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Recent Cases

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RECENT CASES

ATTORNEY AND CLIENT—UNAUTHORIZED PRACTICE OF LAW—DRAFTING OF LEGAL INSTRUMENTS BY REALTORS

A bar association brought suit to enjoin a licensed real estate broker from drafting or filling in blank forms of certain legal instruments normally used in the sale and purchase of real estate. *Held* (5-2), injunction granted. A realtor is to be restricted in the drafting of papers to those such as the "memorandum, deposit receipt, or the contract," which merely record the transactions performed in bringing together the buyer and seller. *Keyes Co. v. Dade County Bar Ass'n*, 46 So.2d 605 (Fla. 1950).[1]

The issue presented in the instant case has been the principal bone of contention between realtors and lawyers for years, and the problem has been thrust upon courts countless times. The definition of "practice of law" as applied to these cases has been recognized as including the drafting of legal instruments such as those involved in the purchase and sale of real estate.[2] However, as a matter of policy, courts have limited the definition by certain qualifying circumstances. (1) Laymen may lawfully draw simple legal instruments and fill out legal forms whereas the drawing of complex instruments would be forbidden on the theory that a complicated instrument requires more legal knowledge than is possessed by the average layman.[3] But the selection and filling in of a form instrument coupled with the giving of legal advice concerning the instrument is deemed to be unauthorized practice of law.[4] (2) Some courts have said that laymen may select and fill in form instruments when they receive no consideration therefor.[5] But since

1. In a vigorous dissent, it was concluded that a realtor should be allowed to execute blank deeds, contracts, notes, leases or lease agreements, assignments of leases, rental contracts, mortgages, satisfactions or releases of mortgages, options and other instruments essential to the bargain and sale of real estate.

2. *E.g.*, People *ex. rel.* Colorado Bar Ass'n v. Denver Clearing House, 99 Colo. 50, 59 P.2d 468 (1936); Boykin v. Hopkins, 174 Ga. 511, 162 S.E. 796 (1932); *In re* Duncan, 83 S.C. 186, 65 S.E. 210, 24 L.R.A. (N.S.) 750 (1909); 49 C.J., *Practice* § 5 (1930); 33 WORDS AND PHRASES 193 (Perm. ed. 1940).

3. Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N.E.2d 27 (1943); *In re* Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 (1935); Cain v. Merchants Nat. Bank & Trust Co., 66 N.D. 746, 268 N.W. 719 (1936). *But see* concurring opinion of Pound, J., in People v. Title Guarantee and Trust Co., 227 N.Y. 366, 125 N.E. 666, 670 (1919): "I am unable to rest any satisfactory test on the distinction between simple and complex instruments. The most complex are simple to the skilled, and the simplest often trouble the inexperienced."

4. Clark v. Reardon, 231 Mo. App. 666, 104 S.W.2d 407 (1937); Paul v. Stanley, 168 Wash. 371, 12 P.2d 401 (1932). *Contra:* Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N.E.2d 27 (1943).

5. *In re* Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 (1935); Cain v. Merchants Nat. Bank & Trust Co., 66 N.D. 746, 268 N.W. 719 (1936); Haverty Furniture Co. v. Foust, 174 Tenn. 203, 124 S.W.2d 694 (1939).

the decisions of many courts are expressly or impliedly based on the protection of the public, it is doubtful whether the question of consideration should be relevant.[6] Further, in actual practice the real estate broker receives a lump sum payment for his work in consummating a sale; therefore, it is impossible to ascertain definitely what part of the sum is paid for the actual drafting.[7] (3) The occasional drafting of legal instruments by laymen may not be considered to be the unauthorized practice of law;[8] but a layman who holds himself out as being qualified to prepare legal instruments or who makes it a business to perform legal services for others may be enjoined or convicted of a crime.[9] (4) Laymen may prepare instruments and select forms when they are merely incidental to their principal business.[10] This view seems to be the present trend of the law but is vigorously opposed by the American Bar Association and many courts.[11]

The court in the instant case refused to qualify the broad definition of the practice of law and theorized that realtors and lawyers operate in definite and ascertainable spheres.[12] The work of the realtor is by its nature preliminary and ceases when he has brought the seller and a willing buyer together, from which point the lawyer proceeds with the preparation and execution of legal instruments.[13] This position is far in advance of that which most courts are willing to take in trying to balance business expediency and due protection of the public.

It is apparent from a study of the cases that the courts do not afford the protection to the legal profession that is given to medicine,[14] dentistry,[15]

6. See State *ex rel.* Wright v. Barlow, 131 Neb. 294, 268 N.W. 95, 98 (1936).

7. See Hill, *Real Estate Brokers and the Courts,* 5 LAW & CONTEMP. PROB. 72, 77 (1938).

8. *See In re* Opinion of the Justices, 289 Mass. 607, 194 N.E. 313, 317 (1935); *cf.* People v. Ring, 26 Cal. App. 2d 768, 70 P.2d 281, 284 (1937).

9. *See* People v. Alfani, 227 N.Y. 334, 125 N.E. 671, 673 (1919); Childs v. Smeltzer, 315 Pa. 9, 171 Atl. 883, 885 (1934).

10. Cowern v. Nelson, 207 Minn. 642, 290 N.W. 795 (1940); Cain v. Merchants Nat. Bank & Trust Co., 66 N.D. 746, 268 N.W. 719 (1936); Haverty Furniture Co. v. Foust, 174 Tenn. 203, 124 S.W.2d 694 (1939). *But cf.* Childs v. Smeltzer, 315 Pa. 9, 171 Atl. 883 (1934).

11. *E.g.,* Grand Rapids Bar Ass'n v. Denkema, 290 Mich. 56, 287 N.W. 377 (1939); *In re* Gore, 58 Ohio App. 79, 15 N.E.2d 968 (1937); Land Title Abstract & Trust Co. v. Dworken, 129 Ohio St. 23, 193 N.E. 650 (1934). See Houck, *Drafting of Real Estate Instruments: Problem from Standpoint of Bar,* 5 LAW & CONTEMP. PROB. 66 (1938); Otterbourg, *The Lawyer and the Real Estate Broker,* 26 A.B.A.J. 340 (1940).

12. 46 So.2d 605 at 606. *But see* Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N.E.2d 27, 32 (1943) (court refused to attempt to draw a sharp line between the field of the lawyer and that of the accountant).

13. 46 So.2d 605 at 606.

14. See, *e.g.,* People v. Friedman, 374 Ill. 212, 29 N.E.2d 89 (1940); State *ex rel.* Beck v. Cooper, 147 Kan. 710, 78 P.2d 884 (1938); People v. Hickey, 157 Misc. 592, 283 N.Y. Supp. 968 (N.Y. City Ct. 1935); O'Neil v. State, 115 Tenn. 427, 90 S.W. 627, 3 L.R.A. (N.S.) 762 (1905).

15. Whetstone v. Board of Dental Examiners of California, 87 Cal. App. 156, 261 Pac. 1077 (1927); State v. Thompson, 48 Wash. 683, 94 Pac. 667 (1908).

embalming,[16] architecture[17] and optometry.[18] There would be little doubt that if a layman worked out a cure for the common cold and wrote prescriptions which were filled by a druggist, he would be deemed by the courts to be engaged in the practice of medicine. Yet a layman is permitted by many courts to draw such legal instruments as deeds, mortgages and leases when there is equal risk to the public of inexpert advice.

The basic and fundamental consideration of the courts in deciding cases involving the unauthorized practice of law should be the protection of the public. The argument that the public is inadequately protected if a realtor is permitted to draw form instruments[19] is not without merit. Since his compensation depends entirely upon consummating the sale, his self-interest may be a great temptation to overlook or rush through certain defects of a stereotyped deed that will later harass the parties.[20] Form instruments often create more problems than they cure. As indicated by the instant case, the mere selection of a particular form, as well as its execution, requires legal knowledge and constitutes advice to the parties that it is legally adequate to carry out their intentions.[21]

BAILMENTS—BAILEE FOR HIRE—VALIDITY OF CONTRACT PROVISION LIMITING LIABILITY FOR NEGLIGENCE

Plaintiff brought action to recover the amount of money and checks in a bag placed in defendant bank's night depository. When called for, the bag could not be found; nor was there any record of its being in the vault with the other night deposits. The right to use the facilities was controlled by contract, one clause of which placed the sole risk of loss from any use or attempted use on the depositor. The jury was instructed to find for the plaintiff if delivery was proved and if the defendant did not overcome the presumption of negligence which thereupon arose; the contract was to be disregarded in so far as it conflicted with the charge. Judgment was entered on a verdict for the plaintiff. *Held,* judgment reversed and final judgment entered for defendant. The contract exonerating the defendant, a bailee for hire, from liability for his negligence is not void as against public policy. *Kolt v. Cleveland Trust Co.*, 93 N.E.2d 788 (Ohio App. 1950).

16. State v. Fremont Co-op. Burial Ass'n, 222 Iowa 949, 270 N.W. 320 (1936).
17. Keenan v. Tuma, 240 Ill. App. 448 (1926).
18. Funk Jewelry Co. v. State *ex rel.* La Prade, 46 Ariz. 348, 50 P.2d 945 (1935); State v. Kindy Optical Co., 216 Iowa 1157, 248 N.W. 332 (1933); Rowe v. Standard Drug Co., 132 Ohio St. 629, 9 N.E.2d 609 (1937).
19. See Houck, *Drafting of Real Estate Instruments: Problem from Standpoint of Bar,* 5 LAW & CONTEMP. PROB. 66 (1938); Otterbourg, *The Lawyer and the Real Estate Broker,* 26 A.B.A.J. 340 (1940).
20. Houck, *supra* note 19, at 68.
21. 46 So.2d 605 at 607. See also Clark v. Reardon, 231 Mo. App. 666, 104, S.W.2d 407 (1937); *In re* Gore, 58 Ohio App. 79, 15 N.E.2d 968 (1937).

The law imposes on a bailee for hire the duty of ordinary care,[1] a duty which bailees early attempted by contract to avoid. Consequently the issue arose whether a bailee for hire can limit his common law liability through contract. In England there is no doubt that he may do so.[2] The law in America, however, is unsettled.[3]

Two principal methods are used by the bailee in limiting his obligation: (1) he may fix a sum beyond which he will not be liable at all, or beyond which he will not be liable unless additional value is declared and paid for; or (2) he may shift the risk entirely to the bailor and assume no responsibility whatsoever.[4] If the restrictive terms are to bind the bailor, whichever device is used, notice of their existence must be given him.[5] Where a statute fixes the degree of care, any attempt to set up a lesser degree than that required by the law has been struck down.[6] Generally the courts have allowed a restriction as to the *amount* of liability to stand.[7] However, where the bailee has en-

1. The law of Tennessee is typical. The care required is that of men of ordinary prudence under similar circumstances with respect to their own property or property of others placed in their custody. Fields v. Gordon, 203 S.W.2d 934 (Tenn. App. W.S. 1947).

2. Gibaud v. Great Eastern Ry., [1921] 2 K.B. 426 (C.A.); Joseph Travers & Sons, Ltd. v. Cooper, [1915] 1 K.B. 73 (C.A. 1914); Van Toll v. The South Eastern Ry., 12 C.B.N.S. 75, 142 Eng. Rep. 1071 (C.P. 1862). "The custodian may limit or relieve himself from his common law liability by special conditions in the contract; but they will be strictly construed, and he must show that the bailor knew of and assented to the conditions. The mere fact that they are his usual terms will not be sufficient." 1 HALSBURY, LAWS OF ENGLAND 749 (2d ed., Hailsham, 1931).

3. See Willis, *The Right of Bailees to Contract Against Liability for Negligence*, 20 HARV. L. REV. 297 (1907); Notes 175 A.L.R. 8, 110-144 (1948), 86 U. OF PA. L. REV. 772 (1938).

4. A third method, that of stipulating against a particular hazard, may be available. See Taussig v. Bode & Haslett, 134 Cal. 260, 66 Pac. 259 (1901) (leakage of spirits); Gesford v. Star Van & Storage Co., 104 Neb. 453, 177 N.W. 794 (1920) (freezing of apples).

5. Kravitz v. Parking Service Co., 29 Ala. App. 523, 199 So. 727, *cert. denied*, 240 Ala. 467, 199 So. 731 (1940); Denver Union Terminal Ry. v. Cullinan, 72 Colo. 248, 210 Pac. 602, 27 A.L.R. 154 (1922); Sandler v. Commonwealth Station Co., 307 Mass. 470, 30 N.E.2d 389, 131 A.L.R. 1170 (1940); Van Noy Interstate Co. v. Tucker, 125 Miss. 260, 87 So. 643 (1921); Dodge v. Nashville, C. & St. L. Ry., 142 Tenn. 20, 215 S.W. 274, 7 A.L.R. 1229 (1919). The requirement of notice has arisen most frequently in the checkroom and parking lot cases. There the terms of limitation usually are posted on signs and printed on claim checks. The effectiveness of such notice has varied with the courts. See Weinberger v. Werremeyer, 224 Ill. App. 217 (1922) (bailor's reading sign did not relieve bailee); Noyes v. Hines, 220 Ill. App. 409 (1920) (placards and claim check gave reasonable notice to bind bailor); Jones v. Great Northern Ry., 68 Mont. 231, 217 Pac. 673, 37 A.L.R. 754 (1923) (where bailor saw printing on the check but did not read same he had no notice and was not bound by the limitation); McAshan v. Cavitt, 229 S.W.2d 1016 (Tex. 1950) (where bailor has no notice of restrictions, they do not become a part of the bailment contract); Allen v. Southern Pac. Co., 213 P.2d 667 (Utah 1950) (same).

6. Scott Auto & Supply Co. v. McQueen, 111 Okla. 107, 226 Pac. 372, 34 A.L.R. 162 (1924).

7. Hart v. Pennsylvania R.R., 112 U.S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717 (1884); Missouri Pac. R.R. v. Fuqua, 150 Ark. 145, 233 S.W. 926 (1921); George v. Bekins Van & Storage Co., 196 P.2d 637, 648 (1948), *as modified*, 33 Cal.2d 858, 205 P.2d 1037, 1045-46 (1949); Manhattan Co. v. Goldberg, 38 A.2d 172 (D.C. Mun. App. 1944); Noyes v. Hines, 220 Ill. App. 409 (1920). The rationale is that the declared sum represents an agreed predetermined value of the goods, and, particularly where the bailor may increase the declared value by paying a higher rate, he should be bound to it; further, by limiting the risk, the bailee is able to reduce the price of bailment for the benefit of his bailors.

deavored to absolve himself from any liability at all, a majority of the courts have held for the plaintiff bailor.[8] Here the *ratio decidendi* has differed. Some of these courts have held flatly that the contract will not relieve the bailee of the consequences of his own negligence.[9] Others, reserving the question of the validity of the limiting contract provisions, have declared that the language of such provisions must be strictly construed, and that the provision will not be construed to cover negligence so long as "any other meaning may reasonably be ascribed to the language employed."[10] With this principle in mind they have found the wording of the restrictive clauses to be so broad and ambiguous as to have no effect in relieving the bailee of liability for his negligence.[11]

The instant case represents a departure from the majority view and from the apparent Ohio law of bailments for hire.[12] As a court of appeals decision, its position is rather tenuous, but its result is not altogether unsound. In the instant case, there is no question of notice: the parties entered into a written agreement.[13]

The court has drawn a nebulous distinction: the majority American rule applies to contracts limiting liability from negligence in the management and control of bailed chattels; the rule does not apply where there is a limitation of liability from negligence in the receipt of the goods.[14] The distinction is ingenious but at the same time unsubstantial. Possession is the heart of bailment; until the goods have been received no bailment and no corresponding duties arise. Better grounds are available to reach the same result. Public

8. "[T]he general rule in this country is that a bailee may not contract to exempt himself from liability arising out of his own negligence." BROWN, PERSONAL PROPERTY 302-03 (1936). *Contra:* Evans & Pennington v. Nail, 1 Ga. App. 42, 57 S.E. 1020 (1907); Gashweiler v. Wabash, St. L. & Pac. Ry., 83 Mo. 112 (1884); Memphis & C.R.R. v. Jones, 39 Tenn. 291 (1859) (by implication); *see* Goslant v. Town of Calais, 90 Vt. 114, 96 Atl. 751, 753 (1916). See Note, 86 U. OF PA. L. REV. 772 (1938). As to the effect of express agreements generally in limiting liability from negligence, see PROSSER, TORTS 380-83 (1941).

9. Malone v. Santora, 135 Conn. 286, 64 A.2d 51 (1949); Nagaki v. Stockfleth, 141 Neb. 676, 4 N.W.2d 766 (1942); Pilson v. Tip-Top Auto Co., 67 Ore. 528, 136 Pac. 642 (1913); Sporsem v. First Nat. Bank of Poulsbo, 133 Wash. 199, 233 Pac. 641, 40 A.L.R. 854 (1925); *see* Wendt v. Sley System Garages, 124 Pa. Super. 224, 188 Atl. 624, 625 (1936); Lancaster County Nat. Bank v. Smith, 62 Pa. 47, 55 (1869). The leading Ohio case of Agricultural Ins. Co. v. Constantine, 144 Ohio St. 275, 58 N.E.2d 658 (1944), states the rule that a contract exempting a bailee for hire from his own negligence is void as against public policy; the holding of the case, however, turned upon the fact that no notice of the terms was given the bailor.

10. Langford v. Nevin, 117 Tex. 130, 298 S.W. 536, 537 (1927).

11. Gulf Compress Co. v. Harrington, 90 Ark. 256, 119 S.W. 249, 23 L.R.A. (N.S.) 1205 (1909) (not responsible for loss by fire); Denver Public Warehouse Co. v. Munger, 20 Colo. App. 56, 77 Pac. 5 (1904) (at owner's risk); Minnesota Butter & Cheese Co. v. St. Paul Cold-Storage Warehouse, 75 Minn. 445, 77 N.W. 977 (1899) (at owner's risk of any loss from riot, fire, water, etc.); Langford v. Nevin, 117 Tex. 130, 298 S.W. 536 (1927) (not responsible for loss in case of fire or theft). *Contra:* Wells v. Porter, 169 Mo. 252, 69 S.W. 282 (1902).

12. See Agricultural Ins. Co. v. Constantine, 144 Ohio St. 275, 58 N.E.2d 658 (1944), *supra* note 9.

13. See 1 WILLISTON, CONTRACTS § 90A (Rev. ed. 1936).

14. 93 N.E.2d at 793.

policy demands that individuals be left free to contract as they see fit;[15] as to deposits in banks for safe keeping, the statutory law of Ohio enunciates that policy.[16] Further, the bailee in this case is necessarily unaware of the time and the amount of the deposit. To prevent him from avoiding liability by contract may be to push down his shield against false and fraudulent claims. Competition, it is argued, will keep him from straying far from the path of due care.

The holding here could be reversed on the ground that the language of the limiting provision is too broad to protect the bank from the consequences of its wrong-doing. The case law of Ohio, however, points to a reversal, if at all, on grounds of public policy—a policy which would revoke any invitation of negligence that a limiting contract might give a bailee; a policy which would equate the bargaining positions of the parties rather than force the bailor to accept the facilities by pledging away his birthright for what may not be a satisfactory porridge. Wherever a party holds himself out as a bailee for hire, he is performing a service to the participating public; any attempt to lessen his common law liability should be carefully scrutinized and generally should be ill-favored in the eyes of the law.[17]

BROKERS (REAL ESTATE)—STATEMENT THAT PRINCIPAL MIGHT TAKE LESS THAN LIST PRICE AS BREACH OF FIDUCIARY OBLIGATION—BREACH AS DEFENSE TO ACTION FOR COMMISSION

Plaintiff, a real estate broker, after failing to sell property of defendant at $9,500, the price originally listed with the broker, stated to the ultimate purchaser his belief that the property could be bought for $8,500. After sale of property at $8,500, broker sued to recover commission, and from a jury verdict for plaintiff the defendant appeals. *Held* (4-1), reversed. Plaintiff's conduct was a breach of fiduciary relationship which as a matter of law, bars his recovery. *Haymes v. Rogers,* 219 P.2d 339 (Ariz. 1950).

Breach of the fiduciary relation by an agent is one of many problems involved in determining the right of a real estate agent[1] to recover a com-

15. *E.g.,* see language in Baltimore & Ohio Southwestern Ry. v. Voigt, 176 U.S. 498, 505-7, 20 Sup. Ct. 385, 44 L. Ed. 560 (1900); Manhattan v. Goldberg, 38 A.2d 172, 174 (D.C. Mun. App. 1944); Lamont Bldg. Co. v. Court, 147 Ohio St. 183, 70 N.E.2d 447, 448 (1946).

16. "A bank may receive on deposit for safe-keeping in its vaults and safes, or in the vaults and safes of another bank in this state, securities, stock, bonds, coins, plate, jewelry, books, papers, documents and other valuable papers and property, upon such terms and conditions as it may prescribe." OHIO GEN. CODE ANN. § 710-110 (1946).

17. If it may be concluded that any bailee for hire, in so far as he deals with the public, is under a duty of public service—then, according to the Restatement of Contracts any bargain for exemption from liability for the consequences of negligence is illegal. See RESTATEMENT, CONTRACTS § 575 (1)(b) (1932).

1. Technically, real estate "agents" are not agents in the sense of doing juristic acts. See FERSON, BASIS OF CONTRACTS 60 (1949). Because of the lack of control by the "principal," it is doubtful whether they may be classified as "servants" in most instances. Nevertheless, a fiduciary relationship does exist between the real estate "agent" and his "principal."

mission from his principal.[2] As a general rule, breach of this fiduciary duty by the agent may be asserted by the principal either as a cause of action against the agent[3] or as a defense to an action by the agent for a commission.[4] In real estate cases, the breach is used more often as a bar to the agent's claim.[5]

The denial of the commission in the instant case is based upon circumstances which frequently arise, for sales of realty often are made through an agent at less than list price; but litigation seldom arises for usually both parties are satisfied with the result of the sale. A Louisiana case,[6] squarely opposed to the instant case, held that a disclosure by the agent that the principal might take less than the list price was not a breach of the fiduciary relation.[7] Other cases touching on the point contain expressions which are in harmony with the instant case; but in each of them there was another ground on which denial of the commission might be predicated, as that the broker acted in his own interest[8] or withheld information from the principal.[9]

Although the defense of breach of fiduciary duty is often used, its theory has not been fully explained by the courts. The true rationale may be that the fiduciary duty arises from the contract of agency and that a failure to fulfill the fiduciary obligation is also a breach of the contract. Unless that breach of the fiduciary duty amounts to a material breach of the contract, it should not be allowed to serve as a defense to the principal.[10] Where, as in the instant case, the agent's conduct could under some circumstances constitute a material breach of the contract, and under different

2. Contracts of this type are ofttimes informal and uncertain. Inexact definition of the broker's undertaking and the question of whether the broker was the procuring cause of the sale, along with problems of mutual duties of principal and agent, have led to much litigation. See 2 MECHEM, AGENCY 3 (2d ed. 1914); WALKER, REAL ESTATE AGENCY § 290 (1910). See also Evans, *Fiduciary Obligations of Agents*, 2 WESTERN RES. L. REV. 5 (1950).

3. Johnson v. Mitchell, 192 Ky. 444, 233 S.W. 884 (1921).

4. Felhauer v. Milam, 159 Ark. 178, 251 S.W. 379 (1923); Mitchell v. Gould, 90 Cal. App. 647, 266 Pac. 565 (1928); Ratliffe v. Cease, 100 Kan. 445, 164 Pac. 1091 (1917); Batts v. Snook, 268 Ky. 682, 105 S.W.2d 843 (1937); Harvey v. Lindsay, 117 Mich. 267, 75 N.W. 627 (1898); Capone v. Fosdick Realty Corp., 125 Misc. 828, 211 N.Y.S. 614 (Sup. Ct. 1925); Powell v. Gilbert, 10 Tenn. App. 530 (E.S. 1927). See also 2 MECHEM, AGENCY 2411 (2d ed. 1914); 2 RESTATEMENT, AGENCY 399 (1933); 12 C.J.S., *Brokers* § 69 (1938); 8 AM. JUR., *Broker* § 142 (1937). For a listing of other possible remedies of the principal, see 2 RESTATEMENT, AGENCY 399 (1933).

5. This may be explained by the reluctance of the principal to bring suit when he may achieve the same result, avoiding payment of the commission, merely by using the breach as a defense to a suit brought by the agent. Further, it is likely that the damage done by the agent will closely approximate the amount of his commission; thus the principal would stand to gain little in a suit against the agent.

6. Wolf v. Casamento, 185 So. 537 (La. App. 1939).

7. "Her statement . . . was no more than an attempt to bring the parties together and have them agree on a price satisfactory to both." *Id.* at 539.

8. Alford v. Creagh, 7 Ala. App. 358, 62 So. 254 (1913).

9. Mitchell v. Gould, 90 Cal. App. 647, 266 Pac. 565 (1928).

10. This limits the scope of the rule by requiring that the breach be of sufficient magnitude in relation to the amount of commission and the duties expected of the agent to be considered material.

circumstances the same conduct might not, then the question of materialty of the breach, as under general contract law, should be one for the jury. Applying this approach to the instant case, it would seem that the trial court should properly have submitted to the jury the question whether the representation by the agent amounted to a material breach of the contract.

CORPORATIONS—PREFERRED STOCK—CANCELLATION OF ACCRUED DIVIDENDS BY CHARTER AMENDMENT

Under a recapitalization plan, defendant corporation amended its charter so as to cancel all outstanding stock, including preferred stock with accrued dividends, and to replace it with a single new issue. A Massachusetts statute provided that a corporation might amend its charter to change classes of stock subsequently to be issued. Plaintiff, a nonassenting holder of cumulative preferred stock on which there were dividend arrearages, attacked the plan as an unlawful deprivation of her preference in dividends, in assets on liquidation and in voting rights. From a decree dismissing the bill, plaintiff appeals. *Held,* reversed. In the absence of valid statutory power to change or abolish the privileges of preferred stock, the contractual preferences of a nonassenting shareholder cannot be destroyed. As the present statute applies only to stock to be issued after the charter amendment is approved, not to stock already outstanding, plaintiff's accrued dividends cannot be eliminated. *Janes v. Washburn Co.,* 94 N.E.2d 479 (Mass. 1950).

Where no dividends have been paid on cumulative preferred stock over a period of years, the obligation to pay off such accruals becomes a heavy burden to a corporation.[1] Such burdensome accruals have the effect of discouraging new investors from advancing needed capital, preventing payment of dividends to common as well as to preferred stockholders, and decreasing the market value of the corporation as a whole.[2] Thus, after a corporation has passed through a series of lean years and once again returns to an income-producing stage, unless there can be some sort of reorganization of the capital structure or reclassification of shareholder's rights, the corporation may be doomed to insolvency. Various plans have been formulated with a view to offering an escape from these burdens by recapitalization and re-

1. See Notes, 8 A.L.R.2d 893 (1949), 89 U. OF PA. L. REV. 789 (1941). For examples of such burdensome accruals see Hottenstein v. York Ice Machinery Corp., 45 F. Supp. 436 (D. Del. 1942), *aff'd,* 136 F.2d 944 (3d Cir. 1943), *cert. denied,* 325 U.S. 886 (1945) (accumulated dividends approximated $4,600,000); Hubbard v. Jones & Laughlin Steel Corp., 42 F. Supp. 432 (Pa. 1941) (accumulated dividends of $26,430,000); McNulty v. W. & J. Sloane, 184 Misc. 835, 54 N.Y.S.2d 253 (Sup. Ct. 1945) (the dividends accumulated aggregated $1,127,875, or about $62.50 per share on the old prior preferred stock, and $2,640,000 or about $66.00 per share on the preferred).

2. Burstein, *The Elimination of Accumulated Dividends,* 28 B.U.L. REV. 173 (1948).

organization of the corporation.[3] Plans providing for cancellation of accrued dividends may take the form of indirect charter amendment,[4] merger,[5] consolidation,[6] and direct charter amendment.[7] These schemes are provided for and implemented by statute, because the state has an interest in the welfare of corporations organized under its sanction and may thereby permit flexibility in the capital structure so as to enable them to meet necessary business and financial needs. A decision of the legislature to allow financial rejuvenation of the corporation, then, involves a balance of interests between the public and the dissenting stockholder.[8]

By the *Dartmouth College* case,[9] the provision of the Constitution of the United States which forbids the impairment of contracts was interpreted to prohibit the changing of corporate charters without unanimous consent of the shareholders, unless a power be reserved to the state. Following Justice Story's suggestion in the *Dartmouth College* opinion, most states have enacted legislation reserving the power to alter, amend or repeal corporation laws and by this power to eliminate dividend arrearages of corporations chartered subsequent to the statute.[10] This reserved power to amend charters

3. Kohler, *Elimination or Adjustment of Accrued Dividends on Cumulative Preferred Stock Issued by a Tennessee Corporation,* 18 TENN. L. REV. 254 (1944); Meck, *Accrued Dividends on Cumulative Prefrered Stocks: The Legal Doctrine,* 55 HARV. L. REV. 71 (1941); Notes, 63 HARV. L. REV. 529 (1950), 28 TEXAS L. REV. 419 (1950). *See* Davison v. Parke, Austin & Lipscomb, Inc., 285 N.Y. 500, 35 N.E.2d 618 (1941) (distinguishing purposes of recapitalization, for sole interests of common stockholders, or for the interest of the corporation as a whole).

4. Charter amendment to create a new preferred stock with dividend rights prior to those of outstanding cumulative preferred stocks and possibly with other preferential rights, and with another amendment giving old preferred stockholders the opportunity to exchange their stock for the new preferred on condition of release of the old accruals. This differs from direct charter amendment in that any exchange and release of accruals is voluntarily done by the stockholder. Shanik v. White Sewing Machine Corp., 25 Del. Ch. 371, 19 A.2d 831 (Sup. Ct. 1941). *But see* Patterson v. Durham Hosiery Mills, 214 N.C. 806, 200 S.E. 906, 909 (1939).

5. Union effected by the absorbing of one or more existing corporations by another, which survives and continues the combined business. *E.g.,* Federal United Corp. v. Havender, 24 Del. Ch. 318, 11 A.2d 331 (Sup. Ct. 1940). See BALLANTINE, CORPORATIONS 681 (2d ed. 1946).

6. Uniting or amalgamation of two or more existing corporations to form a new corporation, where all previous stocks and benefits are cancelled. *E.g.,* Carolina Coach Co. v. Hartness, 198 N.C. 524, 152 S.E. 489 (1930). See 15 FLETCHER, CYCLOPEDIA OF CORPORATIONS §§ 7041-43 (Perm. ed. 1938). The terms merger and consolidation are frequently used loosely and interchangeably. 15 *id.* § 7041.

7. Cancellation of accrued dividends by charter amendment, agreed to by a majority of stockholders. Usually a new issue of stock is issued prorata to stockholders based upon old stock holdings. Such procedure depends upon the nature of stock contract and statute. *E.g.,* McNulty v. W. & J. Sloane, 184 Misc. 835, 54 N.Y.S.2d 253 (Sup. Ct. 1945). See BALLANTINE, CORPORATIONS 525 (2d ed. 1946); STEVENS, CORPORATIONS § 127 (2d ed. 1949).

8. McNulty v. W. & J. Sloane, 184 Misc. 835, 54 N.Y.S.2d 253 (Sup. Ct. 1945). See STEVENS, CORPORATIONS 580 (2d ed. 1949); Note, 28 TEXAS L. REV. 419 (1950).

9. Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629 (U.S. 1819).

10. 7 FLETCHER, CYCLOPEDIA OF CORPORATIONS §§ 3712-14 (Perm. ed. 1931). It was never seriously doubted that a charter amendment properly adopted is valid if it does no more than deprive preferred shareholders of their preferences as to dividends or principal, or of the cumulative feature of dividends as to the future.

is a part of the charter contract;[11] and under it the powers, purposes, rights and liabilities of the corporation may be changed; for it can be implied that the shareholder has contemplated and assented to the exercise of the reserved power by majority vote necessary for such corporate actions.[12] While there is some conflict among the states over the extent of this reserved power, it has been invoked as authorizing amendments of the contract between the corporation and the shareholders as well as of the contract between the corporation and the state.[13]

But, as seen in the instant case, before courts will allow elimination of arrearages, the statute must be sufficiently clear and broad in its authorization for corporate changes.[14] However, some courts, even though there is a statute deemed sufficiently clear and broad to permit elimination of accruals, disallow such corporate action.[15] This view which denies the power to eliminate accumulated arrearages holds that the right to such accrued dividends is a vested right,[16] treating the right to arrearages as property vested in its owner by contract, or as a right in the nature of a

11. Fundamentally, whether a preferred stock dividend may be eliminated depends upon the relation between the stockholders and the corporation and the nature of the preferred stock contract. Burstein, *The Elimination of Accumulated Dividends,* 28 B.U.L. REV. 173 (1948). That a corporate charter is a contract between the stockholders and the corporation, see Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629 (U.S. 1819); BALLANTINE, CORPORATIONS 501 (2d ed. 1946). The right to dividends arises out of this contract, the terms of which are in the stock-certificate, corporate charter, by-laws, statutes and decisions of law. See 7 FLETCHER, CYCLOPEDIA OF CORPORATIONS § 3634 (Perm. ed. 1931); 12 *id.* § 5443 (Perm. ed. 1932); Burstein, *The Elimination of Accumulated Dividends,* 28 B.U.L. REV. 173 (1948).

12. Western Foundry Co. v. Wicker, 403 Ill. 260, 85 N.E.2d 722 (1949), 63 HARV. L. REV. 529 (1950); STEVENS, CORPORATIONS 576 (2d ed. 1949). That the statute authorizing charter amendment of corporation to eliminate cumulative dividends is not violation of due process of law, see McNulty v. W. & J. Sloane, 184 Misc. 835, 54 N.Y.S.2d 253 (Sup. Ct. 1945) (since states have constitutional provisions reserving the legislative power to amend corporate charters, shareholder's contract is assumed to have included contemplation of possibility of amendment by statute, and thus, the assent to the charter amendment as authorized by subsequent amended statutes). *Contra:* Wheatley v. A. I. Root Co., 147 Ohio St. 127, 69 N.E.2d 187 (1946).

13. This extends both to mandatory changes made by amendment of the law and to permissive changes authorized to be made by the requisite majority of the shareholders in accordance with statutory authorization. Dodd, *Dissenting Stockholders and Amendments to Corporate Charters,* 75 U. OF PA. L. REV. 585 (1927). But Ohio, contrary to the weight of authority in other jurisdictions, has construed such reserved power applicable only to those features of the contract embraced in the corporate charter in which the state has an interest and not to those features concerning private rights between stockholders and the corporation or as between individual stockholders. Wheatley v. A. I. Root Co., 147 Ohio St. 127, 60 N.E.2d 187 (1946); Note, 18 U. OF CIN. L. REV. 172 (1949).

14. Consolidated Film Industries, Inc. v. Johnson, 22 Del. Ch. 407, 197 Atl. 489 (Sup. Ct. 1937); Keller v. Wilson & Co., Inc., 21 Del. Ch. 391, 190 Atl. 115 (Sup. Ct. 1936).

15. *E.g.,* Lonsdale Securities Corp. v. International Mercantile Marine Co., 101 N.J.Eq. 554, 139 Atl. 50 (Ch. 1927).

16. Cases cited note 14 *supra;* Patterson v. Durham Hosiery Mills, 214 N.C. 806, 200 S.E. 906 (1939) (vested-right theory prevents reclassification of stock to lower preferences of cumulative preferred shareholders). *But see* Davison v. Parke, Austin & Lipscomb, Inc., 285 N.Y. 500, 35 N.E.2d 618 (1941) (vested rights challenged); Johnson v. Lamprecht, 133 Ohio St. 567, 15 N.E.2d 127 (1938) (corporate necessity allowed to overshadow the claims of minority stockholders to dividends, negativing any claim of vested rights). *Contra:* Western Foundry Co. v. Wicker, 403 Ill. 260, 85 N.E.2d 722 (1949); McNulty v. W. & J. Sloane, 184 Misc. 835, 54 N.Y.S.2d 253 (Sup. Ct. 1945).

debt.[17] True, if a preferred stock contract establishes a debtor-creditor status between the corporation and shareholders, accrued dividends cannot be eliminated;[18] but there is unanimity among the courts that a debt is not created until the dividend is actually declared.[19] Even assuming the shareholder to be a creditor, as after a dividend has been declared, under emergency situations the exigencies may permit the directors of the corporation to rescind a declaration of dividends and thus destroy any assumed creditor status of the shareholder.[20]

However, though the vested-right theory is still applied in some jurisdictions to prevent elimination of accrued dividends by charter amendment, it has not been recognized as preventing such cancellation by merger or consolidation.[21] Upon merger or consolidation, preferred stock dividends in arrears may be eliminated and rights to future dividends on the stock of the merged or constituent corporation may be expunged;[22] thus, the preferential rights which could not be reached directly by amendment may be abrogated under the guise of merger or consolidation.[23] The statutes authorizing merger and consolidation have been held constitutional under the reserved power of the state as to corporations previously existing as well as to future corporations.[24] Even after finding the necessary powers of a

17. Morris v. American Public Utilities Co., 14 Del. Ch. 136, 122 Atl. 696 (Ch. 1923); Roberts v. Roberts-Wicks Co., 184 N.Y. 257, 77 N.E. 13 (1906).

