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RECENT DECISIONS

CARRIERS — INTERSTATE COMMERCE — NO LIMITATION OF LIABILITY POSSIBLE WHEN GOODS ARE PRECIOUS METALS, EVEN THOUGH SHIPPER UNDERSTATES VALUE. — Defendant, the Railway Express Agency, lost a 50-pound shipment of raw platinum, of declared value $50. Shipper, in a suit for actual value, contended that the limitation of liability to declared value included in defendant carrier's standard express receipt was inoperative to limit shipper's recovery to $50, even though his agent had intentionally misstated the value, knowing that the shipment was actually worth over $56,000. The Appellate Division indorsed the shipper's contention by modifying the trial court's $50 verdict for the shipper. The Court of Appeals affirmed the modified judgment, awarding the shipper the full value of the shipment. Held: a special contract limiting a carrier's liability for loss or damage caused by it to goods shipped in interstate commerce is invalid to reduce shipper's recovery to agreed amount, less than the actual value of the goods, where the limitation is not based on the shipper's choice between a rate for full value liability and a lower rate for limited liability.


The "choice of rates" rule which the Court of Appeals found to be decisive is a judge-made requirement in carrier's liability cases which has survived over 73 years of congressional legislation in the field of interstate commerce. As harsh as its application in this case may seem, the rule itself represents judicial leniency in the treatment of common carriers who have failed to deliver the goods.

The metamorphic nature of carrier's liability at common law ranged from early responsibility for fraud or negligence, through absolute liability for losses, except those occasioned by acts of God or the king's enemy, to liability as an insurer against the onslaught of all but a few rare meteorological phenomena. Throughout the history of commerce, carriers have systematically attempted to limit this general liability by making special contracts with shippers. Courts have instinctively rejected any such arrangement which purported to exempt the carrier from liability for his own negligence, or refused to enforce the agreements when it was shown that the shipper either had no actual notice of the attempt to limit liability, or had no choice except to agree to the carrier's terms or not ship at all.

At the time of the reception of the common law into the body of law of this country, a carrier was liable as an insurer but could limit his liability by express agreement with the shipper. During the first four decades of the railroad industry in the United States (circa 1830-1870), a monstrous economic empire began to emerge, fostered by a government eager to effect the speedy settlement of the land by pushing the frontier westward and strengthening the unity of national life. The resultant abuses of power by railroad managers led to public agitation and complaint, directed particularly at the open resort to discriminatory practices by the carriers. After initial reprisals by individual states, reflected in

3 Bissell v. New York Cent. R.R. Co., 25 N.Y. (11 Smith) 442 (1862). This case contains one of the earliest discussions of the "choice of rates" rule in this country.
5 Railroad Co. v. Lockwood, 84 U.S. 357, 360 (1873).
6 MUCHALL, DOCTOR AND STUDENT 222 (18th ed. 1815).
11 Railroad Co. v. Lockwood, 84 U.S. 357, 379 (1873).
state constitutions and statutes alike, Congress responded to the problem by subjecting the railroads to federal regulation. The first comprehensive interstate commerce legislation was embodied in the Act to Regulate Commerce, which created the Interstate Commerce Commission and set up standards for the determination of fair and reasonable rates to be applied uniformly to the transportation of goods and passengers. The practice of discriminating between shippers by the use of arbitrary rate differentials was made punishable by fine and imprisonment. The act contained no provision relating to the nature of a carrier's liability, or the prevalent policy of limiting this liability by special contract. The law regarding these special contracts for liability limitation varied from state to state.

Some states held the carrier to his strict common law liability as an insurer and denied him the right to escape this responsibility in any manner. Others allowed him to restrict his status as an insurer only to the results of his own acts, while still others permitted him to limit the shipper's recovery for losses occasioned by the fault of the carrier. The federal courts held this latter view in those areas in which the application of the "federal common law" was permitted, before Erie R. R. Co. v. Tompkins restricted the concept. Each of these divergent policies was founded on a general recognition of the unequal bargaining position occupied by the shipper. Those courts which permitted any variation of the strict common law liability required that the variation be based on an express contract of limitation, distinctly separate from the bare promise to carry, supported by the promise to pay for carriage. The contract of limitation had to be reasonable and fair, and to satisfy these elements the carrier was obliged to show that the shipper had made an active choice between alternate rates offered by the carrier.

The first congressional treatment of carrier's liability appeared in an amendment to the original act, often called the Carmack Amendment, which, inter alia, declared that a carrier was liable for the full value of any loss or damage to goods caused by it; the amendment made unlawful and void those special contracts by which the carrier sought exemption from his statutory responsibility. The Carmack Amendment was interpreted by the United States Supreme Court, in Adams Express Co. v. Croninger, as an enactment of the "federal common law" as it then existed, holding that, where the shipper had been offered a choice of rates, the agreed value put on the goods in order to obtain the lower rate was a limitation on the recovery which the shipper might have in a subsequent action for loss or damage to the goods. This part of the act was the forerunner of what is now Section 20(11) of Title 49 of the United States Code.

A second amendment followed in 1915, known as the First Cummins Amendment, which prohibited the carrier from limiting either his liability or the amount of the shipper's recovery. The amendment added a proviso that where the goods were hidden from view and the shipper failed to notify the carrier of the character of the goods, the carrier might then require the shipper to state, in

14 ILL. CONST. art. XI, §§ 12, 15 (1870).
15 IOWA CODE ANN. § 1308 (1873).
16 24 Stat. 379 (1889).
17 Id. at 382.
21 304 U.S. 64 (1938).
22 Railroad Co. v. Lockwood, 84 U.S. 357, 380 (1873).
23 Express Co. v. Caldwell, 88 U.S. 264, 266 (1874).
25 34 Stat. 593 (1906).
26 226 U.S. 491 (1913).
27 38 Stat. 1196 (1915).
writing, the value of the goods. This declaration would then serve to limit the liability of the carrier in the event of loss or damage for which he was responsible. The Interstate Commerce Commission was authorized to determine fair and reasonable rates based on such declared value. In treating an attempt by a carrier to fix the value of recovery to an agreed value (market price at time of shipping), in the event of loss of a carload of grain shipped while the First Cummins Amendment was in effect, the United States Supreme Court\(^2\) held that such attempts were declared void by Congress in the amendment, since, in the event the market price rose while the goods were in transit, the agreement would work to deprive the shipper of full value recovery. The facts of the case show that the Court felt that the shipment was neither hidden from view nor of a character unknown to the carrier and therefore not within the Cummins provision.

In 1916, a third amendment, popularly known as the Second Cummins Amendment\(^2\) was enacted, changing only the proviso of the First Cummins Amendment. By the terms of the new proviso, all property, excepting ordinary livestock, may be the subject of special limiting contracts based on declared value, if the carrier has been authorized by the ICC to establish and maintain rates dependent on the value declared in writing by the shipper. This change in the law was viewed by the United States Supreme Court\(^2\) as a congressional reaction to what had proved to be a more comprehensive restriction of carriers' ability to make fair limitation contracts than was found to be desirable.

While it is true that the date of any case decided in any court during the period of these successive amendments must be carefully noted, the decisions at this point seem to be in substantial agreement that the "choice of rates" rule determines the validity of a special liability limiting contract. If a choice of rates is available to the shipper, the special contract is reasonable and fair, and if it is reasonable and fair it is valid and enforceable. This rule is based on the doctrine of estoppel. The shipper, having declared or agreed upon a less than actual value for his goods, to take advantage of the lower freight rate applicable to the lower value, could not later declare a higher value for recovery in a suit for loss or damage caused by the carrier.\(^3\)

It seems clear that if the action of the shipper in the \textit{Grace} case is rightly characterized as a declaration of value, to gain the lower of two rates offered by the carrier, as the Court of Appeals and the Appellate Division held, then the application of the choice of rates test to part of the transaction was proper and the result should stand careful scrutiny. Where the shipment is money or precious metal the carrier can offer but one scale of rates, based on declared value and weight.\(^3\) The difficulty lies in the fact that the result reached in the \textit{Grace} case will not stand the ultimate test, as pointed out in the dissenting opinions of Judges Dye and Van Voorhis in the Court of Appeals.

Simply stated, the facts indicate that a shipper, after deliberately understating the value of his goods, for the admitted purpose of obtaining a lower freight rate, has been permitted to recover the much higher actual value when the goods were lost. This kind of double dealing by shippers has been expressly condemned by the United States Supreme Court, and, where there is fraud shown, it is made a crime by the Interstate Commerce Act.\(^3\) It is necessary to look more closely at the reasons given by the New York courts for tolerating such a transaction.

The "choice of rates" rule was applied in the \textit{Grace} case because the courts

\(^2\) 39 Stat. 441 (1916).
\(^3\) Adams Express Co. v. Darden, 265 U.S. 265 (1923).
\(^3\) Kansas So. Ry. v. Carl, 227 U.S. 639, 651 (1912).
\(^3\) This rate classification is often referred to as the "money rate" or the "gold coin rate."
\(^3\) 49 U.S.C. § 10(3).
found, or were urged to find, that the transaction consisted of the familiar two-part agreement, the bare contract of carriage and a special contract for limitation of liability. Because the carrier could not offer the shipper a choice of rates to support the special agreement, but only the single scale of rates, based on actual value for a precious metal shipment, the court struck out the supposed special contract and reformed the entire transaction as if the shipper had declared the value of the shipment to be $56,000. The carrier was permitted to set off $139 as the fare for a shipment of platinum weighing 50 pounds and valued at $56,000, and the shipper was awarded the difference as his recovery.

A carrier was liable at common law for the full amount of money or precious metals placed with him for shipment, that requirement being based on a rationale suited to the times. More recently, however, the United States Supreme Court has had occasion to comment on the common law rule:

If faith may be put in this argument, advanced by eminent authority and strengthened by a common-sense perusal of modern business practices, the original reason for holding a carrier to full liability in the particular case of the disappearance of money or precious metal shipments has lost its force; it is no longer as necessary to insure that no profit can be made by a carrier who conspires with thieves. The Court of Appeals seems to have been led to find that the transaction before them in the *Grace* case consisted of two contracts by the fact that the carrier's driver made use of a regular merchandise receipt to record the terms of the shipment, writing across the face of the form the word "platinum." Unlike the standard merchandise receipt, the regular money receipt normally used for precious metal shipments has no standard limitation of liability clause, but merely a space for the insertion of the declared value and the weight of the shipment. The trial court, looking beyond the face of the form to facts not cited by the Court of Appeals, characterized the use of the merchandise form by the carrier's agent as mere negligence, induced by the shipper's telephone request to the carrier's office that an ordinary driver be sent after the shipment, instead of the usual armed driver normally sent to receive money or precious metal shipments.

Granting that the reluctance of the Court of Appeals to look beyond form to substance may be viewed as a valid exercise of judicial discretion, it does not seem to be quarreling over arithmetic to point out that the "gold coin rate" which should have been applied at the inception of this transaction would not have been the $139 which the court set off against the shipper's recovery, but the amount determined by entering the money rate tables with a 50-pound shipment valued at $50, a rate which is just pennies over the actual merchandise rate charged

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35 New York & Honduras Rosario Mining Co. v. Riddle Airlines, 3 App. Div. 2d 457, 162 N.Y.S.2d 314, 316, n. 2 (1957). Speaking of the rate for transporting precious metal from El Salvador to Miami, the Appellate Division said:

Rate is based on two factors, weight and value. The weight rate is constant. The value rate is variable, depending on the value declared. (Emphasis added.)


The law charges this person (common carriers) thus entrusted to carry goods, against all events but acts of God, and of the enemies of the king. For though the force be never so great as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politick establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c. . . .

through the negligence of the carrier's agent. There would here seem to be two basic contracts of carriage from which a court might choose.

The choice made in the Grace case is founded on the proposition that, in a money shipment, the shipper is bound to declare the actual value and the carrier is bound to charge the rate applicable to such declared value. But the clear facts of the case show that the shipper was not so bound. He was, in fact, free to select any rate he wanted to pay simply by declaring the value set out in the rate table which corresponded to the desired rate, regardless of the actual value of his goods. A carrier must assume that the shippers who seek his services not only know the law but abide by it. While the carrier does not afford a choice of rates to a shipper of precious metals, there is in fact such a choice, albeit an illegal choice, open to that shipper by the very nature of the goods shipped. The shipper of precious metals has the advantage over any carrier in such a transaction because he alone knows the actual value of his goods; he is controlled only by that portion of the act which applies criminal sanctions to a shipper who undervalues his goods to gain a preferential rate not available to the truthful shipper. The Grace decision would encourage more shippers of precious metals to make that illegal choice—it removes the risk of losing the civil action for full value recovery if the shipment is lost by the carrier, leaving only the risk of the more easily defended criminal prosecution.

There is authority for the proposition that the Second Cummins Amendment was an attempt by Congress to return the law of carrier's liability to the position achieved prior to the Carmack Amendment. If this is true, and it seems implicit in the decisions which discuss this aspect, then the rule of Pennsylvania R. R. Co. v. Hart is controlling in the Grace controversy. From the very diverse nature of goods in commerce it is evident that those specific decisional rules which may apply to one type of goods are not fully determinative in cases involving certain other types of goods, although it is equally true that some general principles apply universally in this area, such as the nature of carriers' liability or their ability to enter into any limitation contract. There is a striking similarity in the nature of the goods shipped in the Hart case (race horses) and the goods shipped in the Grace case, in that the actual value of a race horse is peculiarly within the knowledge of the shipper and not the carrier. So, too, is the value of packaged precious metals (or unpacked raw platinum, for that matter) known only to the shipper. In either case the carrier would be required to call in expert help to assay the actual value if the shipper did not choose to supply it. It is in this context that the Hart Court said:

The rate of freight is indissolubly bound up with the valuation. If the rate of freight named was the only one offered by the defendant (carrier), it was because the rate of freight named was measured by the valuation expressed.

There are decisions which hold that a fraudulent act of the shipper does not

38 Gold Hunter Mining Co. v. Director General, 63 I.C.C. 234, 241 (1921):...
40 112 U.S. 331 (1884). This case implicitly lays down the rule that, where the exact value of the goods is known only to the shipper, the value declared by the shipper governs the entire transaction, even in the event of loss or damage caused by the carrier.
42 112 U.S. 331, 337 (1884).
disable him in an attempt to recover full value for loss from the carrier.\textsuperscript{43} This authority, however, predates the decision in \textit{Adams Express Co. v. Croninger}, which seems to deny this proposition. The Court said:

On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.\textsuperscript{44}

In the \textit{Grace} case, the Appellate Division asked:

If the carrier is not estopped to recover the legal rate where there has been mistake, error, or even illegal computation, there seems to be little reason why the shipper should be estopped to recover the full value in like circumstances.\textsuperscript{45}

Coming as it does from the jurisdiction that sired the \textit{Angerosa v. White}\textsuperscript{46} doctrine of the vitiating effect of fraud upon a contract, this approach is strange, to say the least. It is amply answered by the United States Supreme Court:

To permit such a declared valuation to be overthrown by evidence \textit{aliunde} the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum evaluation thus affixed, would both encourage and reward undervaluations and bring about preferences and discriminations forbidden by the law.\textsuperscript{47}

The \textit{Grace} court cites its decision in \textit{New York & Honduras Rosario Mining Co. v. Riddle Airlines},\textsuperscript{48} a case involving a reduced rate of freight for gold and silver bullion, as authority for the proposition that the shipper can recover the full value of a precious metal shipment even though he fraudulently undervalues the shipment in order to gain a lower freight rate. The facts of that case show that the shipper and the carrier were guilty of collusion, a fact not present in the \textit{Grace} case, and a distinguishing factor, as pointed out by Judge Dye in his dissent in the Court of Appeals decision. Pertinent here is this statement of facts from \textit{Rosario}:

\textit{TAN (carrier) amended its tariffs (illegally) so as to make available to its customer a choice of rates . . . . Following this amendment of TAN’s tariffs, a number of shipments were made without incident until the one in issue.} (Emphasis added.)

This course of dealing should be compared with the prohibition in \textit{Croninger}, quoted above. \textit{Rosario} seems, in truth, to be encouraging and rewarding forbidden undervaluation. But in the \textit{Rosario} case there is, arguably, a basis for such a result—\textit{the carrier was guilty of active collusion.}

It is difficult to determine what a carrier is now required to do when he receives a package containing precious metal from a prospective shipper. Must he open each package and employ assayers or jewelers to determine the actual value of the contents? Clearly the free flow of commerce, traditionally an imperative in this country, would be materially obstructed by such a requirement.

Although three sets of operative facts are stated by the three reported opinions spawned by the \textit{Grace} litigation, there is sufficient concurrence among them to


It seems to be established in England and in this country by the weight of authority, and by the better reason, that where the shipper misrepresents the character of a package for shipment, or misleads the carrier as to its value, he can in case of loss only recover its apparent value according to the representation made; and especially is this true where the representation was made in order to obtain a lower rate of charges.

\textsuperscript{44} 226 U.S. 491, 511 (1913).

\textsuperscript{45} 193 N.Y.S.2d 780, 786 (1959).

\textsuperscript{46} 248 App. Div. 425, 290 N.Y.S. 204 (1936). For a survey of the effect of fraud upon a contract in New York, see 35 \textit{NOTRE DAME LAWYER} 559 (1960).

\textsuperscript{47} Kansas So. Ry. v. Carl, 227 U.S. 639, 652 (1912).


\textsuperscript{49} Id at 316.
warrant charging the shipper with at least civil fraud, both in intentionally under-
 stating the value of the shipment and in requesting that the express company send a regular driver to handle the package, instead of the armed and experienced 
driver who would customarily make such pick-ups. This is set off against the 
negligence of the carrier's agent, apparently due to inexperience at handling money 
shipments. In the New York scales, the heavier sin would seem to be negligence.

Ralph H. Witt

CONFLICT OF LAWS — FOREIGN APPLICATION OF LOUISIANA "DIRECT ACTION" STATUTE — JOINDER OF AUTOMOBILE LIABILITY INSURER PERMITTED. — Parents 
of deceased automobile guest, who was fatally injured in an automobile accident 
in Louisiana, brought action against driver of automobile in Texas, and driver's 
insurer was joined in the action under the Louisiana direct action statute, giving 
an injured person or his survivors or heirs a right of direct action against a liability 
insurer. Insurer's motion to abate the action against it and drop it as a party to 
the suit was granted. After a jury determination adverse to the plaintiffs, appeal 
was taken to the Texas Court of Civil Appeals. Held: reversed and cause re-
manded. Joinder of driver's insurer as a defendant was proper. Powell v. Penny, 

This decision brings to the fore significant questions in conflict of laws, such 
as the nature of the foreign direct action statute, i.e., whether substantive or pro-
ceedural; the effect of the venue provision of the statute when the latter is sought 
to be applied extraterritorially; the effect of the requirement of full faith and credit 
under the federal Constitution; and considerations of public policy.

The enactment of the Louisiana direct action statute,\(^1\) and its subsequent 
amendments,\(^2\) allowing the insurer to be sued immediately and alone in all cases, 
represents the most far-reaching legislative endeavor of all the states in improving 
the position of a person negligently injured in his attempts to recover from the 
tortfeasor's insurer. The portion of this unique\(^3\) statute peculiarly relevant to this 
discussion provides:

The injured person or his or her survivors, or his heirs hereinbefore 
referred to at their option, shall have a right of direct action against the 
insurer within the terms and limits of the policy in the parish where the 
accident or injury occurred or in the parish where the insured or insurer is 
domiciled, and said action may be brought against the insurer alone or 
against both the insured, jointly and in solido, at either of their domiciles 
or principal place of business in Louisiana. This right of direct action shall 
exist whether the policy of insurance sued upon was written or delivered in 
the State of Louisiana or not and whether or not such policy contains a pro-
vision forbidding such direct action, provided the accident or injury occurred 
within the State of Louisiana.\(^4\)

Upon proof of the insured's negligence, therefore, a judgment may be had by or 
on behalf of the injured party directly against the liability insurer.

The present case can perhaps be most appreciated by contrasting it throughout 
with what has been a case of major impact in automobile insurance liability, 
Morton v. Maryland Casualty Co.\(^5\) In that case, the Appellate Division of New

\(^1\) La. Acts 1918, No. 255.  
\(^3\) Wisconsin has a similar direct action statute which allows joinder of the tortfeasor and 
the liability insurer. Wis. Stat. §§ 85.93, 260.11 (1955). Rhode Island has a statute which 
permits a direct suit against the insurer if service upon the insured cannot be effected within 
arise from accidents or injuries which occur in Louisiana.  
\(^5\) 1 App. Div. 2d 116, 148 N.Y.S.2d 524 (1955), aff'd, 4 N.Y.2d 488, 176 N.Y.S.2d 329, 
York refused to allow the maintenance of a suit against the insurer brought under the Louisiana act. It based its decision on two grounds: first, that the interpretation of the direct action statute required that the action be brought in the specified parishes of Louisiana, and, second, that the Louisiana right of action contravened public policy based upon the New York rule that evidence of a tortfeasor's insurance, or any intimation of such, is ordinarily inadmissible and improper in a negligence action. The Court of Appeals, in review, affirmed this holding but did so solely upon the ground of interpretation of the venue provisions. The apparent rationale behind this shall be explained below. Though the Court of Appeals has deemed it unnecessary, in order to refuse enforcement, to consider the question of public policy, it is appropriate to examine the intermediate court's reasoning on this matter since it may be of concern in other jurisdictions where the issue may arise.

In *Powell*, the first problem necessitating resolution was that of characterization of the Louisiana statute as being substantive or procedural, inasmuch as recognition of an imported statute will only be given where it creates a substantive right; in matters of procedure the law of the forum will be deemed binding. As to the actual determination of this question, the courts of both Texas and New York follow the well-settled rule that the forum will make its own characterizations of foreign law based upon its own rules of construction. Maintaining their independence in such determination, the forum courts will, nonetheless, usually look for guidance to the characterization given the statute by the courts of the state of its creation, particularly, as well as the courts of other jurisdictions. There has been a good deal of judicial divergence regarding the nature of the statute. Early Louisiana cases denominated the statute as procedural and remedial and courts of other jurisdictions took their cue from these cases. Subsequently, the Louisiana Supreme Court held, for intrastate purposes, that the right given by the direct action statute constituted a substantive and not a procedural right. These decisions were relied upon by courts in other jurisdictions to permit enforcement of imported statutes. Furthermore, the United States Supreme Court has given its implicit recognition to the latter proposition in a non-conflicts decision. There has also been an inconsistency in the characterization of the two other direct action statutes.
In view of the more recent holdings as to the nature of the statute by the Louisiana courts, which must now be recognized as the law in that state, and the persuasive support given them by the United States Supreme Court, it is likely, in following the usual practice of looking to the courts of the enacting state, that the statute henceforth will be dealt with as conferring a substantive right against the tortfeasor's insurer.\textsuperscript{16} It seems proper to analogize to the Louisiana intrastate holdings for purposes of conflict of laws. Over and above consideration of which court's denomination should be followed, it appears that the statute does establish a new right of action, as opposed to simply designating an additional party defendant or avoiding circuitous litigation. This right vests upon the occurrence of the accident, subject only to such defenses as the tortfeasor may invoke.\textsuperscript{17}

On the point of the substantive nature of the Act, both \textit{Powell} and \textit{Morton} are in agreement. They part company, however, in the interpretation of the venue provision of the Louisiana statute. The statute provides that the right of action given shall be exercised "in the parish where the injury occurred or in the parish where the insured has his domicile."\textsuperscript{18} The controversy revolves around whether the venue restriction is so inextricably a part of the right of action as to deny extraterritorial enforcement. The Court of Appeals in \textit{Morton}, in affirming the dismissal of the plaintiff's suit, treated this limitation as substantive, \textit{i.e.}, it is indispensable to the cause of action itself. The Appellate Division, in maintaining that the venue provision constituted an integral part of the substantive right conferred, analogized to wrongful death cases holding that where a right of action for wrongful death incorporates a time limitation for the bringing of an action, the limitation is an intrinsic and inseparable part of the right and is controlling where the action is brought in a sister state, even if that state has prescribed a longer period. It is not to be treated as a separate statute of limitations.\textsuperscript{19} Though the wording of the direct action statute would seem to compel that finding, the general rule, followed in \textit{Powell},\textsuperscript{20} is that such a personal right of action, transitory in nature, may be enforced anywhere, but the method of enforcement does not follow the right. Thus, venue is no part of the right.\textsuperscript{21} It cannot be maintained that the Louisiana legislature \textit{intended} to create a right of action enforceable only in Louisiana, to the exclusion of all sister states.

In \textit{Tennessee Coal, Iron \\& R. Co. v. George},\textsuperscript{22} the United States Supreme Court

\begin{itemize}
\item The stipulations between the insured and the insurer requiring notice within a specified period of time after the accident and requiring that a judgment first be rendered against the insured tortfeasor before an action can be brought against the insurer are not available as defenses in a "direct action" suit. West v. Monroe Bakery, 217 La. 189, 46 So. 2d 122 (1950); Jackson v. State Farm Mut. Auto. Ins. Co., 211 La. 19, 29 So. 2d 177 (1946).
\item LA. REV. STAT. ANN. § 22:655.
\item "These provisions... go to the remedy and not the right." Powell v. Penny, 336 S.W.2d 224, 227 (Tex. Civ. App. 1960).
\item Tennessee Coal, Iron \\& R. Co. v. George, 233 U.S. 354 (1914); Atchison, T. \\& S.F. Ry. Co. v. Sowers, 213 U.S. 55 (1909). This must also be the logical outcome of Lumbermen's Cas. Co. v. Elbert, 348 U.S. 48 (1954), since it permits suit in the federal court, thus overriding the local venue requirements.
\item 223 U.S. 354 (1914).
\end{itemize}
Court considered a provision of the Alabama Code which gave an employee a right of action against his employer for injuries sustained from defective machinery, and which, at the same time, purported to reserve such causes of action exclusively to the courts of Alabama. The Court held that a state cannot create a transitory cause of action and simultaneously destroy it by a venue restriction. Confronted with this case, the Court of Appeals in *Morton*, in a doubtful approach, distinguished the *George* case on the ground that the venue provisions of the Alabama statute were not physically within the statute creating the right of action, but in a separate section of the code entitled "Venue"; they were not, the New York court said, a substantial part of the statute. The New York court also relied upon a Louisiana Supreme Court case in which failure to bring the action in one of the specified parishes was held fatal to the action, the court of the insurer's agent's parish being without jurisdiction. However, this position is not necessarily irreconcilable with the view taken in the *Powell* case. There is no question but that the venue provision will be strictly adhered to within the state of Louisiana, and this should have no bearing upon another state in which the proper consideration should be whether that restriction is binding beyond the borders of the enacting state at all. Failure to meet the venue requirements within Louisiana does not, of necessity, mean that the provision is an intrinsic part of the statute.

The court in the present case found the ruling in *George* to be controlling and dismissed any consideration of the manifest intent of the Louisiana legislature to give extraterritorial effect to its venue provisions in concluding that these provisions should be characterized as procedural and that Texas was not bound by them. It appears that, although denominating the statute substantive, the New York court is, in effect, holding it to be procedural by the interpretation given the venue provision.

Even when this problem of characterization of the statute is overcome to the satisfaction of a court, there remains the task of determining whether the imported statute is reconcilable with the public policy of the forum state. One of the principal purposes of the conflict of laws doctrine is the realization of uniformity of result in a specific instance, regardless of where the action is brought. That uniform recognition and enforcement of rights, in interstate activity, is ideal is apparent. The full faith and credit clause of the United States Constitution requires that each state enforce the statutes of its sister states. However, this requirement is not without exception. As a general rule, a state need not give recognition to an enactment of another state if the statute is violently opposed to the public policy of the forum state. However, whether the public policy of a state is strong enough to preclude enforcement of a foreign-created right is subject to review by the United States Supreme Court. In the absence of a conflict with public policy, recognition will be required.

In Texas, courts have refused direct actions against the insurer by the injured person, holding that the plaintiff must bring his action within the terms of the policy before he may recover, i.e., recognition has been given to the validity and binding effect of the "no-action" provisions which are almost invariably included in insurance policies or in statutory requirements. Refusal to allow direct actions

25 U.S. Const. art. IV, § 1.
against the tortfeasor's insurer in Texas were not based upon considerations of
public policy. Furthermore, the actions were not brought under the Louisiana
direct action statute.

In Powell, where joinder was sought under the Louisiana direct action
statute, the court found a favorable expression of Texas public policy, respecting
direct action through joinder of the liability insurer and the insured as co-defend-
ants, in specific statutory provisions. By a Texas rule of procedure it was provided
that joinder of a liability or indemnity insurance company shall not be allowed
"unless such company is by statute or contract liable to the person injured or
damaged." Contract liability cannot be invoked because the contract does not
provide for direct action by the injured party, but rather contains the standard
"no-action" clause. Therefore, joinder could be had only by statutory permission.

The defendant-appellee contended that the rule of procedure contemplated
a domestic Texas statute and not the Louisiana act. However, this contention was
overcome by a Texas statute.

By a specific statutory enactment, the right of all citizens to have redress in
Texas courts on the basis of the law of a foreign jurisdiction is clearly granted.
This is an unquestionable expression of a favorable public policy in that state.

However, other jurisdictions, not having this type of statute, find the question
of public policy much more difficult to resolve. It is interesting to note the rationale
employed by the New York Appellate Division in Morton v. Maryland Casualty Co.
The primary policy factor presented in Morton, which conflicts with the policy
of uniform enforcement of foreign-created rights, and which is the ground for
the finding that the Louisiana statute is objectionable, is that of keeping from
the jury any inkling that the defendant is insured. The theory is that knowledge
of insurance would prejudice the jurors' minds to the extent that there might be
an unjust increase in the amount of damages given. Several New York cases indicate
the great emphasis that the courts of that state have attached to evidence of in-
surance. This theory has also been invoked in several other states.

In other jurisdictions, the public policy determination has been divergent.

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29 But see, American Indem. Co. v. Martin, 126 Tex. 73, 84 S.W.2d 697 (Tex. Com. App.
1935).
30 TEX. RULES OF CIVIL PROCEDURE, Rule 97, Sec. (f).
31 TEX. REV. CIV. STAT. art. 4678:
Whenever the death or personal injury of a citizen of this State or of the
United States, or of any foreign country having equal treaty rights with the
United States on behalf of its citizens, has been or may be caused by
the wrongful act, neglect or default of another in any foreign State or country
for which a right to maintain an action and recover damages therefor is
given by the statute or law of such foreign State or country, such right of
action may be enforced in the courts of this State within the time prescribed
for the commencement of such actions by the statutes of this State. The law
of the forum shall control in the prosecution and maintenance of such action
in the courts of this State in all matters pertaining to the procedure. (Em-
phasis added.)
32 Simpson v. Foundation Co., 201 N.Y. 479, 490, 95 N.E. 10, 15 (1911), wherein it was
said: "Evidence that the defendant was insured . . . is incompetent and so dangerous as
to require a reversal even when the court strikes it from the record and directs the jury to
disregard it . . . ." (Emphasis added.) See also, Rodzborski v. American Sugar Refining Co.,
210 N.Y. 262, 104 N.E. 616 (1914); Akin v. Lee, 206 N.Y. 20, 99 N.E. 85 (1912); Cosselmon
33 James Stewart & Co. v. Newby, 266 Fed. 287 (4th Cir. 1920); Watson v. Adams, 187
Ala. 490, 65 So. 328 (1914); Roche v. Llewellyn Ironworks Co., 140 Cal. 563, 74 Pac. 147
(1903).
34 In Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918), Chief Judge Cardozo
espoused what has become recognized as the classic statement regarding this determination. A
state cannot refuse to enforce a foreign law if the enforcement does not violate "some funda-
mental principle of justice, some prevalent conception of good morals, some deep-rooted trad-
ition of the commonweal . . . ."
In Mississippi, Minnesota, and Massachusetts actions were allowed, none of the courts finding any public policy of the state being outraged by enforcement of a foreign direct action statute. In Michigan, enforcement was refused under a specific statutory provision prohibiting knowledge by the jury of, or reference to, insurance in a tort action.

At the very least, denial on the basis of public policy is no longer justifiable in New York. Shortly after the Appellate Division's judgment in Morton, a new statute was enacted, the Motor Vehicle Financial Security Act, providing virtual assurance that most car owners will be insured. Hereafter, the average juror in New York will almost certainly be aware that a tort defendant has insurance. It would appear that this is why the Court of Appeals in the Morton case, affirmed one year after the enactment of the financial security statute, ignored the question of public policy, limiting itself to consideration of the Louisiana venue provision.

The evidence question remains real and disturbing in other jurisdictions. Further observations may controvert the rationale behind the rule. It may be speculated that a jury will assume that a defendant tortfeasor is insured, or that the defense is conducted by an insurance company, because of the widespread fact of automobile liability insurance. It should be noted, also, that, where it is felt that knowledge of insurance has resulted in an unreasonably high award of damages, the court may reduce or set aside so much of the reward as it thinks unreasonable.

It appears, therefore, that foreign application of the Louisiana statute, since it allows direct action, with its consequent avoidance of multiplicity of suits, increases the number of forums available to the plaintiff because liability insurers are often operating in many states. The Texas decision also negates such defenses as failure of notice by the insured and the standard "no-action" clause. It has more advantages than disadvantages. Its desirability can, perhaps, be more fully appreciated under the circumstances of Powell, in view of the close proximity of Louisiana and Texas and the naturally substantial flow of travel between those two states.

Raymond Brown

Constitutional Law — Eminent Domain — Constitutional Provision Requiring Just Compensation for Taking or Damaging Private Property Is Not Self-Executing. — Abutting landowners alleged that Salt Lake County lowered the grade of their street some 16 feet below the previous level, thus destroying their means of ingress and egress. Plaintiffs sought either damages or a writ of mandamus requiring the county to institute condemnation proceedings to assess damages. On appeal to the Utah Supreme Court from a denial of summary judgment for defendants, held: reversed. The constitutional provision requiring just compensation is not self-executing, and in the absence of statutory consent the state may not be made a party to suit. Fairclough v. Salt Lake County, 354 P.2d 105 (Utah 1960).

It is the universal holding that neither the federal nor a state government may

39 N.Y. Vehicle & Traffic Law, tit. III, art. 6, § 312.
be sued by a citizen without its consent. This governmental immunity seems to be based on the old common law maxim "The King can do no wrong." When the individual sovereign was replaced by the concept of popular sovereignty, the idea persisted. Many reasons have been advanced in its support. However, in all jurisdictions statutory consent to be sued has been given, usually restricted to particular causes of action. Such statutes are generally strictly construed because they are considered to be in derogation of the sovereign's right to immunity, and the plaintiff-citizen must follow the statutory procedures precisely or run the risk of having his case dismissed. The consent is often conditional or limited, as, for example, to suit in the state courts only and not in the federal courts.

If the court in Fairclough had found that the constitutional provision in question was self-executing, i.e., that it required no statute to make it effective, then presumably the suit would have been allowed. "Self-execution" is either an exception to sovereign immunity, or a waiver of it.

In construing constitutional provisions, courts commonly begin with the presumption that the provisions are self-executing; this follows from the fact that present state constitutions often contain provisions associated with legislative action. A constitutional provision that resembles legislative action will therefore take effect as legislation. This has not always been true; the federal constitution and early state constitutions established a broad framework of basic principles—leaving actual implementation to the legislature. Under this sort of constitutional provision, the argument against self-execution is more persuasive.

A constitutional provision is generally said to be self-executing if it fulfills the following requirement:

[I]t can be given effect without aid of legislation and there is nothing to indicate that legislation is contemplated to render it operative, and . . . there is a manifest intention that it should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed.

In an illustrative case, where there was no statutory provision for disqualification of a probate judge on the basis of bias, the Minnesota Supreme Court nevertheless held the judge disqualified under a constitutional provision which read, "Every person ought to obtain justice freely and without purchase; completely and without denial." It was there said that "prohibitive clauses of a constitution are

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3 For a succinct statement of the theories behind the doctrine, see Hagerman v. City of Seattle, 189 Wash. 694, 66 P.2d 1152 (1937).
4 See 42 A.L.R. 1464.
5 Prosser, op. cit. supra note 2 at 771.
7 Shuey v. Michigan, 106 F. Supp. 32 (E.D. Mich. 1952). Plaintiff should have brought his action in the Michigan Court of Claims, which was established to hear cases against the state; accord, McPheeters v. Board of Medical Examiners, 74 Cal. App. 2d 46, 168 P.2d 65 (1946).
8 Copper S.S. Co. v. Michigan, 194 F.2d 465 (6th Cir. 1952).
9 See note 15 infra, and accompanying text.
14 Minn. Const. art. 1, § 8.
always self-executing and require no legislative provisions for their enforcement.”

The Utah constitutional provision in Fairclough read, “Private property shall not be taken or damaged for public use without just compensation.” As would seem proper, most courts have held similar provisions self-executing. In a leading California case the court stated that such a provision

...is a restriction placed by the Constitution upon the state itself ..., it cannot be said the mere failure of the legislature to enact a statute allowing suit to be brought against the state entitles the state to disregard and violate the limitation. The logical inference is that said constitutional provision is intended to be self-enforcing.

The Fairclough court, in spite of overwhelming authority to the contrary, decided that Utah’s just compensation provision is not self-enforcing; the state may in effect take private property without any compensation.

The power of the state to take private property is commonly denominated “eminent domain.” This power exists along with and as a concomitant necessity of sovereignty. Constitutions do not grant the power but recognize it and circumscribe it, requiring that its exercise be for a public purpose and that just compensation be paid for property taken. As a result of these constitutional restraints, eminent domain is said to mean the “right of the sovereign to acquire private property for public use upon making just compensation ....” Since the power exists as a necessary element of sovereignty, every state and the federal government possess it. The power is customarily exercised pursuant to statute, through condemnation proceedings, which are neither actions at law nor suits in equity.

Usually the state brings condemnation proceedings to acquire land needed for highways or other purposes and the court ascertains damages to be paid the owner. However, situations do arise, as in Fairclough, where the state or its agencies do not do so, but merely take the land, or destroy a property interest of the owner (such as an easement appurtenant of ingress and egress). In this situation, the theory of inverse eminent domain is applicable. This theory derives its name from the fact that in ordinary proceedings just compensation is paid before the state acquires land or an interest in land; in the inverse situation, the state is found liable for just compensation after it appropriates the land. The taking remains an exercise of the power of eminent domain, even though it precedes a mature right to compensation.

Unlike an exercise of the police power, where there is no recognized taking but only regulation, the power of eminent domain requires, by definition, a taking.

15 Payne v. Lee, 222 Minn. 269, 24 N.W.2d 259, 264 (1946); but see, State v. Parker, 150 Ohio St. 22, 80 N.E.2d 490, 492 (1948), wherein the court said: “Although the constitutional provision prohibits lotteries but only regulation, the power of eminent domain requires, by definition, a taking.

20 For a broad interpretation see Berman v. Parker, 348 U.S. 859 (1954), is to the contrary on the effect of omission of penalties.


23 The phrase seems to have been first used by the Dutch jurist, Grotius. See Morton, Institute on Eminent Domain 1 (1960).


25 North Carolina appears to be the only exception, but the right to compensation is nevertheless recognized because it is demanded by natural justice. Sale v. State Highway & Pub. Works Comm’n, 242 N.C. 612, 89 S.E.2d 290 (1955).

26 JAER, EMINENT DOMAIN 2 (1955).

27 Id. at 302. For general outline of statutes see id. at 302-310.

Thus in order to bring suit under the theory of inverse eminent domain, the complainant must first show to the court's satisfaction that the taking was an appropriation of property, and not a permissive regulation. Where the state has appropriated the entire fee of the landowner there has not been too much difficulty in finding a taking. The less the taking resembles appropriation of a fee, the closer it approaches the area of regulation under the police power. Damage resulting from such exercise is generally considered not compensable.

The court in Fairclough made the gratuitous assumption that a change in the grade of the street was a reasonable exercise of the police power. If such were the case, then the discussion of the constitutional provision involved was superfluous; it is generally conceded that injury resulting from exercise of the police power is non-compensable. The truth of the matter is that destruction of the right of access to abutting property by a change of street grade is today generally held to require compensation, especially under constitutional provisions, such as Utah's, which specifically mention "taking or damaging." The progress of the law is generally hesitant, at times almost imperceptible. Perhaps the Utah court is here adding a new dimension to the judicial consideration of the police power and resultant damage to property. Thus, if the initial assumption of the court, that this is a reasonable exercise of the police power, is accepted at face value, then perhaps the court, by relating the discussion of the constitutional provision requiring just compensation to the police power, is suggesting a more flexible approach to the problem of damage resulting from the use of the police power. Possibly, if the Utah legislature sees fit to enact a statute permitting suit against the state, this case will be authority for the proposition that damage resulting from the valid exercise of the police power is no longer a wrong without a remedy.

The power of eminent domain must also be exercised for a public purpose. Logically, the requirement is a moot point in an inverse eminent domain case. But at least one court has construed this condition to deny recovery for damage or destruction occurring by reason of the negligence of state officers or agents, saying such destruction was obviously not for a public purpose. Other courts distinguish merely between tort and taking, without discussion of public purpose, and hold that traditional immunity applies if a tort has been committed. The plaintiffs in Fairclough sought either damages or a writ of mandamus forcing defendants to start condemnation proceedings. Both remedies have been recognized and approved by various states. By far the most popular approach is a common law action for damages. In the early case of Swift & Co. v. City of Newport News, the court said:

... when the provision of a constitution, as does ours ... forbids damage to private property, and points out no remedy, and no statute affords one, for the invasion of the right thus secured, the provision is self-
executing, and the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of such grievance.\textsuperscript{33}

For some inexplicable reason this logic did not commend itself to the Utah court. A petition for a writ of mandamus has also received favor as a means of enforcing landowners' constitutional rights to compensation. In the case of Haycock v. Jannarone,\textsuperscript{34} the court in dismissing an action for trespass against a contractor said:

The creation of such an agency with the power to condemn implies that the legislature will make provision to pay the award, otherwise we would have to assume that the State intended to violate the Constitution by taking land without compensation, a thought not to be tolerated. . . . His [landowner's] remedy is to require the state highway commission to fulfill their statutory duty, which is to take proper proceedings to condemn the land.\textsuperscript{35}

The Minnesota Supreme Court adds: "It is the ministerial duty of the commissioner to start condemnation proceedings against land that he has already subjected to damage for highway purposes."\textsuperscript{36} The Fairclough court failed to even consider this possibility, dismissing it as being "without merit." If the court had considered this alternative, it might have realized that such a writ could be issued only against state officers. The cherished sovereign immunity would have gone undisturbed, and the constitutional rights of Utah's citizens would have been protected.\textsuperscript{37}

At least one court has allowed the property owner to recover on a theory of implied contract where the highway commissioner had appropriated land without having obtained title by formal condemnation. Under this theory, the recovery was the value of the property taken.\textsuperscript{38}

The possibility of compensation by way of legislation, upon the recommendation of the Utah Board of Examiners, is mentioned in both the majority and dissenting opinions. This board seems to function as some sort of screening agency for legislative appropriations. It owes its existence to the fact the Utah legislature meets only biannually, in short sessions.\textsuperscript{39} It is at best a poor substitute for judicial redress, and the mere possibility of legislation should not dissuade the court from enforcing the provisions of the state constitution.

As a general observation it would seem that Fairclough is contrary to the prevailing trend of judicial thought.\textsuperscript{40} The constitutional provision\textsuperscript{41} at issue is intended to be an effective rein on over-zealous bureaucrats. This principle, which finds embodiment in the Magna Carta, in the federal constitution, and in virtually every state constitution, is too much a part of the American democratic heritage to be discarded by the oversight of the legislature.

In recognizing and accepting its responsibility in a similar case, the Florida Supreme Court said:

In the administration of constitutional guaranties, the State cannot afford to be other than square and generous. To deprive the citizen of his property by other than legal processes and depend on escape from the consequences under cover of plea of non-suability of the State is too anomalous

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\textsuperscript{33} Id. at 824; accord, Heldt v. Elizabeth River Tunnel Dist., 196 Va. 477, 84 S.E.2d 511 (1954); Tomasek v. State, 196 Ore. 120, 248 P.2d 703 (1952); Chick Spring Water Co. v. State Highway Dep't., 159 S.C. 481, 157 S.E. 842 (1931).

\textsuperscript{34} 99 N.J.L. 183, 122 Atl. 805 (1923).

\textsuperscript{35} Accord, People v. Kingery, 369 Ill. 289, 16 N.E.2d 761 (1938); Riggs v. State Rd. Comm'n, 120 W. Va. 298, 197 S.E. 813 (1938).

\textsuperscript{36} State v. Anderson, 220 Minn. 139, 19 N.W.2d 70, 76 (1945).

\textsuperscript{37} People v. Kingery, 369 Ill. 289, 16 N.E.2d 761 (1938).


\textsuperscript{39} For a complete analysis of the functions of the board and its effectiveness, see Note, The Utah Board of Examiners, 5 Utah L. Rev. 349 (1957).

\textsuperscript{40} See note 15 supra, and accompanying text.

\textsuperscript{41} Utah Const. art. 1, § 22.
and out of step with the spirit and letter of the law to claim protection under the constitution.  

Thomas A. McNish

EXECUTORS AND ADMINISTRATORS — ANCILLARY ADMINISTRATION — FAILURE OF NEW YORK EXECUTRIX TO TAKE OUT ANCILLARY LETTERS PRIOR TO FILING CLAIM AGAINST RHODE ISLAND ESTATE HELD TO BAR MAINTENANCE OF HER ACTION DESPITE SUBSEQUENT GRANT OF LETTERS IN RHODE ISLAND. — Plaintiff executrix, appointed in New York, brought action against the estate of a Rhode Island sheriff for damages resulting from the sheriff's alleged non-feasance and misfeasance in connection with the sale of real estate owned by her decedent. A diversity action was brought in federal district court in Rhode Island. The sheriff died on April 18, 1958; defendant was appointed executrix. She first published notice of her appointment on May 7, 1958; plaintiff filed claim against the estate on August 13, 1958, and defendant disallowed it. Plaintiff then filed her claim in court on August 27, 1958, but did not obtain ancillary letters in Rhode Island until February 23, 1960, which was after expiration of the period within which a claim could be filed against the estate under Rhode Island law.  

Plaintiff submitted an amended complaint alleging her appointment as ancillary executrix in Rhode Island. Held: the failure of plaintiff to procure ancillary letters before filing her claim makes a nullity of her action; there was no valid presentation of a claim. Action dismissed. Fitch v. Firestone, 184 F. Supp. 424 (D.R.I. 1960).

The decision in this case rests on the familiar common-law rule that the representative of a deceased person, whether he be executor or administrator, cannot maintain an action in his official capacity in the courts of a state or country other than that of his appointment. A modern court has stated the rule:

It seems generally to be conceded that a personal representative of a deceased person can sue or be sued, or can be a party to an action or proceeding in his official capacity as representative, only in the state wherein he was appointed, and that his role as extended personality of the deceased does not exist extraterritorially but only within the four corners of the state of his appointment. . . .

The representative of a deceased person is thus thought of as being a somewhat artificial creature, a mere legal personality created by the state appointing him.


§ 33-11-5: "Claims shall be filed within six (6) months from the said first publication. Claims not filed within six (6) months from said publication shall be barred. . . ."

§ 33-11-4: "Any claim filed within six (6) months from said first publication may be disallowed within six (6) months and thirty (30) days from said first publication by the executor or administrator. . . ."

§ 33-11-48: "Suit may be brought on a disallowed claim within six (6) months after notice is given to the claimant that the same is disallowed. . . . and, unless otherwise authorized, suit on such claim shall not be brought thereafter against the executor or administrator. . . ."

2 The terms "executor" and "administrator" are essentially synonymous under modern law [Rollison, Wills § 256, p. 476 (1939)] since both derive their power from the court appointing them [3 Beale, Conflict of Laws 1445 (1935)]. The term "representative" will be used herein to denote both.


As such, he cannot claim recognition in a foreign jurisdiction. Once ancillary letters are issued to him by the foreign jurisdiction, however, this defect is remedied and the representative is empowered to maintain actions in his official capacity in the courts of the state granting the letters. Applying this rationale, the judge in the present case held that the New York executrix' actions in Rhode Island prior to taking out ancillary letters were a nullity. It was therefore held that she could not maintain her action by filing an amended complaint (alleging ancillary appointment) since there was, so to speak, nothing to amend. The effect of this ruling was to bury plaintiff's cause of action since the state statute of limitations had run out on the filing of claims against defendant's decedent's estate. It was too late for the plaintiff to start over. The decision in Fitch can be examined in the light of two questions: (1) How desirable is the general rule that an administrator or executor cannot function in his official capacity outside the state of his appointment? (2) Should ancillary letters, once obtained, relate back to validate the prior acts of the representative acting in his official capacity?

Despite the conceptionalist arguments advanced in support of the common law rule, stated in (1), above, the actual driving force behind the doctrine seems to be the convenience of local creditors which militates against allowing a foreign representative to remove local assets of the estate to a foreign jurisdiction before the local creditors have been satisfied. An early court pointed out the evils which, it felt, would accompany a policy of allowing a foreign representative to sue without first taking out ancillary letters:

By adopting such a principle the effects or credits of a testator or intestate, found in this state, might be withdrawn, which may be necessary for satisfying debts due from such testator or intestate to citizens of this state.

In a much later case, this same policy of protecting local creditors was said to be the sole reason for the rule:

It has been repeatedly observed that the reason for insisting that a foreign administrator obtain ancillary letters before suing in another State is to assure that the decedent's domestic creditors shall have their claims paid out of any fund recovered for the benefit of the debtor's estate.

This practical policy argument in support of denying the right to sue until after ancillary appointment seems weak in view of the fact that foreign creditors are usually allowed to file claims and local creditors are entitled only to their fair pro rata share of the whole estate regardless of the assets of the estate located in the forum state. Moreover, it may be reasonably inferred from the Supreme Court decision in the case of Blake v. McClung that any discrimination against

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6 Cases cited supra note 3. For a comparison of the powers of administrators in America, Great Britain and the civil law countries see 4 Rabel, Conflict of Laws ch. 73 (1958).


9 For a discussion of the retroactive effect of a grant of letters of administration see Rollison, Wills § 256 (1939).


11 Stearns v. Burnham, supra note 10 at 263.


13 Sackett v. Osgood, 149 F.2d 825 (D.C. Cir. 1945).


15 172 U.S. 239 (1898).
out-of-state creditors would be unconstitutional. Since, therefore, the local creditors apparently cannot be placed in a better position than foreign creditors, even if the assets of the estate are administered locally, the practical justification for the common-law rule is questionable.\textsuperscript{16}

More convincing arguments have been advanced in support of abandoning the common-law rule.\textsuperscript{17} A unified administration of a decedent's estate would avoid duplication, confusion, and waste more successfully than the common-law system involving the appointment of a representative in each state wherein assets of the estate are located.\textsuperscript{18} The general unworkability of the common-law system has given rise to a number of judicially-created exceptions to the general rule that a foreign representative cannot maintain an action without obtaining ancillary letters. Thus, a foreign representative is allowed to sue in connection with matters obtained in a foreign jurisdiction,\textsuperscript{19} choses in action arising after his appointment,\textsuperscript{20} possession of land,\textsuperscript{21} or stock certificates.\textsuperscript{22} It has even been held that a foreign representative will be given standing in court, without ancillary letters, when failure to do so would result in "a failure of justice."\textsuperscript{23} In addition to the court-made exceptions, over half of the states have enacted statutes to the effect that a foreign representative has the power to sue (at least for some purposes) without taking out ancillary letters in the forum state.\textsuperscript{24} In summary, it would seem that the practical and theoretical grounds for the common-law rule are rather insubstantial.\textsuperscript{25} The numerous exceptions, both legislative and judicial, which have been made to the rule are quasi inconsistent with the rule that a foreign representative has no existence outside the state of his appointment.\textsuperscript{26}

\textsuperscript{16} See Cheatham, supra note 8; Handbook of the National Conference of Commissioners on Uniform State Laws 320 (1944); Uniform Powers of Foreign Representatives Act.

\textsuperscript{17} See Basye, supra note 8.

\textsuperscript{18} Cf. Atkinson, Wills 587 (1953).

\textsuperscript{19} Schlorer v. Mangin, 39 F. Supp. 64 (E.D.N.Y. 1941).

\textsuperscript{20} VonLingen v. Field, 154 Md. 638, 141 Atl. 390 (1928).


\textsuperscript{22} North v. Ringling, 187 Misc. 621, 63 N.Y.S.2d 135 (Sup. Ct. 1946).

\textsuperscript{23} Ibid., Kirkbride v. Van Note, 275 N.Y. 244, 4 N.E.2d 852 (1937).


\textsuperscript{25} The New York statute cited in note 24, supra, is a re-enactment, in modified form, of a similar statute which was enacted in 1911 and repealed in 1926. The conflicting arguments in favor of allowing a foreign representative to sue without obtaining ancillary letters are well set out in 17th Annual Report of the Judicial Council of the State of New York 153-170 (1951). The Council recommended the re-enactment of the repealed law in modified form.

\textsuperscript{26} A further inconsistency may lie in the fact that the defendant who is sued by a foreign representative must plead lack of capacity to sue on the part of the plaintiff, or the defense will be considered waived. It would seem that, if the foreign representative is really non-existent outside his own state, no failure of pleading on the part of the defendant could call him into existence. The general rule is stated in 21 Am. Jur. Executors and Administrators § 984 (1939): Since it is generally held that the disability of an executor or administrator
As stated above, the present case can also be examined with respect to the court's indisposition to apply the "relation back" theory as a means of allowing the plaintiff to maintain her action. The practice is quite common in the case of a domiciliary representative and has been described as follows:

"Relation" is defined as a fiction of law by which an act or instrument is from necessity and for the advancement of justice, permitted to take effect at a time anterior to its actual performance or execution. . . . The doctrine is applied only to subserve the ends of justice.

Another authority states:

In the interval of time between the death of the deceased and the granting of letters the legal title to the personal property is in suspense, or in the keeping of the law, and vests in no one; there is no person who can sue or be sued for it. But upon the grant of letters, the letters, for certain purposes, relate back to the death of the deceased.

On principle, there would seem to be no sound policy against allowing ancillary letters to relate back so as to validate prior actions of a foreign representative. This has been done in a number of cases. By the same token, ancillary letters can relate back so as to permit maintenance of an action against a representative which was commenced prior to his appointment. The court in the present case recognized that the question of retroactive effect of ancillary letters would determine the result reached. Since the question was one of first impression in Rhode Island, it devolved upon the federal judge to make an "informed prophecy" as to how the Supreme Court of Rhode Island would decide the issue should it ever arise before that court.

In doing this, the following result was reached:

Where, as here, the power purportedly exercised by the foreign executrix is derived wholly from her official capacity as the representative of said estate in New York, I am constrained to conclude that the courts of Rhode Island would treat her act as a nullity.

Since there has been no valid presentment of the claim upon which this action is based, it follows that this Court is without jurisdiction to sue in an ancillary jurisdiction without qualifying therein attaches to the person of the plaintiff, and not to the subject matter of the action, the courts generally agree that the disability must be seasonably and properly pleaded to constitute a bar to the action. Such objection, being dilatory in nature, should be raised by a plea in abatement, or a special plea in bar designed for the purpose, unless the plaintiff's lack of capacity to sue appears on the face of the complaint, in which case a special demurrer will lie. Such objection has been deemed waived by a failure to interpose a plea in abatement, by failure to demur, especially where such objection appears on the face of the complaint, petition, or declaration, and by pleading to the merits in actions at law. It should be noted, however, that a different view has been taken in equity. Lack of knowledge that the representative is not qualified within the state has been held no excuse for failure to make a timely and proper objection.

27 See text accompanying note 11, supra.
29 Rollison, Wills § 256, p. 476 (1939).
33 Accord, Mutual Ben. Health & Accident Ass'n v. Cohen, 194 F.2d 232, 241 (8th Cir. 1952).

In determining what the State law is there are several criteria. Of course, if there be an applicable State statute or decision, such must govern the United States Courts. If there be no such statute or decision, other aids must be sought. The problem then becomes one of an informed prophecy as to what the State courts would probably decide were the issue before them.
entertain the same. Accordingly this action is hereby dismissed for want of jurisdiction.34

It would seem that, inherent in this decision, the Federal District Court of Rhode Island has reaffirmed, in all its rigor, the common-law rule which precludes suit by a foreign representative. As has been indicated above, this common-law rule is now open to serious question, both from a practical and conceptionalistic point of view.35 This was recognized in the case of Kruskal v. United States,36 where the court said, speaking of the rule: "This fundamentally artificial rule of the common law has been severely criticized and seems destined to an appropriate interment in due course."37 It is submitted that, in the light of present-day conditions, the common-law rule should be mitigated, if not abandoned entirely. Furthermore, even if the common-law rule is upheld, there would still seem to be no justification for denying retroactive effect to the ancillary letters when they are obtained,38 as in Fitch, before the hearing of the case. Chancellor Kent seems to have expressed a more "modern" outlook in 1822:

... (I)f the party sues as executor or administrator, without probate or taking out letters of administration, the taking them out at any time before the hearing will cure the defect and relate back so as to make the bill good from the beginning. . . . In a light so merely formal is that omission viewed.39

Daniel J. Manelli

LABOR LAW — JURISDICTION — STATE COURT DENIED JURISDICTION UNDER "ARGUABLY SUBJECT" RULE TO REINSTATE OUSTED MEMBER TO UNION.—Appellee Samuel Wax was expelled from the local and international divisions of the Mailer's Union on August 31, 1956. Wax brought an equity action in the Philadelphia Court of Common Pleas against the union seeking reinstatement and damages, alleging that his expulsion was invalid and that as a result he had been unable to get work as a mailer. The union appealed from a dismissal of its preliminary objections to Wax's complaint, grounded on the lower court's lack of jurisdiction. On immediate appeal to the Supreme Court of Pennsylvania held: reversed. A state court may not entertain any action based on facts which might be "arguably subject" to provisions of the Taft-Hartley Act unless jurisdiction had first been refused by the National Labor Relations Board. Wax v. Int'l Mailer's Union, 400 Pa. 173, 161 A.2d 603 (1960).

Wax is the first state court decision to decide whether the state court jurisdiction doctrine of United Const. Workers v. Laburnum1 is limited to acts of violence as a result of the "arguably subject" rule laid down in the second Garmon2 case.

The enactment of the Taft-Hartley Act3 in 1947 greatly intensified the problem as to where to draw the line between those cases which were the exclusive jurisdiction of the National Labor Relations Board and those still left to the state and federal courts.4

One of the major problem areas was the handling of disputes growing out of the expulsion of a member from a union. The anomaly in these situations was that the facts alleged in the complaints might have been considered violations of the act, but the National Labor Relations Board, the exclusive tribunal for

35 See Note, 50 Colum. L. Rev. 518 (1950); Cheatham, supra note 8.
36 178 F.2d 738 (2d Cir. 1949).
37 Id. at 739.
38 See, cases cited supra, note 30.

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violations of the act,ū could not grant the desired remedy — reinstatement into
the union.ū This conflict was reflected by contemporaneous decisions in several
circuit courts. The Ninth Circuit held that since the act provided for redress
and a corresponding remedy these cases came under the exclusive jurisdiction of
the Board,ū whereas the Sixth Circuitū sustained, in opposition, a district court's
allowance of a state court’s jurisdiction because the Board’s remedies were in-
adequate. In 1957 the Supreme Court considered the issue in I.A.M. v. Gonzales,ū
and upheld a California decisionū which granted an ousted union member re-
instatement for an illegal expulsion. Damages for loss of work and mental distress
were also decreed. In California union membership gives rise to a contractual re-
relationship between the member and the union. The court therefore felt an illegal
expulsion was a breach of the contract. In his complaint, Gonzales had alleged
that his ouster precluded him from getting a job because of a hiring hall provision
in the employer-union contract; part of his damages were measured by the mone-
tary loss resulting from his deprivation of work. The Supreme Court decided that
protection of union members in their rights as members was not an area that was
undertaken by federal law, and despite the realization that the loss of work allega-
tion was possibly a violation of Section 8(b) (2) of the Taft-Hartley Act,ū they
refused to deny the states the right to handle these disputes. The Court reasoned
that to do so would deprive an unjustly ousted member of his contractual rights.ū
The main distinction between Gonzales and other pre-emption cases lies in the
Gonzales Court’s emphasis upon remedies, or rather the lack of them.

Thus, it would seem apparent that the Gonzales decision gave state courts
the right to handle disputes involving internal union affairs and Wax relied upon
this decision in his claim before the Pennsylvania court. The Pennsylvania court,
however, felt that the Court, through Mr. Justice Frankfurter, who indicated
when he wrote the Gonzales opinion that he needed “a more compelling indica-
tion of congressional will” that deprivation of state courts’ traditional power, mo-
Gonzales in San Diego Unions v. Garmon.ū The Pennsylvania tribunal held
that Garmon either effectively undercut Gonzales or severely limited it to its facts.ū

5 Section 8(a)(3) of the Act provides that no employer shall justify any discrimination
against an employee for non-membership in a labor organization if he has reasonable grounds
for believing that membership was denied or terminated for reasons other than the failure of
the employee to tender the periodic dues and the initiation fees uniformly required as a
condition of acquiring or retaining membership.
6 Section 10(c) of the Act only provides for job reinstatement with back pay.
7 I.A.M. v. Laube, 213 F.2d 407 (9th Cir. 1954).
11 Section 8(b)(2) provides that to cause or attempt to cause an employer to dis-

12 I.A.M. v. Gonzales, supra note 9, at 621:
The National Labor Relations Board could not have given respondent the
relief that California gave him according to its local law of contracts and
damages. Although, if the union's conduct constituted an unfair labor
practice, the Board might possibly have been empowered to award back
pay, in no event could it mulct in damages for mental and physical suffer-

15 Construing the Garmon decision, the Wax court commented, at 161 A.2d 608:
In the Garmon decision, Justice Frankfurter dismisses the Gonzales de-
cision as one involving a situation where the activity regulated was a mere-
Garmon involved a dispute between an employer and a picketing union attempting to force his employees to join the union. The employer petitioned the Board to obtain a cease and desist order enjoining the union picketing. The Board dismissed the complaint because the employer did not meet its monetary standards, and the employer proceeded to the California courts seeking an injunction and damages. The California court granted both. After a second appeal, the Supreme Court set aside the damage award and established the rule that, when an activity is "arguably subject" to Section 7 or Section 8 of the Act, the state and federal courts must defer to the exclusive jurisdiction of the National Labor Relations Board. It was the "arguably subject" rule that the Pennsylvania court used to dismiss the Wax petition.

The Wax court felt that Gonzales was given relief because he had claimed injury to his "union member" relationship, but that Wax was pleading for relief because of damage to his "employment" relationship. It was only upon this semantic difference that the Pennsylvania court was able to distinguish Wax from Gonzales. The court conceded that they would have granted relief if Wax had asserted damage to his "union member" relationship.

It is conceded that Wax, by claiming that one of the results of his loss of membership was his inability to get a job, might have alleged an unfair labor practice. However, it must be admitted, Wax did not desire the Board's remedy nor did he seek it. It was specifically for this type of situation that Justice Frankfurter devoted a pertinent but unheeded portion of the ill-construed Garmon decision. Elucidating the matter, Justice Frankfurter stated:

However, due regard for the presupposition of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the states of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. I.A.M. v. Gonzales, 356 U.S. 617, 620 (1958). It would seem that only by completely eliminating the peripheral areas, as Justice Cohen, writing the Wax opinion, attempts to do, may the semblance of logic be imputed to this position. But it is contradictory of the explicit language of Garmon to eliminate the peripheral area. And to so use the Garmon decision as authority for severe limitation would be to completely misconstrue the decision. However, even if Gonzales were to be severely limited, Wax still should have been given relief. A closer analysis reveals that the essential facts in Wax and Gonzales were the same, for in both instances union members were suing in state courts for damages and reinstatement to their respective unions.

The Wax court attempts to distinguish the two cases in that Gonzales alleged harm to his union member relationship while Wax claimed harm to his employment relationship. What the Wax court failed to realize was that damage to Wax's employment was only one of the results of his union ouster. Wax necessarily suffered damages similar to those incurred by Gonzales, for his ouster necessarily destroyed the union member relationship. The damage for the harm to the employment relationship was merely an additional claim and not the only or all-important allegation made by Wax.

Job reinstatement does not compensate for all the damages which result from loss of union membership. A union member might have contributed over a period of years to a union health and welfare or pension plan, the benefits of which probably would be lost. While in theory, a worker can labor in a union shop after he loses his membership, this is oftentimes not the case. Yet, even though the NLRB could

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not give Wax that which was the most important to him, the Pennsylvania tribunal denied him the relief sought on the basis of a doubtful assumption that the loss of work was Wax's sole damage.

It was precisely because of the potential loss of benefits mentioned that the Gonzalez Court was willing to overlook the possibility of an unfair labor practice and concern itself with the available remedies. A similar line of reasoning espoused in the Wax case would have allowed the court to disregard the claim for damages for loss of employment and concern itself with the essential remedy — reinstatement to the union.

The Labor Management Relations Act was not enacted to handle internal disputes between unions and their members. The act was set up to protect workers' rights which were granted under Section 7 of the act; it is the settling of disputes involving deprivations of these rights with which the Board is primarily concerned.

The effect of Wax on future Pennsylvania cases is debatable, but it would seem that the National Labor Relations Board will determine whether the state has jurisdiction should a defendant union raise the defense of pre-emption, asserting the complaint alleges an unfair labor practice. This creates a problem, however, inasmuch as the plaintiff will not be able to choose the forum he desires until the Board resolves the jurisdictional question. A possible solution to this dilemma lies in the Board's policy of granting advisory opinions concerning jurisdiction when there is a case pending before the state courts. This would eliminate the necessity of the state court dismissing the complaint and Garmon would still be effectual since the Board would be making the decision as to jurisdiction.

Stanley B. Nelson

OIL AND GAS — TAXATION — EFFECT OF TAX SALE OF SURFACE ON PREVIOUSLY SEVERED MINERAL INTEREST. — This was an action brought to quiet title to certain mineral estates by heirs and assigns of the original patent owner of the entire estate against parties (Trenary interests) derailing their title from various resale tax deeds stemming from a tax sale of the land for delinquent ad valorem taxes. Prior to the tax sale the original patent owner had conveyed the land, reserving in himself a majority interest in the oil and gas in place. Under a lease executed by the original patent owner to Hercules Oil and Gas Co. (Hercules lease), gas was being produced and taxed on a gross production basis at the time of the tax sale of the land, but the production subsequently ceased and the lease was abandoned. The Trenary interests then executed an oil and gas lease, reserving a one-eighth royalty to W. R. Yeager (Yeager lease), whose assigns discovered and produced oil on the land. The trial court held that by reason of production of gas under the original lease, prior to the delinquency of the ad valorem taxes, the mineral estate was severed from the whole estate and survived the tax sale until such time as the lease was abandoned. The right to the leased interest then passed to the resale tax deed purchasers as they held the possibility of reverter, and hence the Yeager lease was validly executed. On appeal, held, judgment vacated, and cause remanded for new trial. The possibility of reverter did not pass by the tax deed, but was relieved from the general ad valorem tax lien by the payment of a gross production tax on the gas then being produced. Secondly, the production of the gas and payment of gross production tax on it severed both the oil and gas interests. The court also held that the right to lease the mineral interest did not pass to the tax deed purchaser, but was pre-empted and remained in the chain of title emanating from the original owners of this interest. Dilworth v. Fortier, 354 P.2d 1091 (Okla. 1960).

The law of oil and gas in producing states is distinguishable on the basis of

the classification of ownership assigned to oil and gas in place.\textsuperscript{2} Where the absolute ownership theory is followed, the oil and gas are said to be capable of separate and distinct ownership apart from the land estate, but until such severance they remain a part of the land.\textsuperscript{2} The other theory is based on nonownership, or exclusive right, and evolved from the concept of oil and gas being fugacious minerals which must be reduced to possession or "captured" before ownership becomes absolute.\textsuperscript{3} According to this latter theory the oil and gas interest capable of being sold by an absolute owner of the land is merely the exclusive right to enter on the land and drill. Oklahoma follows this theory, although it has modified it by saying that an interest in oil, gas, or other minerals is an interest in the land itself, and creates a separate estate therein.\textsuperscript{4} Under both theories separate ownership of the interests beneath the surface is allowed whether such is termed a separate estate, right, title, or interest.\textsuperscript{5}

The most common means by which a landowner effects a severance of his oil and gas interests are by deed,\textsuperscript{6} by reservation in a deed,\textsuperscript{7} or by execution of a lease, in some jurisdictions.\textsuperscript{8} The \textit{Dilworth} case represents the Oklahoma rule that an oil and gas lease will operate as a severance of the mineral interest when there has been mineral production. When a lease is executed, the landowner is said to retain three interests: ownership of the land subject to the lease, the right to receive the royalties under the lease, and a reversionary fee interest to the minerals in place.\textsuperscript{9}

In most jurisdictions, notably those following the ownership theory, such severance of title will effectively prevent the mineral interest passing to a tax deed purchaser when the land is sold for delinquent taxes.\textsuperscript{10} If the mineral interest was separately taxed and the taxes have been paid, the tax title will definitely not include the severed mineral interest.\textsuperscript{11} Separate assessment and taxation of a severed mineral interest is allowed in all absolute ownership jurisdictions except Montana, and in most which follow the exclusive right theory.\textsuperscript{12} Oklahoma does not permit separate taxation of severed mineral interests, but taxes them as part of the surface estate, except when there is production.\textsuperscript{13} The basis of this

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\textsuperscript{1} Sullivan, \textit{Handbook of Oil and Gas Law} § 12 (1955); Note, 35 \textit{Notre Dame Lawyer} 250, 252 (1960).

\textsuperscript{2} Texas Co. v. Daugherty, 107 Tex. 234, 176 S.W. 717 (1915).

\textsuperscript{3} Gulf Refining Co. of Louisiana v. Glassell, 186 La. 190, 171 So. 846 (1936).

\textsuperscript{4} Cornelius v. Jackson, 201 Okla. 662, 209 P.2d 166, appeal dismissed, 335 U.S. 906 (1949); Rich v. Doneghy, 71 Okla. 204, 177 Pac. 86 (1918). But, by statute, absolute ownership of natural gas in place is permitted: OKLA. STAT. ANN. tit. 52, § 231 (1950).

\textsuperscript{5} Emery, The Doctrine of Severance of Estates and the Effect of Tax Titles Thereon, 22 Rocky Mt. L. Rev. 523, 527 (1950).

\textsuperscript{6} Jilek v. Chicago W. & F. Coal Co., 382 Ill. 241, 47 N.E.2d 96 (1943).

\textsuperscript{7} Bodcaw Lumber Co. v. Goode, 160 Ark. 48, 254 S.W. 345 (1923).

\textsuperscript{8} Hager v. Stakes, 116 Tex. 453, 294 S.W. 835 (1927). Note, The Effect of Theories of Ownership Upon the Remedies of an Oil and Gas Lessee, 27 \textit{Notre Dame Lawyer} 613 (1952). The term of the lease and the type of right, title or interest conveyed are all important in determining whether there has been a severance. 1A Summers, Oil and Gas §§ 151-71 (perm. ed. 1954).

\textsuperscript{9} 1A Summers, \textit{Oil and Gas} § 601 (perm. ed. 1958).


\textsuperscript{11} Magnolia Petroleum Co. v. Moyle, 162 Kan. 133, 175 P.2d 133 (1947).

\textsuperscript{12} Statutes in most jurisdictions provide for separate taxation of severed mineral rights. \textit{E.g.}, MINN. STAT. ANN. § 272.04 (1947); TEX. REV. CIV. STAT. ANN. art. 7146 (1960). Even where there is no such statutory provision, severed mineral interests are generally held to be independently taxable. Appeal of Baird, 334 Pa. 410, 6 A.2d 306 (1939). 2 Cooley, \textit{Taxation} § 566 (4th ed. 1924). This is not the law in Wyoming, Montana, and Oklahoma. See THORNTON, \textit{Oil and Gas} § 1237 (Supp. 1960, at 83).

\textsuperscript{13} McNaughton v. Beattie, 181 Okla. 603, 75 P.2d 400, 403 (1937):

[This separate taxable estate in the mineral rights exists only during the time]
refusal to tax separately stems from Oklahoma's concept of mineral interests being a part of the land estate even when severed, plus the fact that the legislature failed to provide for separate taxation.\textsuperscript{14} Yet, most jurisdictions under similar circumstances have allowed for separate taxation of the severed mineral interest before production.\textsuperscript{15} The effect of this Oklahoma doctrine is to provide for two different types of severance: title and tax. Thus, the mineral interest will pass to a tax deed purchaser even when there is a severance of title.\textsuperscript{16} If, however, there is mineral production, this will cause a severance for tax purposes under the gross production tax statute.\textsuperscript{17} and the mineral interest will not pass to a tax deed purchaser of the land.\textsuperscript{18}

\textit{Dilworth} is unique under Oklahoma law for two reasons: 1) It presented a new issue, \textit{i.e.}, whether the possibility of reverter to the oil and gas in place, which had been activated by the abandonment of the Hercules lease, passed to the resale tax deed purchaser or stayed with the owner of the land at the time of the tax sale. 2) Under this lease there had been only production of gas, and thus there arose a question of whether this gas production would also sever the oil interest, which was the only mineral being produced under the Yeager lease.

Under the first proposition, the Trenary interests, the owners of the surface fee, sought to show that since the possibility of reverter in the minerals under the Hercules lease was not covered by the provisions of the gross production tax statute, it was meant to pass to their predecessor in title at the ad valorem tax sale. The Trenarys claimed that at the time of abandonment of the Hercules lease, the title to all the oil and gas passed to them because they held the possibility of reverter. The court disagreed with this reasoning and held that the Trenary interests were not vested with title to any part of the mineral estate by reason of the abandonment of the Hercules lease. The possibility of reverter could not pass to a tax deed purchaser, because the lien for delinquent ad valorem taxes could not attach to any element of the mineral estate, as this estate had been severed from the land and was subject to the gross production tax instead. The gross production tax covered this interest because it was not a tax just “on the landowner's or lessor's interest, or of just the lessee's interest in the mineral estate,” but it was one “in lieu” of all taxes upon the entire mineral interest at such times as there was mineral production.\textsuperscript{19} The dissent concurred in this and quoted \textit{McNaughton v. Beattie}:\textsuperscript{20}

The ultimate basis of a tax deed is a valid assessment and a lien. The lien can be no broader than the assessment, and the tax deed can be no broader than the lien. Consequently when the mineral rights are excluded from the assessment of the ad valorem tax because of the payment of the gross production tax, they are excluded from the lien and cannot be conveyed by the tax deed.\textsuperscript{21}

\begin{flushleft}
\text{when production is obtained from the property and gross production tax levied and paid thereon. . . . [B]efore oil or gas is discovered, or after such production has ceased, the mineral rights are subject to ad valorem tax as real property of the owner of the land.}
\end{flushleft}

\textsuperscript{14} See State v. Shamblin, 185 Okla. 126, 90 P.2d 1053 (1939).
\textsuperscript{15} Riggs v. Board of Comm'rs of Sullivan County, 181 Ind. 172, 103 N.E. 1075 (1914); Consolidated Coal Co. of St. Louis v. Baker, 135 Ill. 545, 26 N.E. 651 (1891).
\textsuperscript{18} Meriwether v. Lovett, 166 Okla. 73, 26 P.2d 200 (1933).
\textsuperscript{19} Dilworth v. Fortier, 354 P.2d 1091, 1097 (Okla. 1960). The gross production tax statute, Okla. Stat. Ann. tit. 68, § 821 (1951), provided that those engaged in the production of certain enumerated minerals, including oil and gas, were to pay a percentage tax on the gross value of the minerals produced. This was to be “in lieu” of all taxes “upon any property rights attached to or inherent in the right to said minerals . . . upon the mineral rights and privileges for the minerals aforesaid belonging or appertaining to land. . . .”
\textsuperscript{20} 181 Okla. 603, 75 P.2d 400 (1937).
\textsuperscript{21} Id. at 402-03.
The court also denied the defendants' alternative theory, that the production of gas, alone, could not have preserved any interest in the oil or other mineral from passing by the tax deed. According to the majority opinion, oil and gas are elements "invariably discovered and produced together . . . are parts of the same mineral estate; and production from said estate of either of them brings about a severance of said estate, from the whole estate, for tax purposes." Furthermore, the conveyances of the mineral interest in this land had consistently spoken of oil and gas as the elements conveyed, and hence both were severed together by the terms of the instruments. The dissent took the opposite position, claiming that oil and gas are separately mentioned in the gross production tax statute and can hardly be thought of as synonymous. The dissenting judge refused to accept the theory of severance of the entire oil and gas estate, and held that the severance of gas by production does not also sever any other part of the remaining mineral estate.

The dissent logically points out that oil and gas are not synonymous, but fails to comprehend that what is severed for tax purposes by the provisions of the gross production tax statute is not just one mineral, but the entire mineral estate. The mineral estate for the purposes of title severance was oil and gas, and thus when tax severance occurred it also severed this same mineral estate. The gross production tax is levied on just the mineral or minerals produced, but it is "in lieu" of all other taxes on this entire mineral interest, not just on what is being produced.

The Dilworth case points up the difference between title and tax severance; tax severance completes title severance. Title severance is the separation of estates or interests in land which is allowed in all states, regardless of whether the absolute ownership or exclusive right theory is followed. But in Oklahoma, title severance does not have the effect of total severance, as it does in most other states, because the mineral estate is still considered part of the land and both are taxed together. The severance becomes complete for all purposes only when there is mineral production. At this time the tax burden on the mineral interest, which has been severed by title, is shifted from the surface fee owner to the mineral producer. Thus, the dissent is wrong in claiming that gas alone was severed, because production, while determining the time a severance for all purposes will occur, does not determine what will be severed. This is accomplished by the title severance.

George A. Pelletier, Jr.

**TAXATION — INCOME TAX — TREATMENT OF THE INTEREST AND EXPENSES OF A NON-CORPORATE GUARANTOR; BUSINESS AND NON-BUSINESS BAD DEBTS DISTINGUISHED. — Nelson was the sole stockholder of Southwest Land Improvement Company (herein designated as Southwest). During the years 1946 through 1949, Nelson's sole business activity was in connection with this and another wholly-owned corporation. A bankruptcy proceeding was instituted against Southwest in 1946. In order to reduce losses, Nelson arranged financing for Southwest, hoping that the corporation could at least complete part of the housing development for which it was created. In order to secure funds, Nelson guaranteed loans made directly or indirectly to Southwest. On some of these loans, he also had a primary obligation. Despite the financing, Southwest failed and Nelson, because of his guarantees, was required to pay the loans plus interest and expenses. Southwest was not able to fully compensate him for this. The Tax Court decided that Nelson was entitled to deduct these payments as short term capital losses on bad debts. On appeal to the Fifth Circuit the question raised was whether the interest and expenses

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paid were to be considered in the same way as the payment of the loans, or whether they could be deducted fully as interest and expenses. Held: that the interest and expenses were properly treated as non-business bad debt losses. Nelson v. Commissioner, 281 F.2d 1. (5th Cir. 1960).

This case, in both the Tax Court and Fifth Circuit opinions, raises and seemingly puts to rest a number of important questions about the bad debts section of the Internal Revenue Code.4

The most basic of these issues is how to treat, for tax purposes, the payment by a non-corporate guarantor of an indebtedness of a corporation, when that corporation was insolvent at the time that the guarantor paid the obligation. Of the three possible methods of treatment, the one which the Commissioner argued for in this case is the most easily dismissed. The Commissioner proposed that Nelson should not be allowed any deduction because his payment on the guaranty was nothing more than a contribution to the capital of the company by a stockholder.2 In order to accept this proposal, as the Tax Court said in this case, there would have to be a finding that, when Nelson guaranteed the loans, "he did not expect reimbursement from Southwest in the event that he was required to respond on his guaranty."3 In other words, the court would have had to make a factual finding that Nelson, when he made the guaranty, intended that any payment he would have to make under the guaranty would be a gratuity to the corporation.4 But the factual finding of the Tax Court was quite the opposite of this. Nelson expected, if he was forced to pay on his guaranty, that he would be reimbursed from the sale of the undeveloped lots that Southwest owned.5 This factual finding is, of course, binding on the Circuit Court, unless it is clearly erroneous.6

But, given the determination that this was not a contribution to capital and that Nelson could consider his payment as a deduction, the court was still faced with the subtle distinction between the other two methods of allowing deduction of this payment. One method is to consider the payment as a loss "incurred in a transaction for profit, though not connected with his trade or business."7 The other is to consider it as a bad debt loss.8 If the first method is applied, the taxpayer is allowed a full deduction for his payment; if the latter is used, the deduction, if it were for a non-business bad debt, would be limited to a short term capital loss.9 These two possible methods are mutually exclusive; if the payment is deductible under one, it cannot be deducted under the other.10

Some of the Courts of Appeals have taken the view that payments such as Nelson’s are fully deductible, as losses incurred in a transaction for profit. There are two reasons generally given for supporting this position. The Fifth Circuit found that the Internal Revenue Code requires that for a debt to be deductible as a bad debt, the debt must become worthless while in the hands of the taxpayer. The court reasoned that, since the debt in a guaranty arrangement is one running from the original debtor to the guarantor, and the original debtor was insolvent at the time the guarantor acquired the debt, then the debt was worthless at its origin and could not therefore be considered a bad debt. The court determined

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1 Int. Rev. Code of 1939 § 23(k) [now Int. Rev. Code of 1954 § 166].
2 Int. Rev. Code of 1939 § 23(g) [now Int. Rev. Code of 1954 § 165(f), (g)].
4 see, e.g., the reasoning of Hoyt v. Commissioner, 145 F.2d 634 (2d Cir. 1944).
6 Grace Bros., Inc. v. Commissioner, 173 F.2d 170 (9th Cir. 1949); (Int. Rev. Code of 1939 § 1141(a) [now Int. Rev. Code of 1954 § 7482(a)] states that the Courts of Appeals shall have jurisdiction to review Tax Court decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury").
7 Int. Rev. Code of 1939 § 23(e) (2) [now Int. Rev. Code of 1954 § 165(c) (2)].
10 Edwards v. Allen, 216 F.2d 794 (5th Cir. 1954).
that, since the payment there at issue did not constitute a bad debt loss, and since some loss on the transaction was obvious, the loss must have been incurred in a transaction for profit. The second reason for such a holding was, as set out in a Third Circuit opinion, that the payment could not constitute a bad debt because, at the time it was made, the original debtor was insolvent and the taxpayer could not expect reimbursement. In other words, the taxpayer voluntarily acquired a debt which he knew to be worthless.\(^{11}\)

The Eighth Circuit, however, took the other tack and decided that the payments may not be deducted fully as losses incurred in a transaction for profit, but must be limited to bad debt deductions.\(^{12}\) The Supreme Court, in Putnam v. Commissioner,\(^{13}\) resolved this conflict among the circuits by affirming the Eighth Circuit. The Court said:

\[\text{[The debtor's obligation to the creditor becomes an obligation to the guarantor, not a new debt, but by subrogation, the result of the shift of the original debt from the creditor to the guarantor who steps into the creditor's shoes. Thus, the loss sustained by the guarantor unable to recover from the debtor is by its very nature a loss from the worthlessness of a debt.]}^{14}\]

The Supreme Court went on to explain the error in the reasoning of lower courts which had held the other way. The Fifth Circuit argument, that the debt did not become worthless in the hands of the taxpayer but was worthless from its origin, assumes that when the guarantor pays the creditor, a new debt is created between the guarantor and the original debtor, and that the debt therefore originates at the time the guaranty payment is made, at which time, of course, the debt would be worthless, since the original debtor is insolvent. But, in fact, no new debt is created; by subrogation the guarantor acquires the original debt, which ran from the debtor to the creditor, which originated at the time of the transaction between the original debtor and creditor. The debt that the guarantor acquires by satisfying the guaranty is not, therefore, worthless from its origin.

As to the Third Circuit argument, the Supreme Court answered that the guarantor is not in the position of one who voluntarily acquires a worthless debt, for the guarantor's act is involuntary and his loss arises not from any gratuity, but from the inability of the debtor to reimburse. The Supreme Court then distinguished the case on which the Third and Fifth Circuits relied, Eckert v. Burnett.\(^{15}\) The Putnam opinion explains that the Court in that case had been confronted with an entirely different question. The lower courts had relied on the statement in Eckert that the debt acquired by a guarantor upon his payment under the guaranty "... was worthless when acquired. There was nothing to be charged off."\(^{16}\)

But in Eckert, the Court was not considering whether a payment by a guarantor was entitled to a bad debt loss deduction, but only whether a guarantor who paid on his guaranty by giving his own note, payable in a subsequent year, could take a bad debt deduction during the year in which he gave the note.

As far as Nelson's deduction for the loans which he had to pay as a guarantor, the Putnam decision cited above controls, and limits the deduction to a bad debt. This is so well settled by the Putnam decision that Nelson did not contest this on the appeal here considered. He did, however, contend that the Putnam decision did not control as far as any interest or expenses which he had to pay on these loans were concerned. The reasoning behind this contention was that the interest and expenses were the taxpayer's and could not be considered with the principal as bad debts; they were, rather, ordinary deductions.\(^{17}\)

\(^{11}\) Pollack v. Commissioner, 209 F.2d 57 (3d Cir. 1954).

\(^{12}\) Putnam v. Commissioner, 224 F.2d 947 (8th Cir. 1955).

\(^{13}\) 352 U.S. 82 (1956).

\(^{14}\) Id. at 85.

\(^{15}\) 283 U.S. 140 (1931).

\(^{16}\) Id. at 141.

\(^{17}\) Int. Rev. Code of 1939 § 23(b) [now Int. Rev. Code of 1954 § 163(a)].
The treatment of the interest and expenses of a guarantor seems to be a new question. The answer depends upon whether the items are part of the principal debt guaranteed by the taxpayer, and therefore items on which the taxpayer is entitled to reimbursement by the original debtor, or whether they are separate from the principal debt and, as Nelson asserted, the taxpayer's own interest and expenses. The ordinary rule in commercial transactions appears to be that a debt includes both the principal and the interest. "Interest goes with the principal, like the fruit with the tree." The term debt as used in the statute embraces interest as well as principal." This same reasoning has been adopted in tax cases: "A debt . . . ordinarily signifies an exchange of cash for a promise to return it with an increment of interest. United States v. Collier, on the other hand, might be cited for the proposition that a taxpayer may be allowed an interest deduction rather than a bad debt deduction for the interest he pays on an obligation entered into for the benefit of the taxpayer's wholly-owned corporation. In that case, the taxpayer had loans made to him which he advanced to one of his corporations. The taxpayer was allowed an interest deduction for the interest he had paid on the loans.

The Collier case is, however, clearly distinguishable from the case under consideration; in Collier the taxpayer did not guaranty the obligations of the corporation, but instead the loans were made directly to the taxpayer. Both the loans and the interest on them were the taxpayer's obligations to the bank and the bank could look only to the taxpayer and not to the corporation for payment. In the Collier case the taxpayer was paying his own interest; in Nelson the taxpayer was, by subrogation, paying the corporation's interest. What is more, as was said in Nelson:

In the Collier case it was intimated that if the taxpayer had acted as agent for the corporation in making the loans the tax result would have been different. In this case it was found that the Taxpayer, Nelson, was acting in all of the transactions on behalf of Southwest.

Two final considerations would seem to resolve the argument that interest and principal go together and that therefore the interest in this case must be considered a bad debt deduction as to the principal. The first of these is suggested in the language of the Restatement of Security: "The surety's reasonable outlay includes the amount he must pay on account of the principal obligation, with interest and any other charges imposed by the principal's default." Furthermore, the Putnam case, which controls here, limited the taxpayer to a bad debt deduction not only as to the principal, but as to the interest, without any discussion of a possibility that the two could be considered differently.

If the principal and interest are both part of the same debt, then they are both obligations primarily of the debtor and are both transferred by subrogation to the guarantor. Since they are obligations of the debtor, the guarantor has a right to be reimbursed for his payment on them and therefore is limited to a bad debt deduction. The same reasoning must be applied to any expenses incurred in obtaining the loans, since the creditor (in this case, Southwest) was primarily liable for them.

One consideration remains. Once it is determined that the taxpayer is limited to a bad debt deduction on his payment, it remains to be determined whether the deduction will be a business or non-business bad debt deduction. The distinction

18 Himley v. Rose, 9 U.S. 312, 317 (1809).
19 Central Bank & Trust Corp. v. State, 139 Ga. 54, 76 S.E. 587, 589 (1912).
21 104 F.2d 420 (5th Cir. 1939).
22 Nelson v. Commissioner, 281 F.2d 1, 5 (5th Cir. 1960).
here is critical because a deduction in full is allowed for business bad debts,\(^2\) while a non-business bad debt is limited to a deduction as a short-term capital loss.\(^2\) A non-business bad debt is "a debt other than a debt . . . the loss from the worthlessness of which is incurred in the taxpayer's trade or business."\(^2\) The Commissioner in Nelson stated that this was not incurred in the taxpayer's trade or business; thus it could not be a business bad debt. Nelson claimed that he fell under the reasoning of certain "promoter" cases; he said his trade or business was promoting, organizing and dealing in businesses such as the two wholly-owned corporations mentioned in this case. Since that is Nelson's trade or business, he argued that his loss was from a debt incurred in his trade or business.

The "promoter" cases, which Nelson relied upon, include Giblin v. Commissioner;\(^2\) Estate of Morris H. Cone;\(^2\) and Charles v. Scott.\(^2\) In all of these cases the taxpayer was the sole stockholder in a number of corporations; the taxpayer made loans to these corporations, which loans were never repaid, and the court allowed the taxpayer to take a business bad debt deduction. But in each of these cases the reason for allowing the business bad debt deduction, rather than a deduction for a non-business bad debt, was that the taxpayer, independently of what he was doing with the corporations involved in the loans, was either in the business of lending money to corporations\(^2\) or in the business of organizing or promoting corporations.\(^3\)

In Nelson the taxpayer was not shown to be in the business of guarantying loans to corporations or of "continually seeking out business opportunities."\(^3\) Nelson is in much the same position as the taxpayer in Wheeler v. Commissioner,\(^3\) who was held not to come within the "promoter cases." The court in Wheeler stated: "Here it is clear that the taxpayers did not make the advances to further any independent promoting business of their own but merely to assist the corporation in its business . . . ."\(^3\)

Whether or not a taxpayer is engaged in a trade or business depends in great measure upon the motives behind his activities.\(^3\) It seems quite clear from the facts of this case that Nelson's motive in guarantying the loan was an attempt to protect his investment, not because his business was guarantying corporate loans.

Nelson was a non-corporate guarantor of corporate indebtedness; his payment on the obligation and interest under the guaranty fell squarely within the non-business bad debts provisions of the Internal Revenue Code.\(^3\) The decision in this case will probably never be remembered as a landmark in the law. But Nelson v. Commissioner provides a review and clarification of two important principles of tax law. It helps to brighten the grey area around the "promoter" cases. It serves to interpret the Putnam case, and most important of all, because of the decision as to the treatment of interest and expenses as bad debt losses, it is a major extension of the Putnam rule. How much farther subsequent decisions will extend this rule is difficult to predict, but Nelson serves fair notice that, where

\(^2\) Int. Rev. Code of 1939 § 23(k) (1) [now Int. Rev. Code of 1954 § 166(a), (b)].
\(^2\) Int. Rev. Code of 1939 § 23(k) (4) [now Int. Rev. Code of 1954 § 166(d)].
\(^2\) Ibid.
\(^2\) 227 F.2d 692 (5th Cir. 1955).
\(^3\) 241 F.2d 883 (2d Cir. 1957).
\(^3\) Id. at 884.
\(^3\) 3 PAUL & MERTENS, LAW OF FEDERAL INCOME TAXATION, § 23.06 (1934).
\(^3\) Int. Rev. Code of 1939 § 23(k) (4) [now Int. Rev. Code of 1954 § 166(d)].
certain provisions of the Internal Revenue Code conflict with the bad debts section, the bad debts section has been preferred by the courts.

David T. Link

WARRANTIES — DISCLAIMER OF WARRANTY CLAUSES — AUTOMOBILE MANUFACTURERS' STANDARD WARRANTY VOID AS BEING INIMICAL TO THE PUBLIC INTEREST.—Henningsen purchased a new automobile manufactured by the Chrysler Corporation from Bloomfield Motors. On the reverse side of the purchase order appeared a standard automobile manufacturers' warranty.  

Nine days after the automobile was delivered to Henningsen, his wife was injured while driving it. Henningsen and his wife joined in an action against Chrysler and Bloomfield Motors to recover damages for the wife's injuries and Henningsen's consequential loss. At the trial, the cause was submitted to the jury on a theory of breach of an implied warranty of merchantability. Evidence indicated the accident was caused by a mechanical defect in the car. Verdicts were returned for the plaintiffs against both defendants. On appeal to the New Jersey Supreme Court, Chrysler sought reversal, mainly on the grounds of lack of privity between it and the Henningens and the limitations on its liability imposed by the terms of the warranty. Held: Judgments for plaintiffs affirmed. When a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser. In addition, Chrysler's attempted disclaimer of an implied warranty of merchantability is invalid as being inimical to the public good. Henningsen v. Bloomfield Motors Inc., 32 N.J. 358, 161 A.2d 69 (1960).

The early common law did not recognize implied warranties of quality in the sale of chattels. The maxim caveat emptor was generally applied to relieve the seller from liability when the goods he sold were defective or of a poor quality. However, since Lord Ellenborough's nisi prius decision in Gardner v. Gray, it has been generally accepted that the seller of a chattel is under some obligation to furnish goods that are merchantable.  

This rule was incorporated into the Uniform Sales Act, which provides that where there is a contract to sell or a sale of goods by description, the seller impliedly warrants that the goods are of merchantable quality. Although not defined in the Sales Act, merchantable quality apparently means that the goods are "reasonably fit

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1 More fully that warranty provided:

   The manufacturer warrants each new motor vehicle (including original equipment placed thereon by the manufacturer except tires), chassis or parts manufactured by it to be free from defects in material or workmanship under normal use and service. Its obligation under the warranty being limited to making good at the factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle to the original purchaser or before such vehicle has been driven 4,000 miles, whichever event shall first occur, be returned to it with transportation charges prepaid and which its examination shall disclose to its satisfaction to have been thus defective; this warranty being expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities on its part. . . ."

With the exception of a recent modification as to duration this represents the standard warranty used by all domestic automobile manufacturers. A like warranty is extended to the purchaser by the dealer.

2 I Williston, Sales § 228 (rev. ed. 1948).

3 Ibid.


5 Williston, supra note 2. See also Prosser, The Implied Warranty of Quality, 27 MINN. L. REV. 117, 120 (1943).

6 Uniform Sales Act § 15.
for the ordinary uses to which goods of that kind are put.7 This would mean that
the seller of a new automobile, which is usually sold by description, impliedly
warrants that the vehicle is reasonably fit for use as an automobile.8

Even though the law of implied warranties applies to an automobile manufac-
turer to the same extent that it applies to other sellers of goods, purchasers of new
automobiles have found it virtually impossible to maintain an action against the
manufacturer for breaches of implied warranties.9 One reason is the requirement
that a plaintiff must establish privity of contract with the defendant before re-
ccovery will be allowed for an alleged breach of implied warranty.10 Since automobile
manufacturers market their products through independent dealers, the ultimate
purchaser seldom has contractual connection with the manufacturer. The effective-
ness of this barrier is demonstrated by the fact that only one decision prior to
Henningsen has permitted enforcement of an implied warranty against an auto-
mobile manufacturer.11 However, the days of the privity requirement as a stumbling
block to recovery are probably numbered. The trend is toward abandonment of
this requirement.12 The story of this trend is stated fully in Henningsen.13 Attention
here will be focused upon the disclaimer and limitation of liability clause in
the automobile manufacturers' standard warranty, an obstacle the consumer still
faces once the privity bar is removed.

The common law recognized that the parties to a sale could include in their
contract a provision disclaiming any or all warranties.14 This rule was codified
into Section 71 of the Uniform Sales Act which provides that where "any right,
duty or liability would arise under a contract to sell or a sale by implication of law,
it may be negatived or varied by express agreement. . . . " Nevertheless, a number
of courts, recognizing the fact that implied warranties are imposed by law for the
protection of the buyer, tend to construe disclaimer clauses narrowly.15 By pouncing
upon loose or ambiguous language, some courts have been able to find that certain
disclaimer provisions, which apparently were meant to be broad in scope, did not
nullify implied warranties.16 But even the strict construction courts concede that a

7 Prosser, supra note, 5 at 130. See also Vold, Sales 437, n. 70 (2d ed. 1959).
8 Prosser, supra note 5, at 130.
10 See Bogert and Britton, Cases on Sales 603-16 (3d ed. 1956).
11 Jarnot v. Ford Motor Company, 191 Pa. Super. 422, 156 A.2d 568 (1959); see also Gillam, op. cit. supra note 9, at 84, for a collection of cases.
12 The Henningsen opinion contains a collection of all of the noteworthy cases which have permitted recovery for breach of warranty in the absence of privity of contract. Add to this collection: Bowel v. Zimmer Manufacturing Company, 277 F.2d 868 (7th Cir. 1960) (surgical pin); Gottsdanker v. Cutler Laboratories, 8 Cal. Rptr. 320 (Cal. App. 1960) (polio vaccine); General Motors Corp. v. Dobson, 338 S.W.2d 665 (Tenn. App. 1960), cert. denied by Tennessee Supreme Court 338 S.W. 2d 665 (1960) (automobile; jury found as a fact that privity existed between automobile manufacturer and consumer); Jarnot v. Ford Motor Company, 191 Pa. Super. 422, 156 A.2d 568 (1959) (truck); see also Book Review, 36 Notre Dame Lawyer 103 (1960).
14 Alex J. Mandl, Inc. v. San Roman, 170 F.2d 839 (7th Cir. 1948); Myers v. Land, 314 Ky. 514, 235 S.W.2d 988 (1951).
15 Vold, Sales 91 (2d ed. 1959).
carefully drafted instrument can, by appropriate language, exclude all warranties, express or implied.\textsuperscript{17}  

The automobile manufacturers' and dealers' standard warranty is such an instrument. It has been in use, without substantial change, for at least 30 years.\textsuperscript{18} During this time numerous courts have had an opportunity to construe it, and none have found it to say anything other than "this warranty being expressly in lieu of all other obligations and liabilities. . . ."\textsuperscript{19} Not only has this clause effectively defeated claims based upon implied warranty, but in one case that portion which reads "and all other obligations and liabilities" was interpreted as relieving the manufacturer from liability for alleged negligence.\textsuperscript{20} The court in that case justified its holding by saying that "the buyer is under no compulsion to buy from the seller and, if the buyer desires to buy from the seller, the buyer has a choice of accepting the seller's terms or going elsewhere."\textsuperscript{21}  

The \textit{Henningsen} court took a more realistic view of the automobile buyer's freedom to go elsewhere if not satisfied with the seller's terms. Observing that the warranty in issue was the uniform warranty of the Automobile Manufacturers Association, whose membership includes every major domestic manufacturer of automobiles,\textsuperscript{22} the court quickly concluded that there was no place the buyer could go to obtain better terms. Since there is no competition among car makers with respect to warranties, the consumer "takes it or leaves it, and he must take it to buy an automobile."\textsuperscript{23}  

It becomes even more apparent that the purchaser is not exercising a free choice in accepting the manufacturers' standard warranty when what he gives up is compared with what he receives under the warranty. To illustrate, assume that a buyer purchases a new automobile and, while driving it, before the warranty period expires, the brakes fail because of a manufacturing defect and the buyer is severely injured. Contrast the relief which would be available to him in the absence of the standard warranty with his sole remedy under the warranty.  

In the absence of the standard warranty, the buyer would be entitled to damages for any loss directly and naturally flowing from the defective brakes. If the defect was caused by negligence on the part of the manufacturer, he would have a cause of action sounding in tort against the manufacturer.\textsuperscript{24} Proceeding under a tort theory he would be entitled to compensation for any loss or injury proximately caused by the manufacturer's negligence. If the buyer could get over the privity hurdle he would be entitled to bring action for breach of an implied warranty of merchantability against the manufacturer. The usual measure of damages for a breach of an implied warranty of quality is the difference between the value of the goods in their defective condition and the value they would have had if they had conformed to the warranty.\textsuperscript{25} However, there is ample authority for the al-

\textsuperscript{17} See cases cited note 16 \textit{supra}.  
\textsuperscript{18} The Automobile Manufacturers Standard Warranty is reproduced in Bogert and Fink, \textit{Business Practice Regarding Warranties in the Sale of Goods}, 25 ILL. REV. 400, 408 (1930).  
\textsuperscript{19} See \textit{GILLAM}, \textit{op. cit. supra} note 9, at 176-77, for a collection of cases. See also, Dec. Dig., \textit{SALES}, key number 267.  
\textsuperscript{22} The Court lists the following as members of the Association: American Motors, Checker Motors Corp., Chrysler, Ford, General Motors, International Harvester, Studebaker-Packard, and Willys Motors. \textit{Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 87 (1960).}  
\textsuperscript{23} \textit{Ibid.}  
\textsuperscript{25} Uniform Sales Act § 69(7).
lowance of consequential damages, including damages for personal injuries, in an action arising from a breach of an implied warranty of quality.\textsuperscript{26}

Under the standard warranty the buyer's sole remedy is a conditional right to receive a replacement of defective parts. The buyer must first remove the defective part from his automobile and send it to the factory, transportation charges prepaid. If the manufacturer acknowledges that the part is defective,\textsuperscript{27} the buyer will presumably get a replacement to install at his own expense. Under the terms of the warranty no recovery can be had for his personal injuries or for any damages that may have resulted to other parts of the automobile.\textsuperscript{28} Moreover, the defective brakes in the above illustration may have been caused by a good part being improperly assembled. There being no defective part to replace, the buyer would apparently be without any remedy.\textsuperscript{29}

The \textit{Henningsen} court found the one-sided character of the standard warranty especially distasteful. In the court's opinion, the automobile manufacturers used their greatly unequal bargaining power to transform the warranty from a device designed to protect the consumer into an effective means of escaping liabilities and obligations imposed by law. By giving little and taking much, the manufacturers have shifted the risk of a defective automobile to the consumer, who has no choice but to accept dictated terms. Refusing to follow strict common law notions of freedom to contract, the court held that the standard warranty was so inimical to the public interest as to require a declaration of its invalidity.

It is significant to note that shortly after the \textit{Henningsen} opinion was published, all of the major automobile manufacturers increased the warranty period on their products. Beginning with the 1961 model year, the standard warranty will have a one year or 12,000 mile duration, instead of 90 days or 4,000 miles. However, the other terms remain substantially unchanged.\textsuperscript{30} If this recent modification represents an attempt to localize \textit{Henningsen}, by making the standard warranty appear more reasonable, it would seem that the industry has selected the wrong device. It was the inadequacy of the protection afforded the consumer and the consumer's lack of choice in the matter that the New Jersey court quarreled about, not the

\begin{footnotesize}
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\item \textsuperscript{26} \textit{E.g.}, Gottsdonker v. Cutter Laboratories, 6 Cal. Rptr. 320 (Cal. App. 1960); Ryan v. Progressive Grocery Stores, Inc., 255 N.Y. 388, 175 N.E. 105 (1931). Compare \textsc{Uniform Sales Act} §§ 69(6), 69(7) and 70.
\item \textsuperscript{27} In \textit{Cannon v. Pullion Motor Co.}, 230 S.C. 131, 94 S.E.2d 397 (1956), it was held that the purchaser was not bound by the manufacturer's decision. \textit{Accord}, \textit{Mills v. Maxwell Motors Sales Corp.}, 105 Neb. 465, 181 N.W. 152 (1920).
\item \textsuperscript{28} See Bogert and Fink, supra note 18, at 413.
\item \textsuperscript{29} