Edison Polyform Mfg. Co., 73 N. J. Eq. 136, 67 Atl. 392, 394 (1907); "...it is difficult to understand why the peculiar cast of one's features is not also one's property and why its pecuniary value, if it has one, does not belong to its owner rather than to the person seeking to make an unauthorized use of it."
  \item In jurisdictions which follow the tenets of the civil law, the courts have had no trouble in enjoining the placing of a man's picture in a rogue's gallery when he has not been convicted of a criminal act. Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499 (1905).
  \item Churchill Downs Distilling Co. v. Churchill Downs, Inc., 262 Ky. 567, 90 S. W. (2d) 1041 (1936); Vanderbilt v. Mitchell, 72 N. J. Eq. 910, 67 Atl. 97 (1907) (court enjoined defendant wife from naming a child after her husband where infant was born out of adultery with a third party).
  \item Carter v. Knapp Motor Co., Inc. 243 Ala. 600, 11 S. (2d) 383 (1943); Menard v. Houle, 298 Mass. 546, 11 N. E. (2d) 436 (1937) (defendant enjoined from driving around in a car bought from plaintiff that had derogatory signs and images affixed to it which caused impairment of plaintiff's business reputation).
  \item Contra: Marlin Firearms Co. v. Shields, 171 N. Y. 384, 64 N. E. 163 (1902).
  \item Quentell v. New York Cotton Exchange, 56 Misc. 150, 106 N. Y. Supp. 228 (1907) (court granted injunction to prevent member of exchange from being ousted without compliance with provisions of by-laws provided for that purpose).
  \item "Expulsion from membership in a fraternal society affects the property rights of the member and it may affect his reputation seriously." Gervasi v. Societa Giuseppe Garibaldi, 96 Conn. 50, 112 Atl. 693, 696 (1921).
  \item The Pennsylvania court observed: "...and they [by-laws of union] can never be adjudged reasonable when, as here, they would compel the citizen to lose his property rights. . . . Defendant lodge is part of a beneficial organization and . . . plaintiff has a substantial property interest therein." Spayd v. Ringing Rock Lodge No. 665, Brotherhood of Railroad Trainmen of Pottstown, 270 Pa. 67, 113 Atl. 70, 72 (1921).\end{itemize}
a direct relationship between damage to the personal reputation of the individual and the subsequent impairment of his salary and earning capacity dependent thereon. Illustrative of this reluctance are the cases in which a doctor or a lawyer has sought an injunction to prevent the distribution of circulars which charge that he is inept in his professional work. In denying relief, equity invokes the rule that no property right is involved and that it cannot enjoin a libel because there is an adequate remedy at law.

The court in the principle case, by recognizing that it has jurisdiction to grant relief to the aggrieved pastor, seems to depart from the narrow view that the right to earn a salary is not a property right. If this view is applied in future controversies pertaining to the protection of the right of the individual to earn his livelihood, it will effect a just and logical expansion of the prevailing concept of a property right, and will eliminate an unrealistic distinction between the nature of income obtained in the form of profits from a business on the one hand, and in the form of wages or salary on the other hand. In disputes which arise wholly within the church organization, the right of a priest to revenues derived from part of the rentals and voluntary offerings and the right of a priest to the fixed emolument which is annexed to the office have each been held a sufficient "property right" peg upon which equity may hang its jurisdiction. However, there has been some reluctance to grant relief in a situation where the salary of a priest is derived solely from voluntary offerings.

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18 Wolf v. Harris, 267 Mo. 405, 184 S. W. 1139 (1916).
20 In the Harris and Springer cases plaintiffs sought injunctions on the grounds that the alleged libellous circulars, publicly disseminated, had caused and would continue to cause irreparable damage to reputation and earning capacity. In each case the court stated that equity will not act to enjoin a libel because to do so would deprive defendant of his constitutional right of trial by jury. In so deciding the Illinois court declared: "The law clearly is that the court of chancery will not interfere, by injunction, to restrain the publication of a libel... Charges of slander are peculiarly adapted to and require trial by jury... and suits in equity shall not be sustained in any case where a plain, adequate and complete remedy may be had at law..." Gariepy v. Springer, 318 Ill. 523, 48 N. E. (2d) 572, 574 (1942).
21 The court, in granting relief to prevent arbitrary removal of a priest from his parish without assigning him to another position, observed: "A man's profession is his property. Appellee was not only deprived of his right of property as pastor of that particular church; but he was also prohibited from exercising any priestly functions, as a means of support, elsewhere." O'Hara v. Stack, 90 Pa. 477, 491 (1879).
23 Plaintiff sought an injunction to prevent church officials from effectuating his removal from the office of pastor. In its decision denying relief, the Tennessee court ruled: "The pastor has no property right in his salary, as against the church. That it is a matter of voluntary contribution by the membership... He may secure this
Though a property interest meriting protection was properly found in the principal case, it would seem that the Pennsylvania court’s statement of its authority to intervene in any church dispute to protect a property right is too broad to be in accord with the holdings of other jurisdictions. It is generally required, as a ground for equitable intervention, that the property right involved be adversely affected due to the failure of the presiding church authorities to conform to the procedure provided by the church constitution or its articles of government for handling the controversy in question.

Though on occasion courts have ignored this limitation in order to intercede to protect against arbitrary action on the part of church authority, the tendency is to refuse to question intra-church decisions, even though arbitrary in nature, where the action has been effectuated with regard for the recognized modes of procedure set forth in the laws of the church. Further, equity, as an excuse for declining to accept jurisdiction, often refuses to find a property right where the recognition of that right would involve the determination of purely ecclesiastical matters, or where the practical difficulties of the admin-

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istration of a decree would prevent effective relief from being achieved.29

Thus, it would seem that equity would not have granted relief to the defendant-pastor in the principal case had the plaintiff-bishop ordered his dismissal after a hearing, which, though arbitrary in nature, conformed to the proceedings prescribed in the church constitution. In such a situation, even the existence of a property right would not have prompted the court to intervene.

ROBERT R. KANE, III

PROPERTY—EXERCISE OF OPTION IN DEED TO EXTEND PERIOD FOR CUTTING AND REMOVAL OF TIMBER. [West Virginia]

The most common method of timber conveyancing is by deed granting certain standing timber to be removed within a designated time limit. These instruments often provide that the grantee may, by paying an additional specified sum to the grantor, extend from year to year for a specified number of years the period for cutting and removing the timber. Litigation involving such agreements frequently results from the grantee's failure to remove the timber within the original time limit, and a dispute between the parties as to whether the grantee's option to extend the period for removal has been properly exercised.

D. L. R. 670 (1940) (The contestants actually based their controversy on possession of a tangible symbol of priesthood. But the court refused to accept jurisdiction and held that the true dispute was of a purely ecclesiastical nature over which its jurisdiction did not extend.)

29By analogy, equity courts refuse to interfere in disputes which encompass intra-family controversies because of the difficulty of the enforcement of such a decree. Thus, the Ohio court denied the injunctive relief sought by a wife to prevent a third party from seeing or associating with her husband on the grounds that said third party was alienating the affections of the husband toward her. In rendering its decree the court stated: "Such extension of the jurisdiction of equity to regulate and control domestic relations, in addition to the legal and the statutory remedies already provided, in our opinion, is not supported by authority, warranted by sound reason, or in the interest of good morals or public policy. The opening of such a wide field for injunctive process, enforceable only by contempt proceedings, the difficulty if not the impossibility of such enforcement, and the very doubtful beneficial results to be obtained thereby, warrant the denial of such a decree in this case." Snedaker v. King, 111 Ohio St. 225, 145 N. E. 15, 17 (1924). But cf. Reed v. Carter, 268 Ky. 1, 103 S. W. (2d) 663 (1937) (court decreed an injunction to prevent one sister from keeping another sister from visiting her mother who was residing at the home of the former sister).
Typical of such controversies is the recent case of *Sun Lumber Co. v. Thompson Land and Coal Co.*, which involved the construction of an instrument whereby defendant "sold and doth grant and convey" all timber of a certain size on defendant's lands to plaintiff's assignor. The grantee had five years to remove the timber, "with the right to extend such time, from year to year, not exceeding an additional five years, upon payment to first party of the sum of $75.00 per year for each annual extension."

Prior to the expiration of the initial five-year period, the plaintiff, having removed no timber, exercised his option to extend for an additional year. Two months after the expiration of that year plaintiff tendered to defendant another $75.00 in an attempt to extend for another year. The defendant refused to accept plaintiff's tender and notified him that his rights under the instrument had terminated two months previously. Plaintiff sought an injunction to restrain defendant from interfering with plaintiff's rights under the instrument. The trial court dismissed plaintiff's petition, and on appeal the West Virginia Supreme Court of Appeals affirmed, with two Justices dissenting.

Both the majority and minority of the court engaged in lengthy discussions concerning the legal nature of the interest created in the grantee by the instrument. The majority held that the agreement created a defeasible fee in the grantee, whereas the dissent, without using any precise label, declared that the grantee had "an irrevocable right to perform the actions provided by the agreement." Each opinion then turned to the crucial question of whether the plaintiff was required to pay the fee for the second-year annual extension in advance of, or within a reasonable time after the expiration of the first-year extension. The majority purported to look to the intent of the parties in holding that the plaintiff's rights under the agreement terminated when he failed to exercise his option to extend in advance of the beginning of the period for which he desired the extension, and denied that such a construction involved a forfeiture. The dissent took the contrary view that plaintiff had a reasonable time after the commencement of this period in which to extend, arguing that a denial of relief to the plaintiff would invoke a forfeiture contrary to the principles of equity.

A few courts once construed timber-conveyancing instruments as

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176 S. E. (2d) 105 (W. Va. 1953).

2Sun Lumber Co. v. Thompson Land and Coal Co., 76 S. E. (2d) 105, 111 (W. Va. 1953).
creating an absolute fee in the grantee, but nearly all courts today recognize a lesser interest in the grantee, although they differ as to the precise nature of this interest.

One theory, in accord with the weight of authority, is that the instrument vests in the grantee title to only so much timber as he removes within the time limit—i.e., title passes only when the grantee cuts and removes the timber, and that portion not cut and removed remains the property of the grantor. Another theory is that adopted by the principal case, that upon execution of the deed, title to the timber vests immediately in the grantee subject to being divested by failure to remove the timber within the specified time limit.

2 A rule formerly followed in some jurisdictions was that, although a deed or contract of sale of standing timber limited the time within which it was to be removed, absolute title to the timber vested in the purchaser, notwithstanding the fact that he failed to remove it within the time limit. West v. Maddox, 193 Ala. 612, 69 So. 101 (1915); Pierce v. Finerty, 76 N. H. 38, 76 Atl. 194 (1910). This was the rule in Alabama until 1919 when a statute was adopted declaring: “In all conveyances of standing timber by deed or other instrument, unless otherwise provided in said deed or other instrument, the title to all timber not cut and removed within ten years from the date of the deed or other instrument conveying the same, or at the expiration of the time limit agreed upon by the parties, shall revert to the grantor.” Ala. Gen. Acts (1919) § 4; Ala. Code (1940) Tit. 47, § 49.

3 Foster v. Commissioner of Internal Revenue, 57 F. (2d) 516 (C. C. A. 5th, 1932); Colbran v. Stewart, 71 Ga. 579, 31 S. E. (2d) 494 (1944); Lammers v. Anderson, 65 Idaho 71, 139 P. (2d) 482 (1943); Ream v. Fugate, 283 Ky. 463, 97 S. W. (2d) 11 (1936); Note (1951) 37 Va. L. Rev. 885 at 888; 54 C. J. S. 699.

4 Ordinarily the time limit is as applicable to the removal as it is to the cutting. Smith v. Ramsey, 116 Va. 530, 82 S. E. 189, 15 A. L. R. 32 (1914). A mere severance from the soil does not constitute a removal from the premises. Bond v. Ungerecht, 129 Tenn. 631, 167 S. X. 116 (1914). However it has been held that if the contract specifies the date cutting shall be completed, but not the date of removal of the timber, the purchaser has a reasonable time to remove it after completing the cutting. Osborne v. Eldridge, 130 Ore. 385, 280 Pac. 497 (1929).

5 Fish v. Murrell, 219 Ky. 153, 292 S. W. 1096 (1926); Ross v. Choctow Lumber Co., 176 Okla. 399, 55 P. (2d) 1041 (1936); Carter v. Clark & Boice Lumber Co., 149 S. W. 278 (Tex. Civ. App. 1912); Hall v. W. M. Ritter Lumber Co., 167 Va. 95, 187 S. E. 503 (1936). The reason for this rule was stated in the Carter case as follows: “Having agreed to a limitation upon the right of removal, then the right of the purchaser to the timber is acquired by the act of removal and appropriation; and, as appropriation of the timber as such is dependent upon the removal from the soil, the intention of the parties would appear to be a contract of sale of such timber only as is removed within the time limited.” 149 S. W. 278, 279 (Tex. Civ. App. 1912).

another view advanced is that no beneficial interest in the land or standing timber vests in the grantee; he merely acquires a right, in the nature of a license, to enter upon the land and cut and remove the timber within the time limit, and title to the logs vests in the grantee after severance.\(^8\)

Although each of the foregoing theories recognizes an essentially different interest in the grantee, the choice of one theory or another generally has no effect on the decision as to whether the grantee's interest terminates at the end of the contract period.\(^9\) This fact was recognized by the Minnesota Supreme Court in *King v. Merriman* where, after finding that the instrument created a license, the court added: "But, call it by what name we may,—a license to enter and cut; a sale; a conditional sale; or a contract to sell, coupled with a license to enter,—the object and extent of the grant was only so much timber as the grantee should cut during two logging seasons, and no more."\(^10\) And nearly a half-century ago, the West Virginia court observed: "Some courts hold the right of the grantee to be a license, others a lease, and others a defeasible title to the timber. [But by] the great weight of authority it is determined that no right or title

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\(^8\)Schoemaker v. Meadows, 170 Misc. 158, 10 N. Y. S. (2d) 850 (1939); Emerson v. Shores, 95 Me. 237, 49 Atl. 1051 (1901).

\(^9\)Occasionally a court has applied two or more inconsistent theories to the same instrument; however, the result does not appear to be affected. In *Weaver Bros. Lumber Corp. v. Beasley*, 157 So. 282, 283 (La. App. 1934) wherein the contract fixed a definite time for the removal of the timber, the court stated: "The contract is a conveyance of only so many trees as the purchaser may cut and remove within the time designated, the balance remaining the property of the vendor... when the last extension granted plaintiff expired on August 10, 1933, without having been extended further, the contract was at an end and the ownership of the timber reverted to defendant vendor. [italics supplied]. In *Hanifin v. C. & R. Const. Co.*, 313 Mass. 651, 48 N. E. (2d) 913, 916 (1943) the court stated: "...a contract for the sale of standing wood or timber to be cut is construed as passing an interest in the trees when they are severed from the land,... and where, as here, the contract provides a time within which the cut wood and timber shall be removed, the title to it is conditional on the removal within the time stated, with a reverter of title to the grantor in case it is not so removed."

\(^10\)"As several opinions have pointed out, it does not make much practical difference, with respect to the rights and remedies of the parties, whether we consider that the purchaser under these deeds and contracts acquires a present defeasible title or acquires a title to only the timber removed.... The far-reaching difference is between the cases holding either of the doctrines last mentioned and the cases holding, on the contrary, that the purchaser gets an absolute title to all timber described in the granting clause of the deed or contract, and that the removal clause operates only as a covenant," *Houston Oil Co. of Texas v. Boykin*, 109 Tex. 276, 206 S. W. 815, 816 (1918).

\(^{38}\)Minn. 47, 35 N. W. 570 (1887).
exists in the grantee after the expiration of the time specified in the deed or contract."

Once it has been decided that the grantee has no absolute fee in the timber and that absent a provision for extension, his interest would terminate on the date specified in the deed or contract, the courts will then consider, in those cases in which the instrument provides for the right to extend the period for removal, whether the grantee has properly exercised this right and thereby kept alive his interest in the timber beyond the original date for removal. Thus, the real issue in the principal case becomes whether the right to extend the period of operations must be exercised in advance of the time for the expiration of the current term. The agreement for the extension of time for cutting and removing the timber is usually regarded as an option. The option does not create an interest in the timber but merely amounts to an offer to create one when the offer has been accepted and the conditions have been complied with unless waived.

