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Recent Decisions

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ciety, must be one which will not stand as an absolute deterent to the increase and expansion of these obviously necessary institutions. However this may be, one should be ever-mindful that the rights of individual patients are not to be slighted. They have entered into the hospital-patient relationship with the express or implied understanding that due care consonant with their needs will be accorded them. This anticipatory trusting sense of safety and satisfaction, measured by the standard of reasonableness, is an essential element of the hospital-patient relationship.

When the rights of the individual and the policy of promotion of hospitals comes into conflict, a problem is presented, the solution to which is to be found in a compromise between compensation to the wronged patient on the one hand and the encouragement of hospitalization development and expansion of the other. It is submitted that the compromise is effectively and justly resolved by the practical and realistic application of the general doctrines of due care and foreseeability to all types of hospitals, whether private, public, charitable, or industrial.

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RECENT DECISIONS

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATE TAXATION OF INTERSTATE CARRIERS.—*Spector Motor Service, Inc. v. O'Connor,* 181 F. (2d) 150 (2d Cir.), *cert. granted sub nom. Spector Motor Service, Inc. v. McLaughlin,* ....U. S....., 71 S. Ct. 49, ...L. Ed..... (1950). Plaintiff was a Missouri Corporation operating a motor freight transport service between the Midwest and points in New York and New England. It established terminals for the purpose of assembling freight to be shipped and providing loading and unloading facilities. The plaintiff maintains two leased terminals in Connecticut, and is licensed to do business in Connecticut. It does not engage in intrastate commerce and does not hold a state permit to engage in such commerce. A large share of its business originates in Connecticut, and it maintains freight and sales staffs to handle that business. The usual method for payment of bills and salaries is by draft on the principal office in Chicago.

The State of Connecticut, in 1935, passed the Corporate Business Tax Act, CONN. GEN. STAT. § 416c *et seq.* (Cum. Supp. 1935), which provided for a tax based upon a fraction of the corporation's net income determined by use of a formula which considered the value of tangible property owned, gross receipts received, and wages and sal-

aries paid by the corporation in the state. To commence the extended litigation, in 1942 the plaintiff corporation filed a bill in the United States District Court for the District of Connecticut to enjoin the collection of the tax, charging that it imposed an unconstitutional burden on interstate commerce.

After a long series of adjudications involving both the federal and the Connecticut courts, the court in the instant case held that the tax as applied to the plaintiff interstate carrier was not an unconstitutional discrimination against interstate commerce. A final decision in the case awaits the action of the United States Supreme Court.

In the opinion of the district court, the Connecticut tax of the plaintiff's interstate carrier business was invalid as a discriminatory burden placed on interstate commerce by a state. A state tax on a business engaged solely in interstate commerce has been held invalid, *Alpha Portland Cement Co. v. Massachusetts,* 268 U. S. 203, 45 S. Ct. 477, 69 L. Ed. 916 (1925). But the court in the instant case called attention to the "broad trends in favor of the state-taxing power shown by the Supreme Court," and held that the *Alpha Portland Cement* case was no longer controlling authority, 181 F. (2d) at 153. The court turned, rather, to the "multiple-burdens" and "direct-indirect" tests and held that the Connecticut tax was valid under both.

The strongest argument advanced against state taxation of a business engaged in interstate commerce is that if one state can impose such a levy, other states can too; and the result will be that interstate commerce will carry a larger burden than a company engaged in intrastate commerce alone. This is the multiple-burdens test, or as one author has rephrased it, the "discriminating against" test, Overton, *State Taxation of Interstate Commerce,* 19 TENN. L. REV. 870 (1947). The purpose of the test is to insure that interstate commerce will not be discriminated against through overlapping actions of the states in which it operates, or that it will not be placed in an unfavorable competitive position with local commerce. The recent trend is that interstate businesses must pay their fair share of the costs of local government, but no more than this. In other words, interstate commerce is neither to escape local taxation entirely, nor carry proportionately more than local enterprises engaged solely in intrastate commerce.

This concept is purely economic, but the demands of the federal system make its consideration necessary. If local taxation were allowed to run rampant, interstate commerce would all but be destroyed. Conversely, if the economic needs of the states are ignored, the basic units of the federal system will be rendered impotent. The concept of multiple burdens is an attempt to serve the needs of the local taxing units without obliterating interstate transactions. The solution has been to permit a state to tax interstate commerce if it can be shown that the enterprise will not have to pay an overlapping tax in another state. Perhaps

the most cogent illustration of the latter danger was illustrated in *Gwin, White & Prince, Inc. v. Henneford,* 305 U. S. 434, 59 S. Ct. 325, 83 L. Ed. 272 (1939), where the apple growers of Washington were taxed on gross receipts, regardless of where the sales were made. The court held the Washington tax invalid because the out-of-state transactions (included in the measure of gross-receipts) were themselves susceptible to taxation by other states, thus multiplying the burden of the apple growers of Washington, and placing them in an unfavorable position because of the interstate nature of their business. Most of the cases cited by the court of appeals in the present case involve a tax on gross receipts, 181 F. (2d) at 154. This type of levy taxes a proportion of the income earned in the taxing state, but again the danger of burden exists because of the fact that no consideration is given to net profit or loss.

The other standard which the court considered is the classic "direct-indirect" test. By this criterion, a tax which directly burdens interstate commerce is invalid; while one which only indirectly burdens it is permissible. This test considers the tax, not from its economic effects, but rather from its incidence. It is legal in origin; it considers jurisdiction of interstate commerce as falling into traditional categories as either exclusive or concurrent. No state tax is permitted in the exclusively federal sphere, *Brown v. Maryland,* 12 Wheat. 419, 6 L. Ed. 678 (U. S. 1827). A tax on an interstate transaction has been held to be a direct burden upon interstate commerce, and void, *Freeman v. Hewitt,* 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265 (1946); *McLeod v. J. E. Dilworth Co.,* 322 U. S. 327, 64 S. Ct. 1023, 88 L. Ed. 1304 (1944). But, in the concurrent sphere, a tax on manufacturing, based on the volume of production or sales of goods destined for interstate commerce, *American Manufacturing Co. v. City of Saint Louis,* 250 U. S. 459, 39 S. Ct. 522, 63 L. Ed. 1084 (1919), or a tax on goods having arrived in interstate commerce, *Henneford v. Silas Mason Co., Inc.,* 300 U. S. 577, 57 S. Ct. 524, 81 L. Ed. 814 (1937), has been sustained on the theory that the tax is, at most, only an indirect burden on interstate commerce and therefore valid.

The court distinguished taxes upon gross receipts from net receipts, citing *United States Glue Co. v. Town of Oak Creek,* 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135 (1918), where a state tax measured by net receipts was held valid. In that case the Court stated that a tax on net receipts differs from a tax on gross receipts, because the latter tax is on every dollar of sales and directly burdens interstate commerce because it ignores profit or loss. On the other hand, a net receipts tax, if fairly levied, could be collected only if the company showed a profit, and was considered an ordinary and general burden from which interstate commerce was not exempt.

The Connecticut legislature, in drawing up the statute under which the tax here was sought to be collected, made every effort to assure a

just and equitable levy. First and foremost, it considered only net receipts less certain specified exemptions and deductions. Secondly, it based its tax on a carefully devised formula for equating the property within the state with that without. Thus, even if every other state in which the trucking company did business passed the same kind of tax, there was no possibility of the company being subjected to double taxation. This tax, in the opinion of the court, passed the multiple-burdens (as well as the direct-indirect) test with high honors.

Two recent cases show that much cruder efforts by state legislatures to tax interstate commerce will be upheld by the Supreme Court. *Interstate Pipeline Co. v. Stone,* 337 U. S. 662, 69 S. Ct. 1264, 93 L. Ed. 1613 (1949) (franchise tax on a percentage of capital used within the state); *Memphis Natural Gas Co. v. Stone,* 335 U. S. 80, 68 S. Ct. 1475, 92 L. Ed. 1832 (1948) (gross receipts tax). If the taxes in those cases were held valid, certainly the fair and refined efforts of the Connecticut legislature are worthy of like consideration.

In the case here discussed, the court has considered both tests, and out of them and other Supreme Court cases, arrives at the conclusion that the present tendency of the Supreme Court is to uphold the validity of a state tax unless that tax is unreasonably burdensome. This is based more on economic considerations than on fine legal distinctions. If the interstate enterprise is not penalized for the national character of its business endeavors, the court sees no reason why it should not pay its way. While interstate commerce, in the opinion of this court, is not to bear extra burdens, neither is it to escape supporting local governments which, together with the federal government, make it possible for commerce between the states to exist at all.

Wilmer L. McLaughlin

COURTS—CONTEMPT OF COURT—PERJURY AS OBSTRUCTION OF GRAND JURY INVESTIGATION.—*Howard v. United States,* 182 F. (2d) 908 (8th Cir. 1950). Blanche A. Howard was summoned as a witness and examined before a federal grand jury where she gave evasive and conflicting answers to the questions propounded to her. She was held in contempt for deliberately, willfully, and contumaciously obstructing the investigation of the grand jury under 18 U. S. C. § 401 (Supp. 1950), which provides in part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct administration of justice. . . .

In upholding the decision of the district court, the majority of the court cited *United States v. McGovern,* 60 F. (2d) 880, 889 (2d Cir.) *cert. denied,* 287 U. S. 650, 53 S. Ct. 96, 77 L. Ed. 561 (1932), in which Mr. Justice Chase laid down the general test of contempt of court, as follows:

> . . . where the court is justified in believing, and does believe, that a witness has obstructed the administration of justice, the witness may be adjudged in contempt whether he has sworn falsely or not, but where the court is not justifiably convinced that the performance of its duties has been obstructed, it cannot act under the contempt power even though perjury has been committed.

The court's power to punish for contempt of court is unquestioned. The overwhelming majority of both state and federal jurisdictions have recognized that the power to punish for contempt is inherent in all courts. *Michaelson et al v. United States* ex rel. *Chicago, St. P., M. & O. Ry.,* 226 U. S. 42, 45 S. Ct. 18, 69 L. Ed. 162 (1924); *Universal Credit Co. v. Antonsen,* 374 Ill. 194, 29 N. E. (2d) 96 (1940); *Riley et al. v. Wallace,* 188 Ky. 471, 222 S. W. 1085 (1920).

In considering contempt in the state courts, it is well to note that a contempt proceeding is *sui generis,* being neither civil nor criminal, although it may partake of either in its nature. *State* ex rel. *Short v. Owens,* 125 Okla. 66, 256 Pac. 704 (1927). Contempt of court is a broad and complete remedy given the courts to punish those individuals whose conduct tends to bring the authority and administration of the law into disrespect or disregard. The court has the necessary power to punish all acts out of court which tend to impede or obstruct the court in the administration of its duties. In re *Presentment by Grand Jury of Stetser,* 45 F. Supp. 556 (D. Del. 1942); *Turquette v. State,* 174 Ark. 875, 298 S. W. 15 (1927); *State v. Jones,* 111 Ore. 295, 226 Pac. 433 (1924). In keeping with this broad concept of the contempt power of a court it is well to consider judicial functions outside of the court itself. The court by virtue of its contempt powers may punish anyone whose conduct interferes with, or has a tendency to obstruct the function of a grand jury. *Commonwealth v. McNary,* 246 Mass. 46, 140 N. E. 255 (1923).

It is not necessary that the false swearing constitute perjury in order to justify a court in punishing a witness for contempt, *Young v. State,* 198 Ind. 629, 154 N. E. 478 (1926). On the other hand, it is held that false swearing of itself is considered such an obstruction of justice that it constitutes a direct contempt of court. *Eykelboom v. People,* 71 Colo. 318, 206 Pac. 388 (1922); *Riley et al. v. Wallace, supra.*

However, the substantial interests of the individual person who violates the dignity of the court are not to be overlooked. Even where perjury is committed it is held not to constitute a contempt where it is

in answer to a question which is not material to an issue in the case. *Hegelaw v. State et al.*, 240 Ohio App. 103, 155 N. E. 620 (1927). *But see Young v. State, supra,* 154 N. E. at 479.

The federal courts' power to punish for contempt is set out by statute as cited above. Under this statute, the federal court has held a witness in contempt of court who appeared before a federal grand jury and testified that he could not comply with a subpoena duces tecum when the desired books were in his possession. *United States v. Dachis,* 36 F. (2d) 601 (S. D. N. Y. 1929). The contempt powers extend as well to bankruptcy proceedings when a bankrupt refuses to be examined according to law. *Haimsohn v. United States,* 2 F. (2d) 441 (6th Cir. 1924).

In the majority opinion, Judge Sanborn distinguished the interesting case of In re *Michael,* 326 U. S. 224, 66 S. Ct. 78, 90 L. Ed. 30 (1945), which based its decision on Ex parte *Hudgings,* 249 U. S. 378, 39 S. Ct. 337, 63 L. Ed. 656 (1919). These two cases sought to impart a further limitation on what was thought to be the power of the district courts to deal summarily with contempt when an obstinate witness committed perjury. In the *Michael* case, *supra* 326 U. S. at 228, the Court held that:

> . . . perjury alone does not constitute an "obstruction" which justifies exertion of the contempt power and that there "must be added to the essential elements of perjury under the general law the further element of obstruction to the Court in the performance of its duty."

The court in the instant case, in considering this limitation, attempted to resolve the unsettled state of the law by maintaining that the language quoted above meant that an obstruction to the inquiry of a grand jury by the giving of false or evasive testimony need not completely disable the grand jury from carrying out its function before the obstruction can be dealt with as a contempt. The court maintained that in the *Michael* case, *supra,* there was at best perjury alone, exclusive of any complicating elements which obstructed the judicial process, whereas here there was the added element of an obstruction.