18. Burstein, *The Elimination of Accumulated Dividends,* 28 B.U.L. REV. 173, 174 (1948).

19. See BALLANTINE, CORPORATIONS 557 (2d ed. 1946); STEVENS, CORPORATIONS 458 (2d ed. 1949).

20. Staats v. Biograph Co., 236 Fed. 454, L.R.A. 1917B 728 (2d Cir. 1916) (war seriously affecting corporation business sufficient grounds for rescission of declared dividends); Benas v. Title Guaranty Trust Co., 216 Mo. App. 53, 267 S.W. 28 (1924) (rescission of declared dividends which would impair capital of the corporation); *see* Dock v. Schlichter Jute Cordage Co., 167 Pa. 370, 31 Atl. 656, 660 (1895) (fire destroying corporate property would be sufficient for rescission). *A fortiori* it would seem that accumulated dividends accrued by lapse of time but not declared should be eliminated under a serious financial strain because such dividends are not in the nature of a debt. McNulty v. W. & J. Sloane, 184 Misc. 835, 54 N.Y.S.2d 253, 260 (Sup. Ct. 1945).

21. Hottenstein v. York Ice Machinery Corp., 45 F. Supp. 436 (D. Del. 1942), *aff'd* 136 F.2d 944 (3d Cir. 1943), *cert. denied,* 325 U.S. 886 (1945); Federal United Corp. v. Havender, 24 Del. Ch. 318, 11 A.2d 331, 338 (Sup. Ct. 1940) ("The average intelligent mind must be held to know that dividends may accumulate on preferred stock, and that in the event of a merger of the corporation issuing the stock with another corporation, the various rights of shareholders, including the right to dividends on preference stock accrued but unpaid, may, and perhaps must, be the subject of reconcilement and adjustment"). For an exhaustive review of legal implications of merger, see Fuld, *Some Practical Aspects of a Merger,* 60 HARV. L. REV. 1092 (1947).

22. Burstein, *The Elimination of Accumulated Dividends,* 28 B.U.L. REV. 173, 177 (1947).

23. Cases cited note 21 *supra.*

24. BALLANTINE, CORPORATIONS 683 (2d ed. 1946); Note, 8 A.L.R.2d 893, 909 (1949). Willingness of the courts to permit merger and consolidation may be due in part to the fact that under most merger statutes the dissenting stockholder has the option of having his stock appraised. *E.g.,* DEL. REV. CODE c. 65, § 61 (1935), as amended, DEL. LAWS 1943 c. 125 § 6; N.Y. STOCK CORP. LAWS § 21. But see STEVENS, CORPORATIONS 589,

state to authorize corporate cancellation of accrued dividends the courts are still faced with a consideration of the fairness of the operation;[25] they will not allow elimination of dividends in cases of fraud, unfairness or bad faith.

In the instant case, the court avoided a decision on whether accrued dividends may be eliminated by charter amendment, and decided the issue on statutory construction of explicit words rather than on a consideration of the probable policy intent of the legislature.[26] Although it is well settled that such accruals may be eliminated by merger or consolidation, an examination reveals little apparent difference in so far as constitutional power to eliminate dividends is concerned.[27] The purpose, mechanics and effects of the three methods are substantially similar. If applicable statutes are present and the corporation so desires, there appears to be no substantial reason why a corporation may not eliminate dividend accruals by the amendment process. Under the modern trend, though perhaps not yet by the numerical weight of authority, preferential rights may be altered or extinguished by the amending process if that is authorized at the time the change is made.[28] Such a reorganization frequently will revitalize a corporation by bringing in new capital and stability, which in the long run will probably result in a more profitable and solvent business.

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595 (2d ed. 1949) (questioning the need for appraisal statutes, and asserting that courts of equity can be relied upon to apply the balance of injuries doctrine and to grant or withhold equitable remedies as the justice of each case requires). If the corporation has to pay off dissenting stockholders this in itself destroys the effectiveness of any plan of reorganization. 63 HARV. L. REV. 529, 531 (1950).

Appraisal is not necessarily the crucial factor, because attempts to eliminate arrearages by charter amendment have been struck down, even though means were available for satisfying the dissenting stockholders as adequate as these under the appraisal statutes. *E.g.*, Keller v. Wilson & Co., Inc., 21 Del. Ch. 391, 190 Atl. 115 (1936) (stocks callable, plus arrearages and option to convert into common stock); Patterson v. Durham Hosiery Mills, 214 N.C. 806, 200 S.E. 906 (1939) (offer to purchase 1/3 of old stock in addition to exchanging for new stock). Moreover, if the judicially approved merger and consolidation agreement and the statute are silent in regard to paying dissenting stockholders in cash for their shares, an objecting stockholder eannot recover the value of his stock from the consolidating or absorbed company. Milner v. Van Higgins, 227 Ala. 333, 149 So. 872 (1933) (option in consolidation agreement to take share for share or eash in, and no other relief); Mayfield v. Alton Ry., Gas & Electric Co., 198 Ill. 528, 65 N.E. 100 (1902).

25. Federal United Corp. v. Havender, 24 Del. Ch. 318, 11 A.2d 331 (Sup. Ct. 1940); Western Foundry Co. v. Wicker, 403 Ill. 260, 85 N.E.2d 722 (1949).

26. By permitting in the statutes a change by a corporation "to any other lawful amendment," it is apparent here that the legislature was relying on reserve powers to alter the charter; a specific interpretation of "subsequently to be issued" defeats the intended policy background for the statute.

27. See Western Foundry Co. v. Wicker, 403 Ill. 260, 85 N.E.2d 722, 730 (1949).

28. Western Foundry Co. v. Wicker, 403 Ill. 260, 85 N.E.2d 722 (1949); McNulty v. W. & J. Sloane, 184 Misc. 835, 54 N.Y.S.2d 253 (Sup. Ct. 1945); STEVENS, CORPORATIONS § 127 (2d ed. 1949).

CRIMINAL LAW—EVIDENCE—ADMISSIBILITY OF UNCOMMUNICATED THREATS UNDER PLEA OF SELF-DEFENSE

Defendant was convicted of first degree murder in the United States District Court for the District of Columbia. Defendant testified that he shot deceased in self-defense, but four eye-witnesses testified that deceased made no aggressive move. The court of appeals affirmed the conviction, and the Supreme Court denied certiorari. Defendant moved for a new trial on the ground of newly-discovered evidence, the testimony of a morgue attendant that he had found an open penknife in the pocket of deceased. The motion was denied by the court of appeals. The Supreme Court remanded the case to the court of appeals to determine the rule in the District of Columbia in regard to uncommunicated threats, and whether, under its ruling, a new trial should be granted. *Held* (2-1), evidence of an uncommunicated threat is admissible as relevant to the deceased's apparent conduct; new trial granted. *Griffin v. United States,* 183 F.2d 990 (D.C. Cir. 1950).

In most jurisdictions evidence of threats of violence by the deceased against the defendant and *known* to the defendant is admissible in homicide cases.[1] Self-defense must be in issue,[2] and the courts generally require that there be some evidence of aggression by the deceased in addition to the threat.[3] This is expressed by statements that there must be some evidence of a hostile or overt act on the part of the deceased. The reason for this latter requirement is that evidence of this type is easily fabricated.[4] Consideration has also been given to the possibility that even if the threats are true they may help the defendant improperly by way of justification,[5] since a mere threat can never be justification for a killing.[6] The evidence of the threat, however, is relevant as tending to show whether the defendant reasonably believed his life to be in danger.

Threats made by the deceased which are *not* communicated to the defendant at the time of the commission of the homicide are also generally admissible.[7] The courts apply the same requirements to these uncommunicated

1. UNDERHILL, CRIMINAL EVIDENCE § 564 (4th ed. 1935); 1 WHARTON, CRIMINAL EVIDENCE § 286 (11th ed. 1935); 2 WIGMORE, EVIDENCE § 247 (3d ed. 1940); Note, 32 KY. L.J. 84 (1943). Evidence of communicated and uncommunicated threats is also admissible for the same purposes in cases of assault and battery. 6 C.J.S., *Assault and Battery* § 122 (1937).

2. White v. State, 4 Okla. Cr. 143, 111 Pac. 1010 (1910); 40 C.J.S., *Homicide* § 276 (1944).

3. *E.g.,* Burgen v. State, 32 Ariz. 111, 256 Pac. 111 (1927); People v. Terrell, 262 Ill. 138, 104 N.E. 264 (1914); Malone v. State, 176 Ind. 338, 96 N.E. 1 (1911); Moriarity v. State, 62 Miss. 654 (1885); Rippy v. State, 39 Tenn. 122 (1858).

4. 1 WIGMORE, EVIDENCE § 111 (3d ed. 1940); 2 *id.* §§ 246, 247.

5. *Ibid.*

6. State v. Vernon, 197 La. 867, 2 So.2d 629 (1941); Fields v. State, 85 Okla. Cr. 439, 188 P.2d 231 (1947).

7. UNDERHILL, CRIMINAL EVIDENCE § 564 (4th ed. 1935); 1 WIGMORE, EVIDENCE §§ 110, 111 (3d ed. 1940); Note, 32 KY. L.J. 84 (1943).

threats as to those which are communicated to the defendant.[8] However, uncommunicated threats are not admissible to show the defendant's state of mind when the crime was committed but are admissible to show the victim's state of mind.[9] If the deceased's state of mind is known, it might show by inference that he, not the defendant, was the aggressor.[10] If the deceased is found to be the aggressor, the defendant's plea of self-defense may thus be substantiated. Evidence in the nature of uncommunicated threats may likewise be admissible to corroborate other threats made by the deceased.[11]

In the instant case the court said: "When a defendant claims self-defense and there is substantial evidence, though it be only his own testimony, that the deceased attacked him, evidence of uncommunicated threats of the deceased against the defendant is admissible."[12] In granting a new trial the court felt that it would be too dogmatic to conclude that a jury would not have attached significance to this evidence. An open penknife found in the pocket of the deceased by a morgue attendant is not technically a threat. A threat is ordinarily thought to consist of words which must be uttered. The evidence

8. *E.g.*, Wiggins v. Utah, 93 U.S. 465, 23 L. Ed. 941 (1876) (admissible when doubt as to who was the aggressor); Trapp v. Territory of New Mexico, 225 Fed. 968 (8th Cir. 1915) (same rule); Harlan v. State, 23 Ala. App. 554, 129 So. 482 (1930) (admissible when there is evidence of a hostile demonstration by deceased); State v. Lynch, 32 Del. 597, 128 Atl. 564 (1925) (admissible where evidence is uncertain as to who began the difficulty); Wilson v. State, 168 Ga. 672, 148 S.E. 586 (1929) (admissible with evidence that deceased was the agressor or with evidence of overt act by deceased); Neathery v. People, 227 Ill. 210, 81 N.E. 16 (1907) (admitted with conflict of testimony as to who began the fight); Banks v. Commonwealth, 277 Ky. 647, 126 S.W.2d 1122 (1939) (admitted with no other evidence specified); State v. Vernon, 197 La. 867, 2 So.2d 629 (1941) (admissible when there is doubt as to who was the aggressor); Winner v. State, 144 Md. 682, 125 Atl. 397 (1924) (admissible as relevant to the question of deceased's aggression as raised by the evidence); Commonwealth v. Rubin, 318 Mass. 587, 63 N.E.2d 344 (1945), 26 B.U.L. Rev. 63 (1946) (admissible with some other evidence of deceased's aggression); People v. Cellura, 288 Mich. 54, 284 N.W. 643 (1939) (admitted with no other evidence specified); State v. Scaduto, 74 N.J.L. 289, 65 Atl. 908 (1907) (admissible with overt act of attack so that defendant is in danger); Stokes v. People, 53 N.Y. 164 (1873) (admissible); State v. Minton, 228 N.C. 15, 44 S.E.2d 346 (1947) (admissible when the evidence has an explanatory bearing on the plea of self-defense); Commonwealth v. Peronace, 328 Pa. 86, 195 Atl. 57 (1937) (inadmissible when there is no doubt that defendant was the aggressor); Little v. State, 65 Tenn. 491 (1873) (admissible where acts of the deceased are of doubtful character); Riddick v. Commonwealth, 186 Va. 100, 41 S.E.2d 445 (1947) (admissible with no other evidence specified).

9. "Evidence of communicated threats tends to throw light upon the mental attitude of the accused towards the deceased, while uncommunicated threats serve a reverse purpose, namely, as evidence of the mental attitude of the deceased towards the accused. Where the chief defense of the latter is self-defense, it is of prime importance to determine which of the parties to the combat was the aggressor." State v. Arrington, 88 W. Va. 152, 106 S.E. 445, 446 (1921).

10. Harlan v. State, 23 Ala. App. 554, 129 So. 482 (1930); Stoddard v. State, 169 Ark. 594, 276 S.W. 358 (1925); State v. Lynch, 32 Del. 597, 128 Atl. 564 (1925); Banks v. Commonwealth, 277 Ky. 647, 126 S.W.2d 1122 (1939); Winner v. State, 144 Md. 682, 125 Atl. 397 (1924); State v. Scaduto, 74 N.J.L. 289, 65 Atl. 908, (1907); Commonwealth v. Peronace, 328 Pa. 86, 195 Atl. 57 (1937); Little v. State, 65 Tenn. 491 (1873).

11. State v. Vernon, 197 La. 867, 2 So.2d 629 (1941); Riddick v. Commonwealth, 186 Va. 100, 41 S.E.2d 445 (1947).

12. 183 F.2d at 992.

in the instant case is of the same character because it tends to show that the deceased had a design or plan from which it may be inferred that he was the aggressor. Similar evidence has been admitted for this purpose.[13]

The dissenting judge felt that the testimony of the eye-witnesses was direct evidence that the defendant was the aggressor so that the evidence of the knife would be of no appreciable weight. Where it clearly appears that the defendant was the aggressor, the deceased's threats are not legally relevant since they cannot justify the defendant's act. However, the majority opinion held that the defendant's testimony, itself, was enough to satisfy the requirement that there must be some *other* evidence of aggression by the deceased before the uncommunicated threat can be admitted in evidence. Since defendant's testimony will support a jury verdict, it should be enough to create a doubt as to whether he was the aggressor, even though there was testimony of eye-witnesses to the contrary. Defendant's testimony should be a sufficient basis for the admission of demonstrative evidence such as that in the instant case, since it may well be stronger than mere words and is not so easily manufactured as the ordinary verbal threat.[14]

DOMESTIC RELATIONS—CONSORTIUM—RIGHT OF WIFE TO SUE FOR LOSS DUE TO NEGLIGENT INJURY TO HUSBAND

Plaintiff's husband was injured due to the negligence of defendant, his employer. After her husband was paid the statutory amount for such injuries under the Longshoremen's and Harbor Workers' Compensation Act, plaintiff sued for loss of *consortium.* The lower court granted defendant's motion for summary judgment and plaintiff appeals. *Held,* reversed; a wife has a cause of action for loss of *consortium* due to a negligent injury to her husband. *Hitaffer v. Argonne Co.,* 183 F.2d 811 (D.C. Cir. 1950).

At common law a wife had no cause of action for loss of consortium. It is not clear whether or not she had a right to the consortium of her husband, but if such a right did exist she could not protect it in a court of law because of procedural rules.[1] The husband, on the other hand, had a clearly defined right to consortium which he could effectively protect by an action of trespass,[2]

13. Gibbs v. State, 23 Ala. App. 475, 127 So. 788, *cert. denied,* 21 Ala. 130, 127 So. 790 (1930); Hyche v. State, 22 Ala. App. 176, 113 So. 644, *cert. denied,* 217 Ala. 114, 114 So. 906 (1927); Bly v. State, 213 Ark. 859, 214 S.W.2d 77 (1948); Cranfill v. State, 129 Tex. Cr. R. 338, 87 S.W.2d 740 (1935); Davis v. State, 102 Tex. Cr. R. 608, 279 S.W. 275 (1926). See also State v. Richard, 203 La. 722, 14 So.2d 615 (1943) (decision under statute).

14. The granting of the new trial may have been in part influenced by the fact that the prosecution knew of this evidence at the time of the first trial but did not disclose it to the defendant or his counsel.

1. Holbrook, *The Change in the Meaning of Consortium,* 22 MICH. L. REV. 1, 2-4 (1923); Note, 12 NOTRE DAME LAW. 329 (1937).

2. PROSSER, TORTS § 101 (1941).

the foundation of his right of action being based upon the idea that the wife was her husband's servant and an interference with the service of a servant is an actionable trespass.[3]

Following the passage of the various Married Women's Acts, the courts generally allowed the wife to sue for intentional invasion of the marital relation in actions for alienation of affections and criminal conversation.[4] In allowing a wife's suit for criminal conversation some courts find that each spouse acquires the right to exclusive marital intercourse as a fundamental right of the marriage contract,[5] and the Married Women's Acts give the wife the ability to sue. The historical basis for the action of alienation of affections by the husband was loss of services, but after the emancipation acts most courts extended to the wife the right of action, substituting for loss of services the theory that she has an equal interest with her husband in the marriage relation.[6] Other courts, in suits by the wife for alienation of affections, have held that she has a property right in the consortium of her husband and may therefore sue for an intentional and direct injury to her property right.[7] Despite the fact that the courts in the intentional invasion suits have in effect, if not always expressly, recognized the right of a wife to the consortium of her husband, she nevertheless has been consistently denied a remedy where the loss of consortium was due to a negligent injury to her husband.[8]

The court in the instant case, faced for the first time with the question of allowing an action by the wife for loss of consortium resulting from negligent injury to the husband, effectively analyzed and discounted the various reasons given by courts of other jurisdictions in denying the right of the wife to sue.[9] In one group of cases, the courts have held that the loss of services is the predominant factor for which compensation is given and the wife has no right

3. Lippman, *The Breakdown of Consortium*, 30 COL. L. REV. 651, 653 (1930).

4. HARPER, TORTS §§ 256, 258 (1933); MADDEN, DOMESTIC RELATIONS §§ 56, 57 (1931). The actions are available to the wife without express statutes. 3 VERNIER, AMERICAN FAMILY LAWS § 158 (1935).