In the absence of an express provision in the instrument stating how the grantee must proceed in order to exercise the option, the question of whether he must do so by indicating his decision and paying the consideration for an extension in advance of the termination of the current period has been resolved in different cases in accord with both of the conclusions contended for by the two factions of the West Virginia court in the principal case. In decisions in which it is decided that the grantee must make payment before the expiration of the current period, the courts reason that since the provision for extension confers a privilege on the grantee and is binding only on the grantor, time should be regarded as of the essence in order

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23Adkins v. Huff, 58 W. Va. 645, 648, 52 S. E. 773, 774 (1906). "Disregarding for the moment the varying reasons by which the result is reached, the majority rule is that where a timber deed or contract fixes a time in which the grantee or holder of timber rights may remove timber, the expiration of such time ordinarily terminates the rights created by the deed or contract as to timber not felled." Note (1946) 164 A. L. R. 423, 434.

24Clearly if the court should find that the grantee took an absolute fee under the instrument, it would not be necessary to consider the option provision. See note 9, supra.


to prevent imposing an undue burden on the landowner. Therefore, the doctrine applicable to such contracts is that they should be strictly construed in favor of the grantor or optionor. Thus, the North Carolina court in Bateman v. Kramer stated: "There is, moreover, a strong inclination on the part of the courts to view any delay with great strictness, on the ground that the party seeking to enforce performance was not bound, while the other party was bound." It has also been reasoned that the grantee must exercise his option prior to the expiration of the current term because there can be no extension of a period that has already expired; the agreement is to grant additional time for removal, not to revive or renew the contract. If the grantee may wait until after commencement of the new period to exercise his option, the grantor is kept in suspense as to his right to dispose of his timber and as to the use he can make of the land on which the timber is standing.

On the other hand, in those few decisions which allow the grantee to exercise his option by giving notice and paying the consideration

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1 Bateman v. Kramer Lumber Co., 154 N. C. 248, 70 S. E. 474, 34 L. R. A. (N. S.) 615 (1911). In Estes v. Furlong, 59 Ill. 298, 302 (1871) the court stated: "Where the contract is in anywise unilateral, as in the case of an option to purchase, any delay on the part of the purchaser, in compliance with it, is regarded with especial strictness...."

2 154 N. C. 248, 70 S. E. 474, 475 (1911) quoting 21 Am. & Eng. Enc. Law (2d) 931.


5 Hartley v. Neaves, 117 Va. 219, 87 S. E. 97 (1915). In Hall v. W. M. Ritter Lumber Co., 167 Va. 95, 187 S. E. 503 (1936), as in the principal case, the grantee had on previous occasion notified the grantor that additional time was desired and paid him the stipulated amount in advance. The court taking note of this stated: "Thus the parties have twice acted upon the assumption that these provisions required the grantee to act before the expiration of the time stated. Defendant cannot now object to the court adopting the construction of the instrument which it previously adopted and acted upon with the acquiescence of plaintiff." 167 Va. 95, 107, 187 S. E. 503, 505 (1936). The Virginia court's reasoning appears to be somewhat spurious in assuming that the grantee, by paying in advance on two previous occasions, necessarily believed that he could not have effected an extension just as well by paying within a reasonable time after the expiration of the previous period. One reason given by the federal court in the Granville case, 234 Fed. 424, 432 (E. D. N. C. 1916), for strict construction is as follows: "The timber is subject to destruction by forest fire, in which event the owner of the land would have no remedy for loss sustained by its destruction." The federal court is stretching the probabilities considerably in assuming that otherwise the landowner would have been so far-sighted as to anticipate a forest fire and remove the timber before it was destroyed. Of course the landowner may dispose of the timber so that any loss by fire will fall on the purchaser, but it is highly unlikely that he will be so prescient as to sell with this in mind.
within reasonable time after the expiration of the last established period, the courts reason that where no time has been stated in the instrument for the exercise of the privilege to extend, time has not been made of the essence.\textsuperscript{20} Another line of reasoning adopted is that the provision for extension is a covenant apart from the sale of the timber and not a condition upon which the sale depends, and therefore failure to pay in advance should not work a forfeiture of all the grantee's rights under the sale contract.\textsuperscript{21} It has also been held that the provision to extend is not a mere option but rather a condition subsequent, and that payment within a few days after the expiration of the designated period is a substantial compliance with the condition relating to the extension.\textsuperscript{22}

If there be any sound basis for choice between the two conflicting constructions applied to the option provision, it may lie in the consideration emphasized in the majority opinion in the principal case—that unless the grantee be required to exercise his option by the end of the current term, the grantor will be greatly hampered in the normal use and disposition of his property. Under the rule of the majority, as soon as a period set in the grant expires without an extension being made by the grantee, the owner is safe in using the property as he desires, or in selling the timber or the land free of any rights in the grantee. But if the grantee be given a "reasonable time" to extend, the grantor must bear the risk of making a correct guess as to when the period has elapsed. During this indefinite period he is completely barred from dealing with the land or timber in any manner inconsistent with the grantee's possible right in the timber, because some court

\textsuperscript{20}Bond v. Brown, 2 F. (2d) 797 (C. C. A. 5th, 1924); Stacy v. Reams, 221 Ky. 573, 299 S. W. 193 (1927); Gotham v. Wachsmuth Lumber Co., 156 Wis. 442, 146 N. W. 505 (1914). One court invoked a presumption in favor of the grantee, as follows: "The contract specifies no time within which the defendant must exercise his right to have the time extended for cutting the timber, and it specifies no time within which the 50 cents per acre must be paid or tendered for it, so under these circumstances the presumption is, the parties intended performance of these matters within a reasonable time after the specified period." Stark & Oldham Bros. Lumber Co. v. Burford, 215 Ala. 68, 109 So. 148, 151 (1926); but this decision was later overruled by Murphy v. Schuster Springs Lumber Co., 215 Ala. 412, 111 So. 427 (1926).

\textsuperscript{21}Ciapusci v. Clark, 106 Pac. 436 (Cal. App. 1910). The court in this case held the contract of sale constituted an absolute sale of the timber. As to the provision that the grantee was to pay $5.00 each year in advance for the privilege of extending the period for removal, the court stated: "If we were to speculate as to the real purpose for this rent clause, we should be inclined to think that it was inserted under the misapprehension that without it some sort of prescriptive right might accrue to defendants." 106 Pac. 436, 440 (Cal. App. 1910).

\textsuperscript{22}Watson v. Stout Lumber Co., 175 Ark. 240, 298 S. W. 1010 (1927).
might subsequently find the grantee's right to be paramount and hold the grantor liable for breach of contract, trespass, or conversion.

While there is no completely satisfactory resolution of the controversies which arise from such an ambiguous deed or contract, most of the confusion can be eliminated by simply specifying in the instrument how and when the grantee must act in order to extend the time for cutting and removing the timber.

WILLIAM R. COGAR

SALES—APPLICABILITY OF USURY STATUTES TO CREDIT SALE TRANSACTIONS. [Idaho]

From the early English case of *Beete v. Bidgood* to the most recent decisions, a majority of courts have refused to bring credit sales under the restrictions of the usury laws. The position is taken that there is no analogy between situations in which a lender demands a higher rate of interest as compensation for his loan than the usury statutes permit, and situations in which the seller increases his cash price by an amount in excess of that allowed by such statute to ascertain a credit price. It is reasoned that a price differential is based on valid com-


9Standard Motors Fin. Co. v. Mitchell Auto Co., 173 Ark. 875, 293 S. W. 1026, 57 A. L. R. 877 (1937); Pacific Fin. Corp. v. Lauman, 95 Cal. App. 541, 273 Pac. 48 (1928); Commercial Credit Co., Inc. v. Shelton, 139 Miss. 132, 104 So. 75, 76 (1925) ("... a seller may have two prices, one for cash and one on credit, and the difference between the two is not to be considered as a charge of interest."); Levine v. Nolan Motors, Inc., 169 Misc. 1025, 8 N. Y. S. (2d) 311 (1938); Evans v. Rice, 96 Va. 59, 10 S. E. 463, 465 (1898) (quoting Graeme v. Adams, 23 Grat. 225, 234, 14 Am. Rep. 130 (1873)); "... and it is wholly immaterial whether the enhanced price be ascertained by the simple addition of a lumping sum to the cash price, or by a percentage thereon."); Note (1945) 143 A. L. R. 238, 251. But cf. Gifford v. State, 293 S. W. (2d) 949 (Tex. Civ. App. 1950); Associates Inv. Co. v. Baker, 221 S. W. (2d) 393 (Tex. Civ. App. 1949); Associates Inv. Co. v. Thomas, 210 S. W. (2d) 413 (Tex. Civ. App. 1948), holding that when the goods are sold at a stated cash price which is the only price quoted, the increase in the price on credit may not be in excess of the lawful interest rate. The weakness of such a holding is that in the future, all the sellers need do to make such a credit sale valid is first to arrive at the credit price in the same manner as before but then
mercial considerations in that the seller will accept the low cash price because of immediate payment and freedom from risk of losing his investment, while the buyer will agree to the higher credit price to gain time to pay and thus ease the burden on his financial resources. As interpreted by the courts, usury statutes apply only to loans of money or to forbearances of debts and not to sales, unless the so-called "sale" is used merely to mask a loan on forbearance. Thus, the courts will look through the form of each contested transaction to its substance in order to determine whether the business deal is in fact a bona fide sale with a valid time-differential factor in the purchase price, or a loan or forbearance with an illegal interest charge.

The nature of the problems which confront the courts in such controversies is demonstrated by the recent Idaho case of Bell v. Idaho Finance Co., an action to recover the statutory penalty for usury. Plaintiff Bell purchased an automobile from McCormick Used Cars state only the time price instead of the cash price, thus working the same effect as before but without the same consequences—except to the purchaser, who is faced with the result of high payment in either case. In determining the validity of a sale, most courts seem to consider it irrelevant that a cash price only is quoted in arriving at the credit price between purchaser and seller. In re Bibbey, 9 F. (2d) 944 (D. C. Minn. 1925); Harper v. Futrell, 204 Ark. 822, 164 S. W. (2d) 995, 143 A. L. R. 235 (1942); Atlas Securities Co. v. Copeland, 124 Kan. 393, 260 Pac. 659 (1927).


Such was held to be the situation in the following cases: Liebelt v. Carney, 213 Cal. 250, 2 P. (2d) 144, 78 A. L. R. 405 (1931); Seebold v. Eustermann, 216 Minn. 566, 13 N. W. (2d) 739, 152 A. L. R. 585 (1944); Nazarian v. Lincoln Fin. Corp., 77 R. I. 498, 78 A. (2d) 7 (1951).

The general principle of law is affirmed by the following authorities: Commercial Credit Co. v. Tarwater, 215 Ala. 123, 110 So. 99, 48 A. L. R. 1437 (1926); Dunn v. Midland Loan Fin. Corp., 206 Minn. 550, 289 N. W. 411 (1939); Brown v. Crandall, 218 S. C. 124, 61 S. E. (2d) 761 (1950); 6 Williston, Contracts (rev. ed. 1938) § 1687; Note (1930) 39 Yale L. J. 408.

Dunn v. Midland Loan Fin. Corp., 206 Minn. 550, 289 N. W. 411, 413 (1939): "Whether a particular transaction is usurious is a fact question....Decision is not to be made according to any hard and fast test. The case is not to be determined simply by what the parties represent the transaction to be, but by considering the whole evidence....The process involves looking through the form to the substance. No device or shift may be employed to conceal the true character of the transaction." Loucks v. Smith, 154 Neb. 597, 48 N. W. (2d) 722 (1951); Archer Motor Co., Inc. v. Relin, 255 App. Div. 333, 8 N. Y. S. (2d) 469 (1938); C. I. T. Corp v. Spence, 130 Misc. 659, 224 N. Y. Supp. 297 (1927).

73 Idaho 560, 255 P. (2d) 715 (1953).
under a conditional sale contract which was drawn up in the office of defendant Idaho Finance Co., on a form furnished by that company, and which was immediately assigned to the defendant by the dealer. In his complaint, plaintiff contended that the amount of interest charged by the defendant exceeded the lawful statutory rate because the amount financed was $2,000, the balance due after the down payment, but when the terms of the contract were fulfilled the sum aggregated $2,535.50, of which $341 was interest. Defendant's demurrer was sustained, and on plaintiff's appeal, the essential issue was whether the transaction was in fact a loan or forbearance or a bona fide sale. In a 3 to 2 decision, the court held that it was a valid sale to which the usury statute had no application. The generalization was made that "Contracts for the purchase of property are usurious where a debt is created by an agreement to buy followed by excessive consideration paid or promised for extension or postponement of time for payment or forbearance of the debt." The court then ruled that nothing in plaintiff's complaint disclosed a loan or forbearance, and that his allegations that the sum financed was $2,000 and that the balance due was $2,000 were only conclusions of the pleader unsupported by the evidence. The only facts alleged were the execution of the contract between the vendor and vendee, and its assignment to the finance company; no facts were presented to establish the necessary proposition "that the automobile was sold at an agreed price to which was added some sums or amounts which produced a profit exceeding that permitted by the statute." Defendant Finance Company was regarded as merely a purchaser of the executed contract between the car dealer and the plaintiff, and not a lender of money to plaintiff, because the company had had no prior arrangements with the plaintiff to finance the sale and had taken no part in the transaction until after plaintiff and the dealer had agreed upon the terms of the sale.11


And the fact that the finance company supplies the dealer with contract forms, rate charts, and other papers to compute the credit price does not make the transaction usurious, as such acts are considered normal finance company practices. See Walcott v. Skilton, 139 Conn. 424. 94 A. (2d) 792, 793 (1953). The court took judicial notice that many sales are financed in that manner, observing: "To hold otherwise would invalidate contracts running into millions of dollars." Attorney General v. Contract Purchase Corp., 327 Mich. 636, 42 N. W. (2d) 768 (1950); Dunn v. Midland Loan Fin. Corp., 206 Minn. 550, 289 N. W. 411 (1939) (also holding that the dealer is not the finance company's agent); Grand Island Fin. Co. v. Fowler, 124 Neb. 514, 247 N. W. 429 (1933); Note (1943) 143 A. L. R. 238, 244. For a dis-
In contrast to the situation in the present case, the court stated that "Vastly different were the facts in [cited cases], where the consummation of the sale seems to have been dependent upon performance by the finance company of a previous commitment to provide the funds with which to pay the dealer." 12

The dissenting Justices reasoned that even where the plaintiff does not allege the facts to support his complaint, it is the duty of the court, if it suspects the existence of an illegal transaction to hide usury, to scrutinize the transaction and the parties thereto without regard to the parol evidence rule. Such a duty can only be accomplished by a trial on the merits, and since a general demurrer was filed, the allegations were sufficient to admit evidence that the contract created a debt. The dissent concluded that the conditional sale contract was only a guise to cloak a loan or forbearance because the allegations of the complaint and the reasonable inferences arising therefrom indicated that there was no difference between the cash and credit price of the car so far as the vendor was concerned, and that the plaintiff purchased on a credit basis, paid $1,000 down, and then financed the remaining $2,000 through the defendant at an illegal interest rate.

As unsatisfactory as the result of the case may be in failing to afford the buying public protection against oppressive credit sales terms, the Idaho court has followed the view of the majority of courts in embracing the distinction between situations in which the finance company contracts directly with the purchaser to advance the purchase price before a sale contract is consummated, and situations in which, by prior arrangement between the finance company and the seller, the contract of sale is assigned to the finance company as soon as it is executed. 13

12In Benton v. Sun Industries, 277 App. Div. 46, 97 N. Y. S. (2d) 736, 738 (1950) the court could see no distinction and held that even where the dealer bargained with the finance company, the effect was a single transaction in which "the finance company would lend for the buyers the cash which they would otherwise have had to pay to the dealer..." and that the transaction was a loan in essence. However, the Benton case is not the view of the majority, which recognizes the distinction although the courts do not go into detail to distinguish the two situations, but merely allude to the distinction by saying that the finance company purchased the contract paper and that the transaction was merely a sale of personal property. Also, the fact that the contract paper is transferred to the finance company
Underlying the majority view that usury laws do not apply to credit sales is the fact that the seller must bear the risk of losing his investment if the buyer becomes unable to pay the deferred purchase price and the security value of the property sold has deteriorated, and therefore he should be allowed to increase the credit price for the goods to compensate himself for that risk. Further, it is recognized that the credit seller may incur various added expenses in extra bookkeeping, notification and collection of payments, investigation of credit, insurance and attorney fees and court costs for which he must reimburse himself through higher credit prices. The charging of a higher credit price is also said to be justified by the fact that a purchaser can reject the credit price offered and go elsewhere to buy, as he deals at arms length with the seller. Therefore, if an agreement is reached between the parties and it was their intention to treat the transaction as a sale, then the higher credit price demanded by the seller is of no concern to the courts. By contrast, it is said that a borrower is more frequently and more completely at the mercy of his lender, and so needs the protection of usury laws to guard him against oppressive exactions for the loan.

at a discount that exceeds the legal rate of interest and that the dealer is aware of such a discount beforehand does not render the credit transaction usurious, as the usury statute has no application to discounts. Commercial Credit Co. v. Tarwater, 215 Ala. 123, 110 So. 39, 48 A. L. R. 1437 (1926); Attorney General v. Contract Purchase Corp., 327 Mich. 636, 42 N. W. (2d) 708 (1950); Dunn v. Midland Loan Fin. Corp., 206 Minn. 550, 289 N. W. 411 (1939); General Motors Acc. Corp. v. Weinrich, 218 Mo. App. 68, 262 S. W. 425 (1924). But it is interesting to note that those jurisdictions which follow the majority rule as to dealer-finance company transactions, when confronted with purchaser-finance company situations hold such credit sales transactions as cloaks to hide usury. Bangs v. Midland Loan & Fin. Corp., 200 Minn. 310, 274 N. W. 184 (1937); Nazarian v. Lincoln Fin. Corp., 77 R. I. 497, 78 A. (2d) 7 (1951); G. F. C. Corp. v. Williams, 231 S. W. (2d) 565 (Tex. Civ. App. 1950).


