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RECENT CASES

CONSTITUTIONAL LAW—EQUAL PROTECTION—AUTOMATIC REVERSION OF LAND TO GRANTOR UPON USE BY NON-WHITES

Petitioner, Charlotte Park and Recreation Commission, sought a declaratory judgment determining the validity of a reverter clause which limited the use of land granted for a park to members of the white race only. The superior court found the clause valid. On appeal, *held,* affirmed. A provision in a deed that the estate shall terminate by its own limitation and automatically revert to the grantor upon use by non-whites will operate without judicial enforcement by the state courts; therefore, non-whites seeking to use the park will not be denied equal protection of the laws through the operation of the reversion. *Charlotte Park and Recreation Commission v. Barringer,* 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied sub nom. Leeper v. Charlotte Park and Recreation Comm'n,* 76 Sup. Ct. 469 (1956).

Racial restrictions on the sale and use of land were generally upheld as a proper exercise of the autonomy inherent in the ownership of land[1] until 1948, when the Supreme Court, in *Shelley v. Kraemer,*[2] held that specific enforcement of a private agreement restricting the use of land to a single race constitutes state action violative of the equal protection clause of the fourteenth amendment. In *Barrows v. Jackson*[3] the Court expanded the state action concept of the *Shelley* case, holding that awarding damages at law for breach of a racially restrictive covenant is unconstitutional state action. As a result of these decisions, the effectiveness of such a restriction was made to depend on voluntary compliance by the contracting parties.[4]

1. See Annot., A.L.R.2d 466, 474-77 (1949). Though some courts ruled that racial restrictions are invalid restraints on alienation or violative of public policy, prior to the decision in Shelley v. Kraemer, 334 U.S. 1 (1948), only one court found a violation of the equal protection clause of the fourteenth amendment. See Gandolfo v. Hartman, 49 Fed. 181 (C.C.S.D. Cal. 1892).

2. 334 U.S. 1 (1948), followed in Kraemer v. Shelley, 358 Mo. 364, 214 S.W.2d 525 (1948). In Hurd v. Hodge, 334 U.S. 24 (1948), the Court rendered a similar decision as to the District of Columbia, on the ground of federal public policy.

3. 112 Cal. App. 2d 534, 247 P.2d 99 (1952), *aff'd,* 346 U.S. 249 (1953).

4. So long as the purposes of the agreements are effectuated by voluntary compliance with their terms, there is no state action and the provisions of the fourteenth amendment have not been violated; it is not unlawful to enforce racial restrictions unless the method by which they are enforced contravenes the Federal Constitution. Shelly v. Kraemer, 334 U.S. 1, 13 (1948); Barrows v. Jackson, 346 U.S. 249, 261 (1953). In Claremont Improvement Club, Inc. v. Buckingham, 89 Cal. App. 2d 32, 200 P.2d 47 (1948), declaratory relief to establish the validity of a racially restrictive covenant was refused

The instant case raises the question whether a state court's taking cognizance of an automatic reversion of land to the grantor upon use by non-whites constitutes unconstitutional state action.[5] The North Carolina court found no state action involved in the operation of a possibility of reverter which returned an estate in fee to the grantor by its own limitation, without action by the grantor and without judicial enforcement by a state court.[6] The court further noted that denying the operation of the reverter would deprive the grantor of an interest in property without the due process of law guaranteed by the fourteenth amendment.[7]

The determinable fee, born in medieval England to fit a situation peculiar to the times, is a common-law estate in land created in the grantee until a specified event occurs, upon which the "seisin flies back" automatically to the grantor.[8] While closely akin to a fee simple subject to a condition subsequent and a fee simple with restrictive covenants running with the land, the determinable fee differs from them in two major respects: (1) the reversion operates by its own limitation to revest a fee simple absolute in the grantor,[9] and (2) the grantor retains a property right in the possibility of reverter within the protection of the due process clause of the fourteenth amendment.[10]

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on the ground that such covenants are not unconstitutional insofar as voluntary adherence to the terms is concerned, but are merely unenforceable by the state judicial process. See, also, Roberts v. Curtis, 93 F. Supp. 604 (D.D.C. 1950); Coleman v. Stewart, 33 Cal. 2d 703, 204 P.2d 7 (1949); Matthews v. Andrade, 87 Cal. App. 2d 906, 198 P.2d 66 (1948); Tovey v. Levy, 401 Ill. 393, 82 N.E. 441 (1948); Goetz v. Smith, 191 Md. 707, 62 A.2d 602 (1948), *cert. denied*, 336 U.S. 967 (1949); Phillips v. Naff, 332 Mich. 389, 52 N.W.2d 158 (1952); Weiss v. Leaon, 359 Mo. 1054, 225 S.W.2d 127 (1949); Correll v. Earley, 205 Okla. 366, 237 P.2d 1017 (1951), 5 VAND. L. REV. 634 (1952); Clifton v. Puente, 218 S.W.2d 272 (Tex. Civ. App. 1948).

5. This problem was anticipated in 2 VAND. L. REV. 119, 122 (1948). See also Annot., 3 A.L.R.2d 466, 473, 474 (1949), commenting that a limitation upon the estate granted may accomplish purposes which could not be obtained otherwise.

6. Instant case, 88 S.E.2d at 123.

7. *Ibid.*

8. For discussion of the determinable fee, see AMERICAN LAW OF PROPERTY § 2.6 (Casner ed. 1952). The estate is variously referred to as a fee simple subject to a possibility of reverter, fee simple determinable, qualified fee simple, or fee on limitation. Apparently it exists in all the states except South Carolina, and possibly Pennsylvania. See TIFFANY, REAL PROPERTY § 158 (abd. ed., Zollman 1940); 1 SIMES, FUTURE INTERESTS § 178 (1936).

9. The possibility of reverter is an interest in land which terminates automatically "without any act on her [the grantor's] part." Mott v. Danville Seminary, 129 Ill. 403, 21 N.E. 927, 930 (1889). See Brown v. Hobbs, 132 Md. 559, 104 Atl. 283, 285 (1918); 1 TIFFANY, REAL PROPERTY § 217 (3d ed., Jones 1939). The estate may be created by the use of appropriate words in the deed of conveyance, *e.g.*, " 'until' a certain event takes place," or " 'while' or 'so long as' an existing state of things shall endure." *Id.* § 218. In other words the grantee or devisee of a parcel of land retains his interest therein only so long as a specified event does not take place. The limitation subjects the remote grantee to the same liability as to termination of the estate as is sustained by the original grantee. Riner v. Fallis, 176 Ky. 575, 195 S.W. 1102 (1917); 1 TIFFANY, REAL PROPERTY § 220 (3d ed., Jones 1939).

10. The interest retained in the grantor is subject to various interpretations. The general rule is that a possibility of reverter is an existing reversionary

Heretofore state action has been conceived to be positive action which could fairly be attributed to the state; this does not include private conduct, however discriminatory.[11] Extension of the state action doctrine to the situation in the instant case would require a finding that the state acts in taking judicial recognition of a right of ownership in fee; that passive recognition by a state court of a *fait accompli* constitutes state action quite as much as judicial enforcement of a right of action. Legislation allowing a grantor to condition the future use of land upon race would seem more clearly within the scope of the *Shelley* doctrine; yet it is well settled that state enforcement of a common-law practice is state action quite the same as enforcement of legislation embodying the practice.[12] Since an individual may transfer land only by grace of the state and in the manner prescribed by the state, it could be argued that the designation of a method of conveyancing through legislation or judicial approval of a common-law practice amounts to state control of private action, which is state action.

The argument could be made that state sanction of a reversion of title upon use of land by non-whites operates to deprive colored citizens of rights entitled to positive protection under the fourteenth amendment. More than mere voluntary adherence to a private agreement, the operation of a reversion based upon race constitutes an effective restraint on the use of land by non-whites. Failure to prevent the revesting of title might be termed "passive state action" or "state sanction" of a discriminatory practice. The argument that the owner of the reversion may not be deprived of a property right without due process of law is met by the long-established rule that whenever a determinable fee is based on an invalid limitation, the limitation is inoperative and the estate becomes an absolute fee simple.[13]

interest. See LEACH, FUTURE INTERESTS, (2d ed. 1940); 1 AMERICAN LAW OF PROPERTY § 4.18 n.8 (Casner ed. 1952). The interest is in the nature of a property right. Institute for Savings v. Roxbury Home for Aged Women, 244 Mass. 583, 139 N.E. 301 (1923). It is marketable. See Strong v. Shatto, 45 Cal. App. 29, 187 Pac. 159 (1919); Richardson v. Holman, 160 Fla. 65, 33 So. 2d 641 (1948). However, a possibility of reverter is not an estate in land TIFFANY, REAL PROPERTY § 216 (abd. ed., Zollman 1940); 19 AM. JUR., *Estates* § 32 (1939). It is a vested interest. GRAY, THE RULE AGAINST PERPETUITIES § 113.3 (4th ed. 1915). *Contra,* it may be abolished by legislative act because it is a mere expectation of property in the future, not a vested right. Prall v. Burckhartt, 299 Ill. 19, 132 N.E. 280, 18 A.L.R. 992 (1921).

11. "State action, as that phrase is understood for purposes of the Fourteenth Amendment, refers to exertions of state power in all forms." Shelley v. Kraemer, 334 U.S. 1, 20 (1948). "State action of every kind . . . . State authority in the shape of laws, customs, or judicial or executive proceedings" is subject to review under the fourteenth amendment. Civil Rights Cases, 109 U.S. 317 (1883). Moreover, the fourteenth amendment "erects no shield against merely private conduct, however discriminatory." State action includes "only such action as may fairly be said to be that of the States." Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

12. Bridges v. California, 314 U.S. 252 (1941); AFL v. Swing, 312 U.S. 321 (1941); Cantwell v. Connecticut, 310 U.S. 296 (1940).

13. 6 AMERICAN LAW OF PROPERTY § 26.83 (Casner ed. 1952). See, *e.g.*, Mc-

In any event, it would seem that a racial restriction in the terms of a grant to a public park must be viewed in the light of recent decisions of the Supreme Court indicating that segregation of publicly owned recreational facilities violates the equal protection clause.[14] Assuming that the operation of a determinable fee does not involve state action,[15] the utility of the device insofar as public recreational facilities are concerned seems dubious. If non-whites may not be barred by the state or municipality, reversion of title to the grantor could not be avoided.

Gahon v. McGahon, 84 Ind. App. 500, 151 N.E. 627 (1926); Duval v. Duval, 316 Mo. 626, 291 S.W. 448 (1927); Gard v. Mason, 169 N.C. 507, 86 S.E. 302 (1915); Ruhland v. King, 154 Wis. 545, 143 N.W. 681 (1913). See generally, Wade, *Legal Status of Property Transferred Under an Illegal Transaction,* 41 ILL. L. REV. 487 (1946).

14. City of Richmond v. Deans, 37 F.2d 712, *aff'd,* 281 U.S. 704 (1930); Holmes v. Atlanta, 124 F. Supp. 290 (N.D. Ga. 1954), *aff'd,* 223 F.2d 93 (5th Cir. 1955).

15. Initially, it may be found that the estate created is not a determinable fee. Alternative results which could be urged under local law are:

(1) The particular reverter clause creates a fee simple subject to a condition subsequent or a fee simple absolute with a restrictive covenant. See LEACH, FUTURE INTERESTS 21 (2d ed. 1940); 19 AM. JUR., *Estates* §§ 27, 32 (1939); 54 HARV. L. REV. 271 n.89 (1940). The court may achieve a desired result, except where the type of estate is specifically set out, on rules of construction. See 19 AM. JUR., *Estates* § 65 (1939). The reluctance of the courts to find a fee simple determinable makes them rare. Some courts virtually write them out of the law. See Savannah School Dist. v. McLeod, 290 P.2d 593 (Cal. 1955). If, of course, the reverter in the instant case were construed to be a right of entry for condition broken or a covenant, it would require state action for enforcement, under the *Shelley* rule.

(2) An attempt to create a fee simple determinable creates a fee simple absolute. Many writers argue that the Statute Quia Emptores abolished the fee simple determinable. Since that statute prevents the relation of tenure between the grantor and the grantee such as would entitle him to resume possession, there is no principle upon which the right of automatic reverter may be supported. The fee simple determinable exists today as a result of a misleading statement of the common law by Lord Coke. KALES, FUTURE INTERESTS § 302 (2d ed. 1936); SANDERS, USES 208 (5th ed. 1844); 1 SIMES, FUTURE INTERESTS § 177-78 (1936). However, its existence is judicially recognized today. TIFFANY, REAL PROPERTY § 158 (abd. ed., Zollman 1940). Also see Vance, *Rights of Reverter and the Statute Quia Emptores,* 36 YALE L.J. 593 (1927).

(3) A limitation to a single race is an unreasonable restraint on alienation, and hence is invalid. It is generally conceded that racial restrictions on use or occupancy do not impose improper restraints on alienation of land. Meade v. Dennistone, 173 Md. 295, 196 Atl. 330 (1938); Note, 57 YALE L.J. 426, 447-48 (1948); Annot., 162 A.L.R. 180, 181 (1946). There is, however, a decided split of authority as to whether a restriction on transfer of title is an improper restraint. See Phillips v. Naff, 332 Mich. 389, 52 N.W.2d 158 (1952) (reciprocal restrictive covenant invalid as much as unenforceable because unlawful restraint on alienation). *Contra, Re* Noble and Wolfe, [1949] Ont. R. 503, 4 D.L.R. 375, *rev'd sub nom.* Noble v. Alley, [1951] Can. Sup. Ct. 64, 1 D.L.R. 321. See Porter v. Barrett, 233 Mich. 373, 206 N.W. 532 (1925); 5 TIFFANY, REAL PROPERTY § 1345 (3d ed., Jones 1939); Annot., 3 A.L.R.2d 466, 486-88 (1949); 2 VAND. L. REV. 119 (1948). Decisions are equally divided as to whether restraints on alienation in forfeiture form to a particular group of persons are invalid as contrary to public policy. Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 So. 641 (1915); Koehler v. Rowland, 275 Mo. 513, 205 S.W. 217 (1918). *Contra,* Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 Pac. 596 (1919); Title Guarantee & Trust Co. v. Garrott, 42 Cal. App. 152, 183 Pac. 410 (1919); Porter v. Barrett, 233 Mich. 373, 206 N.W. 532 (1925). See 6 AMERICAN LAW OF PROPERTY § 26.34 (Casner ed. 1952).

CONSTITUTIONAL LAW—FEDERAL EMINENT DOMAIN—POTENTIALITY FOR WATER POWER DEVELOPMENT AS ELEMENT OF COMPENSATION

A condemnation proceeding was instituted by the United States to acquire property along a navigable stream for a power project.[1] The district court awarded compensation to the landowner based in part on consideration of the availability of the land for water power development.[2] In affirming the award, the court of appeals rejected the Government's contention that compensation should be limited to the property's value for agricultural and timber purposes.[3] *Held*, (5-4), reversed. Because of the "dominant servitude"[4] of the United States in the flow of navigable waters, the Government is not required to compensate riparian landowners for an increment of value in land which is due solely to the flowing of a navigable stream. *United States v. Twin City Power Company*, 350 U.S. 222 (1956).

The requirement of the fifth amendment that private property shall not be taken[5] for public use without just compensation has normally been fulfilled in condemnation proceedings by awarding the landowner the fair market value of his property.[6] The courts have disallowed the particular value to the taker[7] as an element of market value unless such an adaptability would actually increase value on the open market apart from the need of the taker.[8] With respect to riparian land there

1. The stated purpose of the project was the improvement of navigation, since Congress could not dam a navigable stream only for power. The courts will not question the purpose of the taking under eminent domain, such as a stated purpose of improving navigation. United States v. Appalachian Power Co., 311 U.S. 377 (1940); Arizona v. California, 283 U.S. 423 (1931); Missouri *ex rel.* Camden County v. Union Elec. Light and Power Co., 42 F.2d 692 (D. Mo. 1930); Alabama Power Co. v. Gulf Power Co., 283 Fed. 606 (M.D. Ala. 1922).

2. United States v. 3,928.09 Acres of Land, 114 F. Supp. 719 (W.D.S.C. 1953).

3. United States v. Twin City Power Co., 215 F.2d 592 (4th Cir. 1954).

4. See Gibson v. United States, 166 U.S. 269 (1897).

5. Property is considered taken when the owner is deprived of its use. United States v. Lynah, 188 U.S. 445 (1903). In United States v. Causby, 328 U.S. 256 (1946), it was held that the noise and glare caused by aircraft flying at low altitude constituted a taking, because the landowner was deprived of its use as a chicken farm.

6. United States *ex rel.* TVA v. Southern States Power Co., 33 F. Supp. 519 (W.D.N.C. 1940).

7. Among the various elements of fair market value included in awarding compensation have been: the value for canal and lock purposes, United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); the value of growing trees, Patterson Orchard Co. v. Southwest Arkansas Util. Corp., 179 Ark. 1029, 18 S.W.2d 1028 (1929); the value of mineral rights, Hollister v. Cox, 131 Conn. 523, 41 A.2d 93 (1945); the value for special uses such as water power development, Amory v. Commonwealth, 321 Mass. 240, 72 N.E.2d 549 (1947); and the value of improvements, Banner Milling Co. v. State, 240 N.Y. 533, 148 N.E. 668 (1925).

8. Olson v. United States, 292 U.S. 246 (1934); City of New York v. Sage, 239 U.S. 57 (1915); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); United States v. Great Falls Mfg. Co., 112 U.S. 645 (1884);

is a further consideration. By virtue of the commerce clause of the Federal Constitution[9] the Government has complete control over navigable streams for purposes of regulating and improving navigation and may extinguish riparian rights in exercising this dominant servitude.[10] Owners of land on navigable streams are not entitled to compensation for injuries which are merely incidental[11] to the proper exercise of the governmental power.[12] In the case of such a taking, it is reasoned that the individual owns nothing and therefore loses nothing. The problem in the instant case is that the condemned property had an actual value as a potential site for the development of water power, but this value hinged upon access to a stream over which the Government had the right of exclusive control.[13]

In 1913, the Supreme Court in *United States v. Chandler-Dunbar Water Power Co.*[14] unanimously held that because a riparian owner had no property right in the stream and no right to construct the works necessary to develop water power, the owner was not entitled to compensation for the value of the land as a site for water power development. This element of value in the land was attributed solely to the flow of the stream. The majority opinion in the instant case utilized the same rationale. Quoting with approval the statement " 'that the running water in a great navigable stream is capable of private ownership is inconceivable' " the Court refused to allow compensation by the Government for an increment of value which it has power to grant or withhold as it chooses.[15] In addition, the Court indicated that such an award would be based upon the unique value of the property to the taker, in contravention of well-established principles of valuation.[16]

Boom Co. v. Patterson, 98 U.S. 403 (1879). In the latter case, the Court remarked that compensation is not diminished because the purpose of the taker was coincidental with the most valuable use of the property.

9. U.S. CONST. art. I, § 8, cl. 3.

10. "All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution." Gibson v. United States, 166 U.S. 269, 271-72 (1897).

11. *E.g.*, a denial of access to a navigable stream is an incidental injury.

12. United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); Scranton v. Wheeler, 179 U.S. 141 (1900); Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co., 142 U.S. 254 (1891). But riparian owners on non-navigable streams are entitled to compensation for incidental injuries. United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950).

13. The exercise of the Government's right requires clear authorization by Congress. The Federal Water Power Act of 1920 has not abolished private proprietary rights existing under state law to use the waters of a navigable stream for power purposes. Federal Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954).

14. 229 U.S. 53 (1913).

15. Instant case at 228. Licensing for development of water power is governed by the Federal Water Power Act. 41 STAT. 1077 (1920), 16 U.S.C.A. §§ 791, 797-814 (1941).

16. "[T]he question is what has the owner lost, not what the taker gained." Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195 (1910).

The dissenting Justices would reject the theory that the government's servitude permits it to pay less compensation than any other condemnor. Support for this position was sought in a holding of the *Chandler-Dunbar* case which permitted value for canal and lock purposes to be included in the compensation for riparian land.[17] However, this element of value was not regarded in that case as attributable to the flow of the stream and the government's "dominant servitude" was therefore not a consideration. In discussing the question of including a value to the taker in market value, the dissenting opinion pointed out that just compensation should include the value of the property for all of the reasonable uses which are not too remote and which would enter into market value in the absence of the needs of the condemnor.[18]

It may be argued that the approach of the majority in the instant case reflects a progressive policy of facilitating the development of public works.[19] Certainly it is a logical corollary to the principle that the Government may control riparian access to navigable streams. However, one might question the use of the navigation powers under the commerce clause to superimpose a condition upon the "just compensation" mandate of the fifth amendment. Under the resulting dual definition[20] of just compensation, the identity of the condemnor may require the exclusion of a normal element of market value and may occasion actual loss to the owner of condemned property. It may be significant, in view of the increasing activity of the federal government in the power and flood control fields, that the unanimity of the Court in the *Chandler-Dunbar* decision was not repeated in the instant case.

CONTRACTS—PLACE OF MAKING—ACCEPTANCE BY INSTANTANEOUS MEANS OF COMMUNICATION

Plaintiff, an English company, sent a counter-offer for the purchase of copper cathodes from London to the Amsterdam agent of the defendant American corporation. Acceptance of the counter-offer by the agent was received by plaintiff in London. The communication between the companies was by telex.[1] In this action for breach of the

17. 229 U.S. at 75.
18. Boom Co. v. Patterson, 98 U.S. 403 (1879).
19. 65 YALE L. J. 96 (1955).
20. Compensation was allowed for dam site value when the taking was not done by the federal government. Grand River Dam Authority v. Grand-Hydro, 335 U.S. 359 (1948); Union Elec. Light & Power Co. v. Snyder Estate Co., 65 F.2d 297 (8th Cir. 1933).

1. This equipment consists of a teleprinter in the offices of the parties operated like a typewriter. The messages dispatched in one country are almost instantaneously received and typed in the other country.

contract plaintiff contended for purposes of jurisdiction that the contract was made in London, and sought leave to serve process on defendant in New York.[2] Service of process was granted and defendant appealed. *Held,* affirmed. When a contract is negotiated by instantaneous means of communication it is not complete until the acceptance is received by the offeror, and the contract is made at the place where the acceptance is received. *Entores Ld. v. Miles Far East Corp.,* [1955] 3 Weekly L.R. 48 (C.A.).

A contract is deemed entered into at the place where the last act necessary to its formation is performed.[3] If acceptance is made immediately after the offer when the parties are together no question arises as to the place of contract.[4] When the offer and acceptance are not simultaneous and the parties are separated the place of contract is generally held to be where the reply is mailed[5] or delivered to a telegraph company.[6] However, in *Rhode Island Tool Co. v. United States*[7] a divided Court of Claims recently rejected this view and followed the minority of courts which hold that the posting of a letter does not constitute an acceptance since the offeree under the postal regulations may withdraw the letter of acceptance from the mail. There is a conflict of opinion as to the place of contract when the means of communication involved are instantaneous, such as telephone or telex service.[8] The instant case,[9] one of first impression, and the

2. R.S.C., Ord. 11, r. 1, provides that service out of the jurisdiction of a writ of summons may be allowed (e) to enforce a contract (i) "made within the jurisdiction." As cited in instant case, [1955] 3 Weekly L.R. at 49.