Judge Sanborn, in the final statement of the court's opinion, upheld the action of the district court by stating, 182 F. (2d) at 915: "Our conclusion is that a District Court has power to deal summarily with a witness before a Grand Jury who is guilty of a patent evasion equivalent to a refusal to give any material information."

Mr. Justice Riddick, in a dissenting opinion, based his reasoning upon the principle that was announced in Ex parte *Hudgings, supra,* and In re *Michael, supra.* He argued that the rule that a witness may not be punished for contempt for perjury alone had been ignored by the majority of the court. He pointed out that the only charge of the presentment was that the defendant was guilty of the crime of perjury,

but no more. In supporting this contention § 268 of the Judicial Code was cited, 28 U. S. C. § 385 (1946), which provides:

> The courts of the United States shall have power to impose and administer all necessary oaths and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any case except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

In conclusion, it is submitted that in deciding the question of what constitutes contempt of court, the fact of a witness' perjury is a neutral factor. The essence of a contempt is the obstruction of the function of a court in the administration of justice. Whether or not a perjury is such an obstruction will depend on the facts of each case. In the principal case, the defendant's false and evasive answers so interfered with the function of the grand jury that the court was justified in holding her in contempt.

Robert C. Enburg

GOVERNMENTAL CLAIMS—PRIORITY OF DEBTS DUE THE UNITED STATES OVER LIENS OF STATE.—In re *Berger's Estate; Clayton v. United States et al.*, ... Ohio ...., 94 N. E. (2d) 248 (1950). In 1938 Daniel Berger and his wife executed a deed conveying their property in trust to the Division of Aid for the Aged of the Department of Public Welfare of the State of Ohio. The deed was executed under the provisions of an Ohio statute, OHIO GEN. CODE ANN. § 1359-6 (1946), which provided that an applicant for aid may convey his property in trust to the Division of Aid, retaining the right to reside thereon for life. Berger died in 1943. His wife received aid until her death in 1948. After Berger's death his widow executed several notes in payment of improvements on the property; these notes were eventually assigned to the United States. After the death of the surviving spouse the property was sold, certain debts were paid, and slightly over $300 remained in the estate. Approximately $6,000 had been paid to Berger and his wife by the State of Ohio for old age assistance while over $800 was due the United States as assignee of the notes. Ohio claimed the remainder of the estate by virtue of its mortgage or trust deed. The United States claimed a priority by virtue of REV. STAT. § 3466 (1875), 31 U. S. C. § 191 (1946), which provides: "... whenever the estate of any deceased debtor ... is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied...."

The court held that the claim of the State of Ohio should take priority over the claim of the United States. It was a lien, said the court, specific and ascertained, and prior in time to the claim of the United States. The decision was based on the test established by the United States Supreme Court in *Illinois* ex rel. *Gordon v. Campbell,* 329 U. S. 362, 67 S. Ct. 340, 91 L. Ed. 348 (1946), that a lien to defeat the priority of the United States, must be definite as to the identity of the lienor, the amount of the lien, and the property to which it attaches. Applying this test in the instant case the court stated, 94 N. E. (2d) at 251:

> . . . there is no question as to the identity of the lienor, and there is no question as to the property to which it attaches. . . .
>
> It is our opinion that the State of Ohio . . . at all times knew definitely the amount of its claim, and therefore the second element . . . was present.

Judgment accordingly was rendered for the State of Ohio. The precise question to be determined was: considering the broad and sweeping language of the statute, can the priority of the United States as to debts due it, be defeated by a state-held lien prior in time to the federal claim? This question, it seems, has never been decided by the Supreme Court of the United States.

The statute under which the United States claims priority is to be liberally construed. *Beaston v. The Farmers' Bank of Delaware,* 12 Pet. 102, 134, 9 L. Ed. 1017 (U. S. 1838). It seems clear that the United States has priority as to tax claims, even over a tax claim of a state which became a first lien at a date prior to the accruing of the United States claim, *Stover et al. v. Scotch Hills Coal Co.,* 4 F. (2d) 748 (W. D. Pa. 1924); however, it is well-settled that the priority to which the United States is entitled is not a lien, *Bramwell, Superintendent v. United States Fidelity & Guaranty Company,* 269 U. S. 483, 488, 46 S. Ct. 176, 70 L. Ed. 368 (1926). This has led some courts to reason that the claim of the United States will be defeated by prior liens. As dicta, it was stated in *Postmaster General v. Robbins,* 19 Fed. Cas. 1126, 1127, No. 11,314 (D. Me. 1829): "If the statute does not create a lien, it would seem it will not remove or supercede an existing lien. . . ." The weight of authority is to the contrary. Where the state statute has not effected a specific perfected lien, the United States is entitled to priority, *United States v. Knott et al.,* 298 U. S. 544, 56 S. Ct. 902, 80 L. Ed. 1321 (1936); *New York v. Maclay et al.,* 288 U. S. 290, 53 S. Ct. 323, 77 L. Ed. 754 (1933). In *Gerson, Beesley and Hampton, Inc. v. Shubert Theatre Corporation et al.,* 7 F. Supp. 399 (S. D. N. Y. 1934), the government contended that which lien attached first is not controlling; its position being that a priority is given the United States "save where the lien has become

'specific'." Judge Caffey, 7 F. Supp. at 400, agreed: " . . . the Supreme Court of the United States has settled . . . that the contention is correct."

There is some support for giving priority to liens existing before the claim of the United States arose. It was stated in *Brent v. The President and Directors of the Bank of Washington,* 10 Pet. 596, 611-2, 9 L. Ed. 547 (U. S. 1836):

> . . . it has never been decided that it [the United States preference] affects any lien, general or specific, existing when the event took place which gave the United States a claim of priority.

In that case the opposing claim was a completed legal lien. See also: *Piedmont Corporation v. Gainesville and N. W. R. R.,* 30 F. (2d) 525 (N. D. Ga. 1929); *Cottrell v. Pierson, and Others,* 12 Fed. 805 (C. C. D. Neb. 1881); *United States v. Lewis et al.,* 26 Fed. Cas. 920, No. 15,595 (C. C. E. D. Pa. 1875). Shortly after the original statute was enacted it was interpreted in *United States v. Nicholls,* 4 Yeates 251, 258 (Pa. 1805), by Mr. Justice Yeates who said:

> I cannot bring myself to believe . . . that the provision . . . was ever intended to extend to cases where an individual state was a creditor, and *as such* was clearly entitled under its municipal law to a *lien* . . .

The court there held that the United States would only be entitled to preference if its claim was prior in time to the state's claim. This construction is not the law today, *County of Spokane, Washington, et al. v. United States,* 279 U. S. 80, 49 S. Ct. 321, 73 L. Ed. 621 (1929), nor was it the law in 1805, *United States v. Fisher et al.,* 2 Cranch 358, 2 L. Ed. 304 (U. S. 1804).

The Supreme Court has never actually decided whether the United States' "priority is overcome by a fully perfected and specific lien," *Illinois* ex rel. *Gordon v. Campbell, supra,* 329 U. S. at 370; although it has been expressly reserved in numerous cases, *United States v. Waddill, Holland and Flinn, Inc. et al.,* 323 U. S. 353, 355, 65 S. Ct. 304, 89 L. Ed. 294 (1945); *Conard v. The Atlantic Insurance Company of New York,* 1 Pet. 386, 442, 7 L. Ed. 189 (U. S. 1828). However, the court has indicated that in certain circumstances a lien might defeat the United States' priority. Only a specific perfected lien bars the priority of the United States, *United States v. Knott, supra;* a lien to be specific and perfected, as stated in *Illinois* ex rel. *Gordon v. Campbell, supra,* 329 U. S. at 375:

> . . . must be definite, and not merely ascertainable in the future by taking further steps, in at least three respects . . .(1) the identity of the lienor . . . (2) the amount of the lien . . . and (3) the property to which it attaches.

An early case, *Thelusson et al. v. Smith,* 2 Wheat. 396, 4 L. Ed. 271 (U. S. 1817), stated that the priority would not override a prior judgment lien if there had been execution and levy. A state tax lien was not sufficiently specific in *Gerson, Beesley and Hampton, Inc. v. Shubert*

Theatre Corporation et al., supra, there having been no levy or warrant directing a levy. A lien held by the State of Texas was not specific where the property was not specified and the claim uncertain, *United States v. Texas et al.,* 314 U. S. 480, 62 S. Ct. 350, 86 L. Ed. 356 (1941). It was held in that case that some procedure such as levy, seizure and sales was necessary. Distraint, or levy of execution was required to effect a specific lien in *Spokane Merchants' Ass'n. v. State et al.,* 15 Wash. (2d) 186, 130 P. (2d) 373 (1942). While these cases seem to hold that the statutory requirements of the state must be followed to create a specific lien, it has been held that the United States' priority cannot be superseded by state law, *United States v. Oklahoma,* 261 U. S. 253, 260, 43 S. Ct. 295, 67 L. Ed. 638 (1923); that is, the state's characterization of a lien as perfected is not conclusive in the Supreme Court of the United States, *United States v. Waddill, Holland and Flinn, Inc. et al., supra.*

In *United States v. Alabama,* 313 U. S. 274, 61 S. Ct. 1011, 85 L. Ed. 1327 (1941), the State of Alabama asserted liens which had attached to property on October 1, 1936, for non-payment of taxes. Part of the property was conveyed to the United States on that same day, and the remainder of it on two later dates. The state lien was made effective against subsequent purchasers by statute. It was held that the lien was not invalid as against the United States. Tax liens of a city and county were held to be specific where all statutory and charter requirements of assessment and review had been completed, In re *Ever Krisp Food Products Co.,* 307 Mich. 182, 11 N. W. (2d) 852 (1943). No further process of law was necessary to determine the amount. In holding that the liens took preference over a United States claim, the court declared, 11 N. W. (2d) at 856:

> If a Federal tax lien cannot be displaced by a later tax lien imposed by State law, *a fortiari* reason indicates that a *specific and perfected tax lien* imposed by State law should not be displaced by a later priority claim (not a lien) asserted under Federal authority.

In conclusion, an *inchoate* lien, whether state-held or privately held, will not outrank the federal preference whether it be for taxes or for other debts. If the state lien has been made sufficiently specific, apparently the Supreme Court will recognize its superiority although it has never had occasion to so hold. The question then becomes whether or not a lien is specific. Certainly the court will not recognize a lien as specific merely because a state statute declares it to be. Probably, possession at least must be in the lienor. The United States' preference is based on sound public policy. Obviously, the power to tax is not a power at all without the correlative power to collect. By reasonable extension, the preference should obtain whether the claim arises from tax default or other indebtedness, in any case the necessary maintenance of the revenue being effected.

Robert A. Layden

INSURANCE—COMPREHENSIVE AUTOMOBILE LIABILITY POLICY—INSURER'S LIABILITY UNDER THE "LOADING AND UNLOADING" CLAUSE.—*Maryland Casualty Co. v. Dalton Coal & Material Co.*, 184 F. (2d) 181 (8th Cir. 1950). A declaratory judgment was sought by the plaintiff insurance company to determine its liability under a "loading and unloading" clause of a Comprehensive Automobile Liability Policy covering the trucks of the defendant. The federal district court, 81 F. Supp. 895 (W. D. Mo. 1949), found the insurer liable. This was affirmed in the instant case, where the court held that the clause covered an accident caused by the improper replacement of a manhole cover after a truck delivery, whereby a pedestrian was injured several hours after the delivery was completed.

The facts disclose that a truck driver employed by the insured defendant delivered a load of coal in the company's vehicle. It was unloaded by means of a belt conveyor feeding through a sidewalk chute into a coal bin. To accomplish this, the cover of this coal chute or hole was removed and later improperly replaced by the driver. Approximately three and one half hours after this was completed, a third party walking along the sidewalk stepped upon the cover which either slipped or turned causing her to fall into the manhole and suffer injuries. A claim was made upon the coal company. The plaintiff insurer was notified and after investigation denied any liability under the policy upon the grounds that the replacement of the cover was in no way connected with the use of the truck, and that the "loading and unloading" provision was not applicable because the act of "unloading" was completed when the coal had been delivered through the chute.

The comprehensive policy provided coverage against liability "... caused by accident and arising out of the ownership, maintenance or use of any automobile." "Use" was defined in another clause to include "the loading and unloading thereof." The court reasoned that a definition of "unloading" for insurance purposes was a question of Missouri law inasmuch as the policy failed to define it. However, since the law of Missouri was not clear upon the point, the court shifted its preliminary attention to the holdings of other jurisdictions.

As is shown in the case, the courts are in disagreement as to when "unloading" ends within the meaning of the standard policy provision. Generally the decisions have been classified into two theories: (1) the "coming to rest" doctrine which interprets "unloading" to include only the actual lifting or removal of the articles from the vehicle until the time they come to rest; (2) the "complete operation" doctrine, which, as a more liberal view, includes the entire process of delivery, and unloading is not considered complete with the mere removal of the contents from the vehicle.

Only in borderline cases do the courts consider these doctrines. In effect the "coming to rest" principle restricts "unloading" to acts re-

lated closely to the physical aspects of removal from a vehicle and therefore generally denies recovery. However, the "complete operation" doctrine, combining "unloading" with delivery, would normally allow recovery. In many cases the circumstances obviously fall within the "unloading" clause and require application of neither doctrine. For example: *St. Paul Mercury Indemnity Co. v. Crow et al.,* 164 F. (2d) 270 (5th Cir. 1947), where oil, spilled from an oil truck during the filling of a customer's tank, ignited causing a fire loss; or *Thompson Heating Corp. v. Hardware Indemnity Ins. Co. of Minn.,* 74 Ohio App. 350, 58 N. E. (2d) 809 (1944), where a pedestrian tripped over a hose laying across a sidewalk, the hose being part of the truck's equipment used for blowing rock wool insulation into buildings; or *Conrad v. Duffin et al.,* 158 Pa. Super. 305, 44 A. (2d) 770 (1945), where a container of ashes, being lifted into a truck, was dropped upon a pedestrian.

The court considered *Stammer v. Kitzmiller et al.,* 226 Wis. 348, 276 N. W. 629 (1937), as the leading case illustrative of the "coming to rest" theory. The insurer was held not liable for an injury to a person who fell into a sidewalk hatchway, left open by the insured's employee. After opening the hatchway, the employee removed a barrel of beer from the truck and placed it in the cellar. Instead of closing it, he went into the building to have the sales slip signed, and during this interval the accident occurred. The Wisconsin court stated, 276 N. W. at 631:

> . . . when the automobile itself is no longer connected with the process of unloading, and when the material which has been unloaded from the automobile has plainly started on its course to be delivered by other power and forces independent of the automobile and the actual method of unloading, the automobile then may be said to be no longer in use. . . . While the open hatchway may have been a convenience in the process . . . it was not . . . included in the process of unloading the truck.

Some of the cases adhering to this position are: *American Casualty Co. v. Fisher,* 195 Ga. 136, 23 S. E. (2d) 395 (1942); *Franklin Co-op. Creamery Ass'n v. Employers' Liability Assur. Corp. et al.,* 200 Minn. 230, 273 N. W. 809 (1937); and *Handley v. Oakley,* 10 Wash. (2d) 396, 116 P. (2d) 833 (1941).

Turning its attention to the "complete operation" theory, the court examined the leading case of *Pacific Automobile Ins. Co. v. Commercial Casualty Ins. Co. of N. Y.,* 108 Utah 500, 161 P. (2d) 423 (1945). On the basis of similar facts this case is in direct conflict with the Wisconsin decision. Here also a passerby was injured by a fall into an opened trap door. Kegs of beer, already removed from the truck to the sidewalk, were being lowered by the brewer's employees into the basement at the time of the injury. In holding liability under the policy the court said, 161 P. (2d) at 428:

> . . . the mission, or transaction, or function being performed by the insured's employees at the time of the accident is the controlling element in determining whether the situation from which the accident occurred is

> included in loading and unloading. The job being performed here, that part of the insured's business functioning at the time of the accident was that of making a proper commercial delivery.

Clearly this doctrine embraces more than mere "unloading." It extends into the delivery phase of the operation. Other decisions following the same pattern are: *Connecticut Indemnity Co. v. Lee et al.,* 168 F. (2d) 420 (1st Cir. 1948); *Coulter v. American Employers' Ins. Co.,* 333 Ill. App. 631, 78 N. E. (2d) 131 (1948); *State* ex rel. *Butte Brewing Co. et al. v. District Ct.,* 110 Mont. 250, 100 P. (2d) 932 (1940); *Turtletaub v. Hardware Mut. Casualty Co. et al.,* 62 A. (2d) 830 (Dist. Ct. Essex County, N. J., 1948); *B. & D. Motor Lines, Inc., et al. v. Citizens Casualty Co. of N. Y.,* 181 Misc. 985, 43 N. Y. S. (2d) 486 (1943), *aff'd without opinion,* 267 App. Div. 955, 48 N. Y. S. (2d) 472, *leave to appeal denied without opinion,* 268 App. Div. 755, 49 N. Y. S. (2d) 274 (1944); *Bobier v. National Casualty Co. et al.,* 143 Ohio St. 215, 54 N. E. (2d) 798 (1944); *London Guarantee & Accident Co. v. C. B. White & Bros., Inc.,* 188 Va. 195, 49 S. E. (2d) 254 (1948). See Note, 160 A. L. R. 1259 (1946) for decisions supporting both doctrines.

In the instant case, the court concluded that Missouri would follow the "complete operation" doctrine, basing this finding upon the holding in *Schmidt v. Utilities Ins. Co.,* 353 Mo. 213, 182 S. W. (2d) 181 (1944). In this case a truck driver, in delivering coal, used some wooden blocks found in the vicinity to ease the wheels of the truck up and over the curb. After emptying the coal into a sidewalk man-hole, he set the blocks on the sidewalk and departed. About six hours later, a pedestrian was injured by falling over them in the dark. The Missouri Supreme Court ruled that the accident fell within the scope of the coverage clause "arising out of the . . . use" of the vehicle. However the court did not mention whether or not the "unloading" clause would have been applicable. From this the federal court reasoned, 184 F. (2d) at 182:

> No Missouri case points to a more restrictive concept with respect to any collateral operation involved in completing a delivery of goods. And the logic of the "coming-to-rest" cases is not so naturally or legally compelling, against that underlying the "complete-operation" doctrine, as to leave us with the conviction that the Missouri courts probably would not apply the concept of automobile "use" in the Schmidt case to every collateral incident involved in completing a delivery as a matter of "unloading."

The court did acknowledge to some extent the insurer's contention that the utilization of blocks to help a truck negotiate a curb is directly related to the "use" while the opening and closing of a man-hole cover is a collateral matter separate from any vehicle "use." However, in the final analysis, the court refused this argument and maintained, 184 F. (2d) at 183: "the Schmidt case does not rest upon a coverage clause

of 'directly connected with the use' but of 'arising out of the use.'" Perhaps the Supreme Court of Missouri has adopted the "complete operation" doctrine, but it is questionable if that court would extend the rule to include the facts of the present case.

In conclusion, it should be understood that problems regarding a "loading and unloading" clause only have concerned the courts for the past twenty years or so, and most states have not made a final adjudication of the matter. Thus the problem is current and practical for the courts and the profession. In attempting to evaluate the two doctrines, it would seem that the "coming to rest" principle is the more logical from the standpoint of the intention of the parties to the insurance contract and from the ordinary viewpoint as to the scope of an act of "unloading." But if some courts choose to construe "unloading" to include delivery, the result is not unreasonable. But to extend "unloading" through the period of delivery to a point in time several hours afterward, appears to expand the "complete operation" theory beyond its permissible boundaries.

If in the case at hand there was negligence in replacing the cover, what is the relation of the cover to the truck? The coal could have been delivered in a hand truck or push cart, and still the same negligence would have caused the injury. The accident is not specifically attributable to either the ownership, maintenance, or operation of a truck. Any attempt to draw a causal connection between the "unloading" and the subsequent mishap would seem to project causation beyond reasonable limits. Why should an automobile insurance company be forced to shoulder this liability? This type of negligence is more reasonably covered under general liability policies, which indemnify for all types of negligence occurring in the conduct of a business.

Lenton G. Sculthorp

LABOR LAW—MASTER AND SERVANT—UNFAIR LABOR PRACTICES—PROHIBITION OF UNION LITERATURE ON COMPANY PREMISES.—*Maryland Drydock Co. v. NLRB*, 183 F. (2d) 538 (4th Cir. 1950). A local union of the CIO composed of the employees of the defendant had published and distributed at the plant gate an official newspaper, "The Maryland Drydocker," for a period of over four years before October 31, 1947, without interference by the defendant. On that date, the regular issue of the newspaper contained articles ridiculing the president of the defendant company followed by a verse in the same vein. This was not the first instance of such an attack. At the direction of the company, the guards refused to allow the union to distribute this particular issue on the company's premises. A later issue in the same

year contained similar material and was likewise banned from distribution on the company's premises. At the union's request, a hearing was held before the National Labor Relations Board and the company was found guilty of an unfair labor practice. The company appealed and the ruling of the NLRB was reversed, the court in the instant case holding that the prohibition was justified, inasmuch as it had been found that the intemperate and invidious nature of these publications were reasonably calculated to injuriously affect the discipline in the company's plant.

The union had a right to distribute literature on company premises, *Moore Grocery Co.*, 58 N.L.R.B. 1273 (1944), during non-working hours, *NLRB v. William Davies Co.*, 135 F. (2d) 179 (7th Cir. 1943), provided it did not violate a non-discriminatory rule of the company designed for a legitimate purpose, *Goodyear Aircraft Corp.*, 57 N. L. R.B. 502 (1944). This right arises under Section 7 of the National Labor Relations Act, 49 STAT. 449 (1935), 29 U. S. C. § 157 (1946), as amended, 61 STAT. 140, 29 U. S. C. § 157 (Supp. 1947):

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment. . . .

and is protected by Section 8(a)(1) of that Act, 49 STAT. 449 (1935), 29 U. S. C. § 158 (1946), as amended, 61 STAT. 141, 29 U. S. C. § 158 (Supp. 1947): "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce . . . employees in the exercise of the rights guaranteed in [Section 7] . . ."

Rights and privileges created by statute are limited to the uses for which the statute created them. *Case v. Kelly et al.*, 133 U. S. 21, 10 S. Ct. 216, 33 L. Ed. 513 (1890).

Neither the trial examiner for the NLRB nor the court passed upon the question whether the libelous statements used in the "Drydocker" could be justified under the rights conferred upon employees by Section 7, although the court in the principal case suggested that the statements had "no reasonable connection with any proper union activity." 183 F. (2d) at 542.

In itself, the fact that the statements were libelous criminally or civilly, does not appear to be decisive as to whether they constituted a proper exercise of employees' rights. Before 1947, it was suggested that the utterance of slanderous remarks concerning supervisory personnel on company premises would justify the discharge of the employees making such statements. *Howard Foundry Co.*, 59 N.L.R.B. 60 (1944); *Thompson Products, Inc.*, 57 N.L.R.B. 925 (1944). To

the same effect, an employer was declared guilty of an unfair labor practice when he referred to members of the union as Communists, reds, and agitators. *Stehli and Co.*, 11 N.L.R.B. 1397 (1939). However, the only case which appears to have treated the point since the 1947 amendment to the National Labor Relations Act held that the same allegation of Communism concerning union leaders was not an unfair labor practice, or admissable as evidence as such. *The Bailey Co.*, 75 N.L.R.B. 941 (1948). The basis on which this latter decision was founded was Section 8(c) of the Act, 49 STAT. 452 (1935), 29 U. S. C. § 158 (1946), as amended, 61 STAT. 142, 29 U. S. C. § 158 (Supp. 1947):

> The expression of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Where the effect of the slander or libel, however, is to infringe upon some right of either party, such as a tendency to cause friction and discord within the plant, its suppression is justified. *NLRB v. Aintree Corp.*, 135 F. (2d) 395 (7th Cir. 1943). The right of employers to establish and enforce such rules as are reasonably necessary to the efficient conduct of their businesses is not abolished by the National Labor Relations Act. *Joanna Cotton Mills v. NLRB*, 176 F. (2d) 749 (4th Cir. 1949). Undoubtedly, the right to maintain discipline within the plant is included in such rights.

Where the rights of two parties to a labor dispute might be in conflict, the motives and purpose of the one charged with an unfair labor practice appear to be decisive in judging his acts. *Tidewater Iron and Steel Co.*, 9 N.L.R.B. 624 (1938); *cf.*, *Ross Packing Co.*, 11 N.L.R.B. 934 (1939). Motive and purpose are determined from the facts in each individual case. In *National Lead Co.*, 67 N.L.R.B. 177 (1946), an employer sought to justify the discharge of a union steward on the ground that his slanderous allegations concerning a foreman tended to disrupt discipline in the shop. Evidence showed that the employer, who had followed an anti-union policy for over three years prior to the steward's discharge, had, on at least two occasions, when the steward presented grievances, suggested that he quit. Further, the company had refused to investigate the circumstances surrounding the alleged scandalous statement. This was held to have indicated that the employer had merely taken advantage of the incident to rid itself of the steward, the real reason for discharge being his union activities.

When a union organizer was discharged for slanderous remarks about his foreman, it was ruled an unfair labor practice by both the NLRB and the United States Court of Appeals for the Tenth Circuit. It was shown that the employer had for nearly two years openly announced its antipathy to unions, had demoted a supervisor who permitted soli-

citation by union representatives in his department, offered to secure deferments from the armed services for its employees who would "forget about the union," and repeatedly warned the man who was fired to cease "union talk" on its premises. Weight was also given to statements, made by company supervisors to other employees following the discharge, which carried the implication that such was the fate of those who tried to organize a union in the plant. *NLRB v. Winter et al.*, 154 F. (2d) 719 (10th Cir. 1946).

In the light of this defendant's long record of non-interference in regard to distribution of union literature on its premises, it becomes difficult to determine what additional facts it must show in order to evidence good faith. Whether an actual disruption of plant discipline must be shown, as contended by the NLRB, or only a reasonable *probability* that discipline will be disrupted, as stated by the court in reversing the NLRB, is necessary cannot be settled on the basis of any recognized rule of law, unless an analogy to the common law right to defend property is permitted. Under that doctrine the existence of the privilege does not depend upon the real necessities of the situation, but rather upon the appearance it would present to a reasonable man in the defendant's position. *Foster v. Shepherd,* 258 Ill. 164, 101 N. E. 411 (1913).

To complete the analogy, both the court and the NLRB found that, 183 F. (2d) at 541:

> . . . the natural tendency of the circulation of the literature was to disrupt discipline. . . . Certainly, the maligning of the supervisors and the holding of the managing officers up to continual ridicule would seem normally calculated to have such an effect.

This justifies the holding of the court in setting aside the order of the NLRB. The paper distributed by the union contained matter reasonably disruptive of discipline, so that the employer was not guilty of an unfair labor practice in banning its distribution from his plant grounds.

Joseph T. Helling

LANDLORD AND TENANT—LIABILITY OF LESSOR TO THIRD PARTY FOR BREACH OF CONTRACT TO REPAIR.—*Huey v. Barton,* .... Mich. ...., 44 N. W. (2d) 132 (1950). Under an oral lease, the defendant-lessor was to repair and maintain the back porch of a dress shop. The defendant's agent was notified of the defective condition of the railing and, on two occasions, had stated that he would see that the repairs were made, but totally failed to do so. The plaintiff, a carpenter, was employed by the lessee to install shelves in the shop. While emptying scraps and trimmings from the back porch, he leaned against the defective railing, fell, and suffered injury.

The Michigan Supreme Court held that a lessor, who retains no control over the demised premises, is not liable for persons on the land with permission of the lessee for personal injuries arising from the total breach of the lessor's covenant to repair.

As authority for this proposition the court cited two of its previous rulings. *Kuyk v. Green,* 219 Mich. 423, 189 N. W. 25 (1922), and *Brady v. Klein,* 133 Mich. 422, 95 N. W. 557 (1903). In the *Kuyk* case it was stated "that an action in tort cannot be predicated, by a tenant, upon a breach by the lessor of an agreement to make repairs." 189 N. W. at 25 (1922). The court in *Brady* case said the remedy, if any, is against the lessor on the covenant, and must be brought by the lessee, as there is no privity between the lessor and the third person.

Unanimity is lacking among the courts and text writers in this country on this precise issue. See, PROSSER, TORTS, 659 (1941); Harkrider, *Tort Liability of a Landlord,* 28 MICH. L. REV. 383, 392 (1927); Note, 48 MICH. L. REV. 689 (1950); Note, 15 MISS. L. J. 219 (1943); Note, 7 TEMP. L. Q. 215 (1932); Note, 163 A. L. R. 300 (1946). During the embryonic development of this phase of the law it could definitely be stated that there was a large majority of authorities denying liability, with few courts allowing recovery. At the present time, however, the numerical difference between the two views is rapidly closing.

A bare majority of states deny recovery to third persons injured on the premises due to the complete failure of the lessor to fulfill his contract to repair: *Home Owners' Loan Corp. v. Huffman,* 124 F. (2d) 684 (8th Cir.), *cert. denied,* 316 U. S. 681, 62 S. Ct. 1268, 86 L. Ed. 1754 (1942); *Breazeale v. Chicago Title & Trust Co.,* 293 Ill. App. 269, 12 N. E. (2d) 217 (1938); *Franklin Fire Ins. Co. v. Noll,* 115 Ind. App. 289, 58 N. E. (2d) 947 (1945); *Hubbard v. Hubbard,* 303 Ky. 411, 197 S. W. (2d) 923 (1946); *Flynn v. South Middlesex Co-op Bank,* 316 Mass. 659, 56 N. E. (2d) 602 (1944); *Norris v. Walker,* 232 Mo. App. 645, 110 S. W. (2d) 404 (1937); *Busick v. Home Owners' Loan Corp.,* 91 N. H. 257, 18 A. (2d) 190 (1941); *Ceccato v. Chiara,* 4 N. J. S. 140, 66 A. (2d) 548 (1949); *Harrill v. Sinclair Refining Co.,* 225 N. C. 421, 35 S. E. (2d) 240 (1945); *Cooper v. Roose,* 151 Ohio St. 316, 85 N. E. (2d) 545 (1949); *King v. Collins,* 190 Okla. 601, 126 P. (2d) 76; *Bouy v. Fidelity-Philadelphia Trust Co.,* 338 Pa. 5, 12 A. (2d) 7 (1940); *Timmons v. Williams Wood Products Corp.,* 164 S. C. 361, 162 S. E. 329 (1932); *Soulia v. Noyes,* 111 Vt. 323, 16 A. (2d) 173 (1940). The basis of this rule can be traced from the early common law. At common law, a lease of land by a landlord to a tenant was regarded as a sale of the premises for a term. *Fowler v. Bott,* 6 Mass. 62 (1809); *Logsdon v. Central Development Ass'n. Inc.,* 233 Mo. App. 499, 506 S. W. (2d) 631 (1938); *Keates v. Cadogan,* 10 C. B. 591, 138 Eng. Rep. 234 (1851). The rule of *caveat emptor* applied to this sale as to others, *Shotwell v. Bloom,* 60 Cal. App. (2d) 303, 140 P.

(2d) 728, 732 (1943); *Holzhauer v. Sheeny,* 31 Ky. L. R. 1238, 104 S. W. 1034, 1035 (1907); *Cowen v. Sunderland,* 145 Mass. 363, 364 (1887). The landlord was not liable for disrepair of the premises as he was considered to have surrendered both possession and control and thereby had no right to enter the premises without the consent of the tenant, *Shotwell v. Bloom, supra; Cowen v. Sunderland, supra.* The result was that the courts held that the landlord had no duty to keep the premises in repair once the tenant had entered into possession, *Cassais v. Shapiro Estate,* 136 N. J. L. 304, 55 A. (2d) 819 (1947); *Rotte v. Meierjohan,* 78 Ohio App. 387, 70 N. E. (2d) 684 (1946).

With the innovation of the landlord-tenant covenant to repair, the courts held that as no duty existed at common law, the mere contractual obligation to repair did not create such a duty, *Kuyk v. Green, supra.* It was maintained that for the failure to repair the landlord was subject to an action *ex contractu, Willis v. Snyder,* 190 Iowa 248, 180 N. W. 290 (1920); *Williams v. Fenster,* 103 N. J. L. 566, 137 Atl. 406 (1927), but not *ex delicto* for there could be no breach of a duty that did not exist, *Murrell v. Crawford,* 102 Kan. 118, 169 Pac. 561 (1917); *Fiorntino v. Mason,* 233 Mass. 451, 124 N. E. 283 (1919). Legal wrongs must spring from neglect of legal duties, *Samuelson v. Cleveland Iron Mining Co.,* 49 Mich. 164, 13 N. W. 499, 504 (1882). The measure of damages for breach of the landlord's promise to repair is the cost of the repairs, *Williams v. Fenster, supra; Schiff v. Pottlitzer,* 51 Misc. 611, 101 N. Y. Supp. 249 (1906). The courts have refused to extend the damages to include personal injury resulting from the breach, on the ground that such damages were not within the contemplation of the parties, *Ward v. Dan Cohen Realty Co.,* 30 Ohio Ops. 469, 16 Ohio Supp. 27 (1945), or that they were too speculative, *Farmer v. Alton Bldg. & Loan Ass'n.,* 294 Ill. App. 206, 13 N. E. (2d) 652 (1938).

A strong minority of jurisdictions, supported by text writers, allow recovery for personal injuries of a third person injured on the premises due to the landlord's failure to perform his contract to repair, *Scholey v. Steele,* 59 Cal. App. (2d) 402, 138 P. (2d) 733 (1943); *Scibek v. O'Connell,* 131 Conn. 577, 41 A. (2d) 251 (1945); *accord, Des Marchais v. Daly,* 135 Conn. 623, 67 A. (2d) 549 (1949); *Seal v. Stodghill,* 44 Ga. App. 643, 162 S. E. 638 (1932), *Mani v. E. Hugo Erickson, Inc.,* 209 Minn. 65, 295 N. W. 506 (1940); *Hodges v. Hilton,* 174 Miss. 343, 161 So. 686 (1935); *Fried v Buhrmann,* 128 Neb. 590, 259 N. W. 512 (1935); *Colligan v. 680 Newark Avenue Realty Corp.,* 131 N. J. L. 520, 37 A. (2d) 206 (1944); *Asheim v. Fahey,* 170 Ore. 330, 133 P. (2d) 246 (1943); *Noble v. Marx,* 298 N. Y. 106, 8 N. E. (2d) 40 (1948); *DuPont Rayon Co. v. Roberson,* 12 Tenn. App. 261 (1930); *Hamblen et al. v. Mohr et al.,* 171 S. W. (2d) 168 (Tex. Civ. App. 1943); *Estep et al. v. Security Savings & Loan Soc. et al.,* 197 Wash. 432, 73 P. (2d) 740 (1937); *Baum v. Bahn Frei Mut. Building*

& Loan Ass'n., 237 Wis. 117, 295 N. W. 14 (1940); *Payne v. Rodgers* 2 H. Bl. 350, 126 Eng. Rep. 590 (1794); RESTATEMENT, TORTS § 357 (1934); *Contra, Ceccato v. Chiaia, supra.*

Rigidity has been cast aside and the time honored attribute, the flexibility of the common law, has been adopted to meet the vastly changed society. Mobility of a rapidly growing population, the transition from an agrarian to an urbanized society, the introduction of short term leases, the shifting of bargaining powers, are all factors which must be encompassed in the principles of modern law.

The American Law Institute, in its restatement of the law of torts, cites the following proposition in support of the theory that a lessor is liable both to the lessee and to third parties for injuries sustained on the premises which he has covenanted to repair, RESTATEMENT, TORTS § 357 (1934):

> A lessor of land is subject to liability for bodily harm caused to his lessee and others upon the land with the consent of the lessee or a sub-lessee by a condition of disrepair existing before or arising after the lessee has taken possession, if
>
> (a) The lessor, as such, has agreed by a covenant in the lease or otherwise, to keep the land in repair. . . .

The reporter's comment on this section was, RESTATEMENT, TORTS §357, comment *a* (1934):

> The lessor's duty to repair . . . is not contractual but is a tort duty based on the fact that the contract gives the lessor ability to make the repairs and control over them.

On the other hand, a number of states have imposed tort liability on the landlord, who has covenanted to repair and negligently fails to do so, on the theory that the contract to repair is deemed a matter of inducement from which arises an affirmative duty to exercise due care towards all who are rightfully upon the premises. *Merchant's Cotton Press & Storage Co. v. Miller,* 135 Tenn. 187, 186 S. W. 87 (1916). This can be distinguished from a contract to repair made by the lessee with an independent contractor on the ground that due to the relationship there is a peculiar probability that the tenant will rely upon the landlord, *Cf. Seigal v. Spear,* 243 N. Y. 479, 138 N. E. 414 (1923).

A third basis for recovery from the landlord's negligent failure to fulfill his contract to repair is followed by other jurisdictions. By allowing recovery, it is asserted that circuity of action is prevented. This, however, has been restricted to cases where the tenant would have a like remedy against the landlord, *Payne v. Rodgers, supra.*

The legislatures of several states, recognizing the judicial reluctance, or judicial restraint, to alter the common law rules to meet the rapidly changing societal conditions, have expressly modified the common law. By legislative enactment the landlord is no longer relieved of all re-

sponsibility, but there is imposed upon him a statutory duty to repair. There are two types of statutes which are particularly addressed to the question. See, Feuerstein and Shestack, *Landlord and Tenant—The Statutory Duty to Repair,* 45 ILL. L. REV. 205 (1905); Note, 62 HARV. L. Rev. 669 (1949). The first type provides that the lessor is to keep the premises in good repair and imposes a penalty for the failure to do so, CONN. GEN. STAT. §§ 4050, 4054 (1949), IOWA CODE §§ 413.66, 413.108 (1946); KY. REV. STAT. ANN. §§ 101.170, 101.990 (1948); MASS. ANN. LAWS c. 144, §§ 66, 89 (1950); MICH. STAT. ANN. §§ 5.2843, 5.2873 (1949); N. Y. Multiple Dwelling Law § 78 (1946); WIS. STAT. §§ 101.06, 101.28 (1949).

The Michigan court has construed this statute to make failure to repair negligence per se. However, the statute does not cover the instant situation as it applies only to dwellings in municipalities having a population of 10,000 or more, *Annis v. Britton,* 932 Mich. 291, 205 N. W. 128 (1925).

The second type of statute, and most effective, requires the landlord to keep the premises in repair, and it expressly provides for recovery in tort by those persons so injured on the leased premises, GA. CODE ANN. §§ 61-111, 61-112 (1937); LA. CIV. CODE ANN. arts. 2322, 2693 (1945). Statutes of this type would preclude the necessity of covenants to repair, or if the covenants were incorporated in the lease would allow recovery without the necessity of construing them.

In the instant case the Michigan Supreme Court has chosen to adhere to the common law and slight majority view. The wisdom of so doing may well be questioned in the light of the compelling reasoning of the strong minority based on the realization that there has been an actual change in the economic and social conditions of the country. The attributes of pliability and flexibility of the common law should not be lost sight of.

John L. Globensky

PROCEDURE—FEDERAL TORT CLAIMS ACT—JOINDER OF THE UNITED STATES AS A THIRD PARTY DEFENDANT.—*Capital Transit Co. v. United States,* 183 F. (2d) 825 (D. C. Cir. 1950). Kenneth Stradley brought suit against the Capital Transit Co. for personal injuries sustained in a collision between a company street car, on which he was a passenger, and a United States Army truck driven by a soldier in the course of his employment. The company moved for leave to join the United States as a third party defendant to secure contribution from the United States as a joint tort-feasor. The motion was granted. The United States then moved to dismiss the complaint against itself for failure

to state a cause of action upon which relief could be granted. This motion was also granted. *Stradley v. Capital Transit Co.*, 87 F. Supp. 94 (D. D.C. 1949). The company appealed, presenting the court in the instant case with the question as to whether the United States could be joined as a third-party defendant in a suit between private litigants under the provisions of the Federal Tort Claims Act, 60 STAT. 843, 28 U. S. C. § 921 *et seq.* (1946), as amended, 61 STAT. 722 (1947), 28 U. S. C. § 921 *et seq.* (Supp. 1948). It was held that the United States could not be joined.

The Capital Transit Co. contended: first, that the Federal Tort Claims Act specifically provides that the United States shall be liable in certain instances to the same extent and in the same manner as a private person for the commission of torts. Secondly, that it is the clear intent of the Act that the local law of the jurisdiction should determine whether there is a right of contribution to joint tort-feasors. Thirdly, that under the Act the United States has made itself amenable to the third-party practice by the adoption of the Federal Rules of Civil Procedure, FED. R. CIV. P. 14. The appellant reasoned that under the law of the District of Columbia there is a right of contribution by joint tort-feasors, and that the United States could be joined as any private litigant.

The United States answered that even if a suit for contribution is permissible under the Act, still the United States may not be joined as a third-party defendant in a suit between private litigants; that in any event a suit for contribution is not within the scope of the Act, the action not sounding in tort.

The Federal Tort Claims Act became law August 2, 1946. Before that, the United States was immune from suit on a common law tort since it was a sovereign body. This immunity implied that no substantive right existed against the United States, not merely that there was a procedural impediment against the enforcement of such right. *Commissioners of the State Ins. Fund. v. United States,* 72 F. Supp. 549 (S. D. N. Y. 1947). The consent of the sovereign was required before it could be sued, and this required a special act of Congress for each claim. The purpose of the Act was to eliminate the heavy burden placed upon Congress which was required to pass these private bills. *State of Maryland, to Use of Burkhardt v. United States,* 165 F. (2d) 869 (4th Cir. 1947).

The Act, subject to the exceptions therein, acknowledges liability of the United States for injuries and damages to both property and persons generally, where such damages result from negligence in the performance of duties by employees of the United States acting within the scope of their employment. *Jefferson v. United States,* 74 F. Supp. 209 (D. Md. 1947).

The Act further provides that the United States district courts, sitting without a jury, shall have exclusive jurisdiction to determine claims falling within the provisions of the Act. 60 STAT. 843 28 U. S. C. § 931 (1946), as amended, 61 STAT. 722 (1947), 28 U. S. C. § 931 (Supp. 1948).

The Act makes no specific mention as to the joinder of the United States, either as a co-defendant or as a third-party defendant, in suits between private litigants. Because of this omission, a conflict has arisen in the federal district courts and circuit courts of appeals, with no final determination yet forthcoming from the Supreme Court.

In the instant case, and in *Sappington v. Barrett,* 182 F. (2d) 102 (D. C. Cir. 1950), the Circuit Court of Appeals for the District of Columbia held that the United States may not be joined either as a third-party defendant or as a co-defendant. However, the Third Circuit Court of Appeals, considering both questions, has held that the Government may be joined as a joint tort-feasor or as a third-party defendant. *Howey v. Yellow Cab Co. (United States); Gutmann v. Yellow Cab Co. (United States),* 181 F. (2d) 967 (3rd Cir. 1950).

The conflict stems from two different interpretations of the legislative history of the Act. In the instant case, it is argued that the legislative history, as evidenced by the report of the Judiciary Committee of the House of Representatives, makes it apparent that the question of joinder was definitely considered by the legislators. H. R. REP. No. 1287, 79th Cong., 1st Sess. 5 (1945). This report indicates the intent of Congress to give the district courts essentially the same jurisdiction as the district courts exercise concurrently with the Court of Claims under the Tucker Act, 28 U. S. C. § 41(20) (1946). Since the Tucker Act does not permit any person to be joined as a defendant with the United States, it is claimed to follow that no such joinder should be permissible under the Tort Claims Act. The substantial weight of authority follows this reasoning. *Sappington v. Barrett, supra; Uarte v. United States,* 7 F. R. D. 705 (S. D. Cal. 1948); *Donovan v. McKenna,* 80 F. Supp. 690 (D. Mass. 1948); *Drummond v. United States,* 78 F. Supp. 730 (E. D. Va. 1948).

A minority of federal courts have held that the exclusion of joinder was not insisted upon, so that when the bill became law no exclusionary clause appeared, and therefore, the legislative extent was that the United States could be joined either as a joint tort-feasor or third-party defendant. *Howey v. Yellow Cab Co. (United States); Gutmann v. Yellow Cab Co. (United States), supra; Englehardt v. United States,* 69 F. Supp. 451 (D. Md. 1947). This argument would seem to be founded upon better logic and upon justice. Certainly we cannot assume that Congress forgot to exclude joinder from the Act where such an exclusionary clause had already appeared in the proposed bill. It

must be presumed that the legislators had a valid reason for not including the provision as to joinder even though no such reason appears in the Act.

It is true that where joinder is permitted under the Act, some procedural difficulties arise which are mentioned by the cases cited herein. Those courts that interpret the Act to exclude joinder argue that there is no trial by jury permitted by the Act where the United States is a defendant. However, a private person is entitled to a trial by jury so that joinder might deprive the individual of his constitutional rights if the Government was joined with him. In *Englehardt v. United States, supra,* the court answered this argument by stating that the same case could have concurrent but separate determinations. The judge, without the aid of the jury, could determine the liability of the United States, whereas the jury could determine liability as to the individual defendant. Perhaps the latter contention would lose some of its weight when we consider the purpose of joinder of parties. Instead of simplifying procedure, joinder in this instance might complicate it. However, whether this defect in procedure would work a greater hardship on the parties than the bringing of two separate suits is doubtful.

Another material argument made in favor of joinder in the aforementioned cases is that the Federal Rules of Civil Procedure allow joinder of parties and the Rules have been held to apply to the Tort Claims Act. *Evans v. United States,* 10 F. R. D. 255 (W. D. La. 1950). The majority of courts, however, hold that it was not intended that the Rules of Civil Procedure should extend jurisdiction beyond that which had been granted in the Act, but it was intended merely to make the Rules applicable where jurisdiction already existed. *Uarte v. United States, supra.*

It is interesting to note that at least in one respect there is uniformity in the cases cited herein. *Englehardt v. United States, supra,* established the precedent for the minority rule that joinder is permissible under the Tort Claims Act. In this case, the United States requested that a private litigant be joined as a joint tort-feasor for purposes of contribution. Thus, the decision operated to the advantage of the Government. In the instant case, as in other cases expressing the majority view, the United States sought to be excluded as a joint tort-feasor in an action between private litigants. Thus, the refusal to allow joinder in these cases also operated to the advantage of the Government. When the courts of this country become the servants of the Government and cease to be the servants of the people, conflicting decisions and injustice must necessarily follow.

The comparison in these cases between the common law theories as to the rights of sovereigns and the political theories upon which this country was founded is an invalid one. The theory that the sovereign

can do no wrong and should therefore be immune from litigation without its consent is a fallacy. Our Government owes its existence, directly or indirectly, to the people and not to any "divine right." Today, as never before, the Government is expanding and coming more frequently in direct contact with the people who have given it its life blood. Therefore, it should be held accountable for the torts of its agents, and the most expeditious remedies should be made available to those who are injured by its agents done in the course of their employment.

Where, as in the instant case, a particular type of situation is contemplated by a legislative body in the formation of a bill, and that situation is not included in the law as enacted, it should be presumed that the situation was not meant to be covered by the act. While we cannot expect our legislators to conceive of every type of situation that might arise under an act and to provide for it accordingly, nevertheless, those situations which are considered should be conclusively resolved and specifically dealt with by the act. Whenever possible, citizens and lawyers should be able to rely upon a statute, and be reasonably certain as to its contents instead of being put to a guess as to the courts' future interpretation of it. Further clarification and additions to statutes must be left to subsequent legislative enactments in a situation such as this. Such a defect clearly calls for legislative correction.

Finally, the Federal Tort Claims Act lists but four exceptions to the general pronouncement that the United States should be treated as a private litigant. These exceptions are: trial without jury, and that the United States shall not be liable for punitive damages, nor for interest before judgment, nor for attorney's fees. Does not the failure to provide an exception against joinder mean that joinder was to be allowed, and that only the specific exceptions listed were intended?

Maurice J. Moriarty

PROCEDURE—JUDGMENTS—EFFECTIVE FROM TIME OF PRONOUNCEMENT IN OPEN COURT.—*Freeport Motor Casualty Co. v. Tharp et al.*, ... Ill. ...., 94 N. E. (2d) 139 (1950). This case involved an action for a declaratory judgment by the Freeport Motor Casualty Company against Hubert Tharp and others for the purpose of construing an insurance policy. On June 15, 1948, the circuit court judge, in absentia, rendered judgment for the plaintiff by sending a judgment order to his clerk accompanied by a letter directing him to file the order. It also stated that appropriate docket entries should be made on the next court day. On June 24, 1948, the next court day, another circuit judge pronounced judgment on the basis of the former judge's memoranda and ordered it filed on the same day. The defendants filed their appeal

within ninety days of the latter date and the appellate court overruled appellee's motion to dismiss which was based upon the contention that the appeal was not timely. The Supreme Court of Illinois held in the instant case that the mailing and the filing of the judgment order does not constitute a proper rendition of judgment, but that judgment is only rendered when it is pronounced in open court. It pointed out that judgment was rendered on June 24, and hence the appeal within ninety days therefrom was timely.

The only question in this case is the timeliness of the defendants' appeal. In order to fully comprehend the scope of this problem, it is necessary to make a survey of the essential components of a validly rendered judgment.

"A judgment is the final determination of the rights of the parties in an action. It is the sentence of the law pronounced by the court upon the matter contained in the record." *The Aetna Ins. Co. v. Swift,* 12 Minn. 326, 333 (1882).

Although there is sharp conflict of authority as to the time a judgment is rendered, the courts have advanced two principal theories on rendition, the pronouncement-entry theory and the pronouncement theory.

In essence, the pronouncement-entry theory states that no effective rendition has taken place until the officially announced judgment has been properly entered in the record. *Wildwood Crate & Ice Co. v. Citizens' Bank of Inverness,* 98 Fla. 186, 123 So. 699 (1929); *State v. Vinson et al.,* 337 Mo. 1023, 87 S. W. (2d) 637 (1935); In re *Getchell's Estate,* 98 Neb. 788, 154 N. W. 537 (1915); *Netherton v. Frank Holton & Co. et al.,* 189 Wis. 461, 205 N. W. 388 (1925).

In *Thomson v. Superior Court of Mendocino County,* 161 Cal. 329, 119 Pac. 98, 100 (1911), the court said: "A judgment therein is not 'rendered' until it is entered; or can legally be held to be entered."

The courts have gradually relaxed this rule with the ensuing result that many now view such acts as the filing of the judgment by the clerk, In re *Hurley Mercantile Co.,* 56 F. (2d) 1023 (5th Cir. 1932); *West States Mortgage Loan Co. v. Hurst,* 41 Idaho 80, 237 Pac. 1107 (1925); *Morley et al. v. Morley et al.,* 130 Wash. 77, 226 Pac. 622 (1919), or the entry in the court journal or docket, *McCarney v. Lightner,* 188 Iowa 1271, 175 N. W. 751 (1920); *Curnyn v. Kinney,* 119 Neb. 478, 229 N. W. 894 (1930); *Union Central Life Ins. Co. v. Saathoff,* 115 Neb. 385, 213 N. W. 342 (1927); *Hayes v. Hayes,* 117 Ohio St. 323, 158 N. E. 650 (1927), as proper rendition of judgments.

The cardinal feature of the pronouncement theory is that rendition is complete when the court officially announces its final determination of the rights of the parties. No accompanying acts are essential to its

validity. *Moulton v. Smith,* 23 Ariz. 319, 203 Pac. 562 (1922); *Coleman v. Moore & McIntosh et al.,* 49 Nev. 139, 241 Pac. 217 (1925); *Long et al. v. Martin,* 112 Tex. 365, 247 S. W. 827 (1923). In *The Washington,* 16 F. (2d) 206, 208 (2d Cir. 1926), the court said: " 'Rendition' of Judgment means the 'annunciation or declaring of the decision of the court,' and not the 'entry of the judgment upon the record.' " The proponents of this theory regard rendition as taking place when the court officially announces its decision in open court at the conclusion of the trial. *Simpson v. Boykin,* 118 Miss. 701, 79 So. 852 (1918); *Kondas v. Washoe County Bank,* 50 Nev. 181, 254 Pac. 1080 (1927). They also assert that it takes place when the judge prepares a memorandum, *Poe et al. v. Walker,* 183 Ark. 659, 37 S. W. (2d) 866 (1931), when the clerk receives authority to enter a determination of the minutes, *Cresswell v. Cresswell,* 164 Miss. 871, 140 So. 521 (1932), when the judgment is filed, *McConnell et al. v. McCord et al.,* 170 Ark. 839, 281 S. W. 384 (1926); *Pocock et al. v. Gladden,* 154 Md. 249, 140 Atl. 208 (1928), or from the time of the making of an order for judgment, *Burnham v. Dollard,* 269 Mass. 530, 169 N. E. 433 (1930).

This survey of the cases in the light of the two principal theories reveals that the concept of "rendition" has been confused with that of "entry." Some courts, however, have adhered to the view that they are distinct legal concepts. *McConnell v. Bourland,* 175 Ark. 253, 299 S. W. 44 (1927); *Jackson v. Jarratt,* 165 Tenn. 76, 52 S. W. (2d) 137 (1932). In In re *Gerhardus' Estate,* 116 Ore. 113, 239 Pac. 829, 831 (1925), the court said: "There is a marked distinction between the rendition and entry of a judgment or order. One is the judicial act of the court, while the other is the ministerial act of the clerk."

The true method for establishing certainty to the rules dealing with rendition of judgment is to view its birth as of the time when the judge pronounces his decision of law upon the matters at issue in open court. *Cosgrove v. Highway Commissioner,* 281 Ill. App. 406 (1935); *Johnson v. Mississippi Power Co.* 189 Miss. 67, 196 So. 642 (1940); *Southern Mortgage Guaranty Corporation v. King et al.,* 168 Tenn. 309, 77 S. W. (2d) 810 (1935). It is the prevailing rule at common law that the essential requisite of a true rendition is that it must be made in open court and, that any rendition, in the absence of statutory or constitutional provisions, not meeting this requirement is invalid. *Scott v. Stutheit,* 21 Colo. App. 28, 121 Pac. 151 (1912); *McIntyre v. Northern Pacific Ry. et al.,* 58 Mont. 256, 191 Pac. 1065 (1920); *Pates & Allen Co. v. Bowen et al.,* 104 S. C. 390, 89 S. E. 356 (1916); *Atlantic Coast Line R. R. v. Moise,* 85 S. C. 530, 67 S. E. 785 (1910). Chamber judgments are void. *Bridgman v. Moore,* 143 Tex. 250, 183 S. W. (2d) 705 (1944). It has been held, however, that judgments rendered in a room other than a regular courtroom are valid if no constitutional rights of the litigants have been infringed. *Walton v. Wilkinson Bolton Co.,*

158 Ga. 13, 123 S. E. 103 (1924). Parties, by waiving their right to have the case tried in open court, may agree that it shall be heard before a judge in chambers, *Beach v. Beckworth,* 13 Wis. 23 (1860), in which case judgment can be rendered there.

In *San Luis Obispo County v. Simas et al.,* 1 Cal. App. 175, 81 Pac. 972 (1905), it was held that a proper rendition took effect in open court when the trial judge signed an order in his chambers adjoining the courtroom with an open door connecting the two rooms.

The statutes in the present case reflect the state of confusion which surrounds "rendition." Section 76 of the Illinois Civil Practice Act provides in part, ILL. ANN. STAT. § 104.076 (1934): "No appeal shall be taken to the supreme or appellate court after the expiration of ninety days from the entry of the order, decree, judgment or other determination complained of. . . ." Another statute, ILL. ANN. STAT. § 24.14 (1934), states that: "They [clerks] shall enter of record all judgments, decrees and orders of their respective courts as soon after the rendition or making thereof as practicable." The first statute referred to judicial entry, not as an act of recording, but rather as a proper pronouncement by the court. This fact is made more conclusive by the second statute which refers to the actual clerical entry, a mere ministerial act which may be performed within a practicable time. It is therefore quite obvious that the legislature is using the term "entry" in two entirely different senses.

The Illinois court perspicaciously distinguished between the act and mere evidence of the act. In the instant case, no pronouncement took effect because the judge was not in open court when he officially decided the case

In adopting the open court pronouncement theory, the court said, 94 N. E. (2d) at 142:

> However, we incline to the opinion that the better view is, and it has often been so held, that a judgment is rendered when the judge acts, as a duly constituted court, in declaring his decision of law and pronouncing judgment thereon in open court.

An eminent authority on judgments, 1 FREEMAN, JUDGMENTS § 38 (4th ed. 1892), states:

> Expressions occasionally find their way into reports and textbooks, indicating that the entry is essential to the existence and force of the judgment. These expressions have escaped from their authors when writing of matters of evidence, and applying the general rule that in each case the best testimony which is capable of being produced must be received, to the exclusion of every means of proof less satisfactory and less authentic. The rendition of a judgment is a judicial act; its entry upon the record is merely ministerial. A judgment is not what is entered, but what is ordered and considered. The entry may express more or less than was directed by the court, or it may be neglected altogether; yet in neither of these cases is the judgment of the court any less its judgment than though it were accurately entered.

In conclusion, it must be pointed out that the courts and legislatures have been guilty of much confusion as to "entry" and "rendition" of judgments. The result has been inconsistent holdings and statutes, which apply contrary tests: the pronouncement theory and the pronouncement-entry theory. It is submitted that the solution to end the confusion is a uniform adoption of the open court pronouncement doctrine, as was done in the instant case.

Robert J. Affeldt

TORTS—HUSBAND AND WIFE—WIFE'S RIGHT OF ACTION FOR NEGLIGENT INVASION OF THE CONSORTIUM.—*Hitaffer v. Argonne Co.*, 183 F. (2d) 811 (D. C. Cir.), *cert. denied*, 340 U. S. ...., 71 S. Ct. 80, 94 L. Ed. .... (1950). Plaintiff's husband was injured while in the defendant's employment and sustained severe and permanent injuries as a consequence of which the plaintiff was deprived of his aid, assistance and enjoyment, specifically sexual relations. The husband received compensation for said injuries under the Longshoreman's and Harbor Workers' Compensation Act, 44 STAT. 1424 (1927), 33 U. S. C. § 901 *et seq.* (1946). This action was instituted by the wife to obtain damages for loss of consortium. The United States District Court for the District of Columbia dismissed the complaint, and the plaintiff appealed. The court of appeals reversed the district court and held that the wife has a cause of action for loss of consortium and that recovery was not precluded by the Longshoreman's and Harbor Workers' Compensation Act which provided that the employer's liability is exclusive, 44 STAT. 1426 (1927), 33 U. S. C. § 905 (1946).

The question involved in the case was whether or not a wife has a cause of action for loss of consortium resulting for negligent injury to her husband.

Various reasons were given by the court in allowing the wife to recover in this case even though practically every other jurisdiction has denied recovery. They were: (1) that consortium did not depend solely on loss of service alone but also included the sentimental elements, *i.e.*, love, affection, companionship, sexual relations, etc.; (2) there was no double recovery in such a case, *i.e.*, that the husband recovered in his action for services and the wife indirectly recovered for any loss of her consortium, an entirely separable injury; (3) invasion of the consortium was an independent wrong belonging directly to the spouse so injured; (4) a wrongdoer was liable for the natural consequences of his negligent act, and therefore the wife's loss of consortium being the natural consequence of the defendant's negligence, there could be a recovery; (5) the husband and wife have equal legal rights arising out of the marriage relationship which will receive equal protection

of the law; (6) since the law allowed the wife to sue in cases of intentional or malicious invasions to her consortium, it would be illogical to deny her the right to sue when the invasion is negligent.

The nature of consortium was defined in *Riggs v. Smith,* 52 Idaho 43, 11 P. (2d) 358, 360 (1932) as:

> . . . a property right growing out of the marriage relation, for loss of which recovery may be had, and includes the exclusive right to the services of the spouse (which contemplate not so much services or reward earned as assistance and helpfulness in the relations of conjugal life according to their station) and also the exclusive right to the society, companionship, and conjugal affection toward each other.

See also, 8 HOLDSWORTH, HISTORY OF ENGLISH LAW, 429 (3rd ed. 1923), quoted in Lippman, *Breakdown of Consortium,* 30 COL. L. REV. 651 (1930).

The common law foundation of the husband's right to recover for loss of consortium was based upon the idea that the wife was the servant of the husband and any interference with the servant which resulted in a loss of service gave the master an action for damages. *Guy v. Livesey,* Cro. Jac. 501, 79 Eng. Rep. 428 (1619). Since the wife at common law had no right to the service of husband she has no corresponding right to sue for loss of her consortium. Lippman, *supra* at 662. Thus, the husband alone, at common law, could sue for intentional interference with the family relation, *i.e.,* criminal conversation and alienation of affection, but no such right was recognized in the wife until the passage of the women's emancipation acts. See PROSSER, TORTS, 928 (1941). Also, the great weight of authority is that the common law right of the husband to consortium was not destroyed by the women's emancipation acts and he could still recover for the loss of such consortium caused by negligent injury to the wife. *Birmingham Southern R. R. v. Lintner,* 141 Ala. 420, 38 So. 363 (1904); *Citizens' Street Ry. v. Twiname,* 121 Ind. 375, 23 N. E. 159 (1890); *Womach v. City of St. Joseph,* 201 Mo. 467, 100 S. W. 443 (1907); *Guevin v. Manchester Street Ry.,* 78 N. H. 289, 99 Atl. 298 (1916); *Baltimore and Ohio R. R. v. Glenn,* 66 Ohio St. 395, 64 N. E. 438 (1902); *Aderhold v. Stewart,* 172 Okla. 77, 46 P. (2d) 346 (1935).

Under the women's emancipation acts enabling a married woman to sue and be sued in her own name, a wife has a right of action for loss of consortium arising from *intentional* interference with any marital duty owed her by her husband. Thus she has a right of action in cases of alienation of affection. *Bennett v. Bennett,* 116 N. Y. 584, 23 N. E. 17 (1889), and criminal conversation, *Oppenheim v. Kridel,* 236 N. Y. 156, 140 N. E. 227 (1923), and for willful wrongful acts which were directed to the husband, causing her loss of his consortium. *Flandermeyer v. Cooper,* 85 Ohio St. 327, 98 N. E. 102 (1912).

Even though a wife can now bring an action for the loss of consortium in those cases where the act of the defendant is willful or intentional on an equal basis with her husband, Kinnaird, *Loss of Consortium,* 35 KY. L. REV. 220 (1947), this is not the rule where the loss of consortium is due to the negligence of the defendant. *Giggey v. Gallagher Transport Co.,* 101 Colo. 258, 72 P. (2d) 1100 (1937); *Sobolewski v. German,* 32 Del. 540, 127 Atl. 49 (1924); *Boden v. Del-Mar Garage,* 205 Ind. 59, 185 N. E. 860 (1933); *Gearing v. Berkson,* 223 Mass. 257, 111 N. E. 785 (1916); *Emerson v. Taylor,* 133 Md. 192, 104 Atl. 538 (1918); *Eshenbach v. Benjamin,* 195 Minn. 378, 263 N. W. 154 (1935); *Bernhardt v. Perry,* 276 Mo. 612, 208 S. W. 462 (1919); *Smith v. Nicholas Bldg. Co.,* 93 Ohio St. 101, 112 N. E. 204 (1915). In these cases the wife is almost universally denied recovery. An exception to this was the case of *Hipp v. E. I. Dupont De Nemours & Co.,* 182 N. C. 9, 108 S. E. 318 (1921). This latter case, however, was disapproved in *Hinnant v. Tide Water Power Co.,* 189 N. C. 120, 126 S. E. 307 (1925), and the law in that jurisdiction now is that the wife may recover only for expenses which she herself has incurred in caring for her husband. *McDaniel v. Trent Mills,* 197 N. C. 342, 148 S. E. 440 (1929).

Various reasons have been propounded by the courts which denied the wife recovery for loss of consortium due to negligent injuries to the husband. Thus it has been held that the damages that the husband recovered in a suit for his injuries sustained through another's negligence were full compensation for his injuries, in which compensation his wife has a benefit. The logical consequence was that if the wife was permitted a separate recovery for her loss of consortium there was, in effect, a double recovery for the same injury. *Feneff v. New York Cent. & H. R. R.,* 203 Mass. 278, 89 N. E. 436 (1909). Also in Pound, *Individual Interest in the Domestic Relation,* 14 MICH. L. REV. 177, 194 (1913), it was stated:

> The reason for not securing the interest of wife or child in these cases seems to be that our modes of trial are such and our mode of assessment of damages by the verdict of the jury is necessarily so crude that if husband and wife were each allowed to sue, instead of each recovering as exact reparation, each would be pretty sure to recover what would repair the injury to both. Moreover the injury to wife and child is very hard to measure in money. Hence, on a practical balancing of interests the wife is usually denied an action.

Another reason frequently given was that the wife's loss of consortium resulting from negligence was too remote and indirect to permit her to recover and thus it was distinguishable from the loss of consortium resulting directly or intentionally from a wrongful act, as in alienation of affection or criminal conversation. *Marri v. Stamford Street Ry.,* 84 Conn. 7, 78 Atl. 582 (1911); *Goldman v. Cohen,* 30 Misc. 336, 63 N. Y. Supp. 459 (1900); *Smith v. Nicholas Bldg. Co., supra.*

In *Stout v. Kansas City Terminal Ry. et al.*, 172 Mo. App. 113, 157 S. W. 1019, 1022 (1913), the court gave another reason for denying the wife's action by saying that since she was not entitled to the husband's services, she could not recover for the sentimental elements which alone are not capable of "pecuniary estimate." The court thus made a distinction in consortium between loss of service and its sentimental elements, *i.e.*, society, comfort, sexual relation, etc., and in justifying this reasoning the court, 157 S. W. at 1020, stated that at common law ". . . consortium has for its principal basis the loss of service, with the loss of society and comfort more in the nature of an aggravating incident."

In *Goldman v. Cohen, supra,* 63 N. Y. Supp. at 459, where the wife sought to recover for loss sustained to her as a wife by injury to her husband from the negligence of the defendant in the handling of a horse, the court, though recognizing her emancipation from the common law disabilities, stated:

> . . . but her interest in the husband's life and companionship is not a right of property, or derived from a contract of bargain and sale. That interest lies in a region into which the law does not enter except when necessity compels.

The rationale of these cases is further complicated by cases holding that since the husband and wife stand on parity in respect of suits for personal injuries and that each may recover for his or her own injuries, including all damages immediately and necessarily incident thereto, but that neither may recover for injuries of the other. *Helmstetter v. Duke Power Co.,* 224 N. C. 821, 32 S. E. (2d) 611 (1945). Therefore the women's emancipation act had, in such cases, abridged the husband's common law right of action to recover damage sustained by him through injuries negligently inflicted on his wife, besides denying the wife the right of action completely. The *Helmstetter* case stated, 32 S. E. (2d) at 613:

> The effect of the legislation on the subject is to equalize the legal status of husband and wife, and to deny to each any overlapping recovery on account of the other's loss or injury.

Lippman, *supra,* at 673, expressed a similar view when he stated:

> The fiction upon which the right was based is presumably abolished by modern legislation, but tradition's hold on our courts gives it new life by the substitution of new fictions for old.

The RESTATEMENT, TORTS, § 695 (1938), has followed the practically unanimous view in denying the wife recovery ". . . for harm . . . caused to any of her marital interest . . ." by the negligent injury to the husband and even denies her recovery ". . . for any expense incurred in providing medical treatment for her husband . . ." Giving credence to this latter view is *Regan v. Davis,* 290 Pa. 167, 138 Atl. 751 (1927), which denied a wife recovery for the amount of the doc-

tor's bill incurred in the treatment of her husband which resulted from the negligent act of the defendant.

The reasons given in the above cases do not seem to justify the conclusions reached in not permitting a wife to sue for loss of consortium when the injury to her husband is occasioned by negligence. Presently, a married woman is allowed to sue in cases where the injury to her consortium is intentional or willful, but denied this same right where the injury is the result of negligence. How the injury can be any less remote or indirect in this latter case is hard to imagine. Is it not just as remote or indirect when the wife is injured by another's negligence and the husband tries to recover? Yet, the husband is still entitled to recover by the weight of authority. In the face of modern legislation giving the wife an equal legal interest in the marriage relation, it is difficult to uphold the reasoning of these cases unless the courts are still clinging, inadvertently, to the archaic idea that the husband is still the master and wife the servant. An old fiction thus becomes a new one with new reasoning given and the old rule remains substantially unchanged. The courts should recognize the facts that consortium includes sentimental elements as well as material services and is a property right growing out of the marriage relation and is now equally available to both the husband and wife under modern legislation. Therefore, any invasion of this right is an actionable wrong to the spouse so injured. Perhaps under such circumstances the anomalies above indicated can be rectified and thus allow the old fiction its proper place in the past, not haunting future decisions. This case goes far in the accomplishment of that objective even though it stands alone. Its reasoning and conclusion should not be prejudiced by the numerical superiority of the contrary decisions.

Louis J. Mustico

TORTS—CONTRIBUTORY NEGLIGENCE—PEDESTRIAN NOT WATCHING TRAFFIC WHILE CROSSING STREET.—*Grass v. Ake*, ... Ohio ...., 93 N. E. (2d) 590 (1950). The plaintiff was proceeding across an intersection, within a crosswalk, in reliance on a green traffic signal in her favor when she was struck and injured by defendant's automobile. It was shown that plaintiff had come to the intersection, glanced at the favorable signal and proceeded to cross the street without looking about for any approaching traffic, apparently in reliance on the green light and her statutory right of way. Plaintiff brought an action to recover damages for personal injuries and property damage contending that defendant was negligent. Defendant denied any negligence on his part, and alleged that plaintiff was guilty of contributory negligence in failing to exercise ordinary care for her own safety. The court refused to

give a requested charge on the question of contributory negligence on the grounds that plaintiff was not guilty of contributory negligence as a matter of law. The jury returned a verdict for the plaintiff, and defendant appealed to a lower appellate court which reversed the trial court on the sole ground that it had erred in refusing to charge the jury on the question of contributory negligence. Plaintiff appealed to the Supreme Court of Ohio which in the instant case affirmed the decision of the appellate court.

The Supreme Court of Ohio, by its decision in this case, affirmed the rule that a pedestrian while crossing a street at an intersection under the protection of a statutory right of way has only a preferential, and not an absolute right of way. Under this rule the pedestrian is still under the duty to use reasonable or ordinary care for his own safety, and whether the pedestrian has exercised such care is a question of fact for the jury in each case. In *Horwitz v. Eurove,* 129 Ohio St. 8, 193 N. E. 644 (1934), and *Morris v. Bloomgren,* 127 Ohio St. 147, 187 N. E. 2 (1933), the rule was applied to situations where the right of way was conferred by statute; in *Will v. McCoy,* 135 Ohio St. 241, 20 N. E. (2d) 371 (1939), and *Juergens v. Bell Distributing Inc., et al.,* 135 Ohio St. 335, 21 N. E. (2d) 90 (1939), the statutory right of way was manifested by marked crosswalks. The decision in this case extended the doctrine on the grounds that it was no less applicable because the statutory right of way was further indicated by traffic signals.

The doctrine pronounced in this case has found considerable support in other jurisdictions. In *Hendricks v. Pappas et al.,* 82 Cal. App. (2d) 724, 187 P. (2d) 436 (1947), the plaintiff waited for the traffic signal to change in his favor before crossing the intersection, proceeded to start across without looking either to right or left, and was struck by defendant's car. Defendant argued that plaintiff's failure to observe traffic conditions was contributory negligence as a matter of law. The court held that it was a question of fact for the jury, stating, 187 P. (2d) at 438:

> It cannot be said as a matter of law that such conduct constitutes contributory negligence. . . . Every person who is himself obeying the law has a right to presume that every other person will perform his duty and obey the law, and while a person may not blindly rely upon this presumption, but must himself use reasonable care . . . whether or not reasonable care is used under the circumstances, in relying upon this presumption, is a question for the jury.

Other cases which have upheld the doctrine on reasonably similar factual situations are: *Spillers v. Silver et al.,* 69 Cal. App. (2d) 231, 158 P. (2d) 617 (1945); *Hyams v. Simoncelli et al.,* 41 Cal. App. (2d) 126, 106 P. (2d) 68 (1940); *Kostouros v. O'Connell et al.,* 39 Cal. App. (2d) 618, 103 P. (2d) 1028 (1940); *Wintrobe v. Hart,* 178 Md. 289, 13 A. (2d) 365 (1940); *Bolster v. Cooper et al.,* 188 Minn. 364, 247 N. W. 250 (1933); *Bora et al. v. Yellow Cab. Co.,*

103 N. J. L. 377, 135 Atl. 889 (1927); *Pecora v. Marique,* 273 App. Div. 705, 79 N. Y. S. (2d) 350 (1949); *Lott v. DeLuxe Cab Co.,* 136 Ore. 349, 299 Pac. 303 (1931); and *Gable v. Field et ux.,* 189 Wash. 526, 66 P. (2d) 356 (1937).

No authority has been found which holds that, as a matter of law, it is not contributory negligence for a pedestrian crossing an intersection to rely solely on a statutory right of way for his own safety. That is to say, a statutory right of way confers only a preferential and not an absolute priority for the use of a crosswalk. On the other hand, the courts have been equally reluctant to hold that, as a matter of law, a pedestrian is guilty of contributory negligence for failure to maintain a lookout while relying on such a right of way. The question is one for the jury, even in the extreme cases. In *Templeton v. Kelley et al.,* 215 N. C. 577, 2 S. E. (2d) 696 (1939), plaintiff crossed an intersection diagonally without observing whether the traffic signal was in his favor. The court held that even if plaintiff were violating the statute in crossing against the light, it was not contributory negligence as a matter of law, but merely evidence to be considered by the jury in determining the question. In *Dwennell v. Oakley,* 61 R. I. 88, 200 Atl. 445 (1938), plaintiff crossed the street near an intersection controlled by a traffic light. Had plaintiff crossed at the proper place the signal would have been in his favor. It was held that plaintiff's failure to cross at the intersection was not, as a matter of law, contributory negligence. But see *Brown v. Reagan et al.,* 10 Cal. (2d) 519, 68 P. (2d) 307, *rehearing granted,* 75 P. (2d) 1063 (1938).

It is to be noted that in some jurisdictions the violation of statutory provisions, such as crossing at an intersection against a traffic signal is considered to be negligence per se, and therefore contributory negligence as a matter of law. *Schatz v. Kehoe,* 15 La. App. 9, 131 So. 66 (1930); *Buckley v. Featherstone Garage, Inc.,* 11 La. App. 564, 123 So. 446 (1929). In *Gulf, C. & S. F. Ry. v. Irick,* 116 S. W. (2d) 1099, 1103 (Tex. Civ. App. 1938), the court stated the rule to be that:

> It is only where there is a violation of some statute by the injured party or where the facts are such that ordinary minds could not differ as to the consequences, that it can be said that contributory negligence exists as a matter of law.

An examination of the authorities reveals that these cases represent the minority doctrine.

The application of the rule that a pedestrian may be guilty of contributory negligence though exercising a statutory right of way gives rise to the question as to when the rule is to be applied. That is, when is the question of contributory negligence a matter of law and when is it a question of fact for the jury. The test to be applied was expressed in *Baltimore & O. R. R. v. Reyher,* 216 Ind. 545, 24 N. E. (2d) 284, 286 (1939), where the court stated:

> Contributory negligence is ordinarily a question of fact for the jury. It is only where the controlling facts are not in dispute and are susceptible of but one conclusion upon the part of reasonable men, that the question becomes one of law for the court. When the facts are of such nature and character as to be reasonably subject to more than one inference, the jury should be permitted to decide whether the party whose conduct is under inquiry was guilty of contributory negligence.

A similar test is stated in *Prisco v. Di Fabio,* 332 Pa. 243, 2 A. (2d) 576, 577-8 (1938), citing *Attomari v. Kruger,* 325 Pa. 235, 188 Atl. 828 (1937).

The courts, after determining that the question of contributory negligence is one of fact, have charged that the standard of care required of a pedestrian is that of a reasonable man in the particular circumstances of the case. In *Spillers v. Silver et al., supra,* the test was stated to be the care a reasonable man would use in observing traffic and providing for his own safety accordingly. The manner in which the pedestrian should make the observation depends upon shifting conditions, *Mackin v. Patterson,* 270 Pa. 107, 112 Atl. 738 (1921); *Healy v. Shedaker,* 264 Pa. 512, 107 Atl. 842 (1919), an especially important condition being the presence of a traffic light in the pedestrian's favor, *Altsman v. Kelley et al.,* 336 Pa. 481, 9 A. (2d) 423 (1939); *Newman v. Protective Motor Service Co.,* 298 Pa. 509, 148 Atl. 711 (1930). *Mosley v. Mills et al.,* 145 Wash. 253, 259 Pac. 715 (1927), supplied further elements of the test to be applied by the jury. The court stated that whether one must continue to look after he starts to cross the intersection depends on such circumstances and conditions as the amount of traffic, the probability of approaching vehicles, and whether other objects or things have attracted his attention. In *Keller v. City Ry.,* 84 N. E. (2d) 69 (Ohio App. 1948), the court held that a favorable traffic signal protected the pedestrian's right of way until the pedestrian knew, or in the exercise of ordinary care should have known, that her right of way was being endangered, at which time it became incumbent upon the pedestrian to exercise the care for her own safety that a reasonable person would use.

In those states following the minority rule that a violation of statute is contributory negligence as a matter of law, the test would be limited to those instances where the pedestrian was exercising the right of way in accordance with the statute. *Schatz v. Kehoe, supra; Buckley v. Featherstone Garage, Inc., supra; Gulf, C. & S. F. Ry. Co. v. Irick, supra.*

The increase, both in volume and speed, of motor traffic on urban streets in recent decades has given rise to questions of the relative rights and duties of pedestrians and motorists. The question raised in the principal case, whether a pedestrian may be guilty of contributory negligence while exercising a statutory right of way, is a typical example. It is well settled that a pedestrian may be contributorily neg-

ligent, but that the question is one of fact to be submitted to the jury. A minority of states, which hold that violation of a traffic ordinance or statute is negligence per se, have adopted the corollary rule that such a violation by the pedestrian is contributory negligence as a matter of law, and deny recovery for the negligence of the motorist. The principal case is a reaffirmation of the majority view which allows each case to be decided on its facts. Until improved traffic systems and urban planning have rectified present-day conditions, this would appear to be the solution which will prevail.

Donald John Tufts

TORTS—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.—*Smolen et al. v. Grandview Dairy, Inc., et al.*, ... N. Y. ...., 93 N. E. (2d) 839 (1950). Plaintiff sustained injuries when a milk bottle from which she was pouring fell apart in her hand. She brought suit against the manufacturer, Owen Illinois Glass Company, and the bottler, Grandview Dairy. At the conclusion of the plaintiff's evidence the case against the manufacturer was dismissed and the jury gave the plaintiff a verdict against the defendant dairy. On appeal, the Supreme Court, Appellate Division, with two justices dissenting, reversed the verdict on the law and facts and dismissed the cause of action, 276 App. Div. 854, 93 N. Y. S. (2d) 382 (1949). The Court of Appeals, two judges dissenting, sustained the Supreme Court's decision in the instant case.

Upon examination, the bottle was found to have been properly manufactured. The cause of the break was attributed, by the plaintiff's expert witness's uncontradicted testimony, to a thermal shock fracture, which in turn resulted from the bottles being subjected to an excessive temperature differential. It was not disputed that the bottle had been delivered to a grocer and sold to the plaintiff within the same morning the injury occurred. The plaintiff's expert witness further testified that reasonable inspection would have discovered the fracture.

The defendant answered by showing that it employed all means and precautions which are ordinarily employed by dairies for the inspection and filling of used bottles. These consisted of a series of visual inspections, a cleansing process that employed a gradual temperature variance, and a vacuum filling process that would prevent the filling of any bottle that had a crack or fracture through which air could pass.

The proposition that a dairy which proves the use of customary procedures in bottling and inspecting its product has established due care as a matter of law, seems implicit in the majority decision of the instant case. Certainly the dissenting judges found such a meaning in the majority decision, and strongly expressed disapproval of the dis-

regard by the majority of what has been termed a "commonplace of law" by the Supreme Court of the United States in *Texas & Pacific Ry. v. Behymer,* 189 U. S. 468, 23 S. Ct. 622, 47 L. Ed. 905 (1903).

Dissenting Judge Conway quoted the words of Justice Johnson, who strongly took issue in the lower court decision because of the emphasis the majority there had placed on the dairy's use of customary procedure, 93 N. Y. S. (2d) at 384:

> The customary way of doing a thing may be a negligent way. Standard practice is not conclusive on the issue of negligence. It was for the jury to say, even though usage and custom were shown, whether the standard practice was negligent. If that were not the rule, defendants could, by a general custom or habit of acting, create a rule of law for their own exemption.

This language expresses a rule for which there is ample evidence in New York and elsewhere. In *Saglimbeni v. West End Brewing Co.,* 274 App. Div. 201, 80 N. Y. S. (2d) 635 (1948), *aff'd,* 298 N. Y. 875, 84 N. E. (2d) 638 (1949), it was held that common usage is a test of negligence to be considered by the *jury,* but not an conclusive one. The Supreme Court of the United States in *Texas & Pacific Ry. v. Behymer, supra,* 23 S. Ct. at 623, stated, "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. . . ." See PROSSER, TORTS, 37 (1941), and cases cited therein.

The majority distinguished the instant case from the *Saglimbeni* case, *supra,* which allowed recovery for injuries sustained when a beer bottle exploded. That decision was based on the grounds that beer exerts pressure on its container; that brewers are in the practice of reusing old bottles; and that the cleaning process which employs brushes and abrasives was liable to weaken the bottles. Thus there was evidence upon which a jury could find negligence. Nevertheless, the brewery in the *Saglimbeni* case, *supra,* employed the customary means of cleaning and inspecting its bottles, as did the dairy in the instant case and the difference in customs between a brewery and a dairy seems hardly a sufficient reason to exempt the means and precautions ordinarily used by a manufacturer or a bottler from the scrutiny of a jury.

Expressly, the majority in the instant case, dismissed the plaintiff's complaint on the grounds that she had established no casual relation between any act or omission on the part of the defendant and her injury. How much then, must a plaintiff prove to establish such a causal relation? In the instant case uncontradicted evidence showed that the cause of the break was due to a thermal shock fracture, that such a fracture was more likely to exist in the bottle at the time the dairy recovered it, or more surely produced by the defendant's cleaning processes than by any action on the part of the grocer or the plaintiff

in the few hours between the time it was delivered to the grocer and the time the injury occurred.

Where personal injuries have resulted from an exploding bottle containing charged liquids, a strong trend of authority maintains that a reasonable inference of negligence will arise when attending testimony establishes that there was proper handling of the bottle subsequent to its leaving the control of the manufacturer of the beverage. This trend is evidenced by the *Saglimbeni* case, *supra,* and more recently in *Boucher v. Louisiana Coca Cola Bottling Co.,* .... La. ...., 46 So. (2d) 701, 702 (1950), which stated that:

> . . . when the plaintiff proved that the bottle was not mishandled after it left the possession of the defendant, plaintiff made out a prima facie case of negligence against defendant, as it must be assumed that the bottle would not have exploded unless there was some defect in the bottle or its contents or both.

Courts have gone so far as to apply *res ipsa loquitur* although the bottle was out of the control of the bottler at the time of the injury, holding that the bottle need only be under the control of the defendant when the act of negligence took place, *Escola v. Coca Cola Bottling Co. of Fresno,* 24 Cal. (2d) 453, 150 P. (2d) 436 (1944); *Payne v. Rome Coca Cola Bottling Co.,* 10 Ga. App. 762, 73 S. E. 1087 (1912); *Stolle v. Anheuser-Busch Inc.,* 307 Mo. 520, 271 S. W. 497 (1925); *Benkendorfer et al. v. Garrett et al.,* 143 S. W. (2d) 1020 (Tex. Civ. App. 1940). In the *Escola* case there is an extensive list of authorities dealing with the subject together with a concurring opinion on the expediency of holding the bottler liable in such cases on the grounds that he must take a responsibility commensurate with the hazard he creates by the reuse of old bottles. This trend has been noted in 1 U. OF FLA. L. REV. 470 (1948). A note discussing the various theories upon which a plaintiff might recover is found in 28 B. U. L. REV. 490 (1948).

It seems, however, that this trend of law has been limited to bottles which contain charged liquids, *Honea et al. v. City Dairy, Inc.,* 22 Cal. (2d) 614, 140 P. (2d) 369 (1943); *Cullem v. M. H. Renken Dairy Co.,* 247 App. Div. 742, 285 N. Y. S. 707 (1936); *Boyd et al. v. American Can Co. et al.,* 249 App. Div. 644, 291 N. Y. S. 205 (1936), *aff'd,* 247 N. Y. 526, 10 N. E. (2d) 532 (1937); *Coralnick v. Abbotts Dairies Inc.,* 337 Pa. 344, 11 A. (2d) 143 (1940).

The basis for this limitation is difficult to understand. Certainly the hazard of a defective bottle is of no less danger to the user of milk than to the user of charged liquids. In each case the reuse of old bottles is involved, it is only the bottler's methods of inspection which protect the ultimate consumer from any defects therein. The extension of the doctrine to milk bottles would no more subject the courts to a flood of litigation than did the extension of this rule to charged liquids.

In the instant case the cause of the break was known, a thermal shock fracture; thus distinguishing it from the *res ipsa loquitur* cases. The plaintiff also produced evidence that this type of fracture was more apt to occur while the bottle was in the defendant's possession, than while in the possession of herself or the grocer. A jury regarded the evidence to be sufficient to infer that the fracture existed in the bottle while in the defendant's possession. The dissenting judges, both in the Appellate Division of the Supreme Court and in the Court of Appeals, maintained that there was evidentiary basis from which such an inference could be derived.

Thus it would seem that even though the rule applied to the charged liquid cases is disregarded here, the majority, in removing from the jury's deliberation the question of negligence and causal relation, have taken a long step down the road leading to judicial determination of facts—a road which ought to be closely guarded and severely restricted.

Sidney Baker

TRADE REGULATIONS — STATE ANTI-MONOPOLY STATUTE — RESTRAINT OF TRADE BY LABOR UNION.—*Commonwealth v. McHugh et al.*, ... Mass. ...., 93 N. E. (2d) 751 (1950). The Supreme Judicial Court of Massachusetts found that the Atlantic Fishermen's Union had violated MASS. ANN. LAWS c. 93, § 2 (1946). The statute reads:

> Every contract, agreement, arrangement, combination or practice in violation of the common law whereby a monopoly in the manufacture, production, transportation or sale in the commonwealth of any article or commodity in common use is or may be created, established or maintained, or whereby competition in the commonwealth in the supply or price of any such article or commodity is or may be restrained or prevented . . . or whereby the price of any article or commodity in common use is or may be unduly enhanced within the commonwealth, is hereby declared to be against public policy, illegal and void.

Under MASS. ANN. LAWS c. 93, § 3 (1946), the Attorney General of the Commonwealth is authorized to bring an action whenever a violation of this statute occurs. The Superior Court of the Commonwealth is given jurisdiction to restrain and enjoin any act forbidden or declared to be illegal under the statute.

The salient facts of the case show that the union passed a number of "votes" or "rules" whereby they sought to limit the number of pounds of fish of several varieties that could be caught by one man or brought in by one vessel on a single trip, fix minimum prices for certain kinds of fish below which the union would not permit such fish to be sold, and impose penalties by holding men or vessels in port or fining them for violation of the "votes" or "rules."

In carrying out these rules, the union became involved in two disputes. The first involved Gorton-Pew Fisheries, Ltd., a large buyer of fish in Gloucester. Gorton-Pew refused to pay for excess weight in three catches of fish. The catches, when weighed, were found to contain about fifteen per cent ice and trash. When the union allowed only a deduction of five per cent, Gorton-Pew withheld a part of the price. Subsequently, bids by Gorton-Pew were not recognized in the union selling rooms, and those who wanted to sell to them were threatened with a blacklisting and told they would not be permitted to hire union crews.

The second incident involved attempts to control prices. A large supply of fish was dumped on the market just before the beginning of Lent. Prices declined below the minimum figure voted by the union. Boats loaded with fish continued to arrive at piers, but were not unloaded by the union crews although the catches had already been sold. Prices were still under the level fixed by the union when over two million pounds of fish had accumulated. Before the preliminary injunction in this cause was issued, over three hundred thousand pounds had to be used for fertilizer.

There are two important aspects of this case to which this discussion will be limited. First, the conflict between state anti-monopoly statutes and federal antitrust laws; and secondly, the applicability of these anti-monopoly statutes to labor unions.

As to the first problem, it can be said that Sections 1 and 2 of the Sherman Anti-Trust Act, 26 STAT. 209 (1890), as amended, 50 STAT. 693 (1937), 15 U. S. C. §§ 1, 2 (1946), do not stand alone as bulwarks against monopolies in restraint of interstate commerce. Anti-trust regulations, similar to the Massachusetts statute and/or common law prohibitions against monopolies and unfair competition, exist in every state in the union. See Note, 32 COL. L. REV. 347 (1932). The form and extent they take varies according to the local problems presented. Some states have constitutional provisions. MISS. CONST. Art. VII, § 198; N. M. CONST. Art. IV, § 38; OKLA. CONST. Art. V, § 44; S. C. CONST. Art. IX, § 13; VA. CONST. Art. XII, § 165.

The real question posed in the conflict of jurisdiction between state and federal authority, in regard to antitrust and anti-monopoly regulation, is whether or not the Federal Government has spoken so as to silence the state. *See Hill et al. v. Florida* ex rel. *Watson*, 325 U. S. 538, 547, 65 S. Ct. 1373, 89 L. Ed. 1782 (1945) (dissenting opinion). In *Puerto Rico v. Shell Oil Co. (P. R.) Ltd. et al.*, 302 U. S. 253, 58 S. Ct. 167, 82 L. Ed. 235 (1937), a conspiracy in restraint of trade was held to be a matter of which the local court could take jurisdiction, notwithstanding the fact that the Sherman Anti-Trust Act also covered the offense. A number of decisions have indicated that state and federal laws must be allowed to exist together unless a contrary intent is

clearly manifest in the federal law, by its terms or by its nature. *Duckworth v. Arkansas,* 314 U. S. 390, 62 S. Ct. 311, 86 L. Ed. 294 (1941); *Mintz et al. v. Baldwin,* 289 U. S. 346, 53 S. Ct. 611, 77 L. Ed. 1245 (1933); *Illinois C. R. R. v. Public Utilities Commission of Illinois et al.,* 245 U. S. 493, 38 S. Ct. 170, 62 L. Ed. 425 (1918); *Savage v. Jones,* 225 U. S. 501, 32 S. Ct. 715, 56 L. Ed. 1182 (1912).

In *Speegle v. Board of Fire Underwriters of the Pacific,* 29 Cal. (2d) 34, 172 P. (2d) 867 (1946), the court held that the fact that Congress had enacted federal antitrust statutes did not preclude the state from legislating on the same subject. The state law in question was the Cartwright Act, CAL. BUS. & PROF. CODE §§ 16700 *et seq.* (1944). This Act expresses the public policy, long recognized at common law, against restraints of trade. The court held that there was no conflict between the Cartwright Act of California and the federal Sherman Anti-Trust Act even though interstate commerce was involved.

Mayer Bros. Poultry Farms v. Meltzer et al., 274 App. Div. 169, 80 N. Y. S. (2d) 874 (1948), expresses the same general principle that state antitrust laws can exist and be enforced along with federal statutes of the same nature.

As to the second phase of the instant case, the court held that unions are amenable to the sanctions of state anti-monopoly laws. Previously, in Massachusetts only one other case has dealt with this problem. In *A. T. Stearns Lumber Co. v. Howlett et al.,* 260 Mass. 45, 157 N. E. 82 (1927), a labor union conspired to injure the business of a "trim" manufacturer by refusing to allow union men to install trim produced by the manufacturer. The union further brought strikes against contractors, who used the non-union product of the manufacturer. An "unfair list" was issued designed to force compliance with the union's demands. The court held that the union was violating the statutory prohibitions. It must be noted, however, that the facts are readily distinguishable from the instant case in that there the action amounted to a boycott by the union in order to unionize the manufacturer's plant. But be that as it may, the doctrine of both cases is similar in that the union was held amenable to the anti-monopoly statute.

In *Local 36 of International Fishermen and Allied Workers of America et al. v. United States,* 177 F. (2d) 320 (9th Cir. 1949), the actions of the fishermen's association were very similar to those of the union in the present case, in that they engaged in an unlawful conspiracy to fix arbitrary and non-competitive prices for selling fresh fish to dealers. Non-cooperative dealers were boycotted. The action was brought under the Sherman Anti-Trust Act. Thus under federal and state acts unions have been held guilty of monopolistic practices.

The principal case must be distinguished from that class of cases where an action is brought arising out of a labor dispute between the