5. Lippman, *supra* note 3, at 664, and cases cited therein; Holbrook, *supra* note 1, at 4. *Cf.* Oppenheim v. Kridel, 236 N.Y. 156, 140 N.E. 227 (1923), where the court reasoned that the wife is as much interested in the health and cleanliness of her husband and children as he is in the legitimacy of his children, the possible doubt as to legitimacy being a principal basis for the husband's action at common law.

6. Lippman, *supra* note 3, at 664.

7. *E.g.*, Noxon v. Remington, 78 Conn. 296, 61 Atl. 963 (1905); Eliason v. Draper, 25 Del. 1, 77 Atl. 572 (Super. Ct. 1910); Nichols v. Nichols, 147 Mo. 387, 48 S.W. 947 (1898). In Eliason v. Draper, *supra*, many of the cases previous to the date of the decision are collected and classified. See also, Holbrook, *supra* note 1, at 4.

8. See, *e.g.*, Feneff v. N.Y. Cent. & H.R.R., 203 Mass. 278, 89 N.E. 436 (1909); Hinnant v. Tidewater Power Co., 189 N.C. 120, 126 S.E. 307 (1925); Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N.E. 204 (1915); Holbrook, *supra* note 1, at 6; Notes, 59 A.L.R. 680 (1929), 5 A.L.R. 1049 (1920).

9. 183 F.2d at 813 *et seq.*

as such to her husband's services;[10] other courts fear double recovery, since the husband may recover for his own injury;[11] and a third group reasons that the injury to the wife is indirect and remote and is therefore one for which she may not be compensated.[12] The present court argues that the reasoning in the multitude of cases it has examined is "specious and fallacious"[13] and that "in light of the demonstratable [*sic*] desirability of the rule under the circumstances, a wife has a cause of action for loss of consortium due to a negligent injury to her husband."[14]

This court, not feeling bound by the precedent of other jurisdictions, has made a bold step forward in the field of domestic relations which may well be the basis for a trend toward a result which has been urged by commentators for some time.[15] A few judges have supported similar holdings in dissenting opinions.[16] There is no reasonable or logical reason why a wife should be denied the protection of her right of consortium while her husband is granted this protection. Nor is there justification for denying her a remedy for a negligent invasion of her right of consortium since she has been allowed a remedy in cases of an intentional invasion of this same right. The court, therefore, has reached the desirable result in a comprehensive and well-reasoned opinion.[17]

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10. Boden v. Del-Mar Garage, 205 Ind. 59, 185 N.E. 860 (1933); Brown v. Kistleman, 177 Ind. 692, 98 N.E. 631 (1912); Stout v. Kan. City Term. Ry., 172 Mo. App. 113, 157 S.W. 1019 (1913). See also Marri v. Stamford St. Ry., 84 Conn. 9, 78 Atl. 582 (1911) (husband may not recover for negligent injury to consortium because Married Women's Act gives wife the right to the fruits of her own services). Redundancy in common law pleading has led to "an absurd division of consortium into services on the one hand, and conjugal affection, etc., on the other. The cases show that this separation is arbitrary and, in the main, fictitious." Lippman, *supra* note 3, at 668.

11. *E.g.*, Eschenbach v. Benjamin, 195 Minn. 378, 263 N.W. 154 (1935); Bernhardt v. Perry, 276 Mo. 612, 208 S.W. 462 (1919); Gambino v. Manufacturers' Coal & Coke Co., 175 Mo. App. 653, 158 S.W. 77 (1913).

12. This group seems to realize that the so-called sentimental elements of consortium are injured in negligent invasions. See, *e.g.*, Feneff v. N.Y. Cent. & H.R.R., 203 Mass. 278, 89 N.E. 436 (1909); Stout v. Kan. City Term. Ry., 172 Mo. App. 113, 157 S.W. 1019 (1913).

13. 183 F.2d at 819.

14. *Ibid.*

15. *E.g.*, HARPER, TORTS 566 (1933); Lippman, *The Breakdown of Consortium*, 30 COL. L. REV. 651 (1930); Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923); Note, 12 NOTRE DAME LAW. 329 (1937).

16. *E.g.*, McDade v. West, 80 Ga. App. 481, 56 S.E.2d 299 (1949) (evenly divided court); Bernhardt v. Perry, 276 Mo. 612, 208 S.W. 462, 467 (1919); Landwehr v. Barbas, 241 App. Div. 769, 270 N.Y. Supp. 534, 535 (2d Dep't 1934). See also Hipp v. E. I. Dupont de Nemours & Co., 182 N.C. 9, 108 S.E. 318, 18 A.L.R. 873 (1921), where the wife was allowed to sue for negligent invasion of consortium. This case was subsequently overruled. Hinnant v. Tide-Water Power Co., 189 N.C. 120, 126 S.E. 307 (1925).

17. It was also held that the right of a wife to recover is not barred by the provision of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 905 (Supp. 1949), that the liability of the employer shall be exclusive and in place of all other liability on account of such injury. The injury is to the wife's independent right of consortium. Her damages should be calculated in exactly the same way as those of the husband are measured in a similar action, subtracting therefrom his prior recovery based on his duty to support. 183 F.2d at 819.

EMINENT DOMAIN—LESSEE AS CONDEMNOR—REQUIREMENT THAT COMPENSATION BE GIVEN FOR IMPROVEMENTS TO LAND MADE BY LESSEE

Certain lands were leased to the Houston Shipbuilding Corporation, an agency of the United States. The leases provided that some dredging would be done by the lessee, and consent was given to deposit the spoil on the lands. At the termination of the leases the United States was to be entitled to remove all improvements which it had placed on the lands. Before the termination of the leases the United States instituted this proceeding to condemn the lands. The owners of the lands, while making no claim for the structural improvements placed upon the lands, maintained that their compensation should include any enhancement in value resulting from the dredging, filling and leveling operations conducted by the government. The United States contended that this enhanced value should be excluded from the measure of damages suffered by the owners. From a judgment in favor of the landowners, the United States appeals. *Held* (2-1), affirmed. The dredging, filling and leveling operations were normal, incidental and contemplated fruits of the leases and rightfully inured to the benefit of the landowners. The right to receive the lands back with the improvements *to* the lands, as distinguished from improvements *on* the lands, was a right implied in the leases that inhered in the landowners. *United States v. Five Parcels of Land,* 180 F.2d 75 (5th Cir. 1950), *cert. denied,* 340 U.S. 812 (1950).

The Federal Constitution requires that "just compensation" be given to the owner of land whose property is taken by eminent domain proceedings.[1] The measure of "just compensation" is the fair market value of the property,[2] the price that would be agreed upon at a voluntary sale between a willing buyer and a willing seller.[3] Generally, market value is ascertained as of the time of the taking.[4] However, some other time is used if (1) there have been no recent sales of comparable property because there is no existing

1. U.S. CONST. AMEND. V. ". . . nor shall private property be taken for public use, without just compensation." Most states have similar constitutional provisions. See, *e.g.,* TENN. CONST. Art. I, § 21. The Supreme Court has held that states are required to pay just compensation under section 1 of the Fourteenth Amendment. Chicago, B., & Q. Ry. v. Chicago, 166 U.S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979 (1897). See 2 LEWIS, EMINENT DOMAIN §§ 451 *et seq.* (2d ed. 1900); MCCORMICK, DAMAGES § 129 (1935); 3 NICHOLS, EMINENT DOMAIN § 8.1[2] (3d ed. 1950). For procedural requirements, see 40 U.S.C.A. §§ 255-58f. (1940).

2. MCCORMICK, DAMAGES § 129 (1935); 1 NICHOLS, EMINENT DOMAIN § 217 (2d ed. 1917); ORGEL, VALUATION UNDER EMINENT DOMAIN §§ 14, 16 (1936); McCormick, *The Measure of Compensation in Eminent Domain,* 17 MINN. L. REV. 461 (1933).

3. Epstein v. Boston Housing Authority, 317 Mass. 297, 58 N.E.2d 135 (1944); New York v. Sage, 239 U.S. 57, 36 Sup. Ct. 25, 60 L. Ed. 143 (1915).

4. United States v. Miller, 317 U.S. 369, 374, 63 Sup. Ct. 276, 87 L. Ed. 336 (1943); Shoemaker v. United States, 147 U.S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170 (1893); 2 LEWIS, EMINENT DOMAIN § 477 (2d ed. 1900); MCCORMICK, DAMAGES § 135 (1935); ORGEL, VALUATION UNDER EMINENT DOMAIN §§ 20 *et seq.* (1936).

market,[5] (2) the owner has bought land within an area where a projected public improvement had itself enchanced the value of the land,[6] or (3) the condemnor has placed improvements upon the land prior to a valid taking.[7]

At common law whatever was affixed to the land became a part of the land.[8] This rule applied to improvements as well as fixtures. The application of the rule to eminent domain proceedings has been criticized,[9] and the law now makes an exception in the case of a condemnor who has placed improvements on the land prior to a valid taking.[10] Courts justify this exception by saying that "just compensation" requires justice to the public as well as to the landowner,[11] or that the condemnor intended to devote the improvements to a "public use" and not to the freehold.[12]

5. United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396, 70 Sup. Ct. 217, 94 L. Ed. 162 (1949), 23 TEMP. L.Q. 425 (1950); ORGEL, VALUATION UNDER EMINENT DOMAIN § 37, (1936).

6. United States v. Miller, 317 U.S. 369, 63 Sup. Ct. 276, 87 L. Ed. 336, 147 A.L.R. 55 (1943). See ORGEL, VALUATION UNDER EMINENT DOMAIN § 96 *et seq.* (1936).

7. Searl v. School District No. 2, 133 U.S. 553, 10 Sup. Ct. 374, 33 L. Ed. 740 (1890).

8. Fechet v. Drake, 2 Ariz. 239, 12 Pac. 694 (1887). For a collection of the cases, see Frost v. Schinkel, 121 Neb. 784, 238 N.W. 659, 77 A.L.R. 1381 (1931). The rule is based on the common law maxim of *quicquid plantatur solo, solo cedit* (whatever is affixed to the soil, belongs to the soil). 2 NICHOLS, EMINENT DOMAIN § 5.83 (3d ed. 1950).

9. The theory behind the rule is that the person has no right of reentry and cannot retake his property without committing a trespass. Since the law cannot sanction a trespass, the law presumes that the owner of the improvements intended to give them to the owner of the freehold. The reasoning of the common law doctrine breaks down when applied to a body clothed with the power of eminent domain, because it is obvious that such a body can reenter and reclaim its property. Justice v. Nesquehoning Valley R.R., 87 Pa. 28 (1878); 2 LEWIS, EMINENT DOMAIN 1145 (2d ed. 1900).

10. Searl v. School District No. 2, 133 U.S. 553, 10 Sup. Ct. 374, 33 L. Ed. 740 (1890). Most cases have arisen where the condemnor's original entry was such that he was at least a "technical trespasser." The cases uniformly hold that if the trespass is not forceful or if the condemnor enters under color of title, then in a subsequent condemnation proceeding the condemnor need not pay the value of any improvements that he has placed on the land. *E.g.*, Albion R.R. v. Heeser, 84 Cal. 435, 24 Pac. 288 (1890) (no positive information as to identity of owner); McClarren v. Jefferson School Township, 169 Ind. 140, 82 N.E. 73, 13 L.R.A. (N.S.) 417, 13 Ann. Cas. 978 (1907) (entry under void proceedings); Atchison, T. & S.F. Ry. v. Morgan, 42 Kan. 23, 21 Pac. 809, 4 L.R.A. 284, 16 Am. St. Rep. 471 (1889) (entry by mistake); Aldridge v. Board of Education, 15 Okla. 354, 82 Pac. 827 (1905) (entry under void statute); Justice v. Nesquehoning V. R.R., 87 Pa. 28 (1878) (intention to subsequently purchase the land); Southern Ry. v. Pouder, 141 Tenn. 197, 208 S.W. 332 (1918) (entry under belief that the premises belonged to them). Today most courts apply the rule in favor of even a wilful trespasser, if he subsequently condemns the land. See, *e.g.*, Atchison, T. & S.F. Ry. v. Richter, 20 N.M. 278, 148 Pac. 478, L.R.A. 1916F 969 (1915). *Contra:* St. Johnsville v. Smith, 184 N.Y. 341, 77 N.E. 617, 5 L.R.A. (N.S.) 922, 6 Ann. Cas. 379 (1906). Courts which apply the rule in favor of trespassers naturally apply it to those entries where the landowner has expressly or impliedly consented to the entry. New York, O. & W. Ry. v. Livingston, 238 N.Y. 300, 144 N.E. 589, 34 A.L.R. 1078 (1924) (entry with consent of life tenant). A federal statute has been held constitutional which provided that in the event of a subsequent condemnation of land by the United States any improvements placed on the land by the United States should be excluded from the measure of damages awarded to the landowner. Old Dominion Land Co. v. United States, 269 U.S. 55, 46 Sup. Ct. 39, 70 L. Ed. 162 (1925). For a general discussion of the subject, see Notes, 34 A.L.R. 1082 (1925), L.R.A. 1916F 980, 13 Ann. Cas. 980 (1909), 6 Ann. Cas. 382 (1907).

11. "The principles to be applied are broad and liberal, and such as are just to both parties. It is just compensation, no more and no less which the Constitution requires to be paid." 2 LEWIS, EMINENT DOMAIN 1145 (2d ed. 1900). See dissenting opinion in instant case, 180 F.2d at 77.

12. See 1 NICHOLS, EMINENT DOMAIN § 230 (2d ed. 1917); Note, 6 Ann. Cas. 382 (1907).

The court in the instant case concludes that the improvements in question do not fall within this exception relied upon by the government. The exception clearly covers improvements *on* the land, for which the owners made no claim. Improvements *to* the land are distinguished from improvements *on* the land because: (1) leveling and filling were not removable improvements within the contemplation of the leases, and (2) the government had no right to destroy the results of the dredging operations and thus intended that they inure to the benefit of the freehold.[13]

The court's first ground does not seem well founded. Assuming that the word "improvements" as used in the leases does not cover the operations in question, the most that can be said is that there was no agreement as to their ownership. In such a case the law is well settled that a tenant may remove the improvements.[14] But the court might well have held that the language used was broad enough to include these operations.[15]

The second basis for the holding also seems unsound. The court deems it "fantastic and unthinkable"[16] that the Government would ever destroy the results of the dredging operations. Upon this reasoning it concludes that no right existed to destroy the improvements and from this it infers an intent that the improvements inhere in the landowners.[17] However, there might be many situations, such as a wartime alteration of the shipyard facilities, indicating a clear right in the Government to destroy or alter these improvements. Thus the court seems to penalize the Government not for a right that it did not have, but for one that it did not exercise. Further, it is difficult to infer on the part of the Government an intent that the improvements inure to the benefit of the freehold. The Government's only intent was the successful prosecution of the war and certainly was not the conferring of a financial windfall on these property owners.

Inasmuch as "just compensation" is determined by equitable principles,[18] it would seem that the court is not justified in its conclusion. The result subjects the United States to the double expense of making the improvements and also paying for them. Since the exception upon which the Government

13. 180 F.2d at 77.

14. 51 C.J.S., *Landlord and Tenant* § 394c (1947).

15. "A proviso giving the right to remove improvements includes every addition, alteration, erection or annexation made by the tenant." BENNETT, LANDLORD AND TENANT 183 (1939). "It would be difficult to select a more comprehensive word. . . ." French v. Mayor of New York, 29 Barb. 363, 366 (Sup. Ct., N.Y. 1859); see Realty Dock & Improvement Corp. v. Anderson, 174 Cal. 672, 164 Pac. 4 (1917); 1 MCADAM, LANDLORD AND TENANT § 135 (5th ed. 1934).

16. 180 F.2d at 77.

17. *Ibid.*

18. New York, O. & W. Ry. v. Livingston, 238 N.Y. 300, 144 N.E. 589, 34 A.L.R. 1078 (1924); 2 LEWIS, EMINENT DOMAIN 1145 (2d ed. 1900); 1 NICHOLS, EMINENT DOMAIN § 230 (2d ed. 1917).

relies applies even to trespassers,[19] manifestly it should apply to one who enters the property under a legal right and does the very things contemplated by the parties.[20]

EVIDENCE—UNANSWERED LETTERS—ADMISSIBILITY ON BEHALF OF WRITER AS ADMISSION OR ESTOPPEL OF RECIPIENT

Plaintiff sued for breach of contract resulting from defendant's failure to accept and pay for certain finished leather. Plaintiff alleged an oral contract, by the terms of which plaintiff was to purchase and finish leather as defendant's agent. Defendant denied that the plaintiff was acting as his agent and alleged that the terms of the contract were that the defendant would purchase the leather when finished. At the trial, plaintiff introduced in evidence an unanswered letter from plaintiff to defendant, written three days after the date of the oral agreement, which purported to state the contract as the plaintiff alleged and also reported the action which plaintiff was taking under that contract. The letter was received in evidence but was not considered as an admission by defendant of the facts therein. Plaintiff appeals from a judgment for the defendant. *Held,* reversed. The circumstances in the case made a reply "requisite or natural," and a failure to answer was an admission of the terms of the contract as set out in the letter. Moreover, the failure to reply created an estoppel. *Willard Helburn, Inc. v. Spiewak,* 180 F.2d 480 (2d Cir. 1950).

It is generally accepted that an unanswered letter, not part of mutual correspondence, cannot be introduced into evidence to prove the truth of the contents of the letter.[1] The reason for this general rule is that the letter is hearsay and self-serving,[2] and to hold it admissible would allow a party to manufacture evidence for himself.[3] There are exceptions to the general rule, which allow the unanswered letter to be introduced either as evidence from

19. See note 10, *supra.*

20. In a similar case arising under a lease, the court said, "With stronger reason, the landowner is not entitled to the value of such improvements, if the company enters with his permission." Kansas City So. Ry. v. Second Street Improvement Co., 256 Mo. 386, 166 S.W. 296, 299 (1914).

1. *E.g.,* Leach & Co. v. Peirson, 275 U.S. 120, 48 Sup. Ct. 57, 72 L. Ed. 194, 55 A.L.R. 457 (1927), 23 ILL. L. REV. 172 (1928); Winn v. Cudahy Packing Co., 241 Ala. 581, 4 So.2d 135 (1941); Kumin v. Fine, 229 Mass. 175, 118 N.E. 187 (1918); Learned v. Tillotson, 97 N.Y. 1 (1884); Wiedemann v. Walpole, [1891] 2 Q.B. 534. See Notes, 8 A.L.R. 1163 (1920), 34 A.L.R. 560 (1925).

2. 20 AM. JUR., *Evidence* § 558 (1939).

3. Leach & Co. v. Peirson, 275 U.S. 120, 128, 48 Sup. Ct. 57, 72 L. Ed. 194, 55 A.L.R. 457 (1927); Learned v. Tillotson, 97 N.Y. 1 (1884).

which an admission of the facts therein might be infered,[4] or as evidence to show an estoppel created by the silence of the recipient.[5] The general test of admissibility used in both is that there must have been a duty to reply.[6]

The circumstances that impose a duty to answer statements made in a letter, and thereby make the unanswered letter admissible as an admission by the recipient, may be grouped into several categories, the largest of which consists of unanswered letters which relate to existing contracts.[7] Unanswered letters have been admitted as part of the *res gestae* when the letter was mailed immediately after the transaction occurred.[8] Other types of unanswered letters held to be admissions have been those upon which the recipient took some action,[9] and letters containing an open account which was not ques-

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4. *E.g.*, Boerner v. United States, 117 F.2d 387 (2d Cir. 1941); Ross v. Reynolds, 112 Me. 223, 91 Atl. 952 (1914); Sturtevant v. Wallack, 141 Mass. 119, 4 N.E. 615 (1896).

5. *E.g.*, Leather Manufacturers' Bank v. Morgan, 117 U.S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811 (1886); Allen-West Comm'n Co. v. Patillo, 90 Fed. 628 (8th Cir. 1898); Furst & Thomas v. Smith, 280 Ky. 601, 133 S.W.2d 941 (1939).

6. The duty test has been more strictly interpreted in the admission cases than in the estoppel cases. For the duty in admission cases, see Leach & Co. v. Peirson, 275 U.S. 120, 48 Sup. Ct. 57, 72 L. Ed. 194, 55 A.L.R. 457 (1927) (circumstances made an answer requisite or natural); Keeling-Easter Co. v. Dunning & Co., 113 Me. 34, 92 Atl. 929 (1915) (naturally calculated to elicit replies and denials); Sturtevant v. Wallack, 141 Mass. 119, 4 N.E. 615 (1896) (according to common experience a man would naturally repudiate it). For the test of duty in estoppel cases, see Letta v. Cincinnati Iron & Steel Co., 285 Fed. 707 (6th Cir. 1922) (obligation to correct a misconstruction of the contract); Furst & Thomas v. Smith, 280 Ky. 601, 133 S.W.2d 941 (1939) (good morals and fairness); Strauss Bros. v. Denton, 140 Miss. 745, 106 So. 257, 45 A.L.R. 341 (1925) (obligation to fellowmen to prevent a fraud).

It should be noted that in a majority of cases which have allowed the unanswered letter to be an admission the letter has been in the course of business. See Dennis v. Waterford Packing Co., 113 Me. 159, 93 Atl. 58 (1915); Barry v. MacNeill, 249 Mass. 279, 143 N.E. 901 (1924). For cases where the letter was not in the course of business, see Boerner v. U.S., 117 F.2d 387 (2d Cir. 1941) (embezzlement action); Benn v. Forrest, 213 Fed. 763 (1st Cir. 1914) (auto wreck suit); Ross v. Reynolds, 112 Me. 223, 91 Atl. 952 (1914) (letter threatening deceit action); State v. Yurkiewicz, 212 Minn. 208, 3 N.W.2d 775 (1943) (prosecution for swindle).

The failure to reply to a letter, as constituting an admission, has been distinguished from the failure to reply to oral statements. Learned v. Tillotson, 97 N.Y. 1 (1884); Fenno v. Weston, 31 Vt. 345 (1858).

7. Unanswered letters have been held admissible to prove the existence of a contract. Simpson v. Bergmann, 125 Cal. App. 1, 13 P.2d 531 (1932); Sturtevant v. Wallack, 141 Mass. 119, 4 N.E. 615 (1886); Sonnesyn v. Hawbaker, 127 Minn. 15, 148 N.W. 476 (1914). *Contra:* Fidelity & Casualty Co. v. Beeland Bros. Mercantile Co., 7 So.2d 265 (Ala. 1942); Learned v. Tillotson, 97 N.Y. 1 (1884). And to prove the terms of the existing contract. Crown Central Petroleum Corp. v. Bates, 37 F.2d 508 (5th Cir. 1930); Denson v. Kirkpatrick Drilling Co., 225 Ala. 473, 144 So. 86 (1932); Keeling-Easter Co. v. Dunning Co., 113 Me. 34, 92 Atl. 929 (1915); Ross v. Reynolds, 112 Me. 223, 91 Atl. 952 (1914).

8. The use of the term *res gestae* in these cases means that the letter is the last step of the transaction, or matures it. Wilmoth v. Hamilton, 127 Fed. 48 (3d Cir. 1904); Denson v. Kirkpatrick Drilling Co., 225 Ala. 473, 144 So. 86 (1932); Murray v. East End Improvement Co., 22 Ky. 1477, 60 S.W. 648 (1901). *But cf.* Learned v. Tillotson, 97 N.Y. 1 (1884); Wakefield, Fries & Co. v. Sherman, Clay & Co., 141 Ore. 270, 17 P.2d 319 (1932).

9. St. Joseph Hydraulic Co. v. Globe Tissue-Paper Co., 156 Ind. 665, 59 N.E. 995 (1901) (recipient cashed check sent with letter).

tioned.[10] There are cases holding the letter admissible which do not fit into the above categories, but which must be determined on their facts.[11]

The failure to answer a letter may be the ground upon which an estoppel by acquiescence may be raised.[12] As in the admission cases, there must be a duty to reply,[13] but the duty is more easily found when the recipient's silence induced reliance,[14] which is an element of estoppel not essential in the admission cases. Typical of the estoppel cases are those in which the failure of the recipient to deny a forgery has induced reliance by the writer.[15]

The basis for admission of the unanswered letter in evidence, whether as an admission or as an estoppel, may produce differing consequences; but the exact line of distinction has not been clearly drawn by the cases.[16] If the estoppel theory is adopted, the recovery should be limited to damages subsequent to the silence of the recipient of the letter,[17] whereas under the admission theory, damages may be recovered as in any action for breach of contract. Another possible distinction is found in the manner of ruling as to admissibility. There is no question of the right of introducing the unanswered letter to prove estoppel by silence, since the letter is the basis of the action.[18] The admission cases, however, have not been in accord as to whether the court or the jury should determine that the failure to answer is an admission. The better rule

10. Perley v. McGray, 115 Me. 398, 99 Atl. 39 (1916); Barry v. MacNeill, 249 Mass. 279, 143 N.E. 901 (1924); Mason, Ehrman & Co. v. Lewis, 131 Ore. 232, 282 Pac. 772 (1929). *Contra:* Wakefield, Fries & Co. v. Sherman, Clay & Co., 141 Ore. 270, 17 P.2d 319 (1932). See 6 WILLISTON, CONTRACTS §§ 1862, 1863 (Rev. ed. 1937). In the instant case, the exclusion of an account and invoices sent to the defendant and not questioned for over a month was held error. 180 F.2d at 483.

11. Boerner v. United States, 117 F.2d 387 (2d Cir. 1941); Benn v. Forrest, 213 Fed. 763 (1st Cir. 1914); Brotherhood of R.R. Trainmen v. Barnhill, 214 Ala. 565, 108 So. 456 (1926); Callahan v. Roberts, 127 Me. 21, 140 Atl. 687 (1928); State v. Yurkiewicz, 212 Minn. 208, 3 N.W.2d 775 (1942). *But cf.* Thrush v. Fullhart, 210 Fed. 1 (4th Cir. 1913); Winn v. Cudahy Packing Co., 241 Ala. 581, 4 So.2d 135 (1941). These cases seem to illustrate the statement made by Wigmore that each of the admission cases must stand on its own facts. 4 WIGMORE, EVIDENCE § 1073 (3d ed. 1940).

12. Leather Manufacturers' Bank v. Morgan, 117 U.S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811 (1885); Veneri v. Draper, 22 F.2d 33 (4th Cir. 1927), *cert. denied*, 276 U.S. 633 (1927); J.R. Watkins Co. v. Daniel, 228 Ala. 399, 153 So. 771 (1934); Furst & Thomas v. Smith, 280 Ky. 601, 133 S.W.2d 941 (1939).

13. See note 7, *supra*. Also Allen-West Comm'n Co. v. Patillo, 90 Fed. 628 (8th Cir. 1898).

14. Aetna Life Ins. Co. v. Kepler, 116 F.2d 1 (8th Cir. 1941); Hoosier Drilling Co. v. Ellis, 282 Ky. 137, 137 S.W.2d 1084 (1940).

15. Leather Manufacturers' Bank v. Morgan, 117 U.S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811 (1886); Heberling Co. v. Dalton, 18 La. App. 256, 138 So. 176 (1931); Strauss Bros. v. Denton, 140 Miss. 745, 106 So. 257, 45 A.L.R. 341 (1925).

16. Crown Central Petroleum Corp. v. Bates, 37 F.2d 508 (5th Cir. 1930); Furst v. Carrico, 167 Md. 465, 175 Atl. 442, 96 A.L.R. 375 (1934). Wigmore says that there is a distinction in that admissions are evidence to prove the truth of other facts but the estoppel creates a new right regardless of the validiy of the original claim, though the same statements may be either. 4 WIGMORE, EVIDENCE § 1057 (3d ed. 1940).

17. Furst-McNess Co. v. Kielly, 233 Iowa 77, 8 N.W.2d 730 (1943).

18. 4 WIGMORE, EVIDENCE § 1057 (3d ed. 1940). Professor Williston says that an estoppel is a rule of substantive law masquerading as a rule of evidence. 5 WILLISTON, CONTRACTS § 1508 (Rev. ed. 1937).

would seem to be that the judge rules as to the admissibility and then the jury must accept the letter as an admission and weigh it against the other evidence.[19] A comparison and analysis of the concepts of admission and estoppel show a fundamental distinction. When the judge decides as a preliminary question of fact that the recipient's silence is an admission, he is finding a subjective state of mind which the jury can then weigh in determining the facts. In estoppel by silence, the jury applies an objective test to determine whether, under the facts, the sender could reasonably have relied on the silence of the recipient.

The instant case adds little to a clarification of the extent to which a failure to reply to a letter may constitute an admission of the truth of its contents. The facts of the case appear to place it within the exception which holds the unanswered letter admissible when it relates to an existing contract. There is language which might indicate that the letter was part of the *res gestae* because it was a timely written communication. The same circumstances which permit the inference of an admission, plus the reliance of the plaintiff, act to create an estoppel. If there is a valid distinction between estoppel by silence and admission through failure to anwer a letter, it is unfortunate that the court was not required to consider whether the defendant's failure to answer justified a reliance on the part of the plaintiff, and whether the plaintiff's acts actually amounted to such a reliance.

FIDELITY BOND—INDEMNITY—VALIDITY OF CLAUSE MAKING SURETY'S PAYMENT IN GOOD FAITH CONCLUSIVE EVIDENCE OF EMPLOYEE'S LIABILITY

Defendant, employee of a hotel company, executed a fidelity bond with plaintiff indemnity company. In a separate indemnity contract, defendant agreed to reimburse plaintiff for all sums of money which it might pay or become liable to pay in consequence of the surety agreement. The contract contained a clause providing that vouchers or other proper evidence of payment on the bond, made in good faith, would be "conclusive evidence" of the fact and amount of defendant's liability. An audit of the employer's accounts revealed a shortage and defendant was discharged. Plaintiff made the shortage good and brought action on the indemnity contract. The chancellor dismissed the bill and plaintiff appeals. *Held,* reversed; an indemnity contract with such a conclusive evidence clause is valid and binding and defendant is liable. *Glenn Falls Indemnity Co. v. Greene,* Tenn. App. W.S., Nov. 15, 1949 (unreported) (Anderson, P.J.).

19. Keeling-Easter Co. v. Dunning & Co., 113 Me. 34, 92 Atl. 929 (1915); Sonnesyn v. Hawbaker, 127 Minn. 15, 148 N.W. 476 (1914). *Contra:* Benn v. Forrest, 213 Fed. 763 (1st Cir. 1914); Murray v. East End Improvement Co., 22 Ky. 1477, 60 S.W. 648 (1901); Sturtevant v. Wallack, 141 Mass. 119, 4 N.E. 615 (1896); *cf.* Norris v. Norton, 75 Fed. 912 (6th Cir. 1896) (mutual correspondence).

In the absence of an express agreement to the contrary, the law imposes an obligation by the principal to reimburse the surety for any payment of debts owed by the principal.[1] The separate indemnity contract in the instant case goes further and purports to be binding if the payment by the surety of the obligee's claim was in good faith, even though there might not be a debt actually owing by the principal.[2]

The courts are not in accord concerning the validity of agreements providing that payment by the surety shall be conclusive evidence of the fact and amount of the principal debtor's liability.[3] The weight of authority is in favor of enforcing these agreements as valid and not contrary to public policy.[4] Here the primary consideration is whether payment by the surety was made in good faith.[5] The only remaining issue is that of good faith. The cases are uniform in holding that a clause in a surety bond making good faith payment by the surety *prima facie* evidence of principal's liability is valid.[6] When, however, parties make the evidence conclusive, some courts hold the clause "void as contrary to public policy."[7] These courts, prompted by the fact that the principal may have to indemnify the surety for a loss he did not cause, give as their reasons that the conclusive evidence clause ousts the court of jurisdiction to hear and determine the case, leaving it only the power to make a formal order confirming the plaintiff's findings;[8] that it makes plaintiff the sole arbiter of de-

1. Searcy v. Shows, 204 Ala. 218, 85 So. 444 (1920); Hartford Acc. & Indemnity Co. v. Dahl, 202 Minn. 410, 278 N.W. 591 (1938); Bishoff v. Fehl, 345 Pa. 539, 29 A.2d 58; 143 A.L.R. 1058 (1942); STEARNS, SURETYSHIP 503 (4th ed. 1934).

2. See Note, 144 A.L.R. 521 (1943).

3. 1 WIGMORE, EVIDENCE 213 (3d ed. 1940). For a collection of cases, see Note, 68 A.L.R. 330 (1930).

4. American Bonding Co. v. Alcatraz Const. Co., 202 Fed. 483 (2d Cir. 1913); Fidelity & Guaranty Co. v. Baker, 136 Ark. 227, 206 S.W. 314 (1918); Guarantee Co. of North America v. Pitts, 78 Miss. 837, 30 So. 758 (1901); Fidelity & Casualty Co. v. Harrison, 274 S.W. 1002 (Tex. Civ. App. 1925); Illinois Surety Co. v. Maguire, 157 Wis. 49, 145 N.W. 768 (1914); 1 WIGMORE, EVIDENCE 213 (3d ed. 1940).

5. The burden of introducing evidence to disprove good faith rests on the defendant debtor. Guarantee Co. of North America v. Pitts, 78 Miss. 837, 30 So. 758 (1901).

6. Carroll v. Nat. Surety Co., 24 F.2d 268 (D.C. Cir. 1928); Nat. Surety Co. v. Casner, 253 S.W. 1057 (Mo. 1923); Nat. Surety Corp. v. Buckles, 31 Tenn. App. 610, 219 S.W.2d 207 (E.S. 1948). One case striking down the validity of the "conclusive evidence clause" admits that a "prima facie clause" would have been binding. Fidelity & Casualty Co. v. Eickhoff, 63 Minn. 170, 65 N.W. 351, 30 L.R.A. 586, 56 Am. St. Rep. 464 (1895).

7. Fidelity & Deposit Co. of Maryland v. Davis, 129 Kan. 790, 284 Pac. 430, 68 A.L.R. 321 (1930); Fidelity & Casualty Co. v. Crays, 76 Minn. 450, 79 N.W. 531 (1899); Fidelity & Casualty Co. v. Eickhoff, 63 Minn. 170, 65 N.W. 351, 30 L.R.A. 586, 56 Am. St. Rep. 464 (1895); Guarantee Co. of North America v. Charles, 92 S.C. 282, 75 S.E. 387, Ann. Cas. 1916B, 687 (1912); ARNOLD, SURETYSHIP & GUARANTY 367 (1927); STEARNS, SURETYSHIP § 242 (4th ed. 1934). *Accord,* Fidelity & Deposit Co. v. Nordmarken, 32 N.D. 19, 155 N.W. 669 (1915); Missouri, K. & T. Ry. v. Simonson, 64 Kan. 802, 68 Pac. 653 (1902).

8. Missouri, K. & T. Ry. v. Simonson, 64 Kan. 802, 68 Pac. 653, 655 (1902); Guarantee Co. of North America v. Charles, 92 S.C. 282, 75 S.E. 387, 388, Ann. Cas. 1916B, 687, 688 (1912).

fendant's liability and the supreme judge in his own case;[9] and that it would be unreasonable and unfair to an employee who, to obtain employment, has no other alternative than to sign the indemnity contract.[10]

On the other hand, the courts supporting the validity of the conclusive evidence clause argue that it is an authorization by the principal in advance allowing the surety discretion in settling claims, and as such should not be upset by the courts;[11] that this stipulation relieves the surety of litigating every question of its liability on the bond, and of proving every fact to show liability;[12] that the stipulation permits surety companies to issue bonds at reduced rates, a benefit to the public as well as to the parties;[13] and that after the surety company has issued the bond and has borne the risk it would be unfair to strike down as void one of the important considerations.[14]

The court in the instant case assumes without discussion that the conclusive evidence clause should be enforced. Virtually all the other courts which have tried the question, regardless of the holding, speak in terms of whether the parties may, by contractual stipulation, change the rules of evidence.[15] The rules of evidence are said to be changed in that the plaintiff is allowed to proceed to judgment on less evidence than is ordinarily allowed.[16] However, the question is actually one of substantive law rather than of procedure. It is simply a question of whether or not such a harsh, one-sided contract should be enforced, or whether it should be struck down as against public policy.

The important social question presented here is whether the economic advantage given to a surety company by this type of contract sufficiently outweighs the right of the individual to have his day in court. It would be interesting to learn whether the conclusive evidence clause actually makes surety bonds less expensive. The instant case indicates that Tennessee adopts the position taken by the majority of other jurisdictions, that the economic benefits derived from the clause are sufficient to justify its enforcement.

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9. Fidelity & Deposit Co. of Maryland v. Davis, 129 Kan. 790, 284 Pac. 430, 432, 68 A.L.R. 321, 325 (1930); Fidelity & Casualty Co. v. Eickhoff, 63 Minn. 170, 65 N.W. 351, 352, 30 L.R.A. 586, 589, 56 Am. St. Rep. 464, 468 (1895); Guarantee Co. of North America v. Charles, 92 S.C. 282, 75 S.E. 387, 388, Ann. Cas. 1916B, 687, 689 (1912).

10. Fidelity & Deposit Co. of Maryland v. Davis, 129 Kan. 790, 284 Pac. 430, 433, 68 A.L.R. 321, 327 (1930).

11. Guarantee Co. of North America v. Pitts, 78 Miss. 837, 30 So. 758, 759 (1901).

12. Illinois Surety Co. v. Maguire, 157 Wis. 49, 145 N.W. 768, 769 (1914).

13. Guarantee Co. of North America v. Pitts, 78 Miss. 837, 30 So. 758, 759 (1901).

14. National Surety Co. v. Fulton, 192 App. Div. 645, 183 N.Y. Supp. 237, 238 (1st Dep't 1920).

15. See Note, 68 A.L.R. 330 (1930).

16. 1 WIGMORE, EVIDENCE 214 (3d ed. 1940).

LIABILITY INSURANCE—COOPERATION CLAUSE—WAIVER OR ESTOPPEL OF INSURER IN CONTINUING DEFENSE OF SUIT AGAINST INSURED AFTER BREACH OF CLAUSE

Plaintiff obtained a judgment against the insured for injuries received from the negligent operation of an automobile by insured's servant. The judgment being unsatisfied, he brought this action against the defendant surety company which had issued a liability insurance policy to the insured. The insurer defended on the ground that the insured, by being willfully absent from the earlier trial, had breached the cooperation clause, which specifically called for the insured's attendance. The plaintiff contended that the insurer, by continuing defense of the action against the insured without making a reservation of rights, had waived the breach or was estopped to assert nonliability. *Held,* the defendant was not estopped and did not waive its rights, even though no reservation was made. *Virginia Surety Company v. Permenter,* Tenn. App. W.S., Nov. 15, 1949 (unreported) (Anderson, P.J.).

The cooperation clause, a common provision in liability insurance policies, requires the cooperation of the insured in defending actions brought nominally against him. Its primary purposes are to hold the assured to a reasonably strict compliance with the terms of the contracts, and to prevent collusion between the insured and the injured party.[1] It is generally termed a condition precedent to the insurer's liability,[2] but some courts have said that it is a condition subsequent.[3] Whether there has been a breach of the condition depends upon the facts of the particular case,[4] and is usually a question for the jury.[5] The burden of establishing a breach of the cooperation clause is upon the insurer.[6] It has been held that, to constitute a breach, there must be a "lack of cooperation in some substantial and material

1. *See* Koontz v. General Cas. Co. of America, 162 Wash. 77, 297 Pac. 1081, 1083 (1931).

2. Coleman v. New Amsterdam Cas. Co., 247 N.Y. 271, 160 N.E. 367, 72 A.L.R. 1443 (1928); *cf.* Horton v. Employers' Liability Assur. Corp., 179 Tenn. 220, 164 S.W.2d 1016 (1942) (cooperation was by the express terms of the contract made a condition precedent); *see* General Cas. & Surety Co. v. Kierstead, 67 F.2d 523, 525 (8th Cir. 1933) (clause said to be "in the nature of" a condition precedent); Marley v. Bankers' Indemnity Ins. Co., 53 R.I. 289, 166 Atl. 350, 351 (1933); also see Note, 72 A.L.R. 1446, 1448 (1931).

3. See, *e.g.,* Glens Falls Indemnity Co. v. Keliher, 88 N.H. 253, 187 Atl. 473, 476 (1936). See Note, 1950 WASH. U.L.Q. 235 (urging that the true nature of the cooperation clause is a condition subsequent).

4. See, *e.g.,* Levy v. Indemnity Ins. Co. of North America, 8 So.2d 774, 779 (La. App. 1942). For an exhaustive collection of cases showing the different kinds of conduct which may constitute a breach, see Notes, 72 A.L.R. 1446, 1453 (1931), 98 A.L.R. 1465, 1468 (1935), 139 A.L.R. 771, 777 (1948).

5. United States Fidelity & Guaranty Co. v. Brandon, 186 Ark. 311, 53 S.W.2d 422 (1932).

6. *See, e.g.,* General Cas. & Surety Co. v. Kierstead, 67 F.2d 523, 525 (8th Cir. 1933). Also see Note, 72 A.L.R. 1446, 1453 (1931).

aspect."[7] Many courts have added that the breach, if it is to be a valid defense, must not only be substantial, but that the insurer must also suffer actual prejudice;[8] but whether prejudice must result is a question upon which the courts are not agreed.[9]

Like the breach of any other condition of a contract, a breach of the cooperation clause may be excused.[10] There are also other legal bases on which the insurer may be prevented from taking advantage of the breach. If the insurer, having knowledge of the facts constituting a breach or ground of forfeiture, continues defense of the suit without disclaiming liability, it impliedly waives the breach by such conduct.[11] A breach of the cooperation clause may also be of no legal effect if the insurer by his conduct is estopped to deny liability.[12] This involves a reliance by the insured that the insurer, notwithstanding the breach, will continue the defense and not subsequently claim a forfeiture. Estoppel and waiver implied from conduct are similar in operation, and the courts have often failed to distinguish between the two.[13] The inability of the insurer to deny liability after continuing the defense has also been explained on the principle of election, which does not necessarily involve a change of position by the insured as does estoppel.[14] The result, however, is the same on each theory: the insurer is prevented from asserting a forfeiture. Waiver, estoppel or election arising between the

7. George v. Employers' Liability Assur. Corp., 219 Ala. 307, 122 So. 175, 72 A.L.R. 1438 (1929). "Trivial or innocent" breaches may be disregarded. See Glens Falls Indemnity Co. v. Keliher, 88 N.H. 253, 187 Atl. 473, 477 (1936).

8. *E.g.*, State Farm Mutual Automobile Ins. Co. v. Koval, 146 F.2d 118 (10th Cir. 1944). This appears to be the majority view. For collection of cases by states, see 8 APPLEMAN, INSURANCE LAW AND PRACTICE § 4773 (1942). Since the law does not favor forfeiture, and since there has been a tendency, as a matter of public policy, to absorb uncompensated losses by providing for financial responsibility laws or compulsory liability insurance, it would seem that the insurer should not be permitted the defense of a breach unless prejudice actually results. Those courts which hold that prejudice must be present have generally added that the burden of showing prejudice is upon the insurer. *E.g.*, State Farm Mutual Automobile Ins. Co. v. Koval, *supra;* Notes, 49 COL. L. REV. 280 (1949); 1940 WASH. U.L.Q. 235. But see 8 APPLEMAN, INSURANCE LAW AND PRACTICE § 4773 (1942), stating that if the rule is carried to the point of placing an almost insurmountable burden of proof upon the insurer, it would amount to a perversion of the contractual provision.

9. See Notes, 72 A.L.R. 1446, 1455 (1931), 98 A.L.R. 1465, 1469 (1935), 139 A.L.R. 771, 780 (1942), 1950 WASH. U.L.Q. 235.

10. RESTATEMENT, CONTRACTS §§ 294 *et. seq.* (1932).

11. Daly v. Employers' Liability Assur. Corp., 269 Mass. 1, 168 N.E. 111, 72 A.L.R. 1436 (1929). It has been held that there can be no waiver unless the insurer had full knowledge of the breach or ground of forfeiture. Hutt v. Travelers' Ins. Co., 110 N.J.L. 57, 164 Atl. 12 (1933). If the insurer has knowledge of facts that suggest a ground of forfeiture but which are not conclusive, it is obligated to make a reasonable inquiry to ascertain the remaining facts, and if it does not do so, it will be deemed to have a constructive knowledge of a ground of forfeiture. See 8 APPLEMAN, INSURANCE LAW AND PRACTICE § 4693 (1943).

12. See Notes, 72 A.L.R. 1446, 1492 (1931), 98 A.L.R. 1465, 1480 (1935), 139 A.L.R. 771, 802 (1942).

13. *See* United States Fidelity & Guaranty Co. v. Miller, 237 Ky. 43, 34 S.W.2d 938, 940, 76 A.L.R. 12 (1931), 13 FORD. L. REV. 248 (1944).

14. See PATTERSON, ESSENTIALS OF INSURANCE LAW § 93 (1935).

insurer and the insured, is also available to injured third parties in actions against the insurer.[15]

Many courts have held that the insurer may avoid the legal effect of waiver, estoppel or election by making a reservation of rights to the insured.[16] Some of these courts have stated that the reservation of rights must actually be communicated and assented to by the insured;[17] others have said that, while communication is necessary, no formal agreement is required,[18] and the insured's consent may be implied.[19] If a valid reservation of rights is made, the insurer can then proceed in defense of the suit without fear of giving up the right to claim a forfeiture. However, when, as in the instant case, no reservation of rights can be made because the insured is not available for such notice, the insurer may be placed in a dilemma.[20] If the insurer withdraws from the suit and allows a judgment by default, there is the hazard of facts later showing a valid excuse for the breach. If the insurer continues the defense, there is the hazard of a waiver, estoppel or election if the breach is later found to be conclusive. The court, in the instant case relaxing the general rule that a reservation of rights is necessary, held that the absence of such a reservation did not preclude the insurer from denying liability.[21]

MASTER AND SERVANT—DUTY TO FURNISH SAFE TOOLS—SIMPLE TOOL DOCTRINE AS AN EXCEPTION

Plaintiff, a member of the defendant fraternal organization, was injured in a fall from a defective step of a stepladder furnished him by the defendant while he was helping to decorate for a social function. Plaintiff alleged that the defendant was negligent in failing to furnish him with safe tools with which to work. After a jury verdict for the plaintiff, the trial court granted a new

15. *E.g.*, Goergen v. Manufacturers Cas. Ins. Co., 117 Conn. 89, 166 Atl. 757 (1933). The right of injured parties to proceed against the insurer, if judgment against the insured is not satisfied, is usually given by statute. See, *e.g.*, MASS. GEN. LAWS c. 175, §§ 112-13 (1932). It has often been stated that the rights of the injured third party against the insurer rise no higher than those of the insured. Royal Indemnity Co. v. Watson, 61 F.2d 614 (5th Cir. 1932); Coleman v. New Amsterdam Cas. Co., 247 N.Y. 271, 160 N.E. 367, 72 A.L.R. 1443 (1928).

16. *E.g.*, Hermance v. Globe Indemnity Co., 221 App. Div. 394, 223 N.Y. Supp. 93 (3d Dep't 1927); *cf.* Hardware Mutual Cas. Co. v. Higgason, 175 Tenn. 357, 134 S.W.2d 169 (1939) (concerning not cooperation clause but extent of insurance coverage).

17. Hermance v. Globe Indemnity Co., *supra* note 17.

18. *Cf.* Hardware Mutual Cas. Co. v. Higgason, 175 Tenn. 357, 134 S.W.2d 169 (1939).

19. *See* Farrell v. Merchants' Mutual Automobile Liability Ins. Co., 203 App. Div. 118, 196 N.Y. Supp. 383, 385 (2d Dep't 1922).

20. See PATTERSON, ESSENTIALS OF INSURANCE LAW 467 (1935).

21. But see Goergen v. Manufacturers Cas. Ins. Co., 117 Conn. 89, 166 Atl. 757 (1933), where the contrary result was reached, the court holding that the injured third party may be induced to change his position by the insurer's continuing the defense after a breach of the clause. The court said that the reservation of rights should also be given to the third party. Also see Eakle v. Hayes, 185 Wash. 520, 55 P.2d 1072 (1936), where the reservation of rights made to the court and the third party was held sufficient.

trial on the ground that the evidence did not support the verdict, and plaintiff appealed. *Held* (3-2), affirmed. A ladder is a simple tool and therefore the defendant was under no greater duty than the plaintiff to inspect. *Olson v. Kem Temple, Ancient Arabic Order of the Mystic Shrine,* 43 N.W.2d 385 (N.D. 1950).

The "simple tool" doctrine[1] is a well recognized exception to the common law rule requiring a master to use reasonable care in furnishing his servant with safe tools and appliances with which to work.[2] The master's liability under the general rule is predicated upon negligence, and he is not considered an insurer of his servant's well being.[3]

Under the simple tool doctrine, if the tool is without any complication in structure and is of such a nature that a person possessing ordinary knowledge and experience is familiar with it, the master is not liable for injuries to the servant resulting from its use.[4] The basic principle underlying the doctrine rests upon the assumption that the master and servant have equal knowledge and/or equal opportunity to discover defects.[5] Therefore, if the master has actual knowledge of the defect and the servant has no such knowledge, the doctrine does not apply.[6] In like manner, if the servant had no opportunity to inspect, some courts will not use the doctrine to avoid liability.[7]

1. See Kilday v. Jahncke Dry Dock & Ship Repair Co., 281 Fed. 133 (5th Cir. 1922); C. F. Hamblen, Inc. v. Owens, 127 Fla. 91, 172 So. 694 (1937); Philip Carey Roofing & Mfg. Co. v. Black, 129 Tenn. 30, 164 S.W. 1183, 51 L.R.A. (N.S.) 340 (1914); Berry, *The Doctrine of Simple Tools,* 82 CENT. L.J. 28 (1916); Note, 12 MISS. L.J. 454 (1940).

2. *E.g.,* Montgomery Ward & Co. v. Lindsey, 104 F.2d 882 (5th Cir. 1939); Newbern v. Great Atlantic & Pacific Tea Co., 68 F.2d 523, 91 A.L.R. 781 (4th Cir. 1934); Belcher v. Chapman, 242 Ala. 653, 7 So.2d 859 (1942); Claris v. Oregon Short Line R.R., 54 Idaho 568, 33 P.2d 348 (1934), *cert. denied,* 297 U.S. 714 (1936); Vanderpool v. Partridge, 79 Neb. 165, 112 N.W. 318, 13 L.R.A. (N.S.) 668 (1907).

3. Baltimore & Ohio S.W.R.R. v. Carroll, 280 U.S. 491, 50 Sup. Ct. 182, 74 L. Ed. 566 (1930); Edward Hines Lumber Co. v. Ligas, 172 Ill. 315, 50 N.E. 225, 64 Am. St. Rep. 38 (1898); Budge v. Morgan's L. & T.R.R. & S.S. Co., 108 La. 349, 32 So. 535, 58 L.R.A. 333 (1902); Purdy v. Westinghouse Electric & Mfg. Co., 197 Pa. 257, 47 Atl. 237, 51 L.R.A. 881, 80 Am. St. Rep. 816 (1900).

4. Newbern v. Great Atlantic & Pacific Tea Co., 68 F.2d 523, 91 A.L.R. 781 (4th Cir. 1934); 35 AM. JUR., *Master & Servant* § 177 (1941). For cases involving various simple tools see Middleton v. National Box Co., 38 F.2d 89 (S.D. Miss. 1930) (chisel); Stirling Coal & Coke Co. v. Fork, 141 Ky. 40, 131 S.W. 1030 (1910) (shovel); Lukovski v. Michigan Central R.R., 164 Mich. 361, 129 N.W. 707 (1911) (iron bucket); Mitchell v. Brooks, 165 Miss. 826, 147 So. 660 (1933) (electric light encased in steel mesh frame); Leierer v. Thompson, 190 Okla. 233, 122 P.2d 387 (1942) (claw hammer); Fields v. Texas Co., 164 S.C. 478, 162 S.E. 441 (1932) (rope); Holt v. Chicago, M. & St. P. Ry., 94 Wis. 596, 69 N.W. 352 (1896) (pinch bar); 3 LABATT, MASTER & SERVANT 2480 (2d ed. 1913). For authorities holding a ladder to be a simple tool, see Nelson v. Wolverine Petroleum Co., 189 Okla. 351, 117 P.2d 787 (1941); Rogers v. Pacific Mills, 161 S.C. 376, 159 S.E. 655 (1931); Note, 145 A.L.R. 542 (1943).

5. See Newbern v. Great Atlantic & Pacific Tea Co., 68 F.2d 523, 91 A.L.R. 781 (4th Cir. 1934); Kilday v. Jahncke Dry Dock & Ship Repair Co., 281 Fed. 133 (5th Cir. 1922); C. F. Hamblen, Inc. v. Owens, 127 Fla. 91, 172 So. 694 (1937); Rule v. Giuglio, 304 Mich. 73, 7 N.W.2d 227, 145 A.L.R. 537 (1942); Nichols v. Bush, 291 Mich. 473, 289 N.W. 219 (1939).

6. Ft. Smith & W.R. Co. v. Holcombe, 59 Okla. 54, 158 Pac. 633 (1916).

7. See, *e.g.,* Cole v. Seaboard Air Line Ry., 199 N.C. 389, 154 S.E. 682 (1930), *cert. denied,* 282 U.S. 898 (1931).

The methods used by the courts in applying the simple tool doctrine vary. Some courts have refused to allow recovery on the ground that the servant assumed the risk in using a simple tool.[8] A few have said that if a servant is injured by a simple tool, he is presumed to have been contributorily negligent and is barred from recovering.[9] Perhaps most jurisdictions hold that no duty on the part of the employer arises when a simple tool is furnished.[10] In determining whether there is a duty these courts take into consideration other circumstances such as the age, capacity and experience of the employee, the character of the defects, the servant's opportunity to learn of these defects, and the use to which the tool is to be put.[11] In the instant case the court said that liability would arise only if the master were under a greater duty to inspect than the servant. This is a comparative duty test. That is, when a tool is furnished, both the employer and the employee are under a duty to inspect, but liability does not arise unless the employer's obligation is superior. When a simple tool is furnished, no such greater obligation exists.

The doctrine is not as important today as in past years. It does not apply to cases brought under workmen's compensation acts,[12] or under the Federal Employer's Liability Act.[13] But employees included within the coverage of these statutes are limited primarily to industrial and railroad workers. Large groups of workers such as farm laborers, domestic workers and gratuitous employees remain outside the scope of these acts.[14] As to these persons an employer's liability is still predicated upon negligence and the simple tool doctrine is still available as a defense. In the instant case the court properly held that a stepladder is a simple tool, and applied the doctrine to relieve the master of liability.

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8. Lukovski v. Michigan Central R.R., 164 Mich. 361, 129 N.W. 707 (1911); Philip Carey Roofing & Mfg. Co. v. Black, 129 Tenn. 30, 164 S.W. 1183, 51 L.R.A. (N.S.) 340 (1913).

9. Ringer v. St. Louis & S.F.R.R., 85 Kan. 167, 116 Pac. 212, 34 L.R.A. (N.S.) 1044 (1911); Holt v. Chicago, M. & St. P. Ry., 94 Wis. 596, 69 N.W. 352 (1896).

10. Newbern v. Great Atlantic & Pacific Tea Co., 68 F.2d 523, 91 A.L.R. 781 (4th Cir. 1934); Vanderpool v. Partridge, 79 Neb. 165, 112 N.W. 318, 13 L.R.A. (N.S) 668 (1907). Normally in negligence cases, courts do not particularize the duty; that is, they simply say that there is a duty to use reasonable care and the application of this standard is left to the determination of the jury. In the master-servant relation, courts are prone to make the duty more specific. For example, there is a duty to use reasonable care in furnishing safe tools and appliances to the servant. The application of this standard is normally left to the jury, but the simple tool doctrine is a rule of law which does not permit the jury to apply the standard to the facts of the particular case. In the general field of negligence, the trend is away from particularizing the duty.

11. See Note, 145 A.L.R. 542 (1943).

12. See Alaska Packers Ass'n v. Industrial Accident Comm'n of California, 294 U.S. 352, 55 Sup. Ct. 518, 79 L. Ed. 1044 (1935); PROSSER, TORTS 520 (1941); 58 AM. JUR., *Workmen's Compensation* § 2 (1948).

13. 35 STAT. 65 (1908), as amended, 45 U.S.C.A. § 51 (1943). The Act abolishes or restricts certain common law defenses, such as assumption of risk and contributory negligence. Although negligence remains as the basis of liability, Ellis v. Union Pacific R.R., 329 U.S. 649, 67 Sup. Ct. 598, 91 L. Ed. 572 (1947), the statutory language "works," Note, 23 A.L.R. 716 (1923).
"ways," "equipment" and "plant" has been construed to include many simple tools. See

14. See PROSSER, TORTS 523 (1941).

MASTER AND SERVANT—TORT LIABILITY TO THIRD PARTY—APPARENT EMPLOYMENT AND ESTOPPEL TO DENY EMPLOYMENT

Defendant Nolan was a driver of a Diamond Cab; defendant Marchetti owned a cab bearing an insurance sticker and registered as a cab in his name and bearing the color scheme and tradename of defendant American Cab Association. Plaintiff contracted with defendant Nolan for the latter to drive her to North Carolina. The next day, defendant Nolan purchased defendant Marchetti's cab, registered it as an automobile, but failed to comply with the statutory cab registration or to notify defendant American Cab Association. During the trip to North Carolina, the plaintiff was injured when this cab driven by defendant Nolan collided with a truck. Plaintiff sued Nolan, Marchetti and the American Cab Association. From a judgment for plaintiff, Marchetti and the Cab Association appeal. *Held,* reversed as to defendant American Cab Association, and affirmed as to defendant Marchetti. Defendant Marchetti made it possible for defendant Nolan to operate the cab in an illegal and unauthorized manner, and by his own reckless disregard for legal requirements he constructively permitted Nolan to operate the cab in his name. Thus defendant Marchetti is estopped to deny liability. *Marchetti v. Olyowski,* 181 F.2d 285 (D.C. Cir. 1950).

The liability of one person for the tortious acts of another is generally based upon a finding of a master-servant relation between the defendant and the tortfeasor, and the tortious acts must come within the servant's scope of employment.[1] A servant may be defined as a person who is employed to render personal services for another, otherwise than in the pursuit of an independent calling, and who in such service is under the control of the master.[2] Liability of the master in tort for the acts of other persons, such as independent contractors or agents, involves different considerations even though the employments of such persons may be of a somewhat similar nature to those of servants.[3]

If no actual master-servant relation is found, an apparent employment relation may exist when an employer intentionally, or by want of ordinary

1. Little v. Hackett, 116 U.S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652 (1886); Fuller Co. v. McCloskey, 228 U.S. 194, 33 Sup. Ct. 471, 57 L. Ed. 795 (1913); Hill v. Poindexter, 171 Ky. 847, 188 S.W. 851, L.R.A. 1917B, 699 (1916); Auer v. Sinclair Ref. Co., 103 N.J.L. 372, 137 Atl. 555, 54 A.L.R. 623 (1927); 6 LABATT, MASTER & SERVANT § 2224 (2d ed. 1913); RESTATEMENT, AGENCY § 219 (1933).

2. Republic Iron & Steel Co. v. McLaughlin, 200 Ala. 204, 75 So. 962 (1917); Hedge v. Williams, 131 Cal. 455, 63 Pac. 721, *rehearing denied,* 131 Cal. 455, 64 Pac. 106 (1901); 1 LABATT, MASTER & SERVANT § 2 (2d ed. 1913); RESTATEMENT, AGENCY § 220 (1933).

3. Erickson v. Erickson Furniture Co., 179 Minn. 304, 229 N.W. 101 (1930) (Workman's Compensation Act); see Note, 44 A.L.R. 1217 (1926); Ferson, *Agency to Make Representations,* 2 VAND. L. REV. 1 (1948); Ferson, *Liability of Employers for Misrepresentations Made by "Independent Contractors,"* 3 VAND. L. REV. 1 (1949).

care, holds out as his servant one not in fact employed by him.[4] When considering the apparent employment doctrine, many courts speak in terms of a contractual relation and seem to require a finding of an apparent agency,[5] but it would seem clear that there may be an apparent employment relation without an apparent agency and no contract need be found.[6]

The apparent master will be held liable in tort for the acts of his ostensible servant only where the plaintiff has relied to his injury upon the apparent employment relation,[7] and thus the scope of liability in these cases is much narrower than that based on an actual master-servant relation. In a typical case involving application of the doctrine of apparent employment in tort cases, the injury occurs while the apparent servant *(e.g.,* a beauty shop attendant in a shop located in a department store) is in the process of performing a contract with or services for a third party (a customer), and liability is imposed on the apparent master (the department store) because by his representations (such as advertising) he has led the injured party to rely on a belief that the apparent servant was in his employ.[8] The true basis of liability is not a contractual relation between the apparent servant and the injured person, but the reliance by that person on the master's representations of an employment relation. Thus, in these cases, the fact that there may be no actual master-servant relation will not affect the rights of the third parties, since the master is estopped to deny the apparent employment which he held the servant out as possessing.[10]

In the instant case no actual master-servant relation was shown to exist between the defendant Marchetti and the driver of the cab. The court,

4. Rhone v. Try Me Cab Co., 62 App. D.C. 201, 65 F.2d 834 (1933); Adelphia Hotel Co. v. Providence Stock Co., 277 Fed. 905 (3d Cir. 1922); Middleton v. Frances, 257 Ky. 42, 77 S.W.2d 425 (1934); RESTATEMENT, AGENCY §§ 266, 267 (1933).

5. Standard Oil Co. v. Gentry, 241 Ala. 62, 1 So.2d 29 (1941); Augusta Friedman's Shop, Inc. v. Yeates, 216 Ala. 434, 113 So. 299 (1927); Hedlund v. Sutter Medical Service Co., 51 Cal. App. 2d 327, 124 P.2d 878 (1942); Hannon v. Siegel-Cooper Co., 167 N.Y. 244, 60 N.E. 597, 52 L.R.A. 429 (1901).

6. Maloney Tank Mfg. Co. v. Mid-Continent Petroleum Corp., 49 F.2d 146 (10th Cir. 1931); see Standard Oil Co. v. Gentry, 241 Ala. 62, 1 So.2d 29 (1941); McDonald v. Dr. McKnight, Inc., 248 Mass. 43, 142 N.E. 825 (1924); Note, 2 A.L.R.2d 406, 408 (1948).

7. See note 6 *supra.*

8. Augusta Friedman's Shop, Inc. v. Yeates, 216 Ala. 434, 113 So. 299 (1927) (plaintiff injured while having her hair waved); Hedlund v. Sutter Medical Service Co., 51 Cal. App. 2d 327, 124 P.2d 878 (1942) (plaintiff injured by alleged assistant's negligence in giving allergy test); Hannon v. Siegel-Cooper Co., 167 N.Y. 244, 60 N.E. 597, 52 L.R.A. 429 (1901) (plaintiff's gums injured while having teeth repaired).

9. Maloney Tank Mfg. Co. v. Mid-Continent Petroleum Corp., 49 F.2d 146, 150 (10th Cir. 1931) (speaking of the rule of ostensible authority: "This rule is applicable here; even if no contract were proven, the circumstances were such that the petroleum corporation had a right to rely upon the supposition that the work was being done by the servants of the responsible company it believed it was dealing with"); Cole v. Atlantic Coast Line R.R., 211 N.C. 591, 191 S.E. 353 (1937), 22 MINN. L. REV. 741 (1938); Fields, Inc. v. Evans, 30 Ohio App. 153, 172 N.E. 702 (1929), 29 MICH. L. REV. 640 (1931); Christman v. Segal, 143 Pa. Super. 87, 17 A.2d 676 (1941) (plaintiff, customer in defendant's store, was injured when she fell into an unguarded stairway to basement, while following one of defendant's clerks); RESTATEMENT, AGENCY § 267 (1933).

10. Augusta Friedman's Shop, Inc. v. Yeates, 216 Ala. 434, 133 So. 299 (1927); McDonald v. Dr. McKnight, Inc., 248 Mass. 43, 142 N.E. 825 (1924).

and efficient court organization and procedure.[1] Even the layman reader can easily see how his own state stands with respect to each recommended standard, and how it compares with neighboring and other states.[2]

The preparation of the main text of the book was unique. The objective was to present a "factual survey" of the existing organizations and procedures in each state and compare each to the recommended standards. Questionnaires pertaining to each recommended standard were sent to "reporters" in each state, usually members of the Junior Bar Conference. "The war retarded some of the answers to the questionnaires . . . but much more time was lost through the obvious failure of some of the state reporters to comprehend some of the questions submitted to them. Our ineptitude for dealing with problems of procedure was demonstrated even among those who obviously desired to be useful, and the consequent necessity of seeking substitutes caused further delay. Another great difficulty arose from the fact that seemingly simple legal terms used in the questionnaires often turned out to mean one thing in one state and something quite different in another." (P. xxvii). The state returns were then checked by at least two persons from each state, usually a judge or a practitioner and a law school professor.

It would be surprising if a book containing so much local material from the various states did not have some errors. This one may have, but at best they are trivia and do not at all detract from the principal purpose and function of the book in providing an enlightened perspective on values and objectives in court organization, administration, and procedure and the existing alternatives for attaining such objectives.

To Chief Justice Vanderbilt, the editor who prepared the main text; to Judge John J. Parker, to whom it is dedicated and who has worked so enthusiastically for improvement; to the great leaders of the American legal profession—judges, lawyers, and law professors—who prepared the committee reports in the appendices; and to the countless others in each state who had the interest and the initiative to prepare and check the state returns a sincere expression of genuine appreciation is due. The work is truly representative of the best thinking in the American legal profession.

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1. Such a consideration might well begin with a study of the entirely independent trial courts in a single county with nevertheless overlapping jurisdiction. The dockets of some of these courts tend to become overcrowded with resultant delay and expense while other courts having fewer cases move along with leisure. In most states there is no effective means for assigning judges to judicial service so as to relieve conjestion of dockets and utilize the available judges to the best advantage. What is needed is an integrated system of trial courts operating under the management of the state supreme court. Chapter 2 of the book discusses the system now existing in the federal courts, together with the functions of the Administrative Office of the United States Courts.

2. See Porter, *Minimum Standards of Judicial Administration: The Extent of Their Acceptance,* 36 A.B.A.J. 614-18 (1950), containing two interesting tables showing the degree of acceptance by each state of all the minimum standards recommended by the American Bar Association. A treatment of Tennessee law is found in Fort, *Tennessee in Relation to Minimum Standards of Judicial Administration,* 21 TENN. L. REV. 506 (1950).

of *Hewlett v. George*[6] in 1891. Recovery was denied on grounds of public policy, the court stating, "The peace of society, . . . and a sound public policy, . . . forbid to the minor child a right . . . [to assert] a claim to civil redress for personal injuries suffered at the hands of the parent."[7] This doctrine of domestic tranquillity was carried to the extreme in *Roller v. Roller*,[8] which denied relief to a daughter who had been raped by her father. This rule of nonliability has become generally recognized, and a great body of authority supporting it has been built up in this country.[9]

However, there is a trend in modern decisions to depart from the rule by way of restriction, exception and modification. The rule of parental immunity is applicable only to suits brought by unemancipated children; where the child has been emancipated, the action may be maintained.[10] The courts are in conflict on extending immunity to a person who is not the natural parent but stands *in loco parentis*.[11] Where the ultimate liability rests on an insurer, several courts have held the nonliability rule inapplicable.[12]

6. 68 Miss. 703, 9 So. 885, 13 L.R.A. 682 (1891). Here a minor daughter, married but separated from her husband, brought an action for false imprisonment against her mother. Whether she had resumed her former place in her mother's home, and the relationship of a minor child to her parent, did not sufficiently appear. The court denied recovery without citing any precedent or making any examination of the early authorities.

7. 9 So. at 887.

8. The court stated that ". . . if it be once established that a child has a right to sue a parent for a tort, there is no practical line of demarkation which can be drawn, for the same principle which would allow the action in the case of a heinous crime, like the one involved in this case, would allow an action to be brought for any other tort." Roller v. Roller, 37 Wash. 242, 79 Pac. 788, 789, 68 L.R.A. 893, 894 (1905).

9. Mesite v. Kirchstein, 109 Conn. 77, 145 Atl. 753 (1929); Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924); Miller v. Pelzer, 159 Minn. 375, 199 N.W. 97 (1924), 9 MINN. L. REV. 76; Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); Goldstein v. Goldstein, 4 N.J. Misc. 711, 134 Atl. 184 (1926); Sorrentino v. Sorrentino, 248 N.Y. 626, 162 N.E. 551 (1928); Small v. Morrison, 185 N.C. 577, 118 S.E. 12, 31 A.L.R. 1135 (1923), 33 YALE L.J. 315 (1924); Matarese v. Matarese, 47 R.I. 131, 131 Atl. 198 (1925); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903), 17 HARV. L. REV. 361 (1904); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905), 53 U. OF PA. L. REV. 387; Zuter v. O'Connell, 200 Wis. 601, 229 N.W. 74 (1930).

10. *See* Taubert v. Taubert, 103 Minn. 247, 114 N.W. 763, 764 (1908) ("The general rule is that a minor cannot sue his parent for a tort; but, if he has been emancipated, he can"); Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905, 913, 71 A.L.R. 1055, 1068 (1930) ("When the right of discipline and family association have been surrendered, a rule intended to preserve their integrity is not applicable").

11. Immunity extended: Miller v. Pelzer, 159 Minn. 375, 199 N.W. 97 (1924), 9 MINN. L. REV. 76 (husband and wife paid by county to care for illegitimate child); Fortinberry v. Holmes, 89 Miss. 373, 42 So. 799 (1907) (person who was to "support, educate, care for and treat as his own child"); Richardson v. State Board, 98 N.J.L. 690, 121 Atl. 457 (1923), *aff'd*, 99 N.J.L. 516, 123 Atl. 720 (1924) (member of Board of Trustees of day nursery); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903) (father and stepmother). Immunity not extended: Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939) (adoptive father); Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901) (stepmother); Dix v. Martin, 171 Mo. App. 266, 157 S.W. 133 (1913) (maternal grandparents); Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640, 5 ANN. CAS. 112 (1903) (maternal aunt); Lander v. Seaver, 32 Vt. 114 (1859) (schoolmaster); Steber v. Norris, 188 Wis. 366, 206 N.W. 173, 43 A.L.R. 501 (1925) (officer of juvenile court).

12. Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905, 71 A.L.R. 1055 (1930) (fact that the father has provided for satisfying the judgment by liability insurance removes the suit from the class promotive of family discord); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932) (court should not grant immunity as a mere gratuity).

Where a child sues his parent's employer for a tort committed by the parent within the scope of his employment, there are several decisions which allow recovery from the employer but not from the parent.[13] In these cases, although the initial loss falls on the master or principal, he may have recourse against the servant or agent who committed the tort.[14] Thus the action in substance is one against the parent by way of circuity. In the instant case, the court imposes a new modification upon the rule by allowing recovery where the tort is classified as willful or malicious.

The rule of nonliability of the parent has been based upon the public policy of protecting domestic tranquillity and preserving the sanctity of the family relationship. If the domestic tranquillity would in fact be disrupted by allowing recovery, a denial would be justified. But usually, as a practical matter, in such a situation there remains little family harmony by the time suit is brought. Further, it has been suggested that the suit itself, rather than recovery, is the disrupting feature.[15] It would seem that each case should be determined upon it own particular facts, and that the adoption of a general rule of nonliability is not warranted. However, no court has intimated that it would refuse to follow the nonliability rule when the proper factual situation arises.[16] In view of the various modifications and exceptions, the trend apparently is toward denying parental immunity, and in the future the exception may become the rule.

WORKMEN'S COMPENSATION—INDEMNITY—EMPLOYER HELD LIABLE OVER TO THIRD PARTY FROM WHOM COMPENSATED EMPLOYEE RECOVERED

Plaintiff, an employee of Armour & Company, was injured when an employee of American District Telegraph Co., engaged in the execution of a contract between Armour and American, fell through a skylight onto him. After Armour paid workmen's compensation to plaintiff under the

13. The Connecticut Supreme Court, holding no action lies directly [Mesite v. Kirchstein, 109 Conn. 77, 145 Atl. 753 (1929)], has recognized the action against the parent's master. Chase v. New Haven Waste Material Co., 111 Conn. 377, 150 Atl. 107 (1930). Likewise, the Wisconsin Supreme Court, after declaring no action will lie directly [Wick v. Wick, 192 Wis. 260, 212 N.W. 787, 52 A.L.R. 1113 (1927)], allowed recovery in an action by an infant against its parent's master for negligence of the parent. Le Sage v. Le Sage, 224 Wis. 57, 271 N.W. 369, (1937).

14. Challiss v. Wylie, 35 Kan. 506, 11 Pac. 438 (1886); Costa v. Yoachim, 104 La. 170, 28 So. 992 (1900); Grand Trunk Ry. v. Latham, 63 Me. 177 (1874); Gaffner v. Johnson, 39 Wash. 437, 81 Pac. 859 (1905).

15. *See* Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905, 915, 71 A.L.R. 1055, 1071 (1930); McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1066 (1930).

16. Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932). See Wick v. Wick, 192 Wis. 260, 212 N.W. 787, 788, 52 A.L.R. 1113, 1115 (1927) (Crownhart, J., dissenting).

Iowa Workmen's Compensation Act,[1] plaintiff brought an action against American,[2] and the latter impleaded Armour, alleging a cause of action for indemnity on the theory that Armour was primarily negligent in allowing its skylight to become so covered with dust and dirt as to be indistinguishable from the rest of the roof. The District Court sustained a motion to dismiss the third-party complaint on the ground that Armour's liability for plaintiff's injuries was covered exclusively by the Iowa Act.[3] After a verdict for plaintiff, American appealed. *Held,* judgment for plaintiff affirmed; order dismissing third-party complaint reversed. The Iowa Workmen's Compensation Act does not abrogate the common law right to indemnity of one secondarily negligent against one primarily negligent in cases where the former has paid damages to an injured third party. *American District Telegraph Co. v. Kittleson,* 179 F.2d 946 (8th Cir. 1950).[4]

Were there no Workmen's Compensation Act involved, recovery in the instant case would present no complex problem. While the courts are not in complete agreement in determining when indemnity among wrongdoers will be allowed,[5] the instant case seems to fit into a frequently recurring exception to the general rule against indemnity[6]—*viz.,* the situation in which the negligence of one wrongdoer brings about the condition from which injury to a third party results, while the negligence of a second wrongdoer

1. IOWA CODE ANN. §§ 85.1-85.69 (1949).

2. "When an employee receives an injury . . . which injury is caused under circumstances creating a legal liability against some person other than the employer to pay damages, the employee . . . may take proceedings against his employer for compensation, and . . . may also maintain an action against such third party for damages. . . ." IOWA. CODE ANN. § 85.22 (1949).

3. "[T]he employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury." IOWA CODE ANN. § 85.3 (1949).

4. The instant case is noted in 13 GA. B.J. 79 (1950). The district court's decision, 81 F. Supp. 25, 33 (N.D. Iowa 1948), is noted in 34 IOWA L. REV. 724 (1949); 4 NACCA L.J. 267 (1949).

5. *See* Cohen v. Noel, 165 Tenn. 600, 56 S.W.2d 744, 746 (1933); see 42 C.J.S., *Indemnity* § 27 (1944). For cases similar to the instant case in which contribution has been sought, see American Mut. Liability Ins. Co. v. Matthews, 182 F.2d 322 (2d Cir. 1950); The Tampico, 45 F. Supp. 174 (W.D.N.Y. 1942); Rederii v. Jarka Corp., 26 F. Supp. 304 (D. Me. 1939); Britt v. Buggs, 201 Wis. 533, 230 N.W. 621 (1930). See RETATEMENT, RESTITUTION § 86 (1937). For a rule apparently allowing contribution between wrongdoers in all cases wherein the wrong is not wilful, see Davis v. Broad Street Garage, 232 S.W.2d 355 (Tenn. 1950). Concerning the distinction between indemnity and contribution, often confused by the courts, see Barbara v. Stephen Ransom, Inc., 191 Misc. 957, 79 N.Y.S.2d 438, 441 (Sup. Ct. 1948); Hodges, *Contribution and Indemnity among Tortfeasors,* 26 TEXAS L. REV. 150 (1947); Leflar, *Contribution and Indemnity between Tortfeasors,* 81 U. OF PA. L. REV. 130 (1932).

6. Union Stock Yards Company of Omaha v. Chicago, B. & Q.R.R., 196 U.S. 217, 25 Sup. Ct. 226, 49 L. Ed. 453, 2 Ann. Cas. 525 (1905); New York & Queens Transit Corporation v. Brooklyn Union Gas Co., 256 App. Div. 728, 12 N.Y.S.2d 1 (2d Dep't 1939), *aff'd,* 283 N.Y. 732, 28 N.E.2d 964 (1940), 9 BROOKLYN L. REV. 231; Humphries v. Manhattan Sav. Bank & Trust Co., 174 Tenn. 17, 122 S.W.2d 446 (1938); see Horrabin v. Des Moines, 198 Iowa 549, 199 N.W. 988, 989 (1924); Pfarr v. Standard Oil Co., 165 Iowa 657, 146 N.W. 851, 853, L.R.A. 1915C, 336 (1914). Concerning the basis of indemnity, see WOODWARD, QUASI CONTRACTS § 259 (1913); Hodges, *Contribution and Indemnity among Tortfeasors,* 26 TEXAS L. REV. 150 (1947) Leflar, *Contribution and Indemnity between Tortfeasors,* 81 U. OF PA. L. REV. 130, 146-48 (1932).

consists of a mere failure to detect or remedy that condition.[7] Although the courts differ in their terminology, it may be said that the first wrongdoer is primarily liable and the second wrongdoer is only secondarily liable.[8]

The workmen's compensation acts differ as to their provisions concerning the right of an injured employee to proceed against a third party, when the latter's wrongful conduct has contributed to cause an injury to the employee.[9] Some acts require that the employee make an election—*i.e.*, that he choose either to recover workmen's compensation from his employer or to recover tort damages from the third party.[10] Others permit the employee to recover both workmen's compensation from the employer and tort damages from the third person.[11] In the absence of any other statutory provisions, it would appear that, under either type of act, where the third party has paid damages to the employee, he should be entitled to his common law right of indemnification from the employer who is primarily liable.[12]

However, most of the acts contain an additional provision to the effect that the liability of the employer under the act "shall be exclusive of all other liability for such injury."[13] Have such provisions abrogated the third

7. Pfarr v. Standard Oil Co., 165 Iowa 657, 146 N.W. 851 (1914); Louisville & N.R.R. v. Southern Ry., 237 Ky. 618, 36 S.W.2d 20 (1931); Cohen v. Noel, 165 Tenn. 600, 56 S.W.2d 744 (1933); *see* Union Stock Yards Company of Omaha v. Chicago, B. & Q.R.R., 196 U.S. 217, 228, 25 Sup. Ct. 226, 229, 49 L. Ed. 453, 457, 2 Ann. Cas. 525, 528 (1905). For cases involving such a situation where the decision was put on the grounds of another exception, see Snohomish County v. Great Northern Ry., 130 F.2d 996 (9th Cir. 1942); Horrabin v. Des Moines, 198 Iowa 549, 199 N.W. 988 (1924). See RESTATEMENT, RESTITUTION § 76 (1937); Leflar, *Contribution and Indemnity between Tortfeasors*, 81 U. OF PA. L. REV. 130, 154-58 (1932).

8. For use of these terms, see George's Radio, Inc. v. Capital Transit Co., 126 F.2d 219, 222 (D.C. Cir. 1942); Pfarr v. Standard Oil Co., 165 Iowa 657, 146 N.W. 851, 856 (1914).

9. 3 SCHNEIDER, WORKMEN'S COMPENSATION §§ 835, 839 (3d ed. 1943); WRIGHT, SUBROGATION UNBER WORKMEN'S COMPENSATION ACTS § 12 (1948); *id.* at xii-xxxiii (analytical table of statutes).

10. Strictly speaking, the "election" statutes are of two types. Some statutes require that the employee elect whether to take compensation or to sue the third party. *E.g.*, ARIZ. CODE ANN. § 56-949 (1939); COLO. STAT. ANN. c. 97, § 366 (1935); VT. REV. STAT. § 8078 (1947). Some statutes permit the employee to claim compensation and sue the third party, but do not allow him to collect from both. *E.g.*, KY. REV. STAT. ANN. § 342.055 (Baldwin Cum. Supp. 1950); S.D. CODE § 64.0301 (1939).

11. *E.g.*, CAL. LABOR CODE § 3852 (1943); CONN. REV. GEN. STAT. § 7425 (1949); IOWA CODE ANN. § 85.22 (1949); TENN. CODE ANN. § 6865 (Supp. 1950); WIS. STAT. § 102.29 (1949).

12. Of course, the problem would not arise, once the employer has compensated the employee, under an "election" statute.

13. "[T]he employer shall be relieved from other liability . . . for such personal injury." IOWA CODE ANN. § 85.3 (1949). "The liability of an employer . . . shall be exclusive and in place of any other liability whatsoever . . . on account of such injury. . . ." N.Y. WORKMEN'S COMPENSATION LAW § 11. See Longshoremen's and Harbor Workers' Compensation Act § 5, 44 STAT. 1426 (1927), 33 U.S.C.A. § 905 (Supp. 1949); CONN. REV. GEN. STAT. § 7419 (1949). But see TENN. CODE ANN. § 6859 (Williams, 1934) ("The rights . . . herein granted to an employee . . . shall exclude all other rights . . . of such employee . . . on account of such injury. . . .").

person's common law right of indemnity against the negligent employer? Among the few decided cases in which the problem has arisen, there is a split of authority. Some courts have adopted the "exclusive remedy" doctrine—that the employer's liability to anyone, including the third party, arising from the employer's negligent act which injures his employee, is limited by the act to the fixed payment which must be made to the employee.[14] The courts adopting this view argue that, if the third person were allowed indemnification from the employer, the employee would be acquiring indirectly more than the statute allows him to recover directly.[15] On the other hand, some courts have held that the "exclusive remedy" defined by the statute applies only to the rights of the injured employee against the employer.[16] The courts adopting this view reason that the third party is seeking recovery for the breach of a duty owed him by the employer.[17]

Although the problem is essentially one of statutory interpretation, the wording of the "exclusive remedy" clauses is so nearly uniform that a fair attempt may be made to determine which is rationally the better view. In favor of the "exclusive remedy" doctrine, it may be said that it is the policy of the workmen's compensation acts to limit the employer's liability in situations in which an employee is injured, because liability is imposed upon the employer in many cases where it would not exist in the absence of the act.[18] Therefore, it may be argued, no exception to the limitation of liability should be made, even in the case of a third person otherwise entitled to indemnity. On the other hand, the third party is seeking redress for an injury independent of the injury sustained by the employee.[19] In the absence of the "exclusive remedy" provision, his right to redress for the injury is recognized. The acts make no change in the third party's obliga-

14. Johnson v. United States, 79 F. Supp. 448 (D. Ore. 1948) (election statute); Standard Wholesale Phosphate & Acid Works, Inc. v. Rukert Terminals Corporation, 65 A.2d 304 (Md. 1949) (election statute); *see* Congressional Country Club, Inc. v. Baltimore & O.R.R., 71 A.2d 696, 698 (Md. 1950).

15. Johnson v. United States, 79 F. Supp. 448 (D. Ore. 1948); *see* Baugh v. Rogers, 24 Cal. 2d 200, 148 P.2d 633, 643, 152 A.L.R. 1043, 1055 (1944) (dissenting opinion); Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N.Y. 175, 15 N.E.2d 567, 569 (1938) (dissenting opinion).

16. Rich v. United States, 177 F.2d 688 (2d Cir. 1949) (election statute); Burris v. American Chicle Co., 120 F.2d 218 (2d Cir. 1941); Rederii v. Jarka Corporation, 26 F. Supp. 304 (D. Me. 1939), *aff'd*, 110 F.2d 234 (1st Cir. 1940) (election statute); Barbara v. Stephen Ransom, Inc. 191 Misc. 957, 79 N.Y.S.2d 438 (Sup. Ct. 1948); Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N.Y. 175, 15 N.E.2d 567 (1938), 8 BROOKLYN L. REV. 248, 38 COL. L. REV. 1517; *accord*, Baugh v. Rogers, 24 Cal.2d 200, 148 P.2d 633 152 A.L.R. 1043 (1944); *see* Calvino v. Pan-Atlantic S.S. Corp., 29 F. Supp. 1022 (S.D.N.Y. 1939) (election statute).

17. Rich v. United States, 177 F.2d 688 (2d Cir. 1949); Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N.Y. 175, 15 N.E.2d 567 (1938).

18. Concerning this policy, see New York Central R.R. v. White, 243 U.S. 188, 201, 37 Sup. Ct. 247, 252, 61 L. Ed. 667, 674 (1917); Johnson v. United States, 79 F. Supp. 448, 449 (D. Ore. 1948); Baltimore Transit Co. v. State, 183 Md. 674, 39 A.2d 858, 859 (1944); 1 SCHNEIDER, WORKMEN'S COMPENSATION § 4 (3d ed. 1941).

19. See note 17 *supra*.

tions. If his obligations are not altered by the workmen's compensation acts, his rights should not be impaired in the absence of a clearly manifested intention of the legislature to do so. Neither the fact that the employee may acquire from his employer indirectly more than the statute would permit him to recover directly, nor the fact that the employer may be subrogated to the rights of the employee[20] where the employer has paid compensation and the employee still may proceed against the third party, should be enough to deprive the third party of his right to indemnity.[21] It appears to be a proper inference that the legislature did not intend that the scope of the acts include this situation so as to abrogate the rights of the third person against the employer, because the acts contain no direct reference to this situation,[22] and the rights of the employee against the third person are preserved,[23] although at the loss of his rights against the employer if the act requires an election of remedy.[24] The question of the liability of the employer to the third person should be determined by the application of the general principles of law which govern the relationship between the two.[25]

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20. See, *e.g.*, CONN. REV. GEN. STAT. § 7425 (1949); IOWA CODE ANN. § 85.22 (1949); WIS. STAT. § 102.29 (1949); WRIGHT, SUBROGATION UNBER WORKMEN'S COMPENSATION ACTS xii-xxxiii (1948); Larson, *A Problem in Contribution: The Tortfeasor with an Individual Defense Against the Injured Party*, 1940 WIS. L. REV. 467, 497.

Should the negligence of the employer affect his right of subrogation? Some courts hold that his negligence will bar his recovery against a third party. Thornton Bros. Co. v. Reese, 188 Minn. 5, 246 N.W. 527 (1933); Brown v. Southern Ry., 204 N.C. 668, 169 S.E. 419 (1933); WRIGHT, SUBROGATION UNDER WORKMEN'S COMPENSATION ACTS § 6 (1948). Other courts hold that the sole test of liability of the third party to the subrogated employer is the liability of the third party to the injured employee. Fidelity & Casualty Co. v. Cedar Valley Electric Co., 187 Iowa 1014, 174 N.W. 709 (1919); Utley v. Taylor & Gaskin, Inc., 305 Mich. 561, 9 N.W.2d 842 (1943); *see* Thornton Bros. Co. v. Reese, 188 Minn. 5, 246 N.W. 527, 530 (1933) (dissenting opinion). The latter view appears especially proper when the employer sues for both himself and the injured employee. Otis Elevator Co. v. Miller & Paine, 240 Fed. 376 (8th Cir. 1917); General Box Co. v. Missouri Utilities Co., 331 Mo. 845, 55 S.W.2d 442 (1932). Of course, the contributory negligence of the employee will bar the recovery by the subrogated employer. State v. Insley, 181 Md. 347, 29 A.2d 904 (1943); Burchard v. Otis Elevator Co., 261 Mich. 142, 246 N.W. 78 (1933); WRIGHT, SUBROGATION UNDER WORKMEN'S COMPENSATION ACTS § 7 (1948). Apparently these problems will not arise under statutes which provide that the employer shall be indemnified, for compensation paid the employee, out of the recovery of damages made by the employee from the third party. *E.g.*, IOWA CODE ANN. § 85.22 (1949). But the negligence of the employer will not bar the recovery of the employee from the third party. Milosevich v. Pacific Electric Ry., 68 Cal. App. 662, 230 Pac. 15 (1924); Fidelity & Casualty Co. v. Cedar Valley Electric Co., 187 Iowa 1014, 174 N.W. 709 (1919); Johnson v. Willoughby, 183 S.W.2d 201 (Tex. 1944).

21. For application of this idea, concerning indirect recovery greater than the allowable direct recovery, see Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N.Y. 175, 15 N.E.2d 567, 568 (1938). Concerning the effect of the employer's right of subrogation, see instant case, 179 F.2d at 954.

22. *E.g.*, IOWA CODE ANN. §§ 85.1-85.69 (1949).

23. See notes 10, 11 *supra*.

24. See note 10 *supra*.

25. Johnson v. Mortenson, 110 Conn. 221, 147 Atl. 705, 66 A.L.R. 1428 (1929); *cf.* American Mut. Liability Ins. Co. v. Matthews, 182 F.2d 322 (2d Cir. 1950) (by implication).

The instant case seems to adopt the correct approach to a problem created by incomplete statutory coverage of the field of compensation for injured employees.[26] The Court's construction of the Iowa Act as not excluding any right to indemnification which American may have against Armour, applying what it considers to be the appropriate general principles of indemnity, appears quite sound.[27]

26. Perhaps a statutory provision barring the employee's action against the third party and leaving the third person's liability only that which may run to the employer would be the most equitable solution of the whole problem. For other proposals, see Larson, *A Problem in Contribution: The Tortfeasor with an Individual Defense against the Injured Party,* 1940 WIS. L. REV. 467, 502.

27. For cases which apparently apply this theory, though finding no basis for indemnity, see American Mut. Liability Ins. Co. v. Matthews, 182 F.2d 322 (2d Cir. 1950); Lo Bue v. United States, 91 F. Supp. 298 (E.D.N.Y. 1950).