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Recent Decisions

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RECENT DECISIONS

CIVIL RIGHTS — ANTI-DISCRIMINATION LEGISLATION — COLORADO ANTI-DISCRIMINATION ACT HELD INAPPLICABLE TO PERSONNEL IN INTERSTATE COMMERCE. — Marlon D. Green, a Negro, applied for a job as a pilot with Continental Air Lines, and was denied employment. He filed a complaint with the Colorado Anti-Discrimination Commission alleging a violation of the Colorado Anti-Discrimination Act of 1957,¹ and, upon a hearing held by the Commission, his allegations were sustained.² Continental was ordered to enroll the complainant in the next regularly scheduled training course, and to make his priority status effective retroactively to the date of the first personal interview between the parties. The State District Court reversed the Commission's finding. On appeal to the Supreme Court of Colorado, *held*: affirmed. The Colorado Anti-Discrimination Act cannot constitutionally be applied to the hiring of flight crew personnel of an interstate air carrier³ as this would put an undue burden on interstate commerce, and would amount to an invasion of a field pre-empted by the federal government.⁴ *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 368 P.2d 970 (Colo. 1962).

Thus, in *Continental*, a state supreme court refused to extend application of a state fair employment practice act to an area affecting interstate commerce. In so doing, it denied the complainant an effective counteractant for the discriminatory wrong suffered, and missed an opportunity to set a significant precedent in extending affirmative remedies available to anti-discrimination commissions.⁵

In holding that application of the Colorado law would unreasonably burden interstate commerce, the Supreme Court of Colorado relied heavily on an eighty-five-year-old Supreme Court case, *Hall v. DeCuir*,⁶ and upon the subsequent use of that decision in *Morgan v. Virginia*.⁷ *Hall v. DeCuir* held unconstitutional a Louisiana statute⁸ prohibiting discrimination in passenger accommodations on public carriers, as applied to public steamship transportation on the Mississippi River be-

1 The Colorado Anti-Discrimination Act of 1957 provides:

"Employer" shall mean the State of Colorado or any political subdivision or board, commission, department, institution or school district thereof, and every other person employing six or more employees within the state; COLO. REV. STAT. ANN. § 80-24-2(5) (1953).

Another section provides that it shall be an unfair labor practice:

For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation against, any person otherwise qualified, because of race, creed, color, national origin or ancestry. COLO. REV. STAT. ANN. § 80-24-6(2) (1953).

2 For a brief summary of the facts proving discrimination in this case, see *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 143 Colo. 590, 355 P.2d 83 (1960).

3 As of 1957, Continental Air Lines was operating in eight states: Colorado, New Mexico, Texas, Oklahoma, Kansas, Missouri, Illinois, and California.

4 U.S. Const. art. I, § 8:

The Congress shall have the power * * * to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

5 See 36 NOTRE DAME LAWYER 189 (1961). For a more comprehensive discussion of anti-discrimination commissions, see also 74 HARV. L. REV. 526 (1961). The latter contains a brief discussion of the territorial jurisdiction of such commissions at page 566.

6 95 U.S. 485 (1877).

7 328 U.S. 373 (1946).

8 Acts of 1869, p. 37. The relevant provision is as follows:

Section 1. All persons engaged within this State, in the business of common carriers of passengers, shall have the right to refuse to admit any person . . . or to expell any person . . . *Provided*, said rules and regulations make no discrimination on account of race or color. . . .

Section 4. For a violation of any of the provisions of the first and second sections of this act, the party injured shall have a right of action to recover any damage, exemplary as well as actual, which he may sustain, before any court of competent jurisdiction.

tween Mississippi and Louisiana. The Court held that such state legislation constituted an undue burden on interstate commerce. That financial and legal hardship to the steamship company, and personal embarrassment to the passenger would result was made explicit by Mr. Chief Justice Waite, for the Court:

If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the conclusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. . . . On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another.⁹

Justice Clifford, concurring, added: "Should state legislation . . . conflict, then the steamer must cease to navigate between ports of the states having such conflicting legislation, or be exposed to penalties at every trip."¹⁰ Finding that "Commerce cannot flourish in the midst of such embarrassments,"¹¹ the Court concluded that "If the public good requires such legislation, it must come from Congress and not from the States."¹²

The Colorado Supreme Court, seeking to bolster *Hall v. DeCuir*, quoted the Court's opinion in *Morgan v. Virginia*. According to Mr. Justice Reed, writing for the majority, the *Morgan* case provided an opportunity for revitalizing the holding in *Hall v. DeCuir*, and his approval was given in the following language: "The factual situation set out in preceding paragraphs emphasizes the soundness of this Court's early conclusion in *Hall v. DeCuir*."¹³

The factual situation in the *Morgan* case involved an interstate bus trip and a Virginia statute¹⁴ requiring segregation on public carriers. A Negro was convicted of violating the statute. The Virginia Supreme Court affirmed. The conviction was reversed by the United States Supreme Court, which held the Virginia statute invalid as an undue burden on interstate commerce: "[T]he transportation difficulties rising from a statute that requires commingling of the races, as in the *DeCuir* case, are increased by one that requires separation, as here."¹⁵

The revitalized *Hall v. DeCuir* doctrine, while based fundamentally on a well-recognized constitutional principle, has had a paradoxical effect in its application in cases involving discrimination. This is so because the rule handed down there has been used to invalidate not only segregation legislation — as in the *Morgan* case — but also anti-discrimination laws as in the situation at hand. This paradox was amply dramatized in the *Continental* case by the Colorado Supreme Court's handling of a reference to *Hall v. DeCuir* made in a brief filed by the Assistant United States Attorney General as *amicus curiae*. The United States noted that *Hall v. DeCuir* was "handed down seventy-six years prior to *Brown v. Board of Education . . .*," that the case had "long been eroded and devitalized," and that it "has no vitality today."¹⁶ In rejecting this contention, the Colorado Court replied that *Hall v. DeCuir* (1) had been used as authority in a 1960 decision handed down by the United States Supreme Court,¹⁷ and (2) was cited by the Attorney General in another

9 95 U.S. 485, 489 (1877).

10 *Id.* at 498.

11 *Id.* at 489.

12 *Id.* at 490.

13 328 U.S. 373, 383 (1946).

14 56 VA. CODE § 329 (1950).

15 328 U.S. 373, 384-85 (1946).

16 368 P.2d 970, 974 (Colo. 1962).

17 *Huron Portland Cement Company v. City of Detroit*, 362 U.S. 440 (1960). In this case, the Court ruled that a city smoke abatement ordinance was applicable to defendant's vessels used in and licensed (by the federal government) for interstate commerce. This is doubtful authority for the position taken by the majority here, for it is a strong case in favor of an area of dual regulation and cooperation.

brief as *amicus curiae* in 1960.¹⁸ The court's concluding remark in this reference borders on the sardonic: "[C]ounsel for the United States, appearing here as *amicus curiae*, attempts like the Roman god Janus to face both ways."¹⁹

This manner of disposing of what seems to be a legitimate contention that the force of *Hall v. DeCuir* has been restricted with the passage of eighty-five years would appear to be more a *statement* of the paradox involved in the use of this important case than it is an attempt to set the matter straight. This is, of course, not to say that because a case is old it is outworn; but it does suggest the *possibility* that the enthusiasm with which the *DeCuir* doctrine has been recently invoked was due more to the result the use of that rule would produce than to any universal approval of the decision in all its particulars. Had the "Janus-like" use of the case, producing results contrary to those initially desired, been evident at the outset, it is not so clear that praise would have followed its citation.²⁰

The principle emanating from *Hall v. DeCuir* — that a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary²¹ — is practically inviolate and is not in controversy here. For *Hall v. DeCuir* is to be distinguished from the instant case, not on the law, but on the facts. This is so because implicit in the earlier case is the possibility that the states might impose conflicting regulations upon interstate commerce in the area of race discrimination.²² Today, *such variations could not constitutionally be enforced*.

Authority for this appraisal of the *Continental* case is to be found in the combined force of two decisions of the United States Supreme Court, both handed down within the past fifteen years: *Bob-Lo Excursion Co. v. Michigan*²³ and *Brown v.*

18 *Boynton v. Virginia*, 364 U.S. 454 (1960). Here, petitioner, a Negro interstate bus passenger, was refused service in the "white" section of a bus terminal restaurant, and, upon refusing to leave, was convicted on a charge of remaining upon the premises of another without authority of law after having been forbidden to do so. The Supreme Court reversed, holding application of the Virginia statute to these facts unconstitutional under the Interstate Commerce Act.

19 368 P.2d 970, 974 (Colo. 1962).

20 Note the "desirable result" obtained in all three cases the majority cites with reference to *Hall v. DeCuir*.

21 95 U.S. 485 (1877). What constitutes a "burden" turns on the circumstances of each case and is usually a question of fact. *Morgan v. Virginia*, 328 U.S. 373, 378 (1946); *Hall v. DeCuir*, 95 U.S. 485, 488 (1877). Thus, constitutionally valid under this principle were an act requiring the licensing of "transportation agents" with the state, *California v. Thompson*, 313 U.S. 109 (1941); licensing regulation enacted for telegraph companies, *Colorado Postal Tel. Co. v. Colorado Springs*, 61 Colo. 560, 158 Pac. 816 (1916); act imposing maximum rates for railroads operating within the state, *Minnesota Rate Cases*, 230 U.S. 352 (1913); act prescribing regulations for wage payments of railroad employees, *Erie R. Co. v. Williams*, 233 U.S. 685 (1914); act limiting the number on railroad crews on freight trains, *Chicago, R. I. & Pacific Ry. Co. v. Arkansas*, 219 U.S. 453 (1911); act setting vision requirements for railroad employees, *Nashville C. & St. L. Ry. v. Alabama*, 128 U.S. 96 (1888); act requiring locomotive engineers to be examined and licensed by the state, *Smith v. Alabama*, 124 U.S. 465 (1888); state regulation of harbor pilots and pilotage, *Cooley v. Port Wardens of Philadelphia*, 53 U.S. (12 How.) 299 (1851); and an authorization by the state for construction of a bridge and dam on navigable streams situate within the state, *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 244 (1829). Invalid were: an act of the state limiting the maximum number of passenger and freight cars on any train operating in the state, *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), and the grant by a state of exclusive navigation rights to a particular individual, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

22 Mr. Justice Clifford, concurring in *Hall v. DeCuir*, *supra*, said (at 497-98):

If Louisiana may pass a law forbidding such steamer from having two cabins and two tables, — one for white and the other for colored persons, — it must be admitted that Mississippi may pass a law requiring all passenger steamers entering her ports to have separate cabins and tables, and make it penal for white and colored persons to be accommodated in the same cabin or to be furnished with meals at the same table.