2 See cases cited, note 14, supra.

3 Verbeck v. Clymer, 202 Cal. 557, 261 Pac. 1017, 1019 (1927): "The parties were unfettered; dealt with each other at arms length and in apparent good faith." See also Ecker, Commentary on "Usury in Installment Sales" (1935) 2 Law and Contemp. Prob. 173, 184.


5 General Motors Acc. Corp. v. Weinrich, 218 Mo. App. 68, 262 S. W. 425, 428 (1924): "The reason is that the statute against usury is striking at and forbidding
However, there seems to be no substantial difference in the risks taken by money lenders and credit vendors, as both must take the chance of losing their investment if the borrower or purchaser defaults. If any distinction exists, perhaps the vendor is in a somewhat better position than the lender, since the property sold is often available for repossession in satisfaction of at least part of the unpaid purchase price. And in the case of a finance transaction, the risk factor becomes even less significant where the seller assigns the sale contract to a finance company, as in the principal case. In such a situation, the seller is immediately reimbursed, in many instances at a bonus above his cash price, by the issuance of a discount to him by the finance company. The finance company can then rely upon the security involved in the conditional sales contract. No distinction

the exaction or receipt of more than a specified legal rate for the hire of money and not of anything else; and a purchaser is not like the needy borrower, a victim of a rapacious lender, since he can refrain from the purchase if he does not choose to pay the price asked by the seller. So that a sale in good faith of property..., if the seller has no other interest in the transaction, is valid and not open to the objection of usury whatever the price." Hafer v. Speath, 22 Wash. (2d) 378, 156 P. (2d) 408 (1945); Ecker, Commentary on "Usury in Installment Sales" (1935) 2 Law and Contemp. Prob. 173, 184.

Universal Credit Co. v. Lowell, 166 Misc. 15, 2 N. Y. S. (2d) 743 (1938) held that a finance charge under a conditional sale contract is in effect a charge for the forbearance of a debt and therefore the usury statute will apply if such charge exceeds the lawful interest rate. [Note that this case and the Failing case, infra, are both lower New York court decisions, and the view of those courts is not the same as the appellate courts of that state which follow the majority view as to credit sales and the application of usury statutes thereto. For appellate view see Archer Motor Co., Inc. v. Relin, 255 App. Div. 333, 8 N. Y. S. (2d) 469 (1938).] In Failing v. National Bond & Inv. Corp., 168 Misc. 617; 6 N. Y. S. (2d) 67 (1938), rev'd 12 N. Y. S. (2d) 260 (1938), aff'd 258 App. Div. 778, 14 N. Y. S. (2d) 1011 (1939), the court adopted the decision of Universal Credit Co. v. Lowell, supra but later reversed its stand and then affirmed the reversal on the imperative authority of Archer Motor Co. v. Relin, supra.

Most credit sales of any consequence are secured transactions which stipulate in the contract of sale the rights of the seller to repossession. This is true regardless of whether the form of paper used in the transaction is chattel mortgage, conditional sale, or deed of trust. For a brief discussion of how repossession works and of the problems involved in repossession, see Adelson, The Mechanics of the Installment Credit Sales (1935) 2 Law & Contemp. Prob. 218, 235; but cf. Myerson, The Practical Aspects of Some Legal Problems of Sales Finance Companies (1935) 2 Law & Contemp. Prob. 244 (which defends the finance company's repossession methods).

As to the practice of finance companies discounting to dealers see Commercial Credit Co. v. Tarwater, 215 Ala. 123, 110 So. 39, 48 A. L. R. 1437 (1926); and for the fact that in many instances bonuses are given the dealers see Cavers, The Consumer's Stake in the Finance Company Code Controversy (1935) 2 Law & Contemp. Prob. 200; Note (1952) 36 Minn. L. Rev. 744.
need be made between lender and credit vendor in regard to charges for the expenses of the transaction, because if the vendor is put under the restriction of usury laws, he can be accorded the same right the lender has to charge for all legitimate expenses entailed in executing the loan, in addition to the maximum valid interest rate. In respect to the distinction made between the "needy" borrower and "free" purchaser, the fact that the buyer sought credit terms indicates his lack of and need for money so as to give him a position analogous to that of a borrower. Furthermore, the buyer has little chance of acquiring a better bargain by shopping around where a finance company is involved, since a very few such companies control the credit field and set the prices the dealers offer.

In spite of the attempts of courts to distinguish between the sale and loan transactions, the purchaser and borrower are both in the position of having to pay for the use of another's money, but the former is not given the protection of the usury laws against exorbitant charges which the latter enjoys. Recognizing this situation, a lower New York court has observed: "Where lies the difference between Brown borrowing $1,000 from Smith for one year, that he may pay him in cash for an automobile, and Brown buying that same automobile from Smith on a year's credit? Each transaction makes Brown, Smith's debtor for the same amount. If Brown's $1,500 note...given...for the debt resulting from the loan..., is usurious..., then how can Brown's same $1,500 note..., given to secure...the debt resulting from the sale of the...$1,000 automobile, sold on...credit, escape like condemnation? Tweedledum and Tweedledee have no place in the law today...." If the amount named in the contract includes any sum as


The distinction between borrower and purchaser becomes even more fallacious where the article sought by the purchaser is considered to be a necessity. See Note (1938) 23 Corn. L. Q. 619. And where the commodity wanted is an automobile, considered by many a necessity today, the distinction becomes even more impractical, as the primary business of finance companies is financing automobile transactions. Cavers, The Consumer's Stake in the Finance Company Code Controversy (1935) 2 Law & Contemp. Prob. 200.


the price of forbearing the cash payment, such sum is interest. Sauvely calling it a differential or naively describing it as a carrying or financing charge neither reduces its amount, nor sweetens its odor."

Therefore, it may be the severity of the statutory forfeiture imposed by the usury laws which to some extent motivates the courts to deny the application of usury legislation to credit sales unless the facts conclusively show the "sales" to be only a device to mask a loan or forbearance of money. Irrespective of the stringency of the statutory penalties, civil or criminal "forfeitures are not favored in law, particularly where good reason exists for refusing such remedy entirely or for granting it only on certain conditions...." However, only a few courts have admitted that the policy against forfeitures is a substantial consideration in arriving at their decisions as to the validity of credit transactions.

In some states, the needed regulation of credit sales has been imposed by the legislatures in the form of retail installment sales acts (1938), rev'd 12 N. Y. S. (2d) 260 (1938), aff'd 258 App. Div. 778, 14 N. Y. S. (2d) 1011 (1939).


Hafer v. Speath, 22 Wash. (2d) 378, 156 P. (2d) 408, 414 (1945).

Milo Theater Corp. v. National Theater Supply, 71 Idaho 435, 233 P. (2d) 425, 429 (1951) (the court held that the contract of sale between Milo Theater Corp. and appellant Blair was usurious and only a cloak for a loan, but that the appellant Theater Supply did not fall within the purview of the usury statute "The provisions of [the statute], being quasi penal and providing for a forfeiture will not be construed to include matters or persons not expressly enumerated therein."

Seebold v. Eustermann, 216 Minn. 556, 13 N. W. (2d) 739, 744 (1944) (the court held the credit sale to be usurious as the conditional sale contract was only a patent sham for a loan, but it stated that usury laws "should not be converted from shields of protection into words of offense... and, since they are penal in nature, they should be construed with reasonable strictness."); Hafer v. Speath, 22 Wash. (2d) 378, 156 P. (2d) 408 (1945).

which vary in coverage from the inclusion of nearly all types of goods to only one specific commodity, the automobile. These jurisdictions generally require the finance companies to be licensed with the state, and a few states even license the dealers and distributors. Most retail installment sales statutes expressly stipulate that the terms of the sale must be disclosed and specified, and that the buyer must receive a copy of the contract which must be in its complete form before it


*E.g., Ohio Code Ann. (Baldwin's Serv., 1948-1952) § 6346-15. Massachusetts like Ohio, has no price limit. Connecticut, Indiana, Maryland, New Jersey, and New York have set a maximum limit under which the credit price must come in order for the credit sale to be within the installment act, such limits ranging from $1500—e.g., New York Pers. Prop. Law (Consol. Laws Serv., 1951) § 64-a—to $3000—e.g., Conn. Rev. Gen Stat. (1949) § 6698(a).  

Five states, California, Maine, Michigan, Pennsylvania, and Wisconsin fit this category. However, Maine's statute is unique and very narrow in scope as it is restricted to the licensing of third parties who finance motor vehicle sales. See Me. Rev. Stat. (1944) C56, § 264.  

*E.g., N.J. Stat. Ann. (1950) § 17:16 B-2. Other states that license the finance company only, are Connecticut, Indiana, Maine, and Maryland. California, Ohio, Massachusetts, and New York have no licensing provision.  


*E.g., Wis. Stat. (1951) § 218.01(2) (in addition to finance companies, dealers, and collector-repossessors, manufacturers and distributors must also be licensed with the state agency). Perhaps the license provision is the most effective weapon a state can use to control credit sales as the state agency can refuse to renew the license of a violator of the installment act.  

Maine requires no disclosure: Me. Rev. Stat. (1944), c. 56, § 264. But California, Connecticut, Indiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, and Wisconsin all require an itemization of the terms of the contract. For general state citations see note 30, supra. Exemplary of the necessary provisions to be specified in the contract is Ind. Ann. Stat. (Burns, 1951 replacement) § 58-904 which demands disclosure of the cash price, the amount of the down payment, the unpaid balance of the cash price, cost and description of the insurance coverage, balance due on the finance charge, the time balance owed to the seller, and the date due, amount, and number of installments.
is signed by the parties. Since a specific statement of the cash price and all expense and finance charges must be set out before the sale is consummated, the uncertainty involved in the principal case as to what constituted the actual sale price would be obviated.

In some of the states regulating credit sales, statutes also limit the finance charges to a maximum sum or to an amount which is determined, in the case of automobiles, by a classification system based on the age of the cars. The majority of the retail installment sales acts also contain a refund provision whereby the seller or assignee must return to the buyer part of the finance charges when the latter pays off the remainder of the price due before the maturity date of the last installment. Unfortunately, none of the installment statutes have

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37 This is required in all the states listed in note 36, supra, with the exception of Maine in which the statute refers only to licensing of auto finance enterprises. As an example of this feature of retail installment sales acts see Md. Ann. Code Gen. Laws (1951) art. 83, § 116. Some states—e.g., Ind. Ann. Stat. (Burns, 1951 replacement) § 58-902—provide that the buyer must by a written acknowledgement, state that he obtained a copy of the contract. The latter requirement was enacted to halt the practice of initialing and accepting credit sale contracts in blank.

38 The Idaho court stated: “Except for the recital in the contract of sale that the sum of $1,000 was paid upon the signing of the contract, the complaint furnishes no information as to either agreed price or amount paid. There is no allegation that $3,000 was the agreed purchase price of the property.... [There was] no allegation that the plaintiff did not actually agree to pay $3,535.50... and no assertion that the dealer agreed to accept and the plaintiff agreed to pay anything less than said sum as the fixed purchase price of the vehicle.” Bell v. Idaho Finance Co., 73 Idaho 560, 255 P. (2d) 715, 719, 720 (1953).

39 E.g., Ohio Code Ann. (Baldwin’s Serv. 1948-1952) § 6346-20; Ind. Ann. Stat. (Burns, 1951 replacement) § 58-906 (where the statute provides for an administrative body to set the rates of the finance charge, and consequently the rate varies from time to time at that department’s discretion). In some states, like New Jersey, that are without express rate limitations, the finance charges are controlled by a provision that licensed finance companies must file rate charges with a state agency, and such charts are not accepted unless the rates are deemed reasonable by that state group. N. J. Stat. Ann. (1950) § 17:16 B-2 (c). And in other states, that have no provision as to the filing of rate charts, the general powers given to the licensing bodies or departments are such that that group can request such charts or any other information it desires from any finance company or group. See Md. Ann. Code Gen. Laws (1951) art. 83 § 142 (e); Wis Stat. (1951) § 218.01 (5).


41 E.g., Ohio Code Ann. (Baldwin’s Serv., 1948-1952) § 6346-23; Ind. Ann. Stat. (Burns, 1951 replacement ) § 58-906 (the refund will be determined by the regulations in force at the time the installment contract was made, such regulations
effectively eliminated the participation of the seller in the finance charges, and consequently the vendor can still receive from the finance company on discount a rebate or kick-back above the cash price, although in one state, that bonus to the seller from the finance charge is limited to a fixed rate.\textsuperscript{42} It is to be regretted that Section Nine of the recently proposed Uniform Commercial Code, fails to include any provisions which would regulate or control the financing of consumer purchases.\textsuperscript{43}

The ease with which the usury statutes can be evaded by disguising loans and forbearances as credit sales requires that regulation composed of all the best features of the retail installment sales acts,\textsuperscript{44} passed in various forms in a minority of the states, be placed on credit transactions to protect the vendee against oppressive terms and exorbitant finance charges. In those states without progressive installment act legislation, the courts, in order to remedy the existing abuses hiding under the veil of credit sales, should apply the usury statutes to sales transactions which, as evidenced by the facts of each case, are of questionable fairness and good faith. Such a measure by the courts would also place the burden of proof on the seller and finance company to prove the transaction was a valid sale. Perhaps that applica-

\textsuperscript{42} Only Ohio has specifically attempted to curb the practice of rebates by forbidding a seller to receive or retain from a buyer or a finance company or the like as a finance charge, more than two percent of the principal balance of the retail installment contract, provided however, that such rebate provisions shall not apply where the seller is to act as collection agent. Ohio Code Ann. (Baldwin's Serv., 1948-52) § 6346-22. One state, Indiana, authorizes the Department of Financial Institutions to make regulations as to the allowance of rebates if that group so wishes. Ind. Ann. Stat. (Burns, 1951 replacement) § 58-910.

For further information concerning retail installment sales acts and the regulation of miscellaneous abuses of some note, see Notes (1950) 63 Harv. L. Rev. 874, 880; (1952) 36 Minn. L. Rev. 744, 753.

\textsuperscript{44} Uniform Commercial Code, Secured Transactions, § 9-102 (note), § 9-203 (2) (note). Fortunately, however, the Commercial Code will not repeal retail installment sales acts existing in those states that also pass the Code; thus, such states will not be forced to return their consumer public to the abuses of pre-installment statute days.

\textsuperscript{42} A model retail installment sales act generally should include the following: a license provision, at least requiring the finance company to be licensed; prepayment clause; rebate restrictions; a wide coverage clause on the order of Ohio’s. [Ohio Code Ann. (Baldwin's Serv., 1948-1952) § 6346-15]; full disclosure of the items in the contract; requirement that the contract be signed, delivered, and acknowledged before it would become effective; a maximum rate charge based on the classification of the goods' age or durability; and a penalty provision to punish violaters of the act.
tion of the usury laws would seriously impair future credit sales, but the organized pressure groups of sellers and finance companies would soon persuade the state legislatures to enact retail installment sales acts, thereby substituting the needed direct regulation of credit sales.

DONALD R. KLENK

SALES—DUTY OF CARRIERS TO NOTIFY SHIPPER UNDER ORDER-NOTIFY BILL OF LADING OF BUYER'S REFUSAL TO ACCEPT GOODS. [Massachusetts]

While several early American decisions held that notification by the carrier was not a reasonable incident of the contract of carriage, in a majority of American jurisdictions it is now well established that the carrier is ordinarily chargeable with the duty of notifying the consignor whenever the consignee fails or refuses to accept the goods shipped to him. In adopting this view, most American courts believe that the giving of notice meets the test of ordinary care and diligence on the part of the carrier as applied to modern business. Consonant with developments in high speed, low cost media of communication during the past seventy-five years, these courts have concluded that to fur-

1“The situation and location of the parties must be considered in reference to notice. Mail-time then, between New York and San Francisco, was twenty-two days. The defendants, of course, expected to get pay for the goods before a letter could be answered. Telegraphing was expensive; and there does not seem to have been occasion for its use. There is no statement that it was usually or ever resorted to under such circumstances.” Weed v. Barney, 45 N. Y. 344, 348, 6 Am. Rep. 96, 98 (1871). Accord, Kremer v. Southern Express Co., 6 Cold. 356 (Tenn. 1869).


nish notice is not an unreasonable burden upon the carriers, but is an expedient designed to facilitate the movement of vast shipments through busy terminals.

Under the modern usage of the "order-notify" bills of lading, American courts, seeking to apply the original common law test of reasonableness, have increased the diversity of opinion as to the duty of notification by the carriers to the consignor-consignee. Eleven different jurisdictions where the question has been squarely presented have applied three rules. Five courts have found an absolute requirement to give notice, while three jurisdictions, seeking to distinguish the "order-notify" bill from the older, "straight" bill, have concluded that no duty to notify exists under any circumstances. A third line of cases maintains that the attending circumstances of each case will determine whether it was reasonable that the carrier should have given notice in order to enable the shipper to protect himself against loss.

In the most recent of these decisions, Lapp Insulator Co. v. Boston & M. R. R., a case of first impression in Massachusetts, plaintiff-shipper,

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4 In such cases, the bills of lading are consigned to the order of the consignor-shipper, who will forward the bill to a bank or agent at the terminal city with a sight draft against the customer for the purchase price and with directions to surrender the bill of lading to the customer when he has honored the draft. Properly negotiated, the order bill of lading thus becomes evidence of the customer's title in the goods, entitling him to possession of the shipment from the carrier. The Federal Bills of Lading Act, 39 Stat. 538 (1916), 49 U. S. C. A. §§ 81-120 (1951), and the Uniform Bills of Lading Act, enacted in many states, have given to properly drawn bills of lading many qualities of negotiable instruments. This legislation has tended to accelerate the frequent use today of the "order-notify" form. See generally, Asbill, Rights of Parties and Duties of Carriers Under Order Notify Bills of Lading (1922) 6 Minn. L. Rev. 271.


8 112 N. E. (2d) 559 (Mass. 1953).
who was issued "order-notify" bills of lading in New York, consigned
two lots of goods to its own order in Concord, New Hampshire. When
the agent of defendant terminal carrier duly notified the customer of
the arrival of the shipments, the customer informed him that it was
unable to pay plaintiff's sight draft for the goods but would do so
when it was financially able. On several occasions the customer re-
peated this promise, but the two lots were destroyed by a fire of un-
known origin in defendant's warehouse two and one-half months after
the goods had arrived. After the fire, the carrier notified the shipper
of the nonacceptance, whereupon the shipper filed claims against the
carrier for the value of the goods. The bills of lading and the federal
statutes being silent as to the asserted duty of a carrier to notify a
shipper of a customer's nonacceptance, the court looked to general
common law principles.9 In affirming a judgment for the plaintiff,
the Supreme Judicial Court of Massachusetts specifically rejected the
contention that as a matter of law no duty of notification
exists,10 but
did not decide between the propriety of the absolute duty and the
reasonableness views. It was concluded that, regardless of whether an
absolute duty of notification exists, under the circumstances of this
case, it was reasonable to require the terminal carrier to inform the
shipper of nonacceptance in order that he might move to repossess,
store, or otherwise dispose of his property.

When the first cases involving "order-notify" bills of lading were
decided, some courts, contending that there was no requirement of
notice, distinguished the situations in which the shipments were made
under "straight" bills of lading with the customers named as the con-
signees.11 Thus, it was held that the carrier owed no duty to notify a
shipper, who, as the consignee, was deemed constructively present at

9"Where, as here, the bill of lading and the statute are silent as to an asserted
duty of the carrier to notify, recourse must be had to the common law. But the
question is nonetheless a Federal one and must be determined by the principles of
common law as accepted and applied in the Federal courts.... Where the Supreme
Court of the United States has dealt with the question its decisions, of course,
would be binding on this court. But where—as is the case here—the decisions of
that court furnish no guide we are free to determine the appropriate rule to be
applied, giving such consideration to the decisions of lower Federal courts as we
think they are entitled.” 112 N. E. (2d) 359, 362 (Mass. 1953).
10"It cannot be said as matter of law that the circumstances here were such
that the defendant was under no duty to notify the plaintiff.” 112 N. E. (ad) 359,
363 (Mass. 1953).
11Beedy v. Pacey, 22 Wash. 94, 60 Pac. 56 (1900); Hardin v. Chicago & A. Ry.,
134 Mo. App. 681, 114 S. W. 1117 (1909). See Note (1953) 37 Minn. L. Rev. 204.
the terminal in his role as consignee. However, the very specification of a “notify party” is notice to the carrier that the shipper himself will not be present at the terminal to accept shipment as consignee. Inasmuch as the purpose of the “order-notify” bill as a security device for the shipper is known to all carriers, the “constructive presence” of the shipper at the terminal becomes an unwarranted fiction. Other courts have concluded that the carrier performed its duty by informing the “notify party” of the arrival of the goods, the “notify party” in such circumstances being deemed the shipper’s agent for the purpose of receiving this notice and informing the shipper in case he refused to accept delivery. However, the theory of the “order-notify” bill rebuts the presumption that the “notify party” is the shipper’s agent. Since the shipper obviously prefers not to rely on the customer’s credit, he designates himself as the consignee in order to control the disposition of the goods. It cannot be assumed, then, that a defaulting vendee who has breached his contract will be disposed to notify the vendor of the default. It has been urged that the shipper’s bank or collecting agent at the terminal should give notice of non-

12“Were such the law, we would have the strange contradiction in this case, where the consignor is itself the consignee of the goods, that the consignor should be advised that it, as consignee, had not accepted delivery.” Trinidad Bean & Elevator Co. v. Pennsylvania R. R., 72 F. (2d) 371, 372 (C. C. A. 3d, 1934). Such an analysis overlooks the purpose of the order bill, inasmuch as nonacceptance would come from the notify party and not from the shipper, a fact of which the carrier is aware when it issues the order bill.

It has been reasoned that the owner, as the consignee, must in legal contemplation be present to receive the goods. Hardin v. Chicago & A. Ry., 134 Mo. App. 681, 114 S. W. 1117 (1909). One court has even stated that the failure of the shipper to be present for delivery constitutes abandonment of the shipment. Beedy v. Pacey, 22 Wash. 94, 60 Pac. 56 (1900).

13“It appears from the books that goods are frequently shipped consigned to the order of the shipper, with instructions to notify some one for whom the goods are intended. ... The purpose of shipping in this manner is plain; it is the intention of the shipper in every such case to exact payment of the purchase price of the goods on delivery. In the case at bar plaintiff proved without objection from the defendant a general custom to ship in this manner, when the shipper is unwilling to extend credit to the purchaser by whom the goods are ordered.” Stoddard Lumber Co. v. Oregon-Washington R. R. & Nav. Co., 84 Ore. 999, 165 Pac. 363, 366, 4 A. L. R. 1275, 1280 (1917).


15Tri-State Produce Co. v. Chicago, B. & Q. R. R. 104 F. Supp. 452 (W. D. Iowa 1952). In a sales transaction, it is difficult to find the elements of an agency relationship between the parties when the vendee has refused to carry out his obligation under the contract of sale. See Note (1952) 65 Harv. L. Rev. 351.
acceptance.\textsuperscript{16} However, while the knowledge of the bank is limited to the status of the draft upon the customer for payment, the carrier will always know at any given time the delivery status of the shipment of goods, and very often no other party will have that knowledge.\textsuperscript{17}

Those courts which have imposed an absolute duty of notification upon the carriers reject the contention that there is any distinction between "straight" and "order-notify" bills of lading, which requires a different rule as to notification. In support of this view, it has been argued that the carrier holds the goods as bailee of the vendor, with the accompanying obligation to notify the vendor in the event the vendee refuses to accept delivery.\textsuperscript{18} The Uniform Sales Act provides the theory for such a bailment relationship,\textsuperscript{19} for, under the Act, although the legal title to the goods may presumably pass to the customer upon shipment, the subsequent actions of the customer which are inconsistent with ownership may revest title in the shipper.\textsuperscript{20} Although the seller may force the buyer to retain the property,\textsuperscript{21} with the right to sue for the full price, he may, in the alternative, treat the property as his own and sue the vendee for any losses which he might sustain.\textsuperscript{22} The

\textsuperscript{16}Stoddard Lumber Co. v. Oregon-Washington R. R. & Nav. Co., 84 Ore. 399, 165 Pac. 399, 4 A. L. R. 1375 (1917). Although, as to third parties, notice to an agent is notice to the principal, such notice, to bind the principal, must relate to the matters over which the agent is authorized to act for his principal and to which his authority extends. Pennoyer v. Willis, 26 Ore. 1, 36 Pac. 568, 46 Am. St. Rep. 594 (1894). See Note (1952) 66 Harv. L. Rev. 351.

\textsuperscript{17}Stoddard Lumber Co. v. Oregon-Washington R. R. & Nav. Co., 84 Ore. 399, 165 Pac. 399, 4 A. L. R. 1375 (1917). See Note (1952) 66 Harv. L. Rev. 351. The purchaser may desire time to inspect the goods or to satisfy the vendor's sight draft against him. Obviously the carrier will be the first to possess this information, and whatever information the bank or collecting agent has will be secondhand to that of the carrier.


\textsuperscript{19}Uniform Sales Act §§ 18 (1) and 20 (2). Before passage of the Uniform Sales Act, there was no conclusive presumption, in the case of goods shipped by order bills, that the title passed to the customer upon shipment. After passage of the Act, if it appears that the only purpose of the order bill was to give the seller security, the legal title is deemed to have passed to the customer upon shipment. See Note (1935) 20 Iowa L. Rev. 523.

\textsuperscript{20}The buyer may, by his subsequent conduct, to all intents and purposes divest himself of this interest in the goods which he had acquired; it is factually reasonable to view the transfer, especially in the case of a self-order bill, as subject to the condition subsequent that if the buyer refuses the goods the property in them reverts in the seller." Note (1935) 20 Iowa L. Rev. 523, 524.

\textsuperscript{21}Uniform Sales Act § 63 (1).

\textsuperscript{22}Dustan v. McAndrews, 44 N. Y. 72 (1870).
fact that a seller has his choice of remedies underlies the assumption that whenever a customer breaches a contract of sale for the goods the carrier becomes the bailee of the shipper, with the accompanying obligation to exercise reasonable care for the protection of the goods.\(^\text{23}\)

The courts which find an obligation in the carrier to give notice of nonacceptance by the buyer only where the shipper can show that the circumstances were such as to make notice reasonably necessary for his protection are in accord that if the goods have certain unusual properties, prompt notification to the shipper is necessary. Thus, where the products are perishable, or of a seasonable nature, or of a fluctuating value,\(^\text{24}\) the courts will always find that prompt notification of nonacceptance should be afforded the shipper, even, as in the principal case, where the jurisdiction is committed to neither the absolute duty view of notification nor the reasonableness view.\(^\text{25}\) In two cases,\(^\text{26}\) the plaintiffs claimed that the Freight Tariff Rules in effect under the Interstate Commerce Act required that notice should be given whenever the goods were of a perishable nature.\(^\text{27}\) In both instances,


\(^{25}\)"We are disposed to reject the view that there is no duty on the part of the terminal carrier to notify the consignor in a situation like the present. Where the 'notify party' does not accept the shipment it is not unreasonable, we think, to require the terminal carrier to inform the shipper of that fact so that he may take the necessary steps for the repossession, storage, or disposition of his property. Whether the duty to notify is absolute as in [cited case], or depends on the attendant circumstances as in [cited case], need not be decided." Lapp Insulator Co. v. Boston & M. R. R., 112 N. E. (2d) 359, 363 (Mass. 1953).

Although the Supreme Judicial Court of Massachusetts intimated that the holding is supportable under either the absolute duty or the reasonableness views, the decision is the first instance in which a court has held (in the "order-notify" cases approving the test of reasonableness as applied to the particular circumstances) that notice can be required for goods not perishable or seasonal or fluctuating in market value. The items shipped in the principal case were hard durables.


\(^{27}\)I. C. C. Freight Tariff No. 4-Y, relating to Car Demurrage Rules and Charges, Supp. No. 137, Rule 4, \(\S\) E. 2. (a): "Except as otherwise provided in Note 1, when perishable carload freight has not been disposed of by this railroad and remains on hand undelivered at the expiration of three (3) days (exclusive of Saturdays, Sun-
the courts agreed that the purpose of the Rules was to require the carriers to give notice before demurrage charges could accrue, and that it was not necessarily intended that failure to give notice should impose liability on the carrier for loss of the goods. However, it was conceded that the so-called "Perishables Rule" is at least a recognition of a duty to give the shippers notice whenever perishable products were refused and that those familiar with the Rule might have the right to expect notice if perishable shipments were not accepted by the "notify party." Existence of the Rule is thus evidence as to an established custom of giving notice, the failure to provide which has been the basis of imposing liability upon a carrier. However, where the duty is found to exist in a particular situation, it derives, not from the Rules or the contractual provisions of the particular bill of lading, but from the common law duty of the carrier to exercise reasonable care for the protection of the shipment in its possession.

26 These rules were doubtless adopted as a foundation of charges against shippers for demurrage. They cannot be said to impose liability on the carrier, or to fix definitely its duty to notify a shipper for his benefit in case of consignee's failure to accept. But it is at least a recognition of a duty to give notice under certain circumstances. A person familiar with the tariff might have the right to rely on such notice. It is somewhat analogous to a custom of giving notice to a shipper so that failure to notify may impose liability." Porter v. Pennsylvania R. R., 217 App. Div. 49, 215 N. Y. Supp. 727, 734 (1926). Accord, Tri-State Produce Co. v. Chicago, B. & Q. R. R., 104 F. Supp. 452, 458-459 (W. D. Iowa 1952).


27 Emerson v. Chicago, B. & Q. R. R., 120 Minn. 84, 138 N. W. 1026 (1912).

28 The Interstate Commerce Commission recognized that the absolute duty view has never received uniform recognition, when it refused the shippers' attempt to incorporate into the uniform domestic bill of lading a provision requiring notification in all cases. See In the Matter of Bills of Lading (1919) 52 I. C. C. 671, at 717-721. It was indicated that a duty to notify in every case might work a hardship on the carriers. "It is undoubtedly to the mutual interest of the carrier and shipper that such notices should be given, but we have no reason to believe that the carriers fail, in the general conduct of their business, to exercise due diligence and observe good business methods in respect to the giving of such notices." 52 I. C. C. 671, 720 (1919), as quoted in Tri-State Produce Co. v. Chicago, B. & Q. R. R., 104 F. Supp. 452, 460 (W. D. Iowa 1952). The Commission has recognized that: "It is in the
Since the courts have provided no readily ascertainable definition of which circumstances make notice a reasonable requirement outside of the field of perishable and seasonal goods and goods with fluctuating values, and since carriers will not often know which goods are perishable or subject to seasonal and market-price variations, the courts could readily consider the requirement of reasonable care to be tantamount to an absolute duty of notification, and thus decline to make a distinction between the "straight" bill of lading and the "order-notify" form in regard to notification. That the absolute requirement of notice which now prevails in a majority of jurisdictions as to "straight" bills, if adopted in the cases involving "order-notify" bills, would not substantially add to the carrier's burden is apparent, since a widespread custom always to give notice exists. As previously indicated, the Freight Tariff Rules already require notice to be given before demurrage charges on perishable goods may accrue. In addition, the carrier must warehouse the rejected goods, subject to the shipper's order, a requirement making notice to the shipper essential sooner or later. The carrier has the means quickly to gather the information regarding defaulting purchasers and to relay it to the shipper, who, often a long distance from the terminal city, would otherwise be handicapped in attempting to supply himself with this information. A comparison of the burdens and risks, coupled with commercial convenience, favors the absolute requirement of notice.

Marvin H. Anderson

Torts—Contributory Negligence as Bar to Recovery by Guest for Injury Caused by Recklessness of Driver. [Texas]

The recent Texas decision in Sargent v. Williams\(^1\) demonstrates anew the unenviable legal status of the gratuitous guest in an automobile, and affords a further confirmation that the Texas courts are de-

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\(^1\)See In the Matter of Bills of Lading (1919) 52 I. C. C. 671 at 720.

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\(^3\)See Note (1952) 66 Harv. L. Rev. 351.


\(^6\)See Note (1952) 66 Harv. L. Rev. 351.