3. Hogue-Kellogg Co. v. G. L. Webster Canning Co., 22 F.2d 384 (4th Cir. 1927); RESTATEMENT, CONTRACTS § 74 (1932).

4. 1 WILLISTON, CONTRACTS § 97 (rev. ed. 1936).

5. Tayloe v. Merchants' Fire Ins. Co., 50 U.S. (9 How.) 390 (1850); Adams v. Lindsell, 1 Barn. & Ald. 681, 106 Eng. Rep. 250 (K.B. 1818); RESTATEMENT, CONTRACTS §§ 64, 67 (1932); 1 WILLISTON, CONTRACTS § 81 (rev. ed. 1936). The offeror may impose the condition that the acceptance actually be received. 1 WILLISTON, CONTRACTS § 88 (rev. ed. 1936).

6. Garrettson v. North Atchinson Bank, 47 Fed. 867 (C.C.W.D. Mo. 1891); Western Union Tel. Co. v. Wheeler, 114 Okla. 161, 245 Pac. 39, 47 A.L.R. 156 (1926).

7. 128 F. Supp. 417 (Ct. Cl. 1955), 7 WESTERN RES. L. REV. 103. The decision is open to criticism for erroneously implying that a supposed change in the postal regulations permitting withdrawal became effective for the first time in 1948. Actually this regulation, which is the basis of the minority view, has been in effect since 1913. See Dick v. United States, 130 Ct. Cl. 703, 82 F. Supp. 326, 329 (1949); Guardian Nat'l. Bank v. Huntington County State Bank, 206 Ind. 185, 187 N.E. 388 (1933); Traders' Nat'l. Bank v. First Nat'l. Bank, 142 Tenn. 229, 217 S.W. 977 (1920). The court in the *Tool Co.* case could have reached the same result by applying the majority view which recognizes that the offeror may impose the condition that the acceptance actually be received. See note 5 *supra.* The Government's invitation to the offeror to submit a bid, which of course became a part of the contract, contained language that could be construed as such a condition.

8. *Compare* Cardon v. Hampton, 21 Ala. 438, 109 So. 176 (1926); Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 74 Pac. 855 (1903); Dudley A. Tyng & Co. v. Converse, 180 Mich. 195, 146 N.W. 629 (1914), *with* RESTATEMENT, CONTRACTS § 65 (1932). See criticism of the above cases in 1 WILLISTON, CONTRACTS § 82 (rev. ed. 1936).

9. Instant case, [1955] 3 Weekly L.R. at 50.

Restatement of Contracts[10] (without comment) adopt the view that acceptance by telephone is the same as an oral acceptance when the parties are in the presence of each other and a contract is made at the place where notice of acceptance is received by the offeror. The majority of courts in the United States seem to treat contracts negotiated by telephone in the same way as postal communications and hold the place of contract to be where the acceptor speaks.[11]

As a major premise for its holding in the instant case the court relied on the long discredited proposition that there must be a "meeting of the minds" in order to form a contract,[12] and deduced as a corollary that actual notification of acceptance to the offeror is a prerequisite to the existence of a contract.[13] Since notification was received by the offeror in London, the court found that to be the place of the contract's formation. The opposite results in cases involving contracts entered into by mail or telegraph were distinguished by the court as exceptions to the general rule requiring actual notice. These so-called exceptions were said to have resulted from the necessities of commercial expediency and convenience, in order to bring about an early conclusion of negotiations with a resulting consummation of a contract. The court stressed the similarity between telex communications and contracts negotiated by the parties in the presence of each other and noted that it was unnecessary to adopt the rule of convenience which accounted for the postal and telegraph exceptions.

The problem of instantaneous communication and its relation to the place of contract has presented itself with frequent significance in the determination of jurisdiction and the law to be applied in the enforcement of the contract.[14] In view of the development of more mechanical and instantaneous means of communication it is to be regretted that the international commercial world is confronted with the conflicting rules which now exist in the United States and England.

INSURANCE—AUTOMOBILE LIABILITY OMNIBUS CLAUSE—COVERAGE OF SUB-PERMITTEE

Plaintiff, who was injured in an automobile accident, recovered judgment against the driver and thereupon brought an action against

10. RESTATEMENT, CONTRACTS § 65 (1932).
11. Cases cited note 5 *supra*.
12. FERSON, RATIONAL BASIS OF CONTRACTS 102 (1949).
13. Instant case, [1955] 3 Weekly L.R. at 54.
14. United States v. Bushwick Mills, Inc., 165 F.2d 198 (2d Cir. 1947); Cowdin Grocery Co. v. Early-Foster Co., 237 S.W. 578 (Tex. Civ. App. 1921); Cuero Cotton Oil & Mfg. Co. v. Feeders' Supply Co., 203 S.W. 79 (Tex. Civ. App. 1918); Planters' Cotton Oil Co. v. Whitesboro Cotton Oil Co., 146 S.W. 225 (Tex. Civ. App. 1912).

the owner's insurer under an omnibus clause in the owner's automobile liability insurance policy.[1] The owner's son had paid the greater part of the price of the automobile, but the purchase was made in the father's name because the son was a minor. The father gave the son permission to use the automobile as his own, and the son lent the automobile to the person who was driving at the time of the accident. The trial court rendered judgment for plaintiff on the ground that the driver was using the automobile with the owner's permission at the time of the accident and thus was within the scope of the omnibus clause. On appeal, *held,* reversed. Permission of the named insured sufficient to bring a person driving his automobile within the coverage of an omnibus clause may be implied; however, a grant of permission to his son to use the automobile as the son's own does not include an implied permission to lend the automobile to third persons. *Hamm v. Camerota,* 290 P.2d 713 (Wash. 1955).

The usual automobile liability insurance policy today contains an "omnibus clause" purporting to insure persons using the named insured's automobile with his permission.[2] The clause involved in the instant case represents the usual form. Although such clauses are standardized for the most part, there is sometimes a difference in wording. Instead of "permission" some clauses use the word "consent." "Permission" and "consent" convey much the same meaning; although "consent" may be more active or affirmative in its meaning than "permission" this distinction has not been given much weight by the courts.[3] Where the named insured expressly gives authority to his permittee to let third persons use his automobile, the courts are in agreement that a sub-permittee becomes an insured under the terms of the omnibus clause.[4] They are also in agreement where the insured expressly forbids the original permittee to let anyone else use his automobile. Under such circumstances a third person would not be covered.[5]

Where the insured is silent—neither giving nor denying permission to lend the automobile—the courts are in conflict, the majority holding

1. "Definition of 'Insured.' With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission." Instant case, 290 P.2d at 716.

2. See 7 APPLEMAN, INSURANCE LAW AND PRACTICE § 4353 (1942), concerning states in which an omnibus clause is required by statute.

3. American Automobile Ins. Co. v. Jones, 163 Tenn. 605, 45 S.W.2d 52 (1932).

4. Mercer Cas. Co. v. Kreamer, 105 Ind. App. 358, 11 N.E.2d 84 (1937); Odden v. Union Indemnity Co., 156 Wash. 10, 286 Pac. 59 (1930).

5. Columbia Cas. Co. v. Lyle, 81 F.2d 281 (5th Cir. 1936); Ohio Cas. Ins. Co. v. Plummer, 13 F. Supp. 169 (S.D. Tex. 1935); Cocos v. American Automobile Ins. Co., 302 Ill. App. 442, 24 N.E.2d 75 (1939); Clemons v. Metropolitan Cas. Ins. Co., 18 So. 2d 228 (La. App. 1944).

that a sub-permittee is not covered.[6] A minority of courts have found that an implied permission to lend the automobile is sufficient to extend coverage. When a permittee extends the use of the car to a third person either an agency or bailment relation is created. The courts which follow the minority view are somewhat more ready to imply authority to lend the car in the case of agency than in the case of bailment. Some courts have found an implied permission by acquiescence where the named insured knew that the original permittee had in the past permitted others to drive the automobile.[7] Following the agency theory, other courts have held that a sub-permittee is covered if he serves some purpose, benefit, or advantage of the original permittee. Thus permission has been found where the original permittee was being driven in the automobile by the sub-permittee,[8] where the sub-permittee was going to get medicine for the original permittee who was ill,[9] and where a garage repairman lent a substitute automobile to a customer without restriction to be used in place of a family car which the repairman knew the customer's wife was accustomed to drive.[10]

An implied permission in the instant case would have to be found in the broad grant of authority to the son to use the automobile as his own. Since it would be difficult to conceive of a broader grant of authority, the implication of the decision is that authority of a permittee to lend the automobile can never be inferred from the broad language of the initial permission alone. In most cases a finding of implied permission to the original permittee to lend the insured's car has been based on circumstances other than the broad scope of the initial permission.[11]

To allow any person, whether acquainted with the named insured or not, to be protected by the terms of an omnibus clause would impose an unfair burden on the insurer.[12] The insurer has signified its

6. Majority: Samuels v. American Automobile Ins. Co., 150 F.2d 221 (10th Cir. 1945); Trotter v. Union Indemnity Co., 35 F.2d 104 (9th Cir. 1929); Allstate Ins. Co. v. Hodsdon, 92 N.H. 233, 29 A.2d 782 (1942); Travelers Ins. Co. v. Marcoux, 91 N.H. 450, 21 A.2d 161 (1941); Cronan v. Travelers Indemnity Co., 126 N.J.L. 56, 18 A.2d 13 (1941).

Minority: United Services Automobile Ass'n v. Preferred Acc. Ins. Co., 190 F.2d 404 (10th Cir. 1951); Perrodin v. Thibodeaux, 191 So. 148 (La. App. 1939); Boyer v. Massachusetts Bonding & Ins. Co., 277 Mass. 359, 178 N.E. 523 (1931).

7. Tomasetti v. Maryland Cas. Co., 117 Conn. 505, 169 Atl. 54 (1933); Schimke v. Mutual Automobile Ins. Co., 266 Wis. 517, 64 N.W.2d 195 (1954).

8. Glens Falls Indemnity Co. v. Zurn, 87 F.2d 988 (7th Cir. 1937); Jones v. New York Cas. Co., 23 F. Supp. 932 (E.D. Va. 1938); American Employers' Ins. Co. v. Liberty Mut. Ins. Co., 93 N.H. 101, 36 A.2d 284 (1944).

9. Aetna Life Ins. Co. v. Chandler, 89 N.H. 95, 193 Atl. 233 (1937).

10. Drake v. General Acc., Fire & Life Assurance Co., 88 Ga. App. 408, 77 S.E.2d 71 (1953).

11. *But see* Perrodin v. Thibodeaux, 191 So. 148 (La. App. 1939); Boyer v. Massachusetts Bonding & Ins. Co., 277 Mass. 359, 178 N.E. 523 (1931).

12. See APPLEMAN, AUTOMOBILE LIABILITY INSURANCE 122-23 (1938).

confidence in the selection made by the named insured but not that made by his permittee. Thus the decision in the instant case seems sound in that the court would not find an implied blanket authority to lend the automobile without the named insured's knowledge or prior consent. Since the amount of risk forms the basis of the premiums charged, ordinarily the insurer has a right to assume that the risk undertaken will not be enlarged.[13]

INSURANCE—INSURER'S RIGHT OF SUBROGATION-WAIVER BY REFUSAL TO PAY CLAIM

Plaintiff's ambulance, worth $6,000 and insured for $3,000, was destroyed by fire allegedly caused by the negligence of a third party. After denial of his claim by defendant, plaintiff released the tortfeasor from all liability in consideration of $3,000, reserving any right of action he might have against defendant. In plaintiff's suit under the policy, defendant demurred on the ground that its right of subrogation had been destroyed by the release of the tortfeasor in breach of a stipulation in the policy of insurance that the insured would do nothing to prejudice such right. The lower court sustained the demurrer and plaintiff took a non-suit. *Held,* reversed. An insurer's refusal to pay an obviously valid claim when filed constitutes a waiver of his right of subrogation so that its destruction cannot be asserted as a defense to an action by the insured. *Poole v. William Penn Fire Insurance Co.,* 84 So. 2d 333 (Ala. 1955).

It is a generally accepted rule of law that an insurer, upon payment of a loss to the insured, is subrogated to the insured's rights against the tortfeasor to the extent of such payment.[1] Since it is derived from the insured's claim against the responsible party, the insurer's right of subrogation will be defeated by the insured's full release of the tortfeasor.[2] Further, the release will be a defense to an action by the insured against the insurer if payment has not been made under the policy,[3] and in many instances, will require reimbursement of the

13. For a general collection of cases: see 7 APPLEMAN, INSURANCE LAW AND PRACTICE 156-59 (1942); 6 BLASHFIELD, AUTOMOBILE LAW AND PRACTICE 595-625 (1945); Annot., 160 A.L.R. 1195-1223 (1946).

1. Garrison v. Memphis Ins. Co., 60 U.S. (19 How.) 312 (1856); Liverpool Steam Co. v. Phenix Ins. Co., 129 U.S. 397 (1889); United States v. United States Fidelity & Guaranty Co., 247 Fed. 16 (6th Cir. 1918); Underwood v. Dooley, 197 N.C. 100, 147 S.E. 686 (1929); Potomac Ins. Co. v. Nickson, 64 Utah 395, 231 Pac. 445 (1924); 6 APPLEMAN, INSURANCE LAW AND PRACTICE § 4051 (1942); 8 COUCH, INSURANCE § 1997 (1931).

2. Phoenix Ins. Co. v. Erie Transp. Co., 117 U.S. 312 (1886); Harter v. American Eagle Fire Ins. Co., 60 F.2d 245 (6th Cir. 1932); Maryland Motor Car Ins. Co. v. Haggard, 168 S.W. 1011, 1013 (Tex. Civ. App. 1914) (dictum); 6 APPLEMAN, INSURANCE LAW AND PRACTICE § 4092 (1942).

3. Auto Owners' Protective Exchange v. Edwards, 82 Ind App. 558, 136

insurer by the insured if payment has been made.[4] The right is an equitable one and rests on the principle that the person primarily responsible for the loss should bear the consequences of his wrongful act.[5] Where the party asserting it has by his conduct made it inequitable to do so, the courts will not enforce the right. Thus, the right has been deemed waived by contract when the insurance policy provides for subrogation if the insurer claims that the loss was caused by negligence of a third party, and, at the time of payment, the insurer makes no such claim.[6] The right has also been deemed waived by a refusal to join with the insured in a suit against the tortfeasor after payment is made under the policy,[7] and by a consistent refusal to pay an obviously valid claim which forces the insured to sue the tortfeasor.[8] In the last situation, the courts have allowed recovery by the insured against the insurer even though the insured had settled with and released the tortfeasor from all liability. It is to be noted, however, that the insurer is not required to act with undue haste in order to avoid losing his right of subrogation. Only inequitable conduct will result in a waiver.[9]

In the instant case, the insurer, by refusing to pay the obviously valid claim, required the insured to sue either the insurer or the tortfeasor and neither course of action would have given him what he contracted for, *i.e.*, indemnity free from vexatious litigation. The insurer lost its right of subrogation, but had the claim been paid when filed and when in good conscience it should have been paid, the insurer and the insured could have joined in suit against the tortfeasor and placed the whole loss where it properly belonged. The result of these rulings is to place good faith compliance with the terms of the contract on the insurer.[10]

N.E. 577 (1922); Packham v. German Fire Ins. Co., 91 Md. 515, 46 Atl. 1066 (1900); Farmer v. Union Ins. Co., 146 Miss. 600, 111 So. 584 (1927); Brown v. Vermont Mut. Fire Ins. Co, 83 Vt. 161, 74 Atl. 1061 (1910) (dictum).

4. However, if insured has acted in good faith towards insurer, the amount of reimbursement may only be the amount recovered from both tortfeasor and insurer which exceeds the actual loss sustained by the insured. See, 29 AM. JUR., *Insurance* § 1346 (1940) and cases cited thereunder.

5. 8 COUCH, INSURANCE § 1996 (1931).

6. Firemen's Ins. Co. v. Georgia Power Co., 181 Ga. 621, 183 S.E. 799 (1935); Firemen's Fund Ins. Co. v. Thomas, 49 Ga. App. 731, 176 S.E. 690 (1934); Fire Ass'n v. Schellenger, 84 N.J. Eq. 464, 94 Atl. 615 (Ct. Err. & App. 1915). See Leonard v. Bottomley, 210 Wis. 411, 245 N.W. 849 (1932).

7. Sun Ins. Office v. Hohenstein, 128 Misc. 870, 220 N.Y. Supp. 386 (N.Y. Munic. Ct. 1927); Aetna Ins. Co. v. Confer, 158 Pa. 598, 28 Atl. 153 (1893).

8. Weber v. United Hardware & Implement Mut. Co., 75 N.D. 581, 31 N.W.2d 456 (1948); Roberts v. Fireman's Ins. Co., 376 Pa. 99, 101 A.2d 747 (1954); Powers v. Calvert Fire Ins. Co., 216 S.C. 309, 57 S.E.2d 638 (1950).

9. Maryland Motor Car Ins. Co. v. Haggard, 168 S.W. 1011 (Tex Civ. App. 1914).

10. That the insurer is not overly concerned with its right of subrogation is shown by surveys indicating that collision insurance premiums are calculated on an indemnity basis, recovery by the insurer on a subrogated claim being unexpected. CROBOUGH AND REDDING, CASUALTY INSURANCE 309 (1928); 48 MICH. L. REV. 1205 (1950).

MASTER AND SERVANT—BORROWED SERVANT DOCTRINE—CONTRACT AS PROOF OF ASSUMPTION OF CONTROL

In a contract with the Bethlehem Steel Company, defendant trucking company agreed to transport steel from a river dock to a bridge site. The contract specifically provided that Bethlehem would unload the steel after its arrival. During an unloading process the driver of one of defendant's trucks negligently loosened the chains that bound the steel to the truck, causing a steel girder to fall and injure plaintiff, an employee of Bethlehem. Bethlehem's foreman had taken charge of the unloading and employees of Bethlehem, including plaintiff, had already boarded the truck to start the unloading process. In plaintiff's suit to recover damages, the trial court held as a matter of law that for the period in which the accident occurred defendant's truck driver had become an employee of Bethlehem, and, therefore, defendant was not liable for the driver's negligence. The appellate division reversed on the ground that the question should have been given to the jury. On appeal, *held,* affirmed. The contract and the exercise of control by Bethlehem's foreman do not constitute conclusive proof that defendant surrendered control of the driver to Bethlehem. *Stone v. Bigley Bros. Inc.,* 309 N.Y. 132, 127 N.E.2d 913 (1955).

Although it has been held that a person may at one time be the servant of two masters who are not joint employers, provided service to one does not involve abandonment of service to the other,[1] the general rule is that when a servant is loaned for the performance of a specific act or series of acts and control of the servant is temporarily released to a new master, the new master assumes responsibility for the acts of the servant done within the scope of his employment.[2] This rule is derived from the "borrowed servant" doctrine.[3] Generally, whether an original employee remained the master of his borrowed servant is a question of fact.[4] Of the factors to be considered,

1. See Butler v. Industrial Comm'n, 50 Ariz. 516, 73 P.2d 703 (1937); King v. Emerson, 10 Cal. App. 414, 288 Pac. 1099 (1930); Meridian Taxicab Co. v. Ward, 184 Miss. 499, 186 So. 636, 120 A.L.R. 1346 (1939); Gordon v. S. M. Byers Motor Car Co., 309 Pa. 453, 164 Atl. 334 (1932); RESTATEMENT, AGENCY § 226 (1933); FERSON, PRINCIPLES OF AGENCY § 35 (1954).

2. See, *e.g.,* Denton v. Yazoo & M.V.R.R., 284 U.S. 305 (1932); Byrne v. Kansas City, Ft. S. & M.R.R., 61 Fed. 605 (6th Cir. 1894); Pennsylvania Cas. Co. v. Elkins, 70 F. Supp. 155 (E.D. Ky. 1947); Indemnity Ins. Co. v. Malisfski, 46 F. Supp. 454 (D. Md. 1942); Blakely v. United States Fidelity & Guaranty Co., 67 Ga. App. 795, 21 S.E.2d 339 (1942); Sanford v. Keef, 140 Tenn. 368, 204 S.W. 1154 (1918).

3. See, *e.g.,* Denton v. Yazoo & M.V.R.R., 284 U.S. 305 (1932); McFarland v. Dixie Mach. & Equipment Co., 348 Mo. 341, 153 S.W.2d 67, 136 A.L.R. 516 (1941); RESTATEMENT, AGENCY § 227 (1933); Smith, *Scope of the Business: The Borrowed Servant Problem,* 38 MICH. L. REV. 1222 (1940).

4. See, *e.g.,* Lee Moor Contracting Co. v. Blanton, 49 Ariz. 130, 65 P.2d 35 (1937); Ryder v. Plumley, 138 Fla. 378, 189 So. 422 (1939); Balaus v. Lexing-

the most important is the division of control agreed upon by the parties.[5] Should all the facts indicate that complete control of the servant was surrendered and that the servant was engaged solely in the furtherance of the business of the new master, the new master is liable for the torts of the servant under the doctrine of respondeat superior.[6] Conversely, if the general employer retains control of the servant while he is in the service of another, the general employer remains liable for any injuries the servant may cause while acting within the scope of his employment.[7] When control is shared, the person who had control of the particular act which caused the injury is liable.[8] However, there is a strong presumption that when only partial control is surrendered the general employment continues.[9]

While control is the most important factor to be considered, continuation of the general employment may be indicated by the length of time the servant is borrowed,[10] the right of the general employer to substitute at any time another servant for the one loaned,[11] or the fact that the servant has the skill of a specialist.[12] Another im-

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ton Shoe Co., 93 N.H. 428, 43 A.2d 155 (1945); Ramsey v. New York Cent. R.R., 269 N.Y. 219, 199 N.E. 65, 102 A.L.R. 511 (1935); Charles v. Barrett, 233 N.Y. 127, 135 N.E. 199 (1922); Mature v. Angelo, 373 Pa. 593, 97 A.2d 59 (1953); Gaston v. Sharpe, 179 Tenn. 609, 16 S.W.2d 784 (1943); Alvey v. Butchkavitz, 196 Va. 447, 84 S.E.2d 535 (1954). The great majority of the cases indicate that this is the essential question to be answered. See, *e.g.*, Standard Oil Co. v. Anderson, 212 U.S. 215 (1909); Charles v. Barrett, 233 N.Y. 127, 135 N.E. 199 (1922). Dean Ferson says that in effect the question to be asked is always "was the very act that caused the injury done in serving the alleged master." FERSON, PRINCIPLES OF AGENCY 48 (1954); see also, Stevens, *The Test of the Employment Relation,* 38 MICH. L. REV. 188 (1939).

5. See, *e.g.*, Case v. Kadota Fig Ass'n of Producers, 207 P.2d 86 (Cal. App. 1949); Thomas v. Great Western Mining Co., 150 Okla. 212, 1 P.2d 165 (1931); Gaston v. Sharpe, 179 Tenn. 609, 168 S.W.2d 784 (1943); Sanford v. Keef, 140 Tenn. 368, 204 S.W. 1154 (1918). *But see* the English rule where control is not the paramount test, Century Ins. Co. v. Northern Ireland Trans. Bd., [1942] A.C. 509 (the great test is—whether the servant was transferred or only the use and benefit of his work).

6. Linstead v. Chesapeake & O.R.R., 276 U.S. 28 (1928); Brown v. Smith, 186 Ga. 274, 12 S.E. 411 (1890); Graalum v. Radisson Ramp Inc., 71 N.W.2d 904 (Minn. 1955); Leeter v. Messick, 92 Ind. App. 264, 173 N.E. 238 (1930); Ramsey v. New York Cent. R.R., 269 N.Y. 219, 199 N.E. 65, 102 A.L.R. 511 (1935); Thomas v. Great Western Mining Co., 150 Okla. 212, 1 P.2d 165 (1931).

7. Standard Oil Co. v. Anderson, 212 U.S. 215 (1909); Doty v. Lacey, 114 Cal. App. 2d 73, 249 P.2d 550 (1952); Densby v. Bartlett, 318 Ill. 616, 149 N.E. 591 (1925); Hassebroch v. Weaver Constr. Co., 67 N.W.2d 549 (Iowa 1954).

8. Kelly v. Summers, 210 F.2d 665 (10th Cir. 1954); FERSON, PRINCIPLES OF AGENCY §§ 35-37 (1954).

9. United States Steel Corp. v. Mathews, 261 Ala. 120, 73 So. 2d 239 (1954); Peters v. United Studios, 98 Cal. App. 373, 277 Pac. 156 (1929); Sarris v. A. A. Pruzick & Co., 37 N.J. Super. 340, 117 A.2d 305 (App. Div. 1955); Falk v. Unger, 33 N.J. Super. 589, 111 A.2d 283 (App. Div. 1955); Agostini v. W. J. Halloran Co., 111 A.2d 537 (R.I. 1955); Blessing v. Pittman, 70 Wyo. 416, 251 P.2d 243 (1952).

10. Shepard v. Jacobs, 204 Mass. 110, 90 N.E. 392, 393 (1910) (dictum); RESTATEMENT, AGENCY § 220(2)(f) (1933).

11. Lowell v. Harris, 24 Cal. App. 2d 70, 74 P.2d 551 (1938).

12. Lee v. Glen Falls Hospital, 265 App. Div. 607, 42 N.Y.S.2d 169 (3d Dep't 1943).

portant question is whether the servant was furthering the business of his general employer in serving the temporary employer.[13]

If reasonable minds might not differ on the conclusion to be drawn from the facts, the question whether the general employment continued during the performance of "borrowed" services becomes one of law for the court to decide.[14] As each case stands on its own particular facts, no concrete rules can be formulated.[15] Evidence that another person was solely responsible for the performance of the work in which the servant was engaged has not been deemed conclusive proof of a transfer of control; but in nearly every such case the injuries for which the general employer was held liable resulted from the servant's negligent use of a dangerous instrumentality, and the courts have stressed the importance of this factor.[16]

In the instant case the driver's negligence was purely personal. The loosening of the chains was clearly an act of unloading, which by the terms of the contract was to be done by the Bethlehem Steel Company. There was no specific agreement to transfer the driver from one employment to another, but usually no such agreement is deemed necessary.[17] Under the contract, defendant had only an

13. See, *e.g.*, Jones v. Getty Oil Co., 92 F.2d 255 (10th Cir. 1937) (ultimate test); Bertino v. Marion Steam Shovel Co., 64 F.2d 409 (8th Cir. 1933); Byrne v. Kansas City Ft. S. & M.R.R., 61 Fed. 605 (6th Cir. 1894) (whose work was the servant doing?); Rockwell v. Grand Trunk Western Ry., 253 Mich. 144, 234 N.W. 159 (1931).

14. See Hudson v. Lazarus, 217 F.2d 344 (D.C. Cir. 1954); Angco v. Standard Oil Co., 66 F.2d 929 (9th Cir. 1933); Lee Moor Contracting Co. v. Blanton, 49 Ariz. 130, 65 P.2d 35 (1937); Ryder v. Plunley, 138 Fla. 378, 189 So. 422 (1939); Balcus v. Lexington Shoe Co., 93 N.H. 428, 43 A.2d 155 (1945); Cook v. Knox, 273 P.2d 865 (Okla. 1954).

15. In Christiansen v. Mehlhorn, 146 Wash. 340, 262 Pac. 633 (1928), an action was brought by an independent contractor against the owner of a building for injuries sustained because of the negligence of the janitor who ran the defendant's elevator while plaintiff was painting the elevator shaft. The court held that surrender of control was conclusively shown by the fact that the plaintiff had control of the janitor and was directing his activity when the accident occurred. Many cases have arisen in which the custom of the trade required the unloading of ships to be done by independent contractor stevedores, but the ship was required to furnish winchmen to operate the ship's winches. In every case the negligence of the winchmen was held chargeable to the shipowner, but the courts indicate that a different result would be reached if a contract existed between the shipowners and the stevedores giving the latter full control of the unloading operation. See The F. B. Squire, 248 Fed. 469 (2d Cir. 1917), and Annot., 55 A.L.R. 1263 (1928).

16. In Rockwell v. Grand Trunk Western Ry., 264 Mich. 626, 250 N.W. 515 (1933), where a statute imposed the duty of unloading on the consignee, it was held as a matter of law that the operator of a railroad crane loaned to the consignee by the railroad was in the employment of the consignee during the unloading process. Under the same federal statute a like result was reached in Rau v. Wilkes-Barre & E. Ry., 311 Pa. 510, 167 Atl. 230 (1933); but a contrary result was reached in Ramsey v. New York Cent. R.R., 269 N.Y. 219, 199 N.E. 65 (1935). See also Annot., 102 A.L.R. 514 (1936).

17. See Hercules Powder Co. v. Harry T. Campbell Sons Co., 156 Md. 346, 144 Atl. 510, 62 A.L.R. 1497 (1929). Where there is a doubtful interpretation leaving unclear just who is to be the master of the borrowed servant at a particular time, clearly a jury issue is presented. Krausse v. Decker, 57 S.W.2d 1124 (Tex. Civ. App. 1933).

indirect interest in the unloading; where command has been surrendered, the general employer is no longer liable for the torts of his employee, notwithstanding that the employee is in a general way furthering his business.[18] Both the majority and dissenting members of the court agreed that the only question presented in the instant case was that of control. It would seem that conclusive proof of surrender of control might be found in the existence of a contract imposing on Bethlehem the responsibility of unloading the steel and the uncontradicted testimony of Bethlehem's foreman that he had taken charge of the operation when the accident occurred.

WILLS—ANTI-LAPSE STATUTES—BENEFICIARIES OF CLASS GIFT DEAD AT WILL'S EXECUTION

A South Dakota anti-lapse statute[1] provided that if a devisee or legatee who is a "child or other relation of the testator . . . dies before the testator . . . or is dead at the time the will is executed [the surviving lineal descendants of such devisee or legatee take] . . . in the same manner the devisee or legatee would have done had he survived the testator." The residuary clause of the will of a native Norwegian read: "[A]ll the remainder of my estate to all my first cousins." The will was probated in 1946 in South Dakota and final distribution of the residue was made among twenty-one of testator's first cousins, not including those who lived in Norway. Plaintiffs, residents of Norway, were first cousins of testator and lineal descendants of first cousins who were dead when the will was executed. Alleging negligence and fraud, plaintiffs brought an equity action against the executor and those first cousins of testator who shared in the 1946 distribution. As to those plaintiffs who were lineal descendants of deceased first cousins, the trial court dismissed the complaint for failure to state a cause of action.[2] *Held,* reversed. The anti-lapse statute applies to a gift to a class of which some members were dead when the will was executed. *Hoverstad v. First National Bank and Trust Co.,* 74 N.W.2d 48 (S.D. 1955).

Most states today have statutes designed to prevent lapse of testa-

18. Westover v. Hoover, 88 Neb. 201, 129 N.W. 285 (1911); FERSON, PRINCIPLES OF AGENCY § 4 (1954).

1. S.D. CODE § 56.032 (1939).

2. Plaintiffs prayed that the executor be declared trustee for the plaintiffs and be held liable for the amount plaintiffs would have receive from the estate. The court on appeal ordered their action, as against the executor, dismissed without prejudice, holding that the probate court had jurisdiction and that the equity court could not invoke its powers.

mentary gifts in certain situations.[3] The assumption is that in the absence of a disclosure of a contrary intent in the will, testator preferred that failure of his gifts be prevented.[4] Some of the statutes have clauses making the anti-lapse provisions applicable to gifts to a class.[5] Further, the majority of the courts interpreting statutes without such clauses hold them applicable to class gifts.[6] The cases are in conflict as to whether statutes not containing provisions for both class gifts and beneficiaries dead at the execution of the will are applicable to members of a class dead when the will was made.[7] A few statutes, similar to the one applied in the principal case, specifically provide against lapse in cases where the devisee or legatee is dead at the execution of the will,[8] but only three statutes exist today providing for both class gifts

3. ALA. CODE ANN. tit. 61, § 16 (1940); ARIZ. CODE ANN. § 41-109 (1939); CAL. PROB. CODE § 92 (Deering 1949); CONN. GEN. STAT. § 6954 (1949); DEL. CODE ANN. tit. 12, § 2313 (1953); FLA. STAT. ANN. § 731.20 (Supp. 1954); GA. CODE ANN. § 113-812 (1935); IDAHO CODE ANN. § 14-323 (1948); ILL. ANN. STAT. c. 3, § 200 (Sinith-Hurd Supp. 1955); IND. ANN. STAT. § 6-601 (Burns 1953); IOWA CODE ANN. § 633.16 (1950); KAN. GEN. STAT. ANN. § 59-615 (1949); KY. REV. STAT. ANN. §§ 394.400, 394.410 (Baldwin 1955); ME. REV. STAT. ANN. c. 169, § 10 (1954); MD. ANN. CODE art. 93, §§ 351, 352 (1951); MASS. ANN. LAWS c. 191, § 22 (1955); MICH. STAT. ANN. § 27.3178(81) (1943); MINN. STAT. ANN. § 525.203 (1947); MISS. CODE ANN. § 660 (1943); MO. REV. STAT. § 468.310 (1949); MONT. REV. CODE ANN. § 91-139 (1947); NEB. REV. STAT. § 30-228.03 (Supp. 1955); NEV. COMP. LAWS § 9922 (Supp. 1941); N.H. REV. LAWS ANN. c. 551. § 12 (1955); N.J. REV. STAT. § 3A:3-13 (1953); N.Y. DECED. EST. LAW § 29; N.C. GEN. STAT. §§ 31-42, 31-42.1, 31-42.2 (Supp. 1955); N.D. REV. CODE § 56-0420 (Supp. 1953); OHIO GEN. CODE ANN. § 10504-73 (Baldwin 1940); OKLA. STAT. tit. 84, § 142 (1951); PA. STAT. ANN. tit. 20, § 180.14(8) (Purdon 1950); R.I. GEN. LAWS c. 566, § 30 (1938); S.C. CODE § 19-237 (1952); S.D. CODE § 56.0232 (1939); TENN. CODE ANN. § 32-306 (1955); TEX. PROB. CODE § 68 (1956); UTAH CODE ANN. § 74-1-35 (1953); VT. REV. STAT. § 3064 (1947); VA. CODE ANN. § 64-64 (1950); WASH. REV. CODE § 11.12.110 (1952); W. VA. CODE ANN. § 4054 (1955).

4. ATKINSON, WILLS § 140 (2d ed. 1935); Mechem, *Some Problems Arising Under Anti-Lapse Statutes*, 19 IOWA L. REV. 1-3 (1933).

5. KY. REV. STAT. ANN. §§ 394.400, 394.410 (Baldwin 1955); MD. ANN. CODE art. 93, §§ 351, 352 (1951); NEB. REV. STAT. § 30-228.03 (Supp. 1955); PA. STAT. ANN. tit. 20, § 180.14(8) (Purdon 1950); TENN. CODE ANN. § 32-306 (1955); VA. CODE ANN. § 64-64 (1950); W. VA. CODE ANN. § 4054 (1955).

6. *In re* Steidl's Estate, 89 Cal. App. 2d 488, 201 P.2d 58 (1948); Clifford v. Cronin, 97 Conn. 434, 117 Atl. 489 (1922); Kehl v. Taylor, 275 Ill. 346, 114 N.E. 125 (1916); Galloupe v. Blake, 248 Mass. 196. 142 N.E. 818 (1924); *In re* Mott's Estate, 137 Misc. 99, 244 N.Y. Supp. 187 (Surr. Ct. 1930); Woolley v. Paxson, 46 Ohio St. 307, 24 N.E. 599 (1889); ATKINSON, WILLS § 140 (2d ed. 1953).

7. Holding the statute applicable: Kehl v. Taylor, 275 Ill. 346, 114 N.E. 125 (1916); Carroll v. Wilkerson, 249 Ill. App. 98 (1928); Sloan v. Thornton, 102 Ky. 443, 43 S.W. 415 (1897); Bray v. Pullen, 84 Me. 185, 24 Atl. 811 (1892); Shumaker v. Pearson, 67 Ohio St. 330. 65 N.E. 1005 (1902); Wildberger v. Cheek's Ex'r, 94 Va. 517, 27 S.E. 441 (1897). Holding the statute not applicable: Howland v. Slade, 155 Mass. 415, 29 N.E. 631 (1892); Pinel v. Betjemann, 183 N.Y. 194. 76 N.E. 157 (1905); *In re* Harrison's Estate, 202 Pa. 331, 51 Atl. 976 (1902); Williams v. Knight, 18 R.I. 333, 27 Atl. 210 (1893); *In re* Hutton's Estate, 106 Wash. 578, 180 Pac. 882 (1919).

8. CAL. PROB. CODE § 92 (Deering 1949); FLA. STAT. ANN. § 731.20 (Supp. 1954); GA. CODE ANN. § 113-812 (1935); IND. ANN. STAT. § 6-601 (Burns 1953); KY. REV. STAT. ANN. §§ 394.400, 394.410 (Baldwin 1955); OHIO GEN. CODE ANN. § 10504-73 (Baldwin 1940); TENN. CODE ANN. § 32-306 (1955); UTAH CODE ANN. § 74-1-35 (1953); W. VA. CODE ANN. § 4054 (1955).

and gifts to a beneficiary who was dead when the will was made.[9]

The court in the instant case reasoned that an anti-lapse statute is predicted on the theory that kindred of the testator should be protected and that disposition of a defeated legacy to the lineal descendants of the legatee is the most equitable distribution.[10] Thus, said the court, the statute should apply to class as well as individual gifts. Plaintiffs were allowed to share because, being lineal descendants of beneficiaries dead at the execution of the will, they came within the express provisions of the act.

If the court accurately defined the purpose of the statute, the holding is correct. Moreover, if the statute is based on the assumption that testator would have desired such a distribution, the decision is justified. If testator knew that some of the members of the class were dead, he acted either out of perversity or in reliance on the statute.[11] If he did not know they were dead, distribution to the descendants of the deceased member of the class involves no more speculation as to his intent than does distribution to descendants of a specific beneficiary.[12] The objection that membership in a class must be determined at some particular instant, so that persons dead at the execution of the will cannot be included, seems technical and does not permit the interpretation that testator wished the descendants of these deceased persons to take.

9. KY. REV. STAT. ANN. §§ 394.400, 394.410 (Baldwin 1955); TENN. CODE ANN. § 32-306 (1955); W. VA. CODE ANN. § 4054 (1955). NEB. REV. STAT. § 30-228 (1948) providing for neither was repealed in 1951 and replaced by NEB. REV. STAT. § 30-228.02 (Supp. 1951) which provided for both. This was repealed in 1955 and replaced by NEB. REV. STAT. § 30-228.03 (Supp. 1955) which provided for gifts to a class (see notes 3, 5 *supra*).

10. Instant case, 74 N.W.2d at 55.

11. Mechem, *Some Problems Arising Under Anti-Lapse Statutes,* 19 IOWA L. REV. 1, 13-14 (1933).

12. *Id.* at 16.