23 333 U.S. 28 (1948).

Board of Education.²⁴ In *Bob-Lo*, a steamship company providing transportation by boat from Detroit to an island in Canada refused to accommodate a Negro, thereby violating a Michigan statute²⁵ prohibiting discrimination in places of public accommodation. The trial court found the company guilty of violating the statute and imposed a fine. The Michigan Supreme Court affirmed. The defendant appealed to the United States Supreme Court on the ground that Michigan lacked jurisdiction because of the Commerce Clause of the Federal Constitution and could not validly use its civil rights statute against a carrier engaged in foreign commerce. The Supreme Court dismissed the appeal, saying that "It is far too late to maintain that the States possess no regulatory powers over such (foreign) commerce."²⁶ The Court went on to say:

It is difficult to imagine what national interest or policy, whether of securing uniformity in regulating commerce affecting relations with foreign nations or otherwise, could reasonably be found to be adversely affected by applying Michigan's statute to these facts or to outweigh her interest in doing so. Certainly there is no national interest which overrides the interest of Michigan to forbid the type of discrimination practiced here.²⁷

Concurring in *Bob-Lo*, Mr. Justice Douglas first solved the problem of the possible application of *Hall v. DeCuir*. Quickly distinguishing that case from the one before him on the basis that the former involved segregation of the races while the latter was complete denial of facilities to a Negro, he went on to say:

[T]here is no danger of burden and confusion from diverse state laws if Michigan's regulation is sustained. If a sister state undertook to bar Negroes from passage on public carriers, that law would not only contravene the federal rule but also invade a "fundamental individual right which is guaranteed against state action by the Fourteenth Amendment." . . . Hence I do not see how approval of Michigan's law in any way interferes with the uniformity essential for the movement of vehicles in commerce. The only constitutional uniformity is uniformity in the Michigan pattern.²⁸

Extending this principle involving discrimination in transportation to discriminatory practices in employment contracts should present no insurmountable difficulty. The holding in the *Continental* case would then have been that the only constitutional uniformity is uniformity in the Colorado pattern. It seems that following the alternative suggested in *Bob-Lo* would have been preferred.

To some, it might appear that *Bob-Lo* alone would have been sufficient to indicate a decision for the complainant in *Continental*. However, by reference to *Brown v. Board of Education*, hesitancy to do so could have been alleviated. It would seem that, since the *Brown* case, the ground upon which Justice Douglas distinguished *Hall v. DeCuir* from *Bob-Lo* would have even wider application. His remark that the Fourteenth Amendment calls for "at least equality of legal right"²⁹ is not enough to satisfy interpretation of that Amendment since 1954, and distinguishing *Hall v. DeCuir* nowadays need not rest within such narrow confines. Yet, the fact that the *Brown* decision concerned only school segregation was sufficient to preclude the Colorado Supreme Court from proceeding along these lines. While the majority opinion in *Continental* disposed of *Brown* by simply stating that it "did not involve interstate commerce,"³⁰ Justice Pringle, in dissent, said:

[I]n my opinion, the Colorado Anti-Discrimination statute cannot affect the uniformity of regulation in interstate commerce, for if any state passed

24 347 U.S. 483 (1954).

25 MICH. COMP. LAWS § 750.146 (1948).

26 333 U.S. 28, 37 (1948). Although the *Bob-Lo* case deals with the regulation of "foreign" commerce, the rationale of the decision applies equally to interstate commerce, which is treated in Article I, Section 8, clause 3 of the Federal Constitution on equal footing with foreign commerce. See note 4, *supra*.

27 333 U.S. 28, 40 (1948).

28 *Id.* at 42.

29 *Ibid.*

30 368 P.2d 970, 974 (Colo. 1962).

a law permitting or requiring the discrimination complained of here, it would certainly be struck down as a violation of the Fourteenth Amendment to the Constitution of the United States. *Brown v. Board of Education* . . .³¹

Having disposed of *Hall v. DeCuir* with the "no conflict, no burden" argument described above,³² attention can be given to the second reason given by the Colorado Court for its decision: that the field concerning racial discrimination in the interstate operation of carriers has been pre-empted by the federal government, thereby precluding action by the states.³³ Just how much influence this contention had on the holding in *Continental* appears to be questionable, for the court made no argument in its support and the only authority given was mere mention of the Railroad Labor Act, the Civil Aeronautics Act, and the Federal executive orders dealing with discrimination by employers contracting with the federal government. A reading of these provisions and the related cases shows that they do not cover the type of discrimination involved in the present case, nor do they provide an effective remedy for the complainant.³⁴ Furthermore, it is well settled that where Congressional enactment occupies only a limited field, state legislation not in conflict and outside that field is not forbidden when otherwise permissible.³⁵ Finally, pre-emption is largely a matter of intent; and whereas Congress has attempted to pass corrective legislation in this area of the law in every Congressional session since

31 *Id.* at 982.

32 It could not be effectively argued that an undue burden would be placed on interstate commerce even if uniformity of regulation was assured. That such a contention regarding an anti-discrimination law is repugnant on its face, see Justice Pringle's dissent in the *Continental* case, 368 P.2d 970, 982 (Colo. 1962). And, that such a law as is here involved could not be invalidated in terms of the Equal Protection Clause, see *Railway Mail Ass'n v. Corsi*, 326 U.S. 83, 93-94 (1944), particularly Justice Frankfurter's bitter repudiation of that contention in a concurring opinion, *supra* at 98.

33 The reasoning of the court on this point has been discussed in 74 HARV. L. REV. 526, 587 (1961):

The question of federal preemption has been raised with respect to state control of employment discrimination by interstate carriers regulated by the federal government. In the only judicial consideration of such a claim of preemption, a recent concurring opinion of three justices of the Colorado Supreme Court rejected it. In view of the recent rash of court cases, and the fact that many of the public hearings scheduled for the near future involve carriers, it is probable that the situation will soon be squarely before the courts. In the absence of any comprehensive federal legislation concerning discrimination and in light of Supreme Court precedent, it seems that state regulation should not be prohibited.

34 Of course, the court only claims that by such legislation, Congress has pre-empted the field. The act coming closest to affecting the situation in *Continental* is the Railway Labor Act. Yet it does not expressly forbid racial discrimination. Thus, it does not immunize even a proven interstate carrier from the Colorado Anti-Discrimination Act. *Denver Bldg. & Const. Trades Council v. Shore*, 132 Colo. 187, 194, 287 P.2d 267 (1955); *N.L.R.B. v. Denver Bldg. & Const. Trades Council*, 192 F.2d 577 (10th Cir. 1952); see also: *United Mine Workers v. Golden Cycle*, 134 Colo. 140, 300 P.2d 799 (1956). The Railway Labor Act applies to employees after hiring — not to applicants seeking to be hired. *Thomas v. N.Y.C. & S.L.R. Co.*, 97 F.Supp. 687 (N.D. Ohio 1950). Complainant was not an employee of Continental Air Lines and any dispute he had was not within the jurisdiction of the National Mediation Board. 45 U.S.C. § 183 (1954). The Civil Aeronautics Act contains only a declaration of policy that any citizen has the "public right of freedom of transit through the navigable airspace. . . ." 49 U.S.C. § 1304 (1958). That the complainant has a far inferior, if any, remedy under the Federal executive order mentioned is apparent on its face. Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961).

35 *Kelly v. Washington*, 302 U.S. 1 (1937). To have the effect of superseding a state statute, it is not sufficient that regulation of commerce by Congress invade the same field; it must expressly cover the subject matter in question, or show a purpose to take legislative possession of the entire area, *Rogers v. Atlantic Greyhound Corp.*, 50 F.Supp. 662 (S. D. Ga. 1943); or at least the intent to legislate on the particular subject, *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Ind.*, 332 U.S. 507 (1947); or an intention to exclude state action. *Maurer v. Hamilton*, 309 U.S. 598 (1939); and this purpose must be manifested by a valid statute, *People v. County Transp. Co.*, 503 N.Y. 391, 103 N.E.2d 421, *appeal dismissed*, 343 U.S. 961 (1952).

1944, the failure of such bills is evidence that, at least for the moment, such intent is not manifested.³⁶

This analysis of the *Continental* case attempts to describe a manner by which the Colorado Supreme Court could have ruled for the Anti-Discrimination Commission, should it have so wished. It would seem that the only justification for the decision was that, thinking a contrary decision would mean overruling *Hall v. DeCuir*³⁷ and/or extending *Brown v. Board of Education*, the court chose to move cautiously and avoid performing functions which it felt were more properly within the purview of the United States Supreme Court.³⁸ However, *Hall v. DeCuir* need not be overruled but merely distinguished, and *Bob-Lo Excursion Co. v. Michigan* is sufficient of itself to govern this case without extending *Brown v. Board of Education*. And this tack, if taken, seems questionable on other grounds also. It has now been nearly five years since the injured party in this case first registered his complaint with the Anti-Discrimination Commission, and further delay can only compound the wrong to which he has been subjected. Moreover, in the larger view, this court, in denying the Commission jurisdiction, missed an opportunity to implement the social policy of equality of the citizenry, now considered to be inherent in the Federal Constitution. Like state courts elsewhere, this court ignored the responsibility to extend this policy to all citizens where it is legally possible and feasible — a responsibility now borne almost solely by the Federal Courts. The Supreme Court of Colorado thus missed a valuable opportunity to do service to itself, the Anti-Discrimination Commission, and the complainant by refusing to extend the remedy prayed for.

Franklin A. Morse, II

CONTRACTS — PHYSICIANS AND SURGEONS — PATIENT MAY SUE FOR BREACH OF WARRANTY THAT SURGERY WOULD NOT WORSEN PATIENT'S CONDITION. — Defendant physician Proud, in treating plaintiff Noel for ear trouble, advised Noel that he should have a series of "stapes mobilization" operations. Dr. Proud allegedly told Noel that "while the operations might not have any beneficial effect on plaintiff's hearing, his hearing would not be worsened as a result."

Three operations were performed, the last on January 6, 1958. Plaintiff's hearing did not improve; in fact, it got a great deal worse. On January 30, 1960, plaintiff sued defendant, alleging breach of an express warranty that plaintiff's hearing would not get any worse. Defendant demurred, pleading confusion of theory and the tort statute of limitations, which would have barred the action. The trial court overruled the demurrer. On appeal to the Supreme Court of Kansas, *held*: affirmed. The petition stated a cause of action sounding in contract. *Noel v. Proud*, 367 P.2d 61 (Kan. 1961).

Although the instant case is not alone in granting recovery in contract for injuries resulting from medical treatment, it is usually held that suits against physicians for such injuries sound in tort. The tort is almost always termed "medical

36 In 1944, Senator Wagner and others sponsored a bill (S. 2048, 78th Cong., 2d Sess. (1944)) to forbid employers in interstate commerce either to fire or refuse to hire a worker because of his race, color, creed or national origin. In 1949, Senator Taft sponsored a similar bill (S. 1728, 81st Cong., 2d Sess. (1950)). Senator Wagner's bill was used as the model for the first anti-discrimination law — the New York Anti-Discrimination Act of 1945. N.Y. CIVIL RIGHTS LAW §§ 1-8.

37 Justice Pringle, dissenting in the present case, said: "I agree that if *Hall v. DeCuir* . . . is to be placed in limbo it can be done only by the hand which promulgated it — the Supreme Court of the United States." 368 P.2d 970, 982 (Colo. 1962).

38 The United States Supreme Court may have that opportunity in the near future. This writer has been informed that a petition for writ of certiorari was filed April 30, 1962, in that Court.

malpractice." The contract and the tort theories are quite dissimilar in nature, proof, limitations, and the measure of damages.

In malpractice, negligence is an essential allegation, which must be made out or the action fails. The dimensions of the tort have been outlined by the Supreme Court of Washington in this manner:

In order to sustain a judgment against a physician or surgeon, the standard of medical practice in the community must be shown, and, further, that the doctor failed to follow the methods prescribed by that standard. Negligence on the part of a physician or surgeon by reason of his departure from the recognized standard of practice must be established by medical testimony. An exception to the last rule is recognized where the negligence is so grossly apparent that a layman would have no difficulty in recognizing it.¹

The damages recoverable in malpractice suits include all those proximately resulting from the negligent act, including pain and suffering.²

In contract, on the other hand, the problem of making out a case is considerably simplified. It must be shown that a contract existed; plaintiff must prove offer, acceptance, and consideration.³ Plaintiff is not, however, burdened with proving the standard of medical care in the community, since negligence is foreign to the action.⁴ He must show that the warranty was breached, *e.g.*, in the instant case, that his hearing got worse as a result of the operations, which involves some use of expert testimony. The damages recoverable are probably less than what would be the case in tort. The measure of damages for breach of contract, and hence breach of warranty, is generally expressed as that amount necessary to put the plaintiff in as good a position as he would have been had the defendant kept his contract.⁵ Recovery in medical cases is thus usually limited to compensation for consequences that were reasonably within the contemplation of the parties when the contract was made, and which flow naturally from the breach,⁶ *i.e.*, medical fees and hospital bills. There have been a few cases which have allowed recovery for pain and suffering directly traceable to the breach of contract,⁷ although these are traditionally allowed only in tort cases.

One of the most important distinctions between tort and contract actions is the statute of limitations. The malpractice (tort) statute is usually two years,⁸ while the contract statute is often six.⁹ Since in malpractice cases the statute is generally held to begin running at the time of the negligent act which causes the injury,¹⁰ sometimes to the severe prejudice of plaintiffs whose injuries were long in turning up,¹¹ the long contract statute will of necessity look very attractive to attorneys.

1 Cochran v. Harrison Memorial Hospital, 42 Wash. 2d 264, 254 P.2d 752, 755 (1953).

2 See, *e.g.*, Calvin v. Smith, 276 App. Div. 9, 92 N.Y.S.2d 794 (1949).

3 See, *e.g.*, Wilson v. Blair, 211 Pac. 289 (Mont. 1922).

4 It was said in Safian v. Aetna Life Ins. Co., 260 App. Div. 765, 24 N.Y.S.2d 92, 95 (1940), that: "If a doctor makes a contract to effect a cure and fails to do so, he is liable for breach of contract even though he uses the highest possible skill."

5 5 WILLISTON, CONTRACTS § 1338 (Rev. ed. 1937).

6 See, *e.g.*, Hirsch v. Safian, 257 App. Div. 212, 12 N.Y.S.2d 568 (1939).

7 Stewart v. Rudner, 349 Mich. 459, 84 N.W.2d 816 (1957); Hood v. Moffett, 109 Miss. 757, 67 So. 664 (1915); McQuaid v. Michou, 85 N.H. 229, 157 Atl. 881 (1932).

8 *E.g.*, MICH. STAT. ANN. § 27.605 (1938); N.J. REV. STAT. § 2A: 14-2 (1952); S.D. CODE § 33.0232 (1939).

9 *E.g.*, N.J. REV. STAT. § 2A: 14-1 (1952); S.D. CODE § 33.0232 (1939); WYO. COMP. STAT. ANN. § 1-17 (1957).

10 Capucci v. Barone, 266 Mass. 578, 165 N.E. 653 (1929); Conklin v. Draper, 254 N.Y. 620, 175 N.E. 892 (1930); Murray v. Allen, 103 Vt. 373, 154 Atl. 678 (1931).

11 One court dispensed from the rule in a case where plaintiff had discovered a steel wing nut inside his body four years after an operation and two years after the statute would otherwise have run, saying: "Justice cries out that she fairly be afforded a day in court and it appears evident to us that this may be done . . . without undue impairment of the two-year limitation or the considerations of repose which underlie it." Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961). The factual situation is indicative of the problems created in this area by short statutes and early running.

Notwithstanding the attempts of some courts to temper the malpractice limitations rule,¹² lawyers continue to bring suits in contract.¹³

Because it is universally conceded that doctors, by the very nature of their art, do not usually warrant cures, the contract action is not readily available.¹⁴ Courts are quick to find that the essence of the action is in tort, though pleaded as if in contract.¹⁵ This is particularly true where the complaint prays for damages traditionally restricted to tort,¹⁶ or where counsel inadvertently alleges negligence.¹⁷

Plaintiff's petition in the instant case was excellently drafted, avoiding the pitfalls of improper allegations and outlining in proper sequence the necessary elements of breach of warranty. The issue thus presented on appeal was sharp and clear; could the doctor's statement that the operations would not hurt plaintiff's hearing constitute a warranty? The court ruled, over a vigorous dissent, that a cause of action was made out.

The decision broadly follows a well-settled rule. There being no objection to doctors warranting their services, breaches will give rise to recoveries in many jurisdictions.¹⁸ Although the rule is easily stated, it has a number of difficult ramifications. The two dissenting justices in the instant case highlighted the *interpretive* problem in these terms:

Despite the allegations as to "agreements, promises and warranties," . . . looking at this matter from a practical and realistic standpoint — the real contention in this case is that the patient was the victim of "bad medical advice. . . ." ¹⁹

It is easy to see how most such warranty cases will produce such an interpretive difficulty. Weight is given to the view of the dissenters when defendant's statement about the operation is looked at in the light of the personal relationship of trust and confidence existing between a doctor and his patient. It is not hard to visualize a properly confident physician treading precariously near the border between opinion and warranty to encourage a timid patient to undergo an operation traditionally successful in aiding or curing his ailment. It might be of considerable medical value for doctors to be able to indulge in occasional genteel "seller's talk."

Because of the fiduciary nature of the doctor-patient relationship it may be that the criteria for finding express warranty in commercial transactions should be applied restrictively to medical cases.

On the other hand, decisions similar to the instant case might urge upon doctors the need for more caution and candor in dealing with patients presumably able to make up their own minds without the aid of an overenthusiastic physician.

There is another aspect to the problem. At least 165,000 physicians in the United States carry professional liability insurance, according to a recent estimate.²⁰ These policies are quite standardized, and almost universally exclude liability arising

12 *Huysman v. Kirsch*, 6 Cal. 2d 302, 57 P.2d 908 (1936); *Ayers v. Morgan*, 397 Pa. 282, 154 A.2d 788 (1959); *McFarland v. Connally*, 252 S.W.2d 486 (Tex. Civ. App. 1952).

13 "Although the attorney for the plaintiff ordinarily is better off to sound his complaint in tort, often he may escape a particular statute of limitations by proceeding in assumpsit." 3 BELL, *MODERN TRIALS* 2021 (1954); "Suing for breach of contract has become popular, of late among plaintiff's lawyers. . . ." Hassard, *Your Malpractice Insurance Contract*, 168 A.M.A.J. 2117 (1958).

14 See, e.g., *Ewing v. Goode*, 78 Fed. 442 (C.C.S.D. Ohio 1897); *Piper v. Halford*, 247 Ala. 530, 25 So. 2d 264 (1946); *Hawkins v. McCain*, 239 N.C. 160, 79 S.E.2d 493 (1954).

15 *Lakeman v. LaFrance*, 102 N.H. 300, 156 A.2d 123 (1959).

16 *Horowitz v. Bogart*, 218 App. Div. 158, 217 N.Y. Supp. 881 (1926); *Frankel v. Wolper*, 181 App. Div. 485, 169 N.Y. Supp. 15 (1918).

17 *Travis v. Bishoff*, 143 Kan. 283, 54 P.2d 955 (1930); *Ericson v. Charles*, 108 Kan. 205, 194 Pac. 652 (1921).

18 *Colvin v. Smith*, 276 App. Div. 9, 92 N.Y.S.2d 794 (1949); *Conklin v. Draper*, 229 App. Div. 227, 241 N.Y. Supp. 529 (1930); *Seanor v. Browne*, 154 Okla. 222, 7 P.2d 627 (1932); *Brooks v. Herd*, 144 Wash. 173, 257 Pac. 238 (1927).

19 *Noel v. Proud*, 367 P.2d 61, 67 (Kan. 1961).

20 *Hirsh, Insuring Against Medical Professional Liability*, 12 VAND. L. REV. 667 (1959).

out of an agreement guaranteeing the result of any treatment.²¹ Thus a warranty recovery might leave the doctor unprotected by the insurance policy he has taken out in all good faith. And properly so, observed one court:

If a doctor makes a contract to effect a cure and fails to do so, he is liable for breach of contract even though he used the highest possible professional skill. Insurance of such a contract could protect only medical charlatans. The honorable member of the medical profession is more keenly conscious than the rest of us that medicine is not an exact science, and he undertakes only to give his best judgment and skill. He knows he cannot warrant a cure.²²

The instant case, sustaining the complaint on its face, was naturally limited in effect. On remand, plaintiff will still have the extremely difficult task of proving that the operation itself (not his prior ailment) made his hearing worse, since the complaint's very terms indicates that defendant did not say the operation would result in a *cure* of a previously progressive ailment.

It is suggested, however, that even this decision, interpreting the doctor's alleged statement as a warranty, has taken something essentially in the nature of advice and opinion and transmuted it into a statement of fact.

Joseph Freitas

EVIDENCE — HEARSAY RULE — NECESSITY HELD SUFFICIENT BASIS TO ADMIT STATEMENTS OF DECEASED AS TO CAUSE OF INJURY. — In an administrator's suit to recover for injuries inflicted on Elsie J. Moore, the decedent, it was alleged that defendant bus company's driver had closed a bus door on Mrs. Moore. Plaintiff sought to introduce in evidence statements made by Mrs. Moore to a physician of the defendant, during a physical examination eighteen months after the accident, in the course of which she told the doctor that the bus driver had caused her injuries. The Court of Appeals of Georgia, reversing a summary judgment for defendant, *held*: that the declarations of decedent, even though made to defendant's physician, were admissible in evidence since there were no other witnesses to the alleged occurrence. *Moore v. Atlanta Transit System, Inc.*, 123 S.E. 2d 693 (Ga. 1961).

The fundamental reasons underlying the hearsay rule are prompted by practical considerations of authenticity and credibility. It has long been considered undesirable to allow hearsay testimony in evidence due to the distinct possibility of fraudulent alteration of the hearsay statement itself and due to the lack of opportunity to cross-examine the one who made the statement.¹ Firsthand evidence, however, was not always available; and in its absence, secondhand evidence was considered better than none at all. Consequently, during the first half of the nineteenth century certain situations were crystallized into exceptions to the hearsay rule.²

Certain statements made to a physician, and statements of a decedent, are recognized as exceptions when it is *necessary* that they be admitted in order to insure sufficient evidence for a fair judgment. At first glance, it might appear that the decedent's statements in the *Moore* case would be admissible on the basis of either of these exceptions. Closer examination reveals that if this evidence is to be admitted at all, it must be on the basis of necessity and not on the grounds of the statement-to-physician exception.

When a court holds that statements made by a patient to his physician are admissible, it limits such statements to those which concern symptoms, sensations, and feelings.³ It is presumed that the injured person will not falsify statements

²¹ *Id.* at 669.

²² *Safian v. Aetna Life Ins. Co.*, 260 App. Div. 765, 24 N.Y.S.2d 92, 95 (1940).

¹ Wheaton, *What is Hearsay?*, 46 Iowa L. Rev. 210, 219-222 (1961).

² McCORMICK, EVIDENCE § 300 (1954). *E.g.*, admissions of a party-opponent, spontaneous declarations, and dying declarations.

³ *Foulkrod v. Standard Acc. Ins. Co.*, 343 Pa. 505, 23 A.2d 430, 432 (1942).

made to a physician from whom he expects to receive medical aid.⁴ A misstatement concerning symptoms could well lead to faulty diagnosis and consequent harm to the patient. On the other hand, a misstatement concerning an accident's cause might well aid a patient in tort action against a third party.⁵

This, then, is the first of two reasons why the statement-to-physician exception should not be invoked in the present case. The statements here did not simply indicate the symptoms of the injury, but they indicated its cause as well. The greater number of courts have not permitted such declarations as to cause of an injury, even when made to a doctor for treatment, to be admitted in evidence.⁶ Thus, in a case very similar to the one under consideration, statements made to a physician as to how plaintiff fell from a streetcar were held inadmissible.⁷ Despite the fact that there was no testimony by disinterested eyewitnesses, the court here excluded from evidence statements made by plaintiff the morning after the accident upon admission to a hospital.

The second basis on which the testimony offered in the *Moore* case does not meet the statement-to-physician requirement is that, in fact, there was no physician-patient relationship of trust and confidence. The physician was one hired by the defendant to make an examination eighteen months after the injury. In addition to the very real possibility that the decedent might forget some of the circumstances related to her injury, there is also substantial motivation for the decedent intentionally to fabricate a story which might prove favorable to her claim. It is for this reason that, before being allowed to testify concerning the condition of another, a physician must be shown to have been a "treating" doctor.⁸ If the doctor is not consulted for treatment, but solely for the purpose of using his testimony as a witness, the statement-to-physician exception to the hearsay rule is not applicable.⁹ On the basis of this reasoning, there seems to be little ground to allow a party's self-serving declarations, made to the examining physician of an adverse party, to be admitted as evidence.

In the past, self-serving declarations of any type have generally been excluded on the basis that a party's out of court declarations are too unreliable to be used as evidence in his favor. Many courts still exclude self-serving declarations,¹⁰ despite the fact that the rule against self-serving statements "seems to have originated as a counterpart and accompaniment of the rule, now universally discarded, forbidding parties to a suit to testify."¹¹

There is a clear distinction to be made between self-serving declarations on the one hand, and those intended to be used against the declarant, on the other. Statements included under this latter classification are generally allowed as "admissions of a party." This is an additional exception to the hearsay rule,¹² which provides for admitting the words of a party-opponent, or his predecessor or representative, offered as evidence against him.

Characterizing the deceased's statements in the *Moore* case as "self-serving" rather than as "admissions," it would seem that the basic rule excluding hearsay

4 *Shell Oil Co. v. Industrial Commission*, 2 Ill. App. 2d 590, 119 N.E. 2d 224, 231 (1954).

5 *Aetna Life Ins. Co. v. Quinley*, 87 F.2d 732 (8th Cir. 1937).

6 *McCORMICK, EVIDENCE* § 266 (1954).

7 *Brown v. St. Paul City Ry. Co.*, 241 Minn. 15, 62 N.W. 2d 688 (1954). *Cf.*, *New York Life Ins. Co. v. Taylor*, 147 F.2d 297 (D.C. Cir. 1945); *Commonwealth v. Harris*, 351 Pa. 325, 41 A.2d 688 (1945); *Sadjak v. Parker-Wolverine Co.*, 281 Mich. 84, 274 N.W. 719 (1937).

8 *Yellow Cab Co. v. Hicks*, 224 Md. 563, 168 A.2d 501, 505 (1961).

9 *Sutherland v. Kroger Co.*, 144 W. Va. 673, 110 S.E.2d 716 (1959).

10 *Moss v. State*, 208 Ark. 137, 185 S.W.2d 92 (1945); *People v. Smith*, 15 Cal. 2d 640, 104 P.2d 510 (1940); *State v. Barnett*, 156 Kan. 746, 137 P.2d 133 (1943).

11 *McCORMICK, EVIDENCE* § 275 (1954).

12 *Kamanosuke Yuge v. United States*, 127 F.2d 683, 690 (9th Cir. 1942).

would be controlling and that the statements under consideration would be inadmissible as self-serving declarations made to a physician. However the court invoked another exception to the hearsay rule and admitted the statements under the liberally construed principle of necessity, which allows certain statements, ordinarily excluded as hearsay, to be admitted when the interests of justice demand their recognition in the absence of any other testimony. Since both parties agreed to the fact that there were no eyewitnesses to the accident, the necessity is clearly established. The difficulty in a specific case, then, becomes one of arriving at a proper balance in evaluating opposing principles, one of unreliability, the other of necessity. The court in the *Moore* case held necessity controlling and allowed in evidence the decedent's statements on this ground, notwithstanding the fact that they were self-serving declarations made to a nontreating physician.

Relying on a Georgia statute which explicitly provides for the admission of hearsay testimony in the case of necessity,¹³ the court outlined past interpretation of the statute and the evolution in the rule of necessity admitting the statements of deceased persons. Primary authority is found in an important decision, influenced by similar dictates of necessity, in which a Georgia court allowed a decedent's statements in evidence when they had been made to a physician and related the cause of the injury.¹⁴ Citing this case as authority, a later decision allowed such statements made to decedent's wife and relatives, as well as those made to his physician.¹⁵ Progressing still further, Georgia courts have recognized a decedent's declarations when made to relatives alone¹⁶ and even when made only to decedent's wife¹⁷ even when there has been no corroborating testimony of a physician as to similar statements made to him by the deceased.

Other states have also provided, by way of statute, for the admission of a decedent's statements.¹⁸ Where such statutes have been in force, they have been liberally construed to allow for admissions of a decedent's conclusions of fact.¹⁹ In a case analogous to the one at hand, the testimony in issue was decedent's conclusion that he would not have been injured had it not been for the defective condition of a stair-tread. The court held such statement admissible under the state statute as a memorandum of a deceased person relevant to the matter in issue.²⁰

13 GA. CODE ANN. § 38-301 (1933):

Hearsay evidence is that which does not derive its value solely from the credit of the witness, but rests mainly on the veracity and competency of other persons. The very nature of the evidence shows its weakness, and it is admitted only in specified cases from necessity.

14 Mutual Life Ins. Co. of New York v. Davis, 48 Ga. App. 742, 173 S.E. 471 (1934).

15 Lathem v. Hartford Accident & Indemnity Co. et al., 60 Ga. App. 523, 3 S.E.2d 916 (1939).

16 City of Atlanta v. Crouch, 91 Ga. App. 38, 84 S.E.2d 475 (1954).

17 Flemming v. St. Paul-Mercury Indemnity Company et al., 91 Ga. App. 582, 86 S.E.2d 637 (1955); Orkin Exterminating Company, Inc. v. Wright, 92 Ga. App. 224, 88 S.E.2d 205 (1955).

18 MASS. ANN. LAWS ch. 233, § 65 (1956):

In any action or other civil judicial proceeding, a declaration of a deceased person shall not be inadmissible in evidence as hearsay . . . if the court finds that it was made in good faith and upon the personal knowledge of the declarant.

CONN. GEN. STAT. REV. § 52-172 (1958):

In actions by or against the representatives of deceased persons, and by or against the beneficiaries of any life or accident insurance policy insuring a person who is deceased at the time of the trial, the entries, memoranda and declarations of the deceased, relevant to the matter in issue, may be received as evidence. In actions by or against the representatives of deceased persons, in which any trustee or receiver is an adverse party, the testimony of the deceased, relevant to the matter in issue, given at his examination, upon the application of such trustee or receiver, shall be received in evidence.

19 Plisko v. Morgan, 148 Conn. 510, 172 A.2d 621, 622 (1961).

20 *Id.*

Without such a statute, the courts have been reluctant to change the established hearsay law in a manner ordinarily thought proper only by legislative enactment.²¹ It is generally recognized that the mere fact of the declarant's death, without a clear showing of necessity, does not render his statements admissible by his representatives.²²

Granting the case for necessity in the present decision, the self-serving nature of the statements assumes primary importance. When admitting the declarations of a deceased in evidence, courts have ordinarily demanded proof that the declarant was without motive to speak an untruth.²³ A recent decision, recognizing the principle of necessity, outlined a new formula for the old requirements and approved the test of "trustworthiness," holding hearsay admissible if circumstances were such that sincere and accurate statements would naturally be uttered, if danger of easy detection of falsification or fear of punishment would probably counteract a desire to falsify, or if conditions or publicity would probably have caused any error to be detected or corrected.²⁴

It would seem that the decedent's statements in the *Moore* case should not be readily accepted as "trustworthy." Although the court gives no indication that the declarant's testimony is fraudulent, she certainly would have had sufficient motive to fabricate her declaration to defendant's physician. It would seem unlikely that her statements would have been altered by any of the restraints suggested by the "trustworthy" test as outlined above.

Despite the traditional view, there are indications of possible liberalization of the hitherto historically rigid hearsay rules. In 1942, the American Law Institute made the radical suggestion that all hearsay be admissible "if the judge finds that the declarant (a) is unavailable as a witness, or (b) is present and subject to cross-examination."²⁵ When this proved to be too drastic a change to win acceptance, the Commissioners of Uniform State Laws added the requirements that the hearsay statements be made while one's recollection is clear and while he is acting in good faith.²⁶ The advance from the traditional requirement of demanding no possible motive to speak an untruth to that of showing good faith, in fact, would be a significant one in the further breakdown of the hearsay strongholds. Although neither the Model Code nor the Uniform Rules have been widely adopted as law, they indicate a definite agitation to liberalize the present hearsay rule.

"The next and most needed step in the liberalization of the Rule is the adoption of the general exception for *all statements of deceased persons* leaving the application of the rule to the trial court."²⁷ Certainly if such statements are to be generally admitted, there will have to be cautionary instructions given to the jury as to the credibility and relative weight of the testimony. Such instructions, however, would hardly be unusual or excessively burdensome in this day when

21 *First Bank & Trust Co. of South Bend v. Tillson*, 124 Ind. App. 478, 118 N.E.2d 496, 503 (1954).

22 *Colbert v. Miller*, 149 Neb. 749, 32 N.W.2d 500, 502 (1948); *Johnson v. Chicago & N.W. Ry. Co.*, 72 S.D. 580, 38 N.W.2d 348 (1949).

23 *Birmelin v. Gist*, 162 Ohio St. 98, 120 N.E.2d 711, 714 (1954).

24 *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388, 397 (5th Cir. 1961).

25 MODEL CODE OF EVIDENCE rule 503 (1942).

26 UNIFORM RULES OF EVIDENCE rule 63 (1953):

Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

4(c) if the declarant is unavailable as a witness, a statement narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action.

27 5 WIGMORE, EVIDENCE § 1427 (3d ed. 1940).

the juror is often given such a maze of instructions that his abilities, as those supposedly possessed by the typical man-in-the-street, are taxed to the utmost.²⁸ If such testimony is not allowed, it would seem to indicate a lack of confidence in the jury's ability to evaluate the worth and credibility of the evidence presented. Such an attitude constitutes an implicit indictment of the jury as an institution rather than a logical criticism of the admissibility of necessary hearsay evidence.

J. Russell Bley, Jr.

NEGOTIABLE INSTRUMENTS — BANKS AND BANKING — PURCHASER OF INSTRUMENT WHO TRANSFERS OWN BANK DRAFT IN EXCHANGE IS HOLDER IN DUE COURSE EVEN WHERE DRAFT IS NOT PAID BEFORE DEFENSE OR DEFECT IS DISCOVERED. — One Sauer fraudulently obtained ten negotiable notes from the maker. He sold these notes to plaintiff bank in exchange for plaintiff's draft on its account in another bank. Sauer negotiated his draft to the La Salle National Bank. A day later plaintiff bank presented the Sauer notes for payment. The maker had stopped payment on them, having discovered Sauer's fraud.

Notwithstanding this, plaintiff bank allowed its draft to be paid to the La Salle National Bank, and sued the maker in its status as a holder in due course. On appeal, the Supreme Court of Wisconsin held: for plaintiff. The N.I.L. requires only that a holder have "completed the transaction at hand" in order to be entitled to full due course status. Further, bank drafts as used in commerce are the equivalent of money. *First Nat'l Bank v. Motors Acceptance Corp.*, 15 Wis. 2d 44, 112 N.W.2d 381 (1961).

The precise issue raised by this case is the extent to which one who issues his own negotiable instrument in exchange for another negotiable instrument is entitled to the status of a holder in due course, where he discovers something wrong with the purchased instrument before his own is paid.

It is unanimously agreed that the giving of one's own instrument, by itself, constitutes "value," so that holder in due course status is available.¹ However, section 54 of the Negotiable Instruments Law (N.I.L.) casts doubt upon the extent to which a holder in the situation described above can recover on his claim:

Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid therefor the full amount agreed to be paid he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

The key phrase here is, of course, "before he has paid therefor the full amount agreed to be paid." The problem is one of statutory interpretation, more specifically, one of deciding whether the handing over of a bank draft satisfies the requirement that the holder had "paid" for his instrument.

In the instant case, the Wisconsin court held that at least in the case of a bank's own draft this requirement is satisfied. The phrase means "completion of the transaction at hand," and does not require the actual cash payment of the draft.

Wisconsin thus joined a majority of states² in holding that at least in the case where the instrument given is a bank draft, the giving of a negotiable instrument is the same as giving cash. The giver's holder in due course status is not conditional or limited upon either the payment of his own instrument or the

²⁸ GREEN, JUDGE AND JURY 351 (1930).

¹ BRITTON, BILLS AND NOTES 241 (2d ed. 1961).

² *Goodale v. Thorn*, 199 Cal. 307, 249 Pac. 11 (1926); *People's Savings Bank v. Smith*, 210 Iowa 136, 230 N.W. 565 (1930); *Greenwood v. Lowe*, 7 La. Ann. 197 (1852); *Montgomery Garage Co. v. Manufacturers' Liability Ins. Co.*, 94 N.J.L. 152, 109 Atl. 296 (1920); *Matlock v. Scheurman*, 51 Or. 49, 93 Pac. 823 (1908); *Miller v. Marks*, 46 Utah 257, 148 Pac. 412 (1914); *Pennoyer v. Dubois State Bank*, 35 Wyo. 319, 240 Pac. 795 (1926).

transfer of the same to a holder in due course before the giver received notice of defect in the instrument he purchased.

While almost all the cases agree that a negotiable instrument is "value,"³ a minority of states⁴ will grant full, unconditional holder in due course status only if the instrument given in exchange has been paid or is in the hands of another holder in due course.

Illustrative of this minority view is *Jerke v. Delmont State Bank*,⁵ where notes executed by plaintiff maker upon fraudulent representations were sold to an unsuspecting bank in exchange for a draft and some certificates of deposit (all negotiable). It was held, *inter alia*, that although defendant bank had due course status as regards plaintiff maker's notes, this status was subject to a supervening equity between the parties (by operation of section 54, N.I.L.) if the bank learned of the previous fraud before it had paid the certificates and before they had found their way into the hands of another holder in due course.

In another case, where plaintiff paid off its own instruments after it learned of the taint in the note it had purchased, the court said recovery would be allowed only if plaintiff could show that its own instruments, when paid, were in the hands of holders in due course.⁶

This restrictive view of the extent of the holder's due course status is to be contrasted with the view now adopted in Wisconsin, where the original exchange of the instruments is held to constitute "payment," and the holder of the tainted instrument is allowed to recover against the maker regardless of whether he has actually paid his own instrument, provided his own instrument was not worthless in its inception.⁷

The latter view was espoused by the Utah court in *Miller v. Marks*,⁸ in which the court said:

Where, as here, negotiable checks are exchanged for a negotiable note when each is an independent obligation and a sufficient consideration for the other, the purchaser has made payment when the instruments are delivered and the exchange is complete, unless . . . the checks were not, nor intended to be, the consideration for the note, or unless . . . the real transaction constituted nothing more than a mere executory agreement or promise to pay at some future time.⁹

The comments of most legal writers tend to favor the majority view espoused by the Wisconsin court in the instant case,¹⁰ notwithstanding the real interpretive problem of section 54 of the N.I.L. (Majority-rule cases tend to call forth convincing dissents).¹¹

It is to be wondered, however, whether the minority rule has not the better of the argument. These states afford an added protection to an admittedly defrauded maker in a situation where the whole transaction could have been stopped

³ See note 1 *supra*.

⁴ *White v. Wadhams*, 204 Mich. 381, 170 N.W. 60 (1918); *Baruch v. Buckley*, 167 App. Div. 113, 151 N.Y.Supp. 853 (1915); *First Nat'l Bank v. Wallace*, 50 N.D. 330, 196 N.W. 303 (1923); *Citizens' Bank v. White*, 132 S.C. 295, 128 S.E. 27 (1925); *Teutonia Ins. Co. v. Bussell*, 48 S.W. 703 (1897); *Duncan v. Broadway Nat'l Bank*, 127 Va. 34, 102 S.E. 577 (1920).

⁵ 51 S.D. 623, 216 N.W. 362 (1927).

⁶ *Cartier v. Morrison*, 232 Mich. 352, 205 N.W. 108 (1925).

⁷ *Dakota Transfer & Storage Co. v. Merchants Nat'l Bank and Trust*, 86 N.W.2d 639 (N.D. 1957).

⁸ 46 Utah 257, 148 Pac. 412 (1914).

⁹ *Id.* at 418.

¹⁰ BRANNAN, *NEGOTIABLE INSTRUMENTS LAW* 721-722 (7th ed. 1948): "This narrow construction of sec. 54 is the only way in which it can be reconciled with secs. 25 and 27 and is in accord with the modern commercial views of payment." (It is to be wondered whether the conflict with the other sections is that serious.) See BRITTON, *BILLS AND NOTES* 241 (2d ed. 1961). But see Steffen, *The Check Collection Muddle*, 10 TUL. L. REV. 537, 560 (1936).

¹¹ See, *e.g.*, the instant case and *Miller v. Marks*, 46 Utah 257, 148 Pac. 412 (1914).

without harm to anyone. The minority is certainly in tune with the wording of section 54, and is not so adverse to the "free flow of credit" as might be supposed. Even minority rule states allow the purchaser to recover from the maker where his own instrument has come into the hands of another such holder, thus protecting the "flow."

On the other hand, the minority view could, under some circumstances, increase the number of corollary transactions which would have to be proved in a suit to collect on an instrument. The problem must be discussed by weighing quantitative considerations based on vastly insufficient empirical evidence.

At any rate, this entire problem is laid to rest in the new Uniform Commercial Code, which simply abolishes the minority view in favor of extending to its limit the concept that the giving of a negotiable instrument is the giving of money. Section 3-303¹² of the Code lays down that "taking for value" includes taking in exchange for a negotiable instrument. The comments¹³ attached thereto seem to exclude any possibility that courts might modify the holder's rights after once conceding him due course status.

David C. Petre

TORTS — NEGLIGENCE — ACT OF GOD — PENNSYLVANIA SCORNS "IRREVERENT" USAGE, DISPLAYS PREFERENCE FOR TERM, "VIS MAJOR" — On a snowy March morning in 1958, as Rodney Bowman was driving to Pomeroy, Pennsylvania, where he worked, four telephone poles running parallel to the highway broke off. One of them fell on Bowman's automobile, injuring him and reducing the car to junk. There was evidence that five to twelve inches of wet snow had fallen at the time of the accident. Defendant, which owned the poles, argued that the accumulated snow had caused them to fall, and that this act of God relieved it from liability. However, it was shown that the pole which had crushed Bowman's car was rotted on the inside, and had not been inspected for rot during the fifteen years since its installation. The jury returned a verdict for Bowman in the amount of \$10,830, and the company's motion for judgment n.o.v. was denied. On appeal to the Supreme Court of Pennsylvania, *held*: affirmed. *Bowman v. Columbia Telephone Company*, 179 A.2d 197 (Pa. 1962).

Justice Musmanno, speaking for the court, pointed out that five inches of snow in Pennsylvania in March was not such a rare occurrence that it could be

12 UNIFORM COMMERCIAL CODE § 3-303

Taking for value. A holder takes the instrument for value

(a) to the extent that the agreed consideration has been performed or that he acquires a security interest in or a lien on the instrument otherwise than by legal process; or

(b) when he takes the instrument in payment of or as security for an antecedent claim against any person whether or not the claim is due; or

(c) when he gives a negotiable instrument for it or makes an irrevocable commitment to a third person.

13 UNIFORM COMMERCIAL CODE (Comment Two, following § 3-303).

In this Article value is divorced from consideration (Section 3-408). The latter is important only on the question of whether the obligation of a party can be enforced against him; while value is important only on the question of whether the holder who has acquired that obligation qualifies as a particular kind of holder.

(Comment Three following § 3-303).

Paragraph (a) resolves an apparent conflict between the original Section 54 and the first sentence of the original Section 25, by requiring that the agreed consideration shall actually have been given. An executory promise to give value is not itself value, except as provided in paragraph (c).

deemed an act of God,¹ and that the evidence tended to show that defendant company had been negligent in failing to inspect its poles. Thus the jury's verdict was proper.

Justice Musmanno also suggested that, in the future, the Pennsylvania courts refrain from using the term "act of God," and instead refer to this defense as "*vis major*":

It may be in order, however, to suggest that trial judges not place upon juries the awesome and overwhelming duty of deciding whether any particular act was caused by God or by man. . . .

Man in his finite mind cannot pass upon the wisdom of the Infinite. . . . The ways of the Deity so surpass the understanding of man that it is not the province of man to pass judgment upon what may be beyond human comprehension. . . . *This does not mean that the defense of vis major has in any way been lessened in importance and authority.* It merely means that the loose use of the name of the Deity in the realm of the law should not be a matter of our approval.²

The opinion adds nothing new to the substantive law concerning "acts of God." It merely indicates that, as far as the Supreme Court of Pennsylvania is concerned, the term "act of God" is improperly used in speaking of "an unusual, extraordinary, sudden, and unexpected manifestation of the forces of nature which man cannot resist."³ It is thus suggested that the phrase "*vis major*" is a more satisfactory label to attach to the doctrine, so that "the loose use of the name of the Deity in the realm of the law"⁴ may be avoided.

At one time, an injury caused by *vis major* was regarded as being equivalent to one caused by an act of God.⁵ Many courts today use the terms interchangeably.⁶ It has been said, in two Louisiana cases,⁷ that *vis major* is used in the civil law in the same way that "act of God" is employed in the common law.

However, in 1935, a federal case⁸ pointed out that, while the earlier authorities treated the two as being equivalent, *vis major* has become broader in meaning than act of God. *Vis major* has been defined as: "A loss that results immediately from a natural cause without the intervention of man, and could not have been prevented by the exercise of prudence, diligence and care."⁹ It has been translated as "superior force."¹⁰ Apparently then, *vis major* is not necessarily limited to the equivalent of an act of God: "The test is whether . . . there was such an insuperable interference occurring without the party's intervention as could not have been prevented by the exercise of prudence, diligence and care."¹¹

The decision in *Bowman* is, in all respects, in accord with the generally-accepted rules pertaining to negligence in combination with acts of God. In a strict sense, one can perhaps say that all occurrences, be they natural or otherwise, re-

1 The Justice indirectly came to this conclusion by asking, "Is five inches of snow in Pennsylvania so phenomenal as to throw all normal activities and responsibilities into confusion and chaos?" 179 A.2d 197, 199 (Pa. 1962).

2 *Bowman v. Columbia Telephone Co.*, 179 A.2d 197, 201 (Pa. 1962) (Emphasis added).

3 *Brewer v. United States*, 108 F.Supp. 889, 893 (M.D. Ga. 1952).

4 *Bowman v. Columbia Telephone Co.*, 179 A.2d 197, 201 (Pa. 1962).

5 *Southern Pacific Co. v. Schuyler*, 135 Fed. 1015 (9th Cir. 1905).

6 *Fairbrother v. Wiley's, Inc.*, 183 Kan. 579, 331 P.2d 330, (1958); *Hart v. Town of Lake Providence*, 5 La. App. 294 (1926); *Leonard Bros. v. Newton*, 71 S.W.2d 613 (Tex. Civ. App. 1934); *Topping v. Great Northern R. Co.*, 81 Wash. 166, 142 Pac. 425 (1914), *aff'd on rehearing*, 87 Wash. 702, 151 Pac. 775 (1915). *Accord*, the famous case of *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868).

7 *Noel Bros. v. Texas & Pac. Ry. Co.*, 16 La. App. 622, 133 So. 830 (1931); *Brousseau & Co. v. Ship Hudson*, 11 La. Ann. 427 (1856).

8 *National Carbon Co. v. Bankers' Mortgage Co. of Topeka, Kan.*, 77 F.2d 614 (10th Cir. 1935).

9 BLACK, LAW DICTIONARY (4th ed. 1951).

10 *Parker v. Womack*, 37 Cal. 2d 116, 230 P.2d 823 (1951); *Pacific Vegetable Oil Corp. v. C.S.T., Ltd.*, 29 Cal. 2d 228, 174 P.2d 441 (1946).

11 *Pacific Vegetable Oil Corp. v. C.S.T., Ltd.*, 29 Cal. 2d 228, 174 P.2d 441, 447 (1946).

sult from the hand of God. Even if the term "acts of God" be taken to mean only occurrences without human cause, it must be severely limited, lest an affirmative defense arise out of anything from an ordinary wind to an earthquake.¹² As in numerous other situations in the law, a line must be drawn somewhere. Some forty-six years ago, Judge Dawson of the Supreme Court of Kansas stated in *Garrett v. Beers*:¹³ "An 'act of God' as known in the law is an irresistible super-human cause such as no ordinary or reasonable human foresight, prudence, diligence, and care could have anticipated and prevented."¹⁴

For a defendant to be able to avail himself of the defense of act of God, two elements must be present: the occurrence alleged to be an act of God must be such that it was incapable of being avoided or foreseen; and the resultant injury must have come about without the intervention of any human agency.¹⁵ The following passage is particularly significant:

The general rule is that when the negligence of a person concurs . . . with a so-called act of God in producing an injury, the party guilty of such negligence will be held liable for the injurious consequence, if the injury would not have happened except for his failure to exercise care.¹⁶

Thus, where human negligence concurs with an act of God, the latter is no defense.¹⁷ Another way of saying the same thing is that the defendant must prove that the act of God was the *sole proximate cause* of the injury complained of.¹⁸ Where the human negligence of the defendant intervenes to contribute to the injury wreaked by the act of God, such injury becomes the proximate result of the negligence rather than of the act of God, and the plaintiff may recover therefor.¹⁹

Two cases which are quite similar to *Bowman* are *City of Hattiesburg v. Hillman*²⁰ and *Hart v. Town of Lake Providence*.²¹ Both involved tree limbs blown down by wind. In *Hillman*, recovery was allowed, the Supreme Court of Mississippi holding that the wind was an ordinary one for a March day, and thus was not an act of God. Recovery was likewise granted in *Hart*, on the basis that the wind, though strong, could have reasonably been foreseen.

Defendant in the instant case testified that it followed the practice of the Bell System in not inspecting its poles until they had been in the ground for fifteen years. The court rejected this as not being evidence of a custom of which judicial notice should be taken, possibly excusing defendant from responsibility. Justice Musmanno said:

This fifteen year period was not to be regarded as a time bomb which would destroy the pole just as the last grain of sand passed into the

12 The limitation was recognized by the Supreme Court of Kansas in *Fairbrother v. Wiley's, Inc.*, 183 Kan. 579, 331 P.2d 330, (1958), which spoke of the "dignity" of an act of God. The court went on further to say that not every violence of nature rises to such "dignity."

13 97 Kan. 255, 155 Pac. 2 (1916).

14 *Id.* at 3 (Emphasis added).

15 *Parrish v. Parrish*, 21 Ga. App. 275, 94 S.E. 315, 316 (1917).

16 *Brewer v. United States*, 108 F.Supp. 889, 893 (M.D. Ga. 1952).

17 Among the more recent decisions: *Cachick v. United States*, 161 F.Supp. 15 (S.D. Ill. 1958); *Manila School Dist. No. 15 v. Sanders*, 226 Ark. 270, 289 S.W.2d 529 (1956); *Moore v. Standard Paint & Glass Co. of Pueblo*, 358 P.2d 33 (Colo. 1960); *Fred Drew Const. Co. v. Mire*, 89 A.2d 634 (D.C. Mun. App. 1952); *Fairbrother v. Wiley's, Inc.*, 183 Kan. 579, 331 P.2d 330, (1958); *Andreoli v. Natural Gas Co.*, 57 N.J. Super. 356, 154 A.2d 726 (1959); *Carlson v. A. & P. Corrugated Box Corp.*, 364 Pa. 216, 72 A.2d 290 (1950).

18 *Moore v. Standard Paint & Glass Co. of Pueblo*, 358 P.2d 33 (Colo. 1960); *Cover v. Platte Valley Public Power & Irrigation Dist.*, 167 Neb. 788, 95 N.W.2d 117 (1959).

19 *Clark's Adm'r v. Kentucky Utilities Co.*, 289 Ky. 225, 158 S.W.2d 134 (1941); *City of Hattiesburg v. Hillman*, 222 Miss. 443, 76 So. 2d 368 (1954).

20 222 Miss. 443, 76 So. 2d 368 (1954).

21 5 La. App. 294 (1926). See also *City of Birmingham v. Coe*, 31 Ala. App. 538, 20 So. 2d 110 (1944), *cert. denied*, 246 Ala. 231, 20 So. 2d 113 (1944).

lower half of the 15-year hourglass. The pole was not equipped with a time-clock mechanism which would tick out its longevity.²²

The same attitude prevailed in *Clark's Adm'r v. Kentucky Utilities Co.*,²³ where a child was killed by lightning passing through the defendant's wires into the child, who was standing on a metal bench directly beneath an exposed electric switch. The accident would not have happened but for the absence of a ground wire, and the fact that the property owners customarily installed such wires themselves did not eliminate the defendant's duty to do it or to see that it was done.²⁴

Bowman contributes nothing startling in the way of enthusiastic adherence to or radical departure from the present law surrounding acts of God and negligence. In essence, the decision says nothing more than that a five-inch snowfall in south-eastern Pennsylvania in the middle of March is not such an amazing event as to be unforeseeable, and that if a telephone company, which has its poles on land abutting a public highway, is negligent in maintaining and inspecting them,²⁵ it will be liable in damages for any injury resulting from their falling on the highway under the weight of such a snowfall.

As for replacing the ancient and widely-adopted phrase "act of God" with "*vis major*," it is to be wondered whether the Supreme Court of Pennsylvania's reverence is not, under the circumstances, a bit excessive. It seems, after all, that the recognition which is given to the fact that certain happenings descend upon our harried lives solely because of the Will of God lends more a touch of respect to otherwise pathetic and frail human affairs, rather than any denotation of frivolousness with regard to the Divine. The one certain thing, however, is that courts in the Keystone State will choose their spiritual words much more carefully in the future, at least in this area of the law.

Robert C. Findlay

TORTS — NEGLIGENCE — AUTOMOBILE PASSENGERS UNDER A SHARE-THE-EXPENSE PLAN. — Dudley W. Hogan brought suit to recover medical expenses incurred in the treatment of his son, injured while riding as a passenger in defendant's automobile. Seeking to recover on the basis of ordinary negligence, plaintiff introduced evidence which showed that there was a prearranged agreement between his son and defendant, whereby his son was to pay one dollar each way for transportation between Augusta and Atlanta, Georgia. At some point in the journey and before the accident, plaintiff's son and the others riding in the automobile paid one dollar for the purchase of gasoline. The jury returned a verdict for the plaintiff. The Georgia Court of Appeals held: that any agreement for the payment of compensation for transportation, if executed in whole or in part, is sufficient to change the relationship of the parties from that of mere host and invited guest, and to charge the driver with the duty of exercising ordinary care for the safety of the passenger. *Salley v. Hogan*, 123 S.E.2d 313 (Ga. App. 1961).

In 1917 Massachusetts applied the analogy of gratuitous bailment to the situation in which a social guest in an automobile was injured as a result of the driver's negligence. The court held that there could be recovery by the guest only upon

22 *Bowman v. Columbia Telephone Co.*, 179 A.2d 197, 200 (Pa. 1962).

23 289 Ky. 225, 158 S.W.2d 134 (1941).

24 Mr. Justice Holmes made an enlightening comment on the subject in *Texas & Pac. R. Co. v. Behymer*, 189 U.S. 468, 470 (1903): "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."

25 It is well-settled that an owner or occupant of land, in his use and enjoyment of premises abutting a public way, has a duty to exercise reasonable care so as not to endanger the safety of persons lawfully using the way. See *Lavelle v. Grace*, 348 Pa. 175, 34 A.2d 498 (1943).

the showing of gross negligence.¹ Although three states adopted this view,² now retained only by Georgia,³ the remainder held that a gratuitous passenger could recover upon a showing of ordinary negligence.⁴ In rejecting the Massachusetts rule, an Indiana court said:

It will not do to say that the operator of an automobile owes no more duty to a person riding with him as a guest at sufferance, or as a self-invited guest, than a gratuitous bailee owes to a block of wood. The law exacts of one who puts a force in motion that he shall control it with skill and care in proportion to the danger created.⁵

With the advent of "guest statutes,"⁶ there began an increasing repudiation of the common law doctrine. Slightly more than half the states have enacted guest statutes,⁷ whose purpose is both to eliminate collusive lawsuits and to lessen the motorist's liability to those whom he has befriended.⁸ With the exception of Washington,⁹ these statutes uniformly provide that the operator of a motor vehicle owes to a rider a lower standard of care when the rider has not given any consideration for the ride.

In any case where a plaintiff is suing the driver of the car in which he was riding when injured, the question which most frequently arises is: Was plaintiff a guest or a passenger-for-hire? This question becomes particularly acute when the plaintiff has paid for, or agreed to pay for, a part of the expenses, such as gasoline and oil.

It has consistently been held that if the occupant and operator of the automobile made some prearrangement for the sharing of the expenses of the trip, the occupant is not a guest but is a passenger-for-hire who is entitled to recover damages for ordinary negligence.¹⁰ Nor need the remuneration be the payment of money or its equivalent.

It is sufficient if the passenger by his presence in the automobile or by service or assistance to the operator in making the trip compensates the operator or the owner in a material or business sense as distinguished from mere social benefit or nominal or incidental contribution to expenses.¹¹

The alternate driving of members in a car pool is sufficient.¹² In *Spraule v. Nelson*,¹³ the court held that the Florida guest statute did not apply in the case of mutual

1 *Massaletti v. Fitzroy*, 228 Mass. 487, 118 N.E. 168 (1917).

2 *Thomas v. Snow*, 162 Va. 654, 174 S.E. 837 (1934); *Connelly v. Derby*, 167 Wash. 286, 9 P.2d 93 (1932); *Slaton v. Hall*, 172 Ga. 675, 158 S.E. 747 (1931).

3 *Caskey v. Underwood*, 89 Ga. App. 418, 79 S.E.2d 558 (1953).

4 *Munson v. Rupker*, 148 N.E. 169, 171 (Ind. App. 1925).

5 *Id.*, at 174.

6 Conn. Pub. Acts of 1927, ch. 308, § 1, repealed, ch. 82, § 351d, Supp. to Conn. Gen. Stat. (1937):

No person transported 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 injury, 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 heedlessness or his reckless disregard of the rights of others.

7 *Georgetta, The Major Issues in a Guest Case*, 1954 Ins. L. J. 583, 584.

8 *Parker v. Taylor*, 194 Wash. 22, 81 P.2d 806 (1938).

9 Wash. Rev. Code § 46:08.080 (1951):

No person transported by the owner or operator of a motor vehicle as an invited guest or licensee, without payment for such transportation, shall have cause of action for damages against such owner or operator for injuries, death, or loss, in case of accident, unless the accident was intentional on the part of the owner or operator: Provided, That this section shall not relieve any owner or operator of a motor vehicle from liability while it is being demonstrated to a prospective purchaser. (Emphasis added.)

10 *Georgetta, supra* note 7, at 586; 2 HARPER & JAMES, THE LAW OF TORTS 960 (1956).

11 *Duncan v. Hutchinson*, 139 Ohio St. 185, 39 N.E.2d 140, 142 (1942).

12 *Bond v. Sharp*, 325 Mich. 460, 39 N.D.2d 37 (1949).

13 81 So. 2d 478 (Fla. 1955).

advantage between rider and driver. There, an airplane mechanic was injured while following his customary practice of riding on a fuel truck as he directed its placement for the driver. A number of other courts have restricted the prearrangement doctrine by saying that the test is whether the agreement for the sharing of expenses could be enforced in a court of law.¹⁴

At the same time, courts generally agree that mere incidental or gratuitous contribution toward the expenses of a trip is insufficient to establish a passenger status.¹⁵ The benefit must be given as consideration for the transportation.¹⁶ When a trip is taken for pleasure or social purposes, the weight of authority is to the effect that the sharing of the cost of gasoline and oil is nothing more than the exchange of social amenities and does not constitute consideration of payment.¹⁷

Until 1955, Georgia had not passed upon the share-the-expense question. In that year, however, the Georgia Court of Appeals, dealing with an express agreement, held that "[w]here a share-the-expense ride in a motor vehicle is prearranged by a legally enforceable agreement, such a situation makes the passenger a passenger for hire and not a guest, and requires ordinary care on the part of the operator of the motor vehicle."¹⁸ By its holding, the court adopted the minority view, which requires a legally enforceable agreement, and left to conjecture what that might be.

In the present case, Presiding Judge Carlisle stated that *Fountain v. Tidwell*¹⁹ "does not constitute a ruling that an express contract is required in order to impose upon the defendant the duty of exercising ordinary care."²⁰ By extending the "legally enforceable" doctrine to include "any agreement for the payment of compensation which is executed in whole or in part,"²¹ the instant case added fumes to the smog-filled air. How far this doctrine will be extended remains to be seen. The liberal approach itself divides into two directions: one road is pitted with chuckholes and leads to debate over contractual concepts; the other is smooth-surfaced and ends at a destination already refused — one is removed from the status of guest if he has made some prearrangement with the driver for the sharing of expenses.²² Perhaps, the difficulties encountered on the first road will cause the second to be followed.

Robert B. Cash

UNEMPLOYMENT COMPENSATION — LABOR DISPUTE — BENEFITS DENIED FOR FAILURE TO CROSS PICKET LINES. — Claimants, members of nonstriking unions, failed to cross picket lines to work under their contract of employment. The evidence showed that during the initial stages of the strike, upon approaching the picket line and requesting permission to cross, claimants were denied admission to the plant. Although there was some conflict in the evidence, the Appeals Referee for the Indiana Employment Security Act found that there was good reason to fear crossing the massed picket lines, and that this was a forceable restraint from work. This finding was ignored. After various appeals and exhaustion of the administrative remedies, the Supreme Court of Indiana *held*: that a voluntary failure by a nonstriking employee to cross a picket line when there is no justifiable basis for fear amounts to "participating in" the labor dispute. This constitutes voluntary un-

14 *Georgetta*, *supra* note 7 at 586.

15 E.G. 10 A.L.R.2d 1376 (1950).

16 *Davis v. Williams*, 194 Va. 541, 74 S.E.2d 58 (1953).

17 *Ledford v. Klein*, N.D. 87 N.W.2d 345, 350 (N.D. 1957).

18 *Fountain v. Tidwell*, 92 Ga. App. 191, 88 S.E.2d 486, 492 (1955).

19 *Ibid.*

20 *Salley v. Hogan*, 123 S.E.2d 313, 315 (Ga. App. 1961).

21 *Ibid.*

22 *Fountain v. Tidwell*, *supra* note 18.

employment, which is not a compensable status under the Unemployment Compensation Act. *Achenbach v. Review Bd. of the Employment Security Div.*, 179 N.E.2d 873 (Ind. 1962).

The United States Congress in 1935 took the initiative in the field of unemployment compensation legislation with the enactment of the Social Security Act.¹ Providing for the initiation of similar state plans, the act incorporated a sanction disallowing approval of those state plans that would be designed to withhold benefits from a laborer in order to induce him to become a strikebreaker, or to take any position with respect to a labor union.² By 1937, there was unanimity in state response to this stimulus.³ These comprehensive insurance plans continue to possess a considerable degree of uniformity.

Under the provisions of the Indiana statute an employee may be disqualified from eligibility to receive benefits under either of the following conditions: (1) leaving work voluntarily without good cause, (2) unemployment due to a stoppage of work resulting from a labor dispute.⁴ The purpose of this act is to provide, within certain prescribed limits, compensation for persons involuntarily unemployed through "no fault of their own."⁵ The idea behind the eligibility disqualification provisions appears to protect against claims of persons who would prefer benefits to employment.⁶

Since the labor dispute disqualification provision incorporates its own limitations, a claimant can avoid its operation by showing that neither he nor other employees of the same "grade or class"⁷ were "participating in,"⁸ "financing,"⁹ or "directly interested"¹⁰ in the labor dispute.¹¹ The claimant, because the burden of proof is upon him,¹² must show that he comes within all of the exceptions before the disqualification impediment is removed.¹³ The problem raised by this case was whether or not a failure to cross the picket line or a failure to attempt to do so amounted to "participating in" the labor dispute and voluntary unemployment under this particular factual situation.

When a picket line is established at the premises of an employer, and a non-union claimant unequivocally refuses to cross a peaceful picket line without any reason for fear, he is disqualified from receiving the benefits of an employment security act.¹⁴ The same principle applies to a situation in which the claimant is a member of a union other than the one establishing the picket line even if that union is from another plant. This is true regardless of whether or not the claimant

1 Social Security Act, 49 Stat. 639 (1935).

2 INT. REV. CODE of 1954, § 3304(a)(5).

3 Haggart, *Unemployment Compensation During Labor Disputes*, 37 NEB. L. REV. 668, 670 (1955); See chart *Id.* at 696.

4 IND. ANN. STAT. § 52-1539 (Supp. 1961). These statutory provisions would seem to be representative of the majority of jurisdictions. See generally Sanders, *Disqualification for Unemployment Insurance*, 8 VAND. L. REV. 307 (1955).

5 IND. ANN. STAT. § 52-1525 (1951).

6 *Soricelli v. Board of Review*, 46 N.J. Super. 299, 134 A.2d 723, 729 (App. Div. 1957).

7 *Abshier v. Review Bd. of the Employment Security Div.*, 122 Ind. App. 425, 105 N.E.2d 902, 903 (1952).

8 *Baldassarri v. Egan*, 135 Conn. 695, 68 A.2d 120, 121 (1949).

9 *Soricelli v. Board of Review*, 46 N.J. Super. 299, 134 A.2d 723, 729 (App. Div. 1957).

10 *Martineau v. Director of the Div. of Employment Security*, 329 Mass. 44, 106 N.E.2d 420, 424 (1952).

11 The Indiana Legislature has included similar exceptions in the Indiana statute. IND. ANN. STAT. § 52-1539c (Supp. 1961).

12 *Auker v. Review Bd. of the Employment Security Div.*, 117 Ind. App. 486, 71 N.E.2d 629, 632 (1947).

13 IND. ANN. STAT. § 52-1539c (Supp. 1961).

14 *Brown v. Maryland Unemployment Compensation Bd.*, 189 Md. 233, 55 A.2d 696 (1947).

receives any benefits, pecuniary or otherwise, from the outcome of the dispute.¹⁵ Again, the same determination follows even when the picket line is set up in violation of law.¹⁶ Although the cases are not entirely clear as to what constitutes sufficient "refusal to cross" in order to disqualify, it is well established that if the refusal stems from adherence to principles of trade unionism generally,¹⁷ or adherence to the constitutional provisions of the particular union to which the claimant belongs,¹⁸ or from the fact that the claimant preferred not to be called a "scab,"¹⁹ disqualification from unemployment benefits will ensue.

Courts have based their reasoning on the rebuttable presumption that picket lines are peaceful and that strikers are law-abiding.²⁰ It has been said that a non-striking employee has a legal right to pass the lines, and it is for him to exercise this right.²¹ A claimant's mere unilateral statement that he refused to cross a picket line because of fear of injury or bodily harm is held inadequate to establish involuntary unemployment.²² The reasoning is apparently predicated on the notion that, by refusing to work, such employees are strengthening the cause of strikers and increasing their bargaining power with the employer. That reasoning prevailed in the principal case in the light of facts that showed a general tone of unrest among the strikers, some mass picketing, and at least potential violence.

The above decisions show that fear must be genuine under all the circumstances, but in practice they do not provide an objective standard with which to determine factually close questions.

In contradistinction to the above, the view has been set forth that fear arising from the verbal threats of a striking union's strategy committee is sufficient ground for refusing to cross the picket line, even where there were no overt acts of violence.²³ In the instant case, while there were no verbal threats directed at the nonstriking employees, there were unequivocal refusals of permission to pass. Further, the evidence showed some "banging" on automobiles and the injury of a picket. This could have reinforced the fears of claimants, already aroused by the refusals of admission.

Approaching the problem from the premise that a reasonable fear of violence is sufficient ground for a refusal to cross a picket line, one court has indicated that the fear need not arise from actual violence itself, but it may arise from potential violence as well.²⁴

Emphasis has been placed upon the theory that it is the duty of an employer to provide safe ingress and egress to and from his plant. It was held in *Kalamazoo Tank & Silo Co. v. Michigan*,²⁵ that a failure on the part of the employer to provide safe entry and exit, by injunction or otherwise, coupled with a failure by employees

15 Local Union No. 222 v. Gordon, 406 Ill. 145, 92 N.E.2d 739 (1950).

16 1A CCH UNEMPL. INS. REP. # 1980.733 (Mich. 1955) (picket line set up in violation of "Bonine Tripp Act").

17 *In re* Persons Employed at St. Paul & Tacoma Lumber Co., 7 Wash. 2d 580, 110 P.2d 877 (1948); *Lexes v. Industrial Comm'n*, 121 Utah 551, 243 P.2d 964 (1952); *Bodinson Mfg. v. California Employment Comm'n*, 17 Cal. 2d 321, 109 P.2d 935 (1941).

18 *Brown v. Maryland Unemployment Compensation Bd.*, 189 Md. 233, 55 A.2d 696 (1947).

19 *American Brake Shoe Co. v. Annunzio*, 450 Ill. 44, 90 N.E.2d 83 (1950).

20 *Steamship Trade Ass'n v. Maryland Unemployment Compensation Bd.*, 190 Md. 215, 57 A.2d 818 (1948).

21 *Blue v. State*, 224 Ind. 394, 67 N.E.2d 377, 379 (1946).

22 *Baldassaris v. Egan*, 135 Conn. 695, 68 A.2d 120 (1949); *Steamship Trade Ass'n v. Maryland Unemployment Compensation Bd.*, 190 Md. 215, 57 A.2d 818 (1948); *Lexes v. Industrial Comm'n*, 121 Utah 551, 243 P.2d 964 (1952); *McGann v. Unemployment Compensation Station Bd. of Review*, 163 Pa. Super. 379, 62 A.2d 87 (1948). (Allegation that striking longshoremen would repel him if he tried to cross.)

23 *Texas Co. v. Texas Employment Comm'n*, 261 S.W.2d 178 (Tex. Civ. App. 1953) (union strategy committee threatened that "some form of retaliation would be taken" if attempts were made to secure passage. *Id.* at 184).

24 *Shell Oil Co. v. Cummins*, 7 Ill. 2d 329, 131 N.E.2d 64 (1955).

25 324 Mich. 101, 36 N.W.2d 226 (1949).

to cross the picket line, placed those employees outside the "voluntary leaving" category. As a corollary, these employees were not considered to be "participating in" a dispute.²⁶ There was no evidence of violence or mass picketing, and some few nonstrikers had even crossed the picket line. The remaining nonstriking employees were emphatically told that they would not be allowed to cross the picket line just as all the nonstrikers were told in the instant case. This reasoning has been developed further. It has recently been held that a refusal to cross picket lines after a company obtained an injunction enjoining mass picketing, precludes recovery under a compensation act.²⁷

Evaluating the problem at hand, the Supreme Court of Indiana recognized that, under the statute, the findings of the Review Board were conclusive. The fact that its jurisdiction was confined to a question of law was expressed only by the concurring opinion. However, the court apparently overlooked the statutory²⁸ and judicial²⁹ authorization for the remanding of the case for further findings and conclusions on the particular issue of the reasonableness of the claimants' fear. This finding not having been made by the Review Board, it is submitted that this would have been the proper procedure to follow.

As the decision now stands, the law is certainly not clear, and the standard is left unpostulated. Should an individual, nonunion employee be confronted with the same situation with which the claimants in the instant case were faced, he might consider several courses of action. He might seek injunctive relief. This of course carries with it a monetary burden that may well render his potential benefits almost fruitless. He might try the utilization of force in an attempt to secure passage, but this carries with it the possibility of tort or criminal liability. Or he might attempt to secure law enforcement assistance, but this does not preclude the risk of physical contact with pickets. The policy considerations seem to tip the scales in favor of the employee. The act was certainly not intended to make his burdens unreasonable.

Robert E. Frost

26 *Deere Mfg. Co. v. Iowa Employment Security Comm'n*, 294 Iowa 1066, 90 N.W.2d 750, 754-55 (1958).

27 *Marczi v. Board of Review*, 63 N.J. Super. 75, 163 A.2d 723 (1960).

28 IND. ANN. STAT. § 52-1542k (Supp. 1961).

29 *Allis-Chalmers Mfg. Co. v. Review Bd. of the Employment Security Div.*, 121 Ind. App. 227, 98 N.E.2d 512 (1951).