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parting from common law principles applicable to contributory conduct by plaintiffs which may disqualify them from recovering for injuries. The common law principle has been thus stated: In order to be barred from recovery against a defendant who has acted with reckless indifference for the plaintiff's safety, plaintiff must have been guilty of contributory recklessness with respect to his own safety.\(^2\) Recklessness, or "wilful or wanton" misconduct,\(^3\) as it is frequently called, verges on intentional aggression. It is apparent, therefore, that ordinary or casual contributory negligence is no defense to an action based on recklessness. The Restatement of Torts is authority for the view that contributory negligence, in the sense of plaintiff's voluntary exposure to a known unreasonable risk, is likewise no bar against a reckless defendant.\(^4\)

Previous to the Sargent case, the Supreme Court of Texas had deviated from these principles in connection with the question as to the type of contributory fault that would bar recovery under the state's automobile guest statute. The Texas statute\(^5\) declares:

"No person transported over the public highways of this state by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injuries, death, or loss in case of accident, unless such accident shall have been intentional on the part of said owner or operator, or caused by his heedless or reckless disregard of the rights of others."\(^6\)

In construing this statute, the Texas court in Schiller v. Rice\(^7\) recognized that "reckless disregard of the rights of others"—the type of fault necessary to support a recovery of compensatory damages under the guest statute—is closely similar to, if not identical with, the "gross neglect" which is necessary to recovery of exemplary damages under

\(^2\)Restatement, Torts (1934) §§ 482 (a) and 503 (a).

\(^3\)Some jurisdictions, including Texas, treat "gross negligence" as the equivalent of reckless misconduct. Napier v. Mooneyham, 94 S. W. (2d) 564 (Tex. Civ. App. 1936).

\(^4\)Restatement, Torts (1934) § 482, comment a.

\(^5\)About half of the states have passed automobile guest statutes, which have been enacted under the impetus of a feeling that the gratuitous guest is entitled to no claim against his host for the ordinary mishaps of modern traffic, and under the influence of the contention of liability insurance companies that frequent collusion between host and guest has increased insurance rates. Prosser, Torts (1941) 634.

\(^6\)"Gross negligence" is such that is evidenced by "acts indicating a wanton and reckless disregard for human life and safety of others." Napier v. Mooneyham, 94 S. W. (2d) 564, 567 (Tex. Civ. App. 1936).
the state constitutional provision that "every person...[who] may commit a homicide through willful act, or omission, or gross neglect, shall be responsible in exemplary damages...." With respect to contributory fault on the plaintiff's part, the Texas court had ruled earlier that ordinary contributory negligence was a defense to a suit for exemplary damages under this constitutional provision, even against one guilty of "gross neglect." Since the "reckless disregard" of the guest statute was the equivalent of "gross neglect" as used in the constitutional provision, the Schiller case held that ordinary contributory negligence was equally a bar to recovery by a guest against a reckless host.

In Sargent v. Williams, the process of deviation from common law concepts was extended by the court's ruling that a gratuitous guest may be held guilty of contributory negligence as a matter of law when he voluntarily accepts a ride with knowledge that the driver had driven recklessly on previous occasions. The plaintiffs, girls aged thirteen and fourteen, went for a ride with the defendant, a thirteen year old boy, whom they knew to be an incompetent and reckless driver, but with whom they had ridden safely before. Despite protests from the plaintiffs, the boy drove at an excessive rate of speed with the result that he wrecked the car, causing injury to the girls. In the action for damages, the trial court sitting with a jury gave judgment for the plaintiffs, but the judgment was reversed by the Court of Civil Appeals on the ground that the plaintiffs' misconduct in accepting a ride with a known incompetent driver barred recovery. The Supreme Court of Texas affirmed, asserting that the plaintiffs' conduct was a "self-exposure to risk" type of contributory negligence and that the case was governed by the doctrine of Schiller v. Rice, in which the contributory negligence of the rider hinged on her knowledge of the driver's intoxication. The court reasoned that there was no substantial difference between the risk to the rider from a known drunken driver and from a known reckless and incompetent driver, because a driver normally competent and careful may become both incom-

7In an action against a railroad company for the death of plaintiff's husband, who stepped at night in front of an engine having a bright headlight, near defendant's depot, while the train was running at a high rate of speed, it was not error to charge that plaintiff could not recover if deceased was guilty of negligence contributing to his death, though defendant's servants were guilty of gross negligence. McDonald v. International & G. N. Ry. Co., 86 Tex. 1, 22 S. W. 939 (1893).
9246 S. W. (2d) 607 (Tex. 1952).
petent and reckless when intoxicated. Applying the rule of the Schiller case, the Supreme Court of Texas held that the plaintiffs were contributorily negligent as a matter of law, notwithstanding the jury's contrary finding that plaintiffs' acceptance of the ride with knowledge of the driver's incompetence and recklessness was not negligence. The immaturity of the plaintiffs, which might have been a significant factor in the case, was disregarded because the point was not raised seasonably.\(^{12}\)

Three Justices, in a strong dissent, insisted that the plaintiffs' contributory negligence should have been a question of fact because there was some evidence to indicate that they had exercised reasonable care. In further support of this view, it was contended that the Schiller decision is not necessarily controlling here because a substantial difference exists between a drunken driver and a weak, unfit, incompetent driver, in that intoxication temporarily destroys the faculties essential to safe driving, whereas a reckless driver possesses these faculties, but may be heedless in the use of them.\(^{13}\) As an affirmative basis for their position, the dissenting Justices stated that there is no assumption of risk on the part of an invited guest from the mere acceptance of a ride with knowledge that the driver has driven recklessly on former occasions.\(^{14}\)

\(^{12}\)"As a general rule, the appellate court will not review questions or objections not properly raised and saved for review in the lower court." 17-18 Huddy, The Law of Automobiles (9th ed. 1931) § 245.

\(^{13}\)Hemington v. Hemington, 221 Mich. 206, 190 N. W. 683 (1922).

\(^{14}\)It is notable that the majority of the court used the contributory negligence theory, but spoke of "self-exposure to the risk" type of contributory negligence, while the dissenting Justices seemed to use contributory negligence and assumption of risk as synonymous terms. This confusion of the two theories is also found in decisions of other states. Note (1953) 25 Rocky Mount. L. Rev. 73. The doctrines of contributory negligence and assumption of risk are distinct, though they may overlap at times. Contributory negligence has been termed either: (a) an intentional and unreasonable exposure to danger created by the defendant's negligence of which danger the plaintiff knows, or has reason to know, or (b) conduct which falls short of the standard to which the reasonable man should conform in order to protect himself from harm. Restatement, Torts (1934) § 466. On the other hand, the defense of assumption of risk rests upon the plaintiff's consent to take his chances of harm from a particular risk. Such consent may be found by implication from the conduct of the parties, and so, when the plaintiff enters voluntarily into a situation involving obvious danger, he may be taken to have assumed the risk and to have relieved the defendant of responsibility. Such implied assumption of risk ordinarily requires knowledge and appreciation of the risk and a voluntary choice to encounter it. Prosser, Torts (1941) 576. Accord: Knipfer v. Shaw, 210 Wis. 617, 246 N. W. 328, modified 247 N. W. 320 (1933); Rule v. Jones, 256 Wis. 102, 40 N. W. (2d) 580 (1949). "The essence of contributory negligence is carelessness; of assumption of risk, venturousness." Hunn v. Windsor Hotel Co., 119 W. Va. 215, 193
In dealing with this problem of defining the conduct which the law requires of a gratuitous passenger to protect himself against injury caused by the misconduct of the driver, the courts are generally agreed on the rules applicable to certain typical situations. The passenger has the duty to exercise reasonable care to discover and warn the driver of known or obvious dangers. When the rider realizes that the driver is operating the car negligently or recklessly, he has the duty to protest; and if he knows, or should know, that it is dangerous to remain therein any longer, he has the duty to leave the vehicle at a favorable opportunity. If the rider enters the car knowing that the driver is physically incompetent to drive, he is guilty of contributory negligence and cannot recover for injuries incident thereto. Similarly, a rider who voluntarily accepts a ride with a driver whom he knows to be intoxicated will generally be precluded

S. E. 57, 58 (1937). Despite this distinction, either theory may be applied to bar recovery in the case of a gratuitous guest accepting a ride with a known reckless or intoxicated driver. Under the Texas laws, assumption of risk is applied as a defense only in cases involving employer and employee relationships, while contributory negligence is recognized as a defense in cases involving the host-guest relationship in automobiles. Schiller v. Rice, 246 S. W. (2d) 607 (Tex. 1952). In some other states contributory negligence cannot be asserted in defense by a driver whose conduct has been wanton or reckless, but assumption of risk may be asserted. Prosser, Torts (1941) 393.

"Where the evidence is undisputed, or only one inference can reasonably be drawn therefrom, the contributory negligence of a passenger or guest, who is injured in an automobile accident, is a question of law for the court.... But where the evidence is conflicting, or different inferences may reasonably be drawn therefrom, the question whether a passenger or guest, riding in an automobile driven by another, exercises such care for his own safety as a reasonable prudent person would take under like circumstances is one of fact for the jury...." 17-18 Huddy, The Law of Automobiles (9th ed. 1951) § 153.


A guest with knowledge of driver's near-sightedness, acquiescing in her driving forty miles per hour, was held guilty of contributory negligence in an accident caused by the car striking a chuckhole. Maybee v. Maybee, 79 Utah 585, 11 P. (2d) 975 (1932). A guest who knew that driver had a bad arm, which infirmity was a contributing factor in bringing about accident, could not recover because of his contributory negligence. Wilson v. Hill, 103 Colo. 409, 86 P. (2d) 1084 (1939).
from recovery for injuries proximately caused by the driver's condition.

Courts disagree on the specific issue of the principal case. One line of authority holds that there can be no contributory negligence or assumption of risk arising from the mere knowledge of the driver's incompetence or recklessness, but rather that this knowledge is merely one circumstance to consider in determining whether the rider exercised reasonable care; and whether the cause of action is barred becomes a jury question if the rider protests or performs some other act in the interest of his safety. The other line of authority rules that one who enters an automobile as a passenger cannot recover for injuries incident to the known incompetency or inexperience of the driver. Many of the cases applying this rule turn on the fact that the driver was intoxicated, physically incapacitated, or very inexperienced, but in rare instances, the reckless or incompetent nature of the driver was the controlling factor, as in the Sargent case.

The issue of whether certain acts constitute negligence is essentially a question for jury determination. "'The facts of each case must be given independent consideration, and seldom are the facts of any two cases so identical as that the decision in one could be held to be authority for a like decision in the other'.” In the Schiller case the

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driver was obviously intoxicated, as the guests knew when they chose to continue the ride after having several fair and reasonable opportunities to leave the vehicle. On this basis the court ruled that the plaintiffs were barred from recovery because as a matter of law they were heedless and reckless of their own safety. Furthermore, according to the decision, the result would have been the same had the plaintiffs' failure to leave the defendant's automobile been regarded as ordinary contributory negligence.

Since several obvious distinctions between the Schiller and Sargent cases exist, there is considerable doubt whether the Schiller doctrine should have been followed in the Sargent case. An intoxicated driver and one who has driven recklessly before are not necessarily in the same position. In the first place an intoxicated driver is mentally and physically incapable of operating a car safely, while a reckless driver has his faculties and is capable of safe driving. Further, one who consents to be driven by a reckless driver does not always acquiesce in his recklessness, but merely consents to be driven. In the Sargent case the plaintiffs' protests indicate that they were not acquiescing in the defendant's conduct. In addition, the danger of accepting a ride with an obviously intoxicated driver is usually apparent when the ride is accepted, but the danger of accepting a ride with a known previously reckless driver is not necessarily apparent when accepted, but becomes apparent normally when the driver actually becomes reckless. In the Schiller case the plaintiffs knew that the driver was intoxicated and that he would drive dangerously because of his action a few minutes earlier. In the Sargent case the girls merely knew that the defendant previously had driven in a reckless manner; they had no idea as to his state of mind that day. In both cases the defendants' acts were in wanton disregard of the safety of others, and the plaintiffs' in the Schiller case may properly be said to have acted not only unreasonably but also recklessly in exposing themselves to the risk created by the defendant. On the other hand, the most that can be said of the plaintiff girls in the Sargent case is that they were acting unreasonably in accepting the ride with defendant. The Texas Court holds that they are precluded from recovery despite the absence of any determination that they also acted recklessly.

The hardship of the common law doctrine that contributory fault precludes a plaintiff from all recovery against an admittedly tortious defendant is obvious. It is especially apparent in cases like the present one in which contributory negligence is held to be a defense
against the more serious conduct known as recklessness. The hardship is undeserved where, as here, the plaintiffs are of immature years. The rule of the principal case is undesirable also because it immunizes the reckless driver from liability that should be imposed to deter such conduct. Finally, if the Texas rule is to be applied, it is submitted that the position of the dissenting Justices should be adopted so that the issue of contributory negligence can be left to the ameliorative determination of the jury.

RICHARD F. BROUDY

TORTS—GROUNDS FOR IMMUNITY OF PRIVATE CITIZEN FROM LIABILITY FOR PROCURING FALSE ARREST. [California]

In establishing the rules for determining the liability of one who has brought about the arrest, without a warrant, of another person who is mistakenly suspected of having committed a crime, the courts must attempt to strike a balance between two conflicting policies: the protection of the individual's liberty against unjust arrest, and the encouragement of the public to cooperate with the police authorities in the apprehension of criminals.

It is generally agreed that a police officer is privileged to make an arrest without a warrant if he has reasonable grounds to believe that a felony has been committed and that the person arrested is the one who committed the felony. The authority of the private citizen, however, is more limited. He is privileged to arrest without a warrant only if a felony has in fact been committed and if he has reasonable grounds to suspect that the one arrested is guilty. As to this last element, some courts restrict the private person even more narrowly by requiring him to show that the one arrested was actually guilty of the felony.

The situation becomes more complicated when the private citizen

\footnote{To justify, in an action for false imprisonment, an arrest without warrant, a peace officer must show the arrest was made under such circumstances as to be warranted by law. An arrest is legally justified if made of a person whom the officer has probable cause to believe guilty of a felony, if a felony was committed in his presence, or if he has reasonable grounds to suppose the arrested person was about to commit a felony. 22 Am. Jur. 408; 25 C. J. S. 523.}


is involved in some way in having a police officer effect an arrest without a warrant. Some courts in this situation emphasize the presence of the police officer who has the broader privilege, and hold that the private citizen who participates in the arrest with the officer is entitled to his immunities. A greater number of courts, however, hold that the privilege of the private citizen who participates with the policemen in the arrest without warrant is no different from the privilege of the citizen who makes the arrest alone. Thus, strict jurisdictions which require the private person acting alone to show that the one arrested was actually guilty of the felony, will impose the same requirement when defendant is participating in the arrest with the police officer. On the other hand, jurisdictions holding that a private citizen acting alone is privileged upon reasonable grounds to suspect that the one arrested is guilty, could logically reach the same result where the citizen participates with the policemen in the arrests. Modern cases follow this view and turn the decision as to privilege and liability upon two issues: whether the private person "participated" in bringing-


This view is calculated to obtain free access by police to any information possessed by private citizens as to criminal acts. The rule is supported by the argument that the person on whose complaint the arrest is made is usually a layman, not familiar with, and not pretending to determine, the legal procedure to be taken.

The phase of false imprisonment under discussion must be distinguished from the situation arising where an officer requests a private citizen to aid in effecting an arrest, in which latter case the citizen is clearly absolved from liability in all normal situations. 35 C. J. S., False Imprisonment § 43.


17What is a direction or request sufficient to impose liability within the meaning of this rule depends on the facts of each case. Pine v. Okzewski, 112 N. J. L. 429, 170 Atl. 825 (1934); Hertzka v. Ellison, 8 Tenn. App. 667 (1928).

Circumstances held sufficient:


b. furnishing information and encouraging or requesting the officer to make the arrest. Winegar v. Chicago, B. & Q. R. Co., 163 S. W. (2d) 357 (Mo. App. 1942).

Circumstances held insufficient:

a. merely urging police to search for goods alleged to have been stolen. Miller v. Fano, 134 Cal. 103, 66 Pac. 183 (1901).
ing about the arrest; and, if so, whether he had "probable cause" for his participation— that is, whether he had reasonable grounds to suspect that the one arrested was guilty.

Faced with such a problem in the recent case of *Turner v. Mellon*, the Supreme Court of California appears to have applied a new test for liability by resolving the case on the "good faith" of the defendant.

b. suing out an execution and causing a debtor to be taken into custody while attending court as a witness, under the protection of a subpoena. Moore v. Chapman, 3 H. & M 260 (Va. 1808).

c. requesting arrest, but suggesting necessity of warrant and taking no further part in the arrest. Allen v. Lopinsky, 81 W. Va. 19, 94 S. E. 369 (1917).

For a complete list of circumstances deemed sufficient and a like list of insufficient activities, see 25 C. J. 470, n. 91.

"Probable cause or "reasonable cause" was held a good defense in: Christiansen v. Weston, 36 Ariz. 200, 285 Pac. 149 (1930); Collyer v. S. H. Kress Co., 5 Cal. (2d) 175, 54 P. (2d) 20 (1936); Torson v. Backini, 134 Kan. 188, 5 P. (ad) 815 (1931); Chesapeake & Ohio Ry. Co. v. Welch, 268 Ky. 93, 103 S. W. (2d) 698 (1937); Martin v. Cappel, 160 La. 21, 106 So. 660 (1925).

But in Virginia, as well as several other states, probable cause is held to be no defense: Montgomery Ward & Co. v. Wickline, 188 Va. 485, 50 S. E. (2d) 387 (1948); Sands & Co. v. Norvell, 126 Va. 384, 101 S. E. 599 (1919). Under Virginia law, "false imprisonment is restraint of one's liberty without any sufficient legal excuse therefor by word or acts which he fears to disregard, and neither malice, ill will, nor the slightest wrongful intention is necessary to constitute the offense."...

"The gist of the action for false imprisonment is illegal detention of person, without lawful process, or the unlawful execution of lawful process." Montgomery Ward & Co. v. Freeman, 199 F. (2d) 720, 723 (C. A. 4th, 1952), quoting from both the Wickline and Norvell cases, supra.

It has been held, however, that the question of probable cause in its usual sense is not involved in the action for false imprisonment. Ehrhardt v. Wells Fargo & Co., 134 Minn. 58, 158 N. W. 721 (1916). It is said that the phrase "reasonable cause to believe" in the law of false imprisonment by arrest without warrant is of like import to the phrase "probable cause" in the law of malicious prosecution. Caldwell v. Standard Oil Co., 220 Ala. 227, 124 So. 512 (1929).

To understand this distinction, the very nature of the two actions involved must be scrutinized. In false imprisonment, on the one hand, motive is normally deemed immaterial; if defendant participated in the arrest he must show justification in accordance with the exonerating elements set forth above. For malicious prosecution, however, plaintiff *must charge* defendant with malice and *lack* of probable cause for a valid arrest—that is, with process. The distinction between "probable" and "reasonable" cause thus resulted from a combination of the elements of the two offenses in question. Such combination resulted from abolition of forms of action, and court decisions which confused the two causes of action. It is readily seen, then, that "probable" cause for obtaining an arrest with process might well vary greatly from good cause for procuring an arrest without process.

Therefore, it is considered preferable for courts to use "reasonable cause to believe" in reference to false imprisonment. However, they have not practiced the gospel promulgated by this etymological exercise, but rather use "probable cause" for both false imprisonment and malicious prosecution. See Note (1952) 21 A. L. R. (2d) 693, 643.
in bringing about the arrest.\textsuperscript{10} Defendant Mellon effected the arrest, without a warrant, of the innocent plaintiff, whom he suspected of having previously robbed the Western Union office of which Mellon was manager. Defendant took part in the arrest to the extent of summoning the officers, accompanying them to the scene of arrest, and pointing out plaintiff as the supposed robber; but the evidence was conflicting as to whether he had specifically demanded the detention of plaintiff. A suit for damages was brought against Mellon and his employer, in whose behalf he acted, and the jury verdict was for plaintiff against both defendants; but the trial court granted the employer's motion for judgment notwithstanding the verdict, while denying Mellon's like motion. On appeal by plaintiff (Mellon did not appeal) the Supreme Court affirmed the trial court's allowance of the employer's motion and concluded that Mellon's motion for judgment n.o.v. should also have been sustained.\textsuperscript{11} The court, holding that Mellon's "conduct did not in law amount to taking 'some active part in bringing about the unlawful arrest'," declared:

"We think it serves the public interest . . . that citizens who have been criminally wronged may, without fear of civil reprisal for an honest mistake, report to the police or public prosecutor the facts of the crime and in good faith, without malice, identify to the best of their ability to such public officers the perpetrator of the crime.'\textsuperscript{12}

The dissenting Justice made a pointed criticism of the majority's position that since defendant had acted in good faith he had not participated in the unlawful arrest:

"The majority opinion . . . concludes as a matter of law, repudiating the jury's contrary finding, that Mellon did not participate in the arrest. It makes that determination by giving the participation element a meaning that ordinarily would not be ascribed to probable cause. . . . It concludes that Mellon's actions were in good faith, an honest but mistaken opinion as to identity and therefore he did not take an 'active part in bringing about the unlawful arrest.' . . . It is a non sequitur to state that a per-

\textsuperscript{10}The only case found which might have served as a precedent for the principal case, where the elements of good faith and probable cause have been intermingled and considered synonymously, is: Kroger Grocery and Baking Co. v. Waller, 208 Ark. 1063, 189 S. W. (2d) 361 (1945). The court held in substance that the question of good faith in the accusation was determinative of the question of probable cause.

\textsuperscript{11}But as Mellon did not appeal, the court, of necessity, affirmed the verdict as to him.

\textsuperscript{12}Turner v. Mellon, 257 P. (2d) 15, 17 (Cal. 1953).
son did not take an active part in procuring the arrest of a person because he acted in good faith."\(^3\)

The dissent contended that the existence of probable cause, rather than defendant's good faith, should be the determining factor. Uppermost in the mind of this Justice was the fear that the reasoning of the majority would have grave effects upon the rights of individuals to be free from unjustified arrest.\(^4\)

While the courts have rendered diverse decisions on what type of conduct constitutes "participation" in an arrest, the great weight of authority supports the view that one participates in a false arrest when he instigates, directs, countenances or encourages an unlawful detention.\(^5\) Merely giving information leading to an arrest does not normally subject the informer to liability,\(^6\) but this immunity is customarily granted only where the informer has gone no further than reporting to an officer what he has seen or heard, leaving the officer to act on his own investigation and judgment.\(^7\)

On the other hand, it has been recognized that to establish a prima facie case against the defendant it is not absolutely necessary to show that he gave personal orders or directions to the police officer performing the arrest.\(^8\) Rather, it is sufficient if he made a charge

\(^1\)Turner v. Mellon, 257 P. (2d) 15, 19 (Cal. 1953).

\(^2\)"As heretofore mentioned, the basic premise of the majority opinion is that to hold a person liable who by false identification procures the arrest and imprisonment of another would 'contravene public interest.' The nature of the public interest or policy is not elucidated but it is not hard to discern. It is the policy of making it easier for the police to catch alleged criminals even at the expense of the innocent by false imprisonment. That policy is and should be subordinate to the fundamental rights of individual freedom—principles which are imbedded in our constitutions, state and federal.... The framers of the Constitution of the United States weighed that policy against those rights and took the calculated risk in favor of the latter." Turner v. Mellon, 257 P. (2d) 15, 20 (Cal. 1953).


\(^6\)Wood v. Hacker, 23 Ala. App. 12, 121 So. 437 (1928); Webb v. Prince, 64 Ga. App. 749, 9 S. E. (2d) 675 (1940); Hammargren v. Montgomery Ward & Co., 172...
against the plaintiff, or accompanied the arresting officer, if surrounding circumstances in either instance "raise a fair and reasonable presumption that the arrest was ordered or directed by defendant." It would appear, therefore, that most courts would have held defendant Mellon's conduct in the wrongful arrest involved in the principal case to have been "participation." In any event, his conduct was hardly so blameless as to justify a decision that as a matter of law he did not participate in the offence against the plaintiff. Overwhelming authority favors reliance upon the conclusions of the jury in such circumstances. It seems improbable that the majority in Turner v. Mellon actually meant that good faith could prevent a finding of physical participation in a false arrest. The more logical inference is that the California court relied upon an honest intent merely to justify defendant's physical participation. However, the courts normally hold that "acting in good faith is not in and of itself a complete defense to an action for false imprisonment." Of course, accompanying the officers is not conclusive evidence of participation, but this act is normally done for the purpose of extending further aid in consummating the arrest; and any such additional activity by defendant may impose liability. Standard Oil Co. v. Davis, 208 Ala. 565, 94 So. 754 (1922); Grimes v. Gребблatt, 47 Colo. 495, 107 Pac. 1111, 19 Ann. Cas. 608 (1910); Conoly v. Imperial Tobacco Co., 63 Ga. App. 880, 12 S. E. (2d) 398 (1940).

The fact that defendant was not present at the time of arrest is good evidence of non-participation: Vimont v. S. S. Kressege Co., 291 S. W. 159 (Mo. App. 1927).

No case other than the principal case has been found which declares as a matter of law the conduct which constitutes participation. The following cases were very explicit in stating the important position of the jury in the interpretation of defendant's conduct: Hickman v. Jones, 9 Wall, 197, 19 L. ed. 551 (U. S. 1869); Griffin v. Clark, 55 Idaho 364, 42 P. (2d) 297 (1933); Harbison v. Chicago, R. I. & P. Ry. Co., 327 Mo. 440, 37 S. W. (2d) 609, 79 A. L. R. 1 (1931); Burk v. Howley, 179 Va. 539, 36 Atl. 297, 57 Am. St. Rep. 667 (1897); Gunderson v. Struebing, 125 Wis. 173, 104 N. W. 149 (1905). The recent case of Montgomery Ward & Co. v. Freeman, 199 F. (2d) 720 (C. A. 4th, 1952) was succinct in stating the evidence which would suffice to send case to jury.

Where an agent of the corporate defendant food store caused the summary arrest of plaintiff for alleged theft, it was held that an action of damages would be upheld despite the contention of the defendant that he acted in good faith. Also:


Of course, accompanying the officers is not conclusive evidence of participation, but this act is normally done for the purpose of extending further aid in consummating the arrest; and any such additional activity by defendant may impose liability. Standard Oil Co. v. Davis, 208 Ala. 565, 94 So. 754 (1922); Grimes v. Gребблatt, 47 Colo. 495, 107 Pac. 1111, 19 Ann. Cas. 608 (1910); Conoly v. Imperial Tobacco Co., 63 Ga. App. 880, 12 S. E. (2d) 398 (1940).

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Goldberg v. Fleischer's Confidence Food Stores, Inc., 102 N. Y. S. (2d) 176, 180 (1950). Where an agent of the corporate defendant food store caused the summary arrest of plaintiff for alleged theft, it was held that an action of damages would be upheld despite the contention of the defendant that he acted in good faith. Also:
defendant customarily are important only in so far as they may serve to mitigate damages.\textsuperscript{25}

Apparently the only method by which the decision in the \textit{Mellon} case may be reconciled with the general body of law upon the subject is to accept "good faith" and "probable cause" as synonymous terms. However, while the good faith of the defendant is doubtless an element in a determination of probable cause, it certainly does not follow that good faith is the equivalent of such reasonable belief. Few cases are to be found which intermingle good faith and probable cause to the degree of judging one's objective acts by his subjective intent.\textsuperscript{26}

The California court in the \textit{Mellon} case, when confronted with the conflicting policies of expediting law enforcement and the protection of civil liberties, very candidly selected the former. It was declared that a contrary result would "inevitably tend to discourage a private citizen from imparting information of a tentative, honest belief to the police and, hence, would contravene the public interest which must control."\textsuperscript{27} As important as this consideration is, however, the dangers which are latent within the "good faith" test are serious. This threat is thus summarized by the dissenting Justice:

"Certainly every citizen who walks upon the street should not be subjected to the whim and caprice of the fanatical, irrational person who might identify him as the perpetrator of a crime and subject such a person to arrest and imprisonment. Some standard should be adopted to protect innocent, law-abiding people from arrests of this character, and the only standard known to the law is that of probable cause. By refusing to consider this issue as an essential element in determining the reasonableness of the conduct of the defendant Mellon in this case, the majority of this court has disregarded the only standard known to the law for the protection of innocent persons from unjustified arrests in cases such as this."\textsuperscript{28}

It is concluded, therefore, that the recent decision of \textit{Turner v.}

\textsuperscript{26}Kroger Grocery and Baking Co. v. Waller, 208 Ark. 1063, 189 S. W. (2d) 361 (1945), see note 9, supra.
\textsuperscript{27}Turner v. Mellon, 257 P. (2d) 15, 18 (Cal. 1953).
\textsuperscript{28}Turner v. Mellon, 257 P. (2d) 15, 20 (Cal. 1953).
**CASE COMMENTS**

*McLenn* merits the criticism of the dissenting Justice that it makes "the rights of individuals expendable on the chance that more criminals may be apprehended." 

William B. Poff

**TORTS—OWNER'S KNOWLEDGE OF DOG'S VICIOUS PROPENSITIES TOWARD ANIMALS AS BASIS FOR LIABILITY FOR INJURIES TO PERSONS. [NEW MEXICO]**

Though the common law liability of an owner for injuries inflicted by his dog is still dependent on his knowledge of the vicious propensity of the animal, the primitive proposition that "every dog is entitled to one bite," if ever a part of the common law, is no longer accepted. It is generally agreed today that the owner's knowledge, actual or constructive, of the dog's propensities may be proved from circumstances without the necessity of the animal attacking at least one victim. However, some disagreement exists as to whether it is sufficient that the owner only have knowledge of the dog's general propensity to do harm, or whether it must be proved that he had know-

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29 This idea is traceable to a Scotch case which is believed to be its origin: Burton v. Moorhead, 3 Ses. Cas., 4th Ser., 892 (1811). See Prosser, Torts (1941) 440, n. 2.

30 Carrow v. Haney, 203 Mo. App. 485, 219 S. W. 710 (1920); Kennet v. Sossmitz, 260 App. Div. 759, 23 N. Y. S. (2d) 961 (1940); Harris v. Williams, 160 Okla. 103, 15 P. (2d) 580 (1932). In Andrews v. Smith, 324 Pa. 455, 188 Atl. 146, 147 (1936) it is stated: "...[It is said] that the 'maxim that "every dog is entitled to his first bite" is not supportable in law or justice.' With this we agree. We do not understand that this maxim has ever found acceptance in the courts of this commonwealth. A dog may show ferocious propensities without biting any one, and if he does so, it is his master's duty to see to it that he is not afforded an opportunity to take a 'first bite.'" Also see Prosser, Torts (1941) 440.

31 Mailhot v. Crowe, 99 Wash. 623, 170 Pac. 131, 132 (1918): "...it is well established law in this state, in common with many others, that the keeper of a vicious dog is bound to observe other manifestations of ferocity short of actual injury, and is not justified in neglecting to keep him in restraint until he has 'effectually mangled or killed at least one person.'" Also, Peyronnin v. Riley, 15 La. App. 393, 132 So. 295 (1931); Carrow v. Haney, 203 Mo. App. 485, 219 S. W. 710 (1920); Palmer v. Hampton, 129 Misc. 417, 220 N. Y. Supp. 768 (1927); Harris v. Williams, 160 Okla. 103, 15 P. (2d) 580 (1932); Godeau v. Blood, 52 Vt. 251, 36 Am. Rep. 751 (1880).
ledge of tendencies of the dog to cause harm of the same type as that inflicted upon the plaintiff.

This issue was presented to the New Mexico court in the recent case of Perkins v. Drury, which arose when defendant's dog, known to have a jealous and quarrelsome nature and to have made previous attacks on other dogs, made an unprovoked attack on plaintiff's two and one half year old child, resulting in the severe laceration of the child's cheek which left her face disfigured. Prior to this occasion, the dog never was known to have attacked or to have attempted to attack a human being. The only indication that the owner knew of any danger to people was his warning to employees and others that children might be injured by the dog if they came too close to him while he was fighting other dogs. The trial court found for plaintiff and awarded damages of $900 in favor of the infant and $95.09 in favor of her mother for medicines, drugs and for loss of the mother's time from employment. Defendant appealed on the sole question of whether the evidence supported the finding of the trial court that the vicious propensities of the dog making the attack on the child were known to defendant.

In affirming, the three majority Justices of the Supreme Court of New Mexico declared that under the present circumstances they could "entertain no doubt" that the question must be answered affirmatively. Declaring that "The keeper of a dog must observe manifestations of danger from him to human beings from other traits than viciousness alone, short of actual injury to some person," the majority tacitly adopted the position that knowledge of a general propensity to viciousness is a sufficient basis for holding the owner liable. It was concluded that this guilty knowledge or "scienter" could be established or inferred from the circumstances that the owner kept the dog on a leash and in his immediate personal custody all through the day, that the owner knew of the dog's frequent fights with other dogs, and that the owner frequently warned others to keep their children from the dog. Knowing of the dog's tendency to be vicious, the owner became liable for the injuries caused by the direct and unprovoked attack on the child, even though the dog had not previously shown any inclina-
tion to harm people deliberately. Though the opinions of the cases cited as authority for the decision contained general statements which seem to support the New Mexico Court's view, yet it appears that in every instance the owner of the animal had previous knowledge of its propensity to do harm to human beings.

Noting the failure of the majority to support its ruling with precedents, the two dissenting Justices asserted with some alarm that the decision in the principal case will make "a drastic change in the established law on animals...." The position of the dissent finds adequate support in a line of decisions dating back to the seventeenth century and in modern text authority. In the often cited case of Keightlinger v. Egan, the Illinois court declared: "To charge the defendant, he must have had knowledge of the dog's propensity to do similar mischief—that is, to bite mankind, and not animals only." And in reference to this issue, Cooley states that "Notice that a dog is disposed to worry sheep is no notice that he will attack persons." The rule that in order to hold the owner liable there must be specific rather than mere general knowledge of the vicious nature

8 Accord, Hartman v. Aschaffenburg, 12 S. (2d) 282 (La. App. 1943). Plaintiff was bitten by defendant's dog which leaped at plaintiff's dog while in her arms. Defendant's dog was known to have manifested a vicious nature towards other dogs, but not towards human beings. The court held the defendant liable on the grounds that as a reasonable man he should have foreseen such an accident.

Also see Note (1910) 24 L. R. A. (N. s.) 458, 459, where it is stated that Louisiana is the only jurisdiction, absent statute, which does not require proof of scienter: "... that scienter is not a prerequisite to liability, and that the question of liability rests entirely upon whether the owner of the dog has exercised care to protect persons from attack by it. Here, of course, knowledge of the propensities of the animal may be important in determining the question of negligence."

Cases cited by majority where there was previous knowledge, actual or constructive, of the animal's vicious propensity to harm human beings: Owen v. Hampson, 62 S. (2d) 245 (Ala. 1952); Perazzo v. Ortega, 29 Ariz. 334, 241 Pac. 518 (1925); Hicks v. Sullivan, 122 Cal. App. 635, 10 P. (2d) 516 (1932); Rickett v. Cox, 297 Ky. 30, 178 S. W. (2d) 850 (1944); Hill v. Mosley, 220 N. C. 485, 17 S. E. (2d) 676 (1941); Dranow v. Kolmar, 92 N. J. L. 114, 104 Atl. 650 (1918); State (Evans, Prosecutor) v. McDermott, 49 N. J. L. 163, 6 Atl. 653 (1886); Benke v. Stepp, 199 Okla. 119, 184 P. (2d) 615 (1947).


10 Mason v. Keeling, 12 Mo. 333, 88 Eng. Rep. 1359, 1361 (1698): "... and if a dog be assuet. to bite cows, and the master knows it, that will not be sufficient knowledge to make him liable for his biting sheep." In Kinnon v. Davies, Cro. Car. 487, 79 Eng. Rep. 1021 (1637) it is stated that, "An action on the case for knowingly keeping a dog used to bite sheep etc., must aver that the party knew he was used to bite sheep." Burbridge, 13 C. B. (N. s.) 431, 143 Eng. Rep. 171 (1863); Prosser, Torts (1941) 539; Restatement, Torts (1938) § 509; 3 C. J. S. 1255; 2 Am. Jur. 728.

11 Cooley, Law of Torts (1907) 346.
of the animal has also been incorporated into the Restatement of Torts.\textsuperscript{14}

The decision in the principal case may represent a humanitarian reaction against the harshness of the common law rule against the victim of the dog’s attack. Jurists have occasionally raised disapproving voices against the rule,\textsuperscript{15} and the legislatures of a number of states have enacted statutes which facilitate the recovery of damages from dog owners.\textsuperscript{16} These statutes were passed as a result of strong public feeling that the person who keeps or harbors the dog should suffer the loss of its misdoings rather than the innocent victim of the dog’s wrath.\textsuperscript{17} As a result of agitation in Oklahoma by such organizations as the “Postman's Union,” a statute was adopted providing that “The owner or owners of any dog which shall, without provocation, bite or injure any person while such person is in or on a public place, or lawfully in or upon private property of the owner or owners of such dog, shall be liable for damages to any person bitten or injured by such dog to the full amount of the injury sustained.”\textsuperscript{18} Under such a provision, the owner’s liability appears to be virtually that of an insurer against injuries to persons.\textsuperscript{19} A Wisconsin statute provides that in order to hold a dog owner liable it need not be proved that the

\textsuperscript{14}Restatement, Torts (1938) § 509. In Comment g, it is said: “It is not enough, however, that the possessor of the animal has reason to know that it has a propensity to do harm in one or more specific ways; it is necessary that he have reason to know of its propensity to do harm of the type which it inflicts.”

\textsuperscript{15}Osborne v. Chocqueel, 2 Q. B. 109 (1896), see quote, note 25, infra.

\textsuperscript{16}These statutes, where contested, have been held constitutional: Holmes v. Murray, 207 Mo. 413, 105 S. W. 1085, 17 L. R. A. (N. S.) 431 (1907). Held, there was nothing in the statute which amounted to the taking of defendant's property without due process of law.

\textsuperscript{17}There is a feeling on the part of the public generally that one who chooses to harbor a dog on his premises should be responsible for the acts of the animal; and in the absence of provocation by the victim, the public looks to the owner for redress. The propriety of allowing such relief is underscored by the ever-increasing number of states which have imposed absolute liability.” Note (1948) 1 Okla. L. Rev. 110, 111.


\textsuperscript{19}Lavalle v. Kaupp, 61 N. W. (2d) 228, 230 (Minn. 1953): “The statute [Minn. Stat. Ann. § 347.22] leaves the dog owner in the same position which the common law left the keeper of a wild animal; namely, with the strict liability of an insurer.” Consequently, it was held that plaintiff’s cause of action against the dog owner did not survive the owner’s death, under a statute which provided that: “A cause of action arising out of an injury to the person dies...with the person against whom it exists, except a cause of action arising out of bodily injuries or death caused by the negligence of the decedent survives against his personal representatives.” Minn. Stat. Ann. § 572.01. Under § 347.22, the action for injuries inflicted by the dog is no longer based on the negligence of the owner.
owner had knowledge of the vicious propensity of the dog.\textsuperscript{20} Rather, the owner is absolutely liable for damages done by his dog to any persons or property, or for killing, wounding or worrying any horses, sheep, or lambs. If, after notice to the owner, his dog still disturbs animals, the statute provides for double damages;\textsuperscript{21} and in the event that the dog injures a person after notice, the statute provides for treble damages.\textsuperscript{22} Other statutes dispense with the necessity of proof of scienter only in particular cases, such as attacks on sheep or cattle.\textsuperscript{23} As interpreted by the courts in most instances, the general effect of legislation broadening the dog owner's liability is to dispense with the necessity of proving scienter as a prerequisite to the imposition of liability.\textsuperscript{24} 

In view of the apparent inclination of both factions of the New Mexico court to approve the extension of liability of owners for harm inflicted by dogs,\textsuperscript{25} the essential point of difference between the majority and dissent is as to the proper means of obtaining the desired end. The majority of the court has tried by judicial decision to align that jurisdiction with the modern trend, not to the extent of entirely abolishing the necessity of proving scienter, but by making scienter more readily provable by showing that the owner had knowledge merely of the dog's general propensities toward viciousness. The dissent contends that any reform of the common law in this regard must come through legislative enactment, and that the courts must apply

\textsuperscript{20}Wis. Stat. (1947) § 174.02.  
\textsuperscript{21}Wis. Stat. (1947) § 174.03.  
\textsuperscript{22}Wis. Stat. (1947) § 174.04.  
\textsuperscript{23}Holmes v. Murray, 207 Mo. 413, 105 S. W. 1085, 17 L. R. A. (N. s.) 431 (1907) (sheep or other domestic animals killed or maimed by dog); Fairchild v. Bentley, 30 Barb. 147 (N. Y. 1858); Wright v. Pearson, L. R. 4 Q. B. 582 (1969).  
\textsuperscript{25}The dissent was in complete agreement with the remarks made by Lord Russell in Osborne v. Chocqueel, 2 Q. B. 109 (1866): "...I do not say that the law is in a satisfactory condition; I think it is unsatisfactory. It would, in my opinion, be more in accordance with sound reason and principle to make a man responsible for what his dog did—that he should take the risk of keeping it. We have not, however, to decide whether the law in this respect is satisfactory or unsatisfactory, but only to say what it is as applied to the particular case before us....It is impossible, looking at the long series of cases, extending over many years, in which the doctrine of scienter has been applied and acted upon, to arrive at any other conclusion than that, in actions for injury sustained by man through the bite of a dog, the scienter which it is necessary to show is that the dog had a ferocious disposition towards mankind...." quoted in dissenting opinion in Perkins v. Drury, 57 N. M. 269, 258 P. (2d) 379, 386 (1953).
the law as they find it, whether the result is desirable or not. It may well be argued, in support of the majority's action, that the genius of the common law lies in its ability to keep pace with changing conditions by a gradual process of judicial modification, and that under modern conditions of life the need for keeping dogs is not so important as to justify the strong protection against liability which the law afforded the owner in earlier times. However, the change effected by the principal case may be regarded as so drastic a departure from existing principles that the courts should await action by the legislature to broaden the owner's liability.

JOSEPH H. CHUMBLEY

WORKMEN'S COMPENSATION—RECOVERY OF BENEFITS FOR INJURIES SUSTAINED WHILE TRAVELING TO OR FROM PLACE OF WORK. [New Jersey]

The courts have incorporated into workmen's compensation law the so-called "going and coming rule," which, in the absence of special circumstances, precludes an employee injured while in the act of going to or coming from his place of work from recovering benefits under the compensation acts. The reason for this restriction is that the relationship of the employer and employee is ordinarily suspended from the time the employee leaves his work to go home until he resumes his work, because during that time he is rendering no service for the employer. Accidents which occur during this time do not "arise out of and in the course of his employment," and therefore by the terms of the workman's compensation statutes are not compensable.


2California Casualty Indemn. Exch. v. Industrial Acc. Comm., 21 Cal. (2d) 751, 135 P. (2d) 158 (1943); Murphy v. Board of Education, 314 Mich. 226, 22 N. W. (2d) 280 (1946). Going to and from work "he is exposed to risks, not as an employee, but rather as a member of the general public, and the acts do not intend to compensate for injuries resulting from such risks." 8 Schneider, Workman's Compensation Text (3d ed. 1951) 7.

3The words "arising out of" are usually taken to require a causal relation between the employment and the injury. Griffith v. Cole Bros., 183 Iowa 415, 165 N. W. 577 (1917); Patterson v. S. S. Thompson, Inc., 12 N. J. Misc. 4, 169 Atl. 338 (1933); Sinclair Pipe Line Co. v. State Industrial Comm., 134 Okla. 300, 272 Pac. 1050 (1928). The expression "arising in the course of" means arising during the time of employment and at a place where the employee is performing duties of his
Almost as soon as the rule was established, the courts discovered that it could not be made to apply justly in all cases of travel to or from the home of the employee. Consequently, they have developed several exceptions the effect of which is to allow compensation where at the time of the injury:

(i) the employee was on the employer's premises proceeding to or from work;
(ii) the employee was off the premises of the employer, but in close proximity thereto and was using a customary means of ingress or egress;
(iii) the employee, going to or from work, was found to be in the "special service" of his employer while on an errand incidental to his employment with the consent or under the direction of the employer;
(iv) the employee was a salesman or other person travelling from place to place as required by the nature of his job;
(v) the employee was using a vehicle furnished by the employer for going to and from the place of employment;
(vi) the employee was driving from the point of last call to his employment or acts incident thereto. Jett v. Turner, 215 Ala. 352, 110 So. 702 (1926); Paulsen v. Industrial Acc. Comm., 6 Cal. App. (2d) 570, 45 P. (2d) 285 (1935); Pace v. Appanoose County, 184 Iowa 498, 168 N. W. 916 (1918).


For this exception to be invoked, the means of customary ingress and egress to and from the master's premises must be such as to compel the employee to submit, by reason of his employment, to greater hazards than the public in general, although such risks may exist, in some measure, with respect to the general public." Walker v. Lykes Brothers-Ripley S. S. Co., 169 So. 624, 626 (La. 1938).


home where the car was regularly garaged, he being required to use an automobile in fulfilling his contract of service.\textsuperscript{10}

One of the most flexible and often-used of these exceptions is the allowance of recovery where the employee, while going or coming, is in the performance of a special errand at the request of his employer, of such a nature as to constitute a "special service" to the employer. The elusive nature of this exception is demonstrated in the recent case of \textit{Moosebrugger v. Prospect Presbyterian Church of Maplewood}\textsuperscript{11} in which the four judicial agencies that decided the case on successive appeals were divided equally on the issue of recovery, the final determination coming in a 4 to 3 decision of the New Jersey Supreme Court. The plaintiff, a church sexton, worked six days a week from 8:30 a.m. to 5:30 p.m., and in the evenings when church services, meetings or other activities were held. He received a salary of $50 per week, and no overtime, meals or other compensation was paid to him for the work he performed in the evenings. His duties included the cleaning, opening and closing of the church and taking care of the furnaces. On the day of his injury he worked until 5:30 p.m. as usual, and then went home for his evening meal. While walking back to the church to perform his duties in connection with a regularly scheduled evening meeting of the Men's Club, he was struck at a street intersection by an automobile. To be compensable, the plaintiff's injuries had to be brought within the "special services" exception to the general rule. The Workmen's Compensation Bureau determined that the plaintiff was not engaged in performing an errand which constituted a special service at the time of the accident, and that the injury was not suffered "in the course" of his employment. The County Court, however, reversed the finding of the Bureau, and held that the injury arose "out of and in the course of the employment." An appeal was prosecuted by the employer in the Appellate Division, where the judgment of the County Court was affirmed by a divided court. On further appeal, the Supreme Court of New Jersey reversed that judgment, declaring: "The term 'special services' connotes the idea that the service rendered is out of the ordinary, unusual, or one not contemplated under the terms of employment.... There was nothing special, emergent, unusual, or out of the ordinary connected with his work on that night."\textsuperscript{12} Therefore, in accordance with the general "going and coming rule" compensation should not be awarded. The dissent argued that

\textsuperscript{10}Demerest v. Guild, 114 N. J. L. 472, 176 Atl. 558 (1935).
\textsuperscript{11}12 N. J. 212, 96 A. (2d) 401 (1953).
\textsuperscript{12}12 N. J. 212, 96 A. (2d) 401, 403 (1953).
"the course of the employment is not confined to the actual work but may extend to reasonable preparations therefor,"\textsuperscript{13} and since the sexton, when injured, was travelling to the church "to perform extra evening duties for his employer pursuant to prior request..."\textsuperscript{14} the case should came under the exception to the general rule.

The various courts which have been faced with claims for compensation under the "special service" exception have emphasized specific factors, the presence of which rendered an injury sustained by an employee while going to or from work compensable as in the special services of his employer, or the absence of which rendered an injury not compensable. Factors held to be controlling, alone or in combination, are as follows: an errand was being performed under the direction of the employer;\textsuperscript{15} extra wages were paid to the employee for such work;\textsuperscript{16} the employee's compensation had been fixed so as to cover the time involved in going to and from his work;\textsuperscript{17} an allowance had been made for the cost of transportation;\textsuperscript{18} the employee was required

\textsuperscript{12} N. J. 212, 96 A. (2d) 401, 404 (1953).
\textsuperscript{13} N. J. 212, 96 A. (2d) 401, 406 (1953).
\textsuperscript{14} State Compensation Ins. Fund v. Industrial Acc. Comm., 89 Cal. App. 197, 264 Pac. 514, 515 (1928): "... and it was because of the relationship of employer and employee that the one requested the service and the other rendered it. Manifestly, under such circumstances, it would be a harsh and indefensible rule which would withhold compensation for an injury received by an employee in the performance of such an errand." Dauphine v. Industrial Acc. Comm., 57 Cal. App. (2d) 949, 135 P. (2d) 644, 646 (1943): "If the workman is injured while in the execution of a special mission for his employer compensation will not be denied him because he was on his way to his place of work. He is not under such circumstances bound by the going and coming rule." The employment in such cases would begin the instant the employee leaves on the errand. Kyle v. Greene High School, 208 Iowa 1037, 226 N. W. 71 (1929); Bisdom v. Kerbrat, 251 Mich. 316, 232 N. W. 408 (1930); Bradley v. Danzis Pharmacy, 5 N. J. Super. 330, 69 A. (2d) 36 (1949); Martin v. State Workman's Ins. Fund, 108 Pa. Super. 570, 165 Atl. 514 (1933).

\textsuperscript{16} Compensation was computed from the time the employee left his home until his return, Voehl v. Indemnity Ins. Co., 288 U. S. 162, 169, 53 S. Ct. 380, 383, 77 L. ed. 676, 680, 87 A. L. R. 245, 249 (1932): "While service on regular hours at a stated place generally begins at that place, there is always room for agreement by which the service may be taken to begin earlier or elsewhere... service shall commence when the employee leaves his home on the duty assigned to him and shall continue until his return." Ohmen v. Adams Bros., 109 Conn. 378, 146 Atl. 528 (1929); Sapulpa Ref. Co. v. State Industrial Comm., 91 Okla. 53, 215 Pac. 933 (1923) (compensation awarded pipe-line walker injured while going to his work and travelling along the customary route, because his working time started when he left his home and ended when he got back there, having completed walking the line).

by his employer to perform duties at a location away from his place of employment; the work was to be performed outside of the employee's regular hours; the employment required the employee to travel over a public highway; the employee was on an emergency trip outside of his regular duties; the employee had custody of the key to the employer's premises.

Since the courts in the various cases stress different factors, it is impossible to draw any definite conclusions as to which are the most vital to an invoking of the special service exception. Seven years prior to the principal case, the Supreme Court of New Jersey, in *Bobertz v. Board of Education of Hillside Township*, emphasized the location...
of the performance of the special work. The plaintiff was a school teacher who had agreed to undertake the extra-curricular activity of serving as advisor to a girl's club composed of students from her school. One night after she had attended a Christmas party of the club at the Y. W. C. A., she was assaulted and injured as she was entering her automobile to return home. Though compensation was granted for the injury there, the majority of the court in the principal case thought that the situation was distinguishable from that of the Bobertz case because the teacher's "activity at the time of the accident was conducted at a place other than her regular place of employment and at a time when she had no regularly scheduled duties to perform in connection with her employment as a teacher," and because "such special service subjected her to extra travel risks which would not otherwise have been encountered." 25

This distinction, however, seems to be tenuous. The plaintiff in the Bobertz case was performing a regularly scheduled duty in connection with her employment since she performed this duty as part of her responsibilities as a teacher whenever the club met. Her attendance at these meetings was not a special service for the benefit of her employer, but was part of her regular, though extra-curricular, duties, and her salary was regarded as remuneration for both her teaching and outside work. Although the club met at a place other than the school building, it is difficult to imagine exactly what additional travel risks the teacher in the Bobertz case could have encountered as a result of going from her home to the local Y. W. C. A. rather than from her home to the school building.

The factual situations in the two cases are similar in that the plaintiffs were injured while not engaged in the principal duties of their employment but while going to or from places where some normal incidents of their services for their employers were to be performed. As it was the regular duty of the teacher to attend the club meetings, so it was the regular duty of the sexton to keep the church open for the evening meetings and services, both without additional compensation. In both instances the meetings were scheduled in advance; neither plaintiff was responding to an emergency call from his employer. 26 If the injury was compensable in one case, it would

25Moosebrugger v. Prospect Presbyterian Church of Maplewood, 12 N. J. 212, 95 A. (2d) 401, 403 (1953).
26The dissenting Justices in the principal case cited Kyle v. Greene High School, 208 Iowa 1037, 226 N. W. 71 (1929) for supporting authority, in which case the janitor was returning to the school in response to a request by the supervisor for his services due to an emergency light failure.
seem to be so in the other; yet the New Jersey court, in declining to grant compensation in the principal case, has relied on an unpersuasive attempt to distinguish the fact situations rather than expressly discrediting its prior decision.

It may well be argued that the result of the principal decision is proper because it is not socially desirable to extend coverage under the compensation acts to such situations as are presented in this type of case. In the language which could be applied specifically to the principal case, the Wisconsin Supreme Court has accurately evaluated the circumstances:

"It is difficult to imagine what services the employee rendered to his employer in going to his home for this meal. During that period he was on his own time; he was subject to no control while away; he performed no act which in the slightest degree advanced his employer's interest. In hurrying back, he was not rendering a service; he was returning to a place where he was required to present himself for the purpose of future service."

Although as the dissenting Justices argue, compensation acts constitute remedial legislation and should be construed liberally in favor of the workmen, yet, as the dissent itself admits, they are "designed to place the costs of accidental injuries which are work-connected upon the employer. . . ." It was not the purpose of the legislators to provide health and accident insurance for the workman wherever he might be.

Alvin Y. Milberg

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[5]12 N. J. 312, 96 A. (2d) 401, 404 (1953) [italics supplied]. The dissent, though correct in defining the purpose of the compensation acts, incorrectly found the injuries suffered by plaintiff in the principal case to be "work-connected."
The validity of workmen's compensation legislation, which substitutes specific awards to injured employees in lieu of their common law remedy for damages, has become generally accepted. The constitutionality of such legislation was originally attacked on the ground that both the employer and employee were deprived of property without due process of law, in that the employers were held liable without fault and were denied the use of their common law defenses, while the employees were forced to settle for small awards usually based on a percentage of their wages, instead of recovering actual damages as established by a jury. In addition it was argued that employers and employees were prevented from entering into contractual agreements on the terms of the employment respective to compensation for resulting injuries. However, the courts upheld the constitutionality of workmen's compensation statutes on the ground that no vested right in a particular remedy or procedure existed in either employers or employees. Therefore, under the police power of the state, the legislature had the authority to promote the health, safety or general welfare of the people by substituting statutory awards for common law damages.

One phase of the problem still in some doubt arises from provisions in a number of workmen's compensation acts which deny compensation for partial disability resulting from silicosis and similar dust diseases. The recent New York case of Cifolo v. General Electric Co. illustrates the nature of this question. Plaintiffs were employed by de-

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1 Schneider, Workmen's Compensation Text (3d ed. 1941) § 11.
5 305 N. Y. 209, 112 N. E. (2d) 197 (1953).
fendant company in jobs that were included among those "Hazardous Employments" set forth by the New York Workmen's Compensation Law7 for which awards were made for resulting injury and death. As a consequence of such employment, plaintiffs contracted silicosis which partially disabled them. Their action was for damages at common law since the Workmen's Compensation Law expressly excluded partial disability resulting from silicosis as a compensable injury or disease. The suit was based on the theory that defendant negligently and in violation of the New York Labor Law8 failed to install the equipment which was necessary to keep the air free of dust. Defendant pleaded that the court had no jurisdiction because such suits were barred under the terms of the Workmen's Compensation Law. Thus, two issues were presented: First, should the Workmen's Compensation Law be so interpreted as to deny plaintiffs a common law action for negligence against the defendant? Second, if the law is so interpreted, is it constitutional under the Fourteenth Amendment?9 The pertinent statutory provisions invoked by the court provide that compensation shall not be payable for partial disability due to silicosis or other dust diseases,10 and that the liability of an employer for injuries or disease covered by the Act shall be exclusive under the Act and in place of a cause of action for damages at common law or otherwise.11

The majority of the New York Court of Appeals ruled that plaintiffs no longer have any remedy available to them at common law, and that these provisions of the statute abrogating the common law remedy did not violate the Fourteenth Amendment. In construing the "exclusive remedy" provisions of the statute, the court decided that the legislature did not intend to leave an employee who was only partially disabled eligible to sue for a large recovery for common law damages, and at the same time to restrict an employee who was totally disabled by the same disease to the relatively small payments which were specified by the Act. Also, as the Workmen's Compensation Law at one time included partial disability resulting from silicosis as a compensable disease but expressly excluded it by a subsequent enactment,

7New York Workmen's Compensation Law (1952) § 3, subd. 2.
9U. S. Const. Amend. XIV § 1: "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
the court concluded that the legislative intent clearly was to deny the employee any action for partially disabling silicosis.

On the question of constitutionality, the majority stated that it had never been doubted that when an employment was covered by the Act, and awards were authorized for injuries arising out of such employment, the fixing of benefits was solely up to the legislature. Decisions were cited which held that the Workmen’s Compensation Law took away the actions for recovery for pain and suffering\textsuperscript{12} and for injuries or illnesses not industrially disabling.\textsuperscript{13} The Workmen’s Compensation Law balanced the burdens,\textsuperscript{14} and if the particular deprivation of a remedy for an injury was harsh and unfair, it was up to the legislature, and beyond the power of the courts, to alleviate the situation.

The dissent which accompanied the decision of the Appellate Division\textsuperscript{15} asserted that the “exclusive remedy” provision did not affect an employee’s cause of action when the disease from which he was suffering was not compensable under the Act. It was argued that inasmuch as the Act assumed to deal only with silicosis resulting in total disability or death, an employee who was partially disabled from this cause is left free to sue at common law.\textsuperscript{16} In endorsing this contention, the dissenting judges in the Court of Appeals made their point in dramatic language: “...it would be monstrous to say that such sufferers were to be economic derelicts and without aid from any

\textsuperscript{14}The employer should bear the burden of the effects of total disability and the employee should bear the burden arising from partial disability. Del Busto v. E. I. Dupont De Nemours & Co., Inc., 167 Misc. 920, 5 N. Y. S. (2d) 174 (1938).

Courts may not by construction carry a statute, particularly one in derogation of the common law, beyond its clearly defined scope. Therefore, workmen’s compensation legislation is a substitute for the common law only insofar as it specifically covers the common law subject. Rosenfield v. Matthews, 102 Minn. 113, 275 N. W. 698 (1937).

If an employer is negligent in failing to provide safe and healthy working conditions as required by law, and an employee contracts a disease not covered by the statute, his common law action is not affected. See Downing v. Oxweld Acetylene Co., 112 N. J. L. 25, 169 Atl. 709, 712 (1933); Jones v. Rinehart & Dennis Co., Inc., 113 W. Va. 414, 168 S. E. 482, 487 (1933).
source as they coughed their way to total disablement."\(^{17}\) Such action would be violative of the Due Process Clause of the Fourteenth Amendment.\(^{18}\) Further, it was argued that an employer should not be allowed to disregard the State Labor Law in such a way as to cause the partial disabling of an employee without being liable.

On the other hand, it is arguable that sufficiently strong practical reasons exist to establish that the legislature's action in denying compensation for partially disabling silicosis is not arbitrary and unreasonable. It is difficult to determine when a person has silicosis and to what extent it is disabling. Also, if an employee has worked for several employers over the years under similar conditions, it is virtually impossible to prove to what extent each is liable, since the disease grows progressively worse with the passing of time.\(^{19}\) Therefore, the awarding of compensation for claims for partial disability from silicosis would inevitably be based on conjecture and often result in injustice to employers. Taking cognizance of these practical considerations, the courts have found support for the statutory provisions in the reasoning that it is in accordance with the Constitution to compel the employee to bear the burden of partial disability in return for the absolute assurance of being compensated for total disability.\(^ {20}\)

It has been stated that no constitutional right is necessarily violated by abolishing a remedy available at common law, because such action may be a valid exercise of the police power in order to promote the public comfort, health, safety or welfare.\(^ {21}\) A familiar demonstration

\(^{18}\)The dissenting judges also maintained that such action would violate sections 6 and 18 of Article I of the New York Constitution. Section 6 is the "due process" clause of the State Constitution. Section 18 states: "Nothing contained in this Constitution shall be construed to limit the power of the Legislature to enact laws for the protection of the lives, health, or safety of employees; ... or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees." N. Y. Const. (1938) Art. I § 18. This section does not give the legislature the power to abrogate the common law remedy without providing an adequate substitute. See Scherini v. Titanium Alloy Co., 286 N. Y. 531, 37 N. E. (2d) 237, 239 (1941).
of this principle is found in the “Heart Balm Statutes”—legislation abolishing actions for breach of promise, criminal conversation, alienation of affection and seduction. The police power was successfully invoked in such laws to prevent these actions from being used as instruments of fraud and blackmail, since even if the defendant is found to be innocent, the initiation of the action will be detrimental to his reputation. However, inasmuch as the marriage contract is inherently different from a common law contract, the rights growing out of the former can be regulated or abolished by the legislature without violating the Constitution. That the “Heart Balm” actions were constitutionally abolished may therefore be admitted without conceding that the legislature may deprive an employee of all remedy for partially disabling silicosis, because no similar abuse of the common law action has been shown. It is difficult to see that the welfare of the public is promoted by leaving persons with no remedy until they are totally disabled, in order that the administrative difficulties of handling partial disability claims may be avoided.

In the earlier case of Scherini v. Titanium Alloy Co., involving the same provisions of the New York statute, the dissenting judge, contending that the law would be unconstitutional if interpreted to leave a partially disabled employee without remedy, pointed out that a cause of action is a property right and is protected from arbitrary interference. Though a plaintiff has no property in the constitutional


22Young v. Young, 236 Ala. 627, 184 So. 187 (1938); Bunten v. Bunten, 15 N. J. Misc. 592, 192 Atl. 727 (1937); Fearon v. Treanor, 272 N. Y. 268, 5 N. E. (2d) 815 (1938). Note (1951) 8 Wash. and Lee L. Rev. 84.

23"The Legislature, in dealing with the subject of marriage, has plenary power, as marriage differs from ordinary common-law contracts and is subject to control and regulation by the state. . . . It has some of the attributes of such a contract, but contains many elements foreign to a common-law contract. It may be lawfully entered into by parties under twenty-one years of age. It cannot be dissolved by consent of the parties. After marriage, the state imposes duties and obligations upon the parties entirely outside of the marriage agreement. The relation entered into by the parties is regulated by the state." Hanfgarn v. Mark, 174 N. Y. 22, 8 N. E. (2d) 47, 48 (1937); Bunten v. Bunten, 15 N. J. Misc. 592, 192 Atl. 727, 729 (1937).

24286 N. Y. 531, 37 N. E. (2d) 237, 239 (1941). The court refused to rule on the constitutionality of the Workmen's Compensation Law because of improper allegations:

25Gibbes v. Zimmerman, 290 U. S. 326, 54 S. Ct. 140, 78 L. ed. 342 (1933) held that an Act granting the governor power to appoint a conservator to protect depositors and creditors of insolvent banks, in place of the old law that the court should supervise such actions through a receiver, did not deprive appellant of due process of law, as the substantive rights existing under the old laws were pre-
sense in any particular form of remedy, nevertheless he is guaranteed the preservation of his substantial right to redress by some effective procedure.26

The decision in the principal case has few direct precedents to support it.27 In the leading case of New York Central R. R. Co. v. White,28 which sustained the constitutionality of workmen's compensation legislation, the United States Supreme Court expressly stated that it might be doubted whether the state could abolish all rights of action or all defenses without setting up something adequate in their stead. It is obvious that the Supreme Court was only considering the constitutionality of a law which gave a substitute award for the common law remedy. No decision was there rendered concerning the question of leaving an employee with no recourse whatsoever.

Courts are reluctant to strike a statute down as unconstitutional, but it would seem that the New York tribunal in the Cifolo decision has been overly reluctant. It is not disputed that a workmen's compensation law is constitutional when the common law remedy is abrogated in favor of a statutory remedy, and the majority of the court served. The Fourteenth Amendment was not violated as he still had an efficient remedy. See Pritchard v. Norton, 106 U. S. 124, 132, 1 S. Ct. 102, 108, 27 L. ed. 104, 107 (1882).


27The case of Del Busto v. E. I. Du Pont De Nemours & Co., Inc., 167 Misc. 920, 5 N. Y. S. (2d) 174 (1938) is the only New York precedent cited which is directly in point with the principal case. The majority cites two cases from other states which have similar workmen's compensation statutes that held employee's partially disabled from silicosis have no recourse. Both cases were accompanied by dissenting opinions. Moffett v. Harbison-Walker Refractories Co., 399 Pa. 112, 14 A. (2d) 111 (1949); Masich v. United States Smelting, Refining & Mining Co., 113 Utah 101, 191 P. (2d) 612 (1948). Two cases cited by the majority of the New York court as precedents for their decision are not relevant to the particular constitutional question being considered, in that they do not deal with the constitutionality of a statute that leaves a person who has a right with no remedy at all. They deal only with substituted remedies. New York Central R. R. Co. v. White, 243 U. S. 188, 37 S. Ct. 247, 61 L. ed. 667 (1917); Jensen v. Southern Pac. Co., 215 N. Y. 514, 109 N. E. 600 (1915). Two cases cited by the court do not rule on the constitutionality of denying an employee of a remedy at common law when he can receive no compensation under the Act; they merely held that the employee had no recourse at common law. Repka v. Fedders Mfg. Co., 264 N. Y. 538, 191 N. E. 553 (1934); Farnum v. Garner Print Works & Bleachery, 229 N. Y. 554, 129 N. E. 912 (1920).

seems to have reasoned as if such were the case here. However, plaintiffs sustained a very substantial injury, yet they were furnished no statutory remedy for that injury as a substitute for a common law cause of action. Better reason rests with the position taken by the dissenting judges that the balance of burdens doctrine cannot justify leaving an injured employee with no recourse except to wait until he becomes totally disabled and eligible to receive the fixed sum of compensation. To leave an employee in such a situation is not only violative of the Constitution, but it is an obvious injustice incompatible with enlightened social policy requiring industry to bear the burden of its own human wreckage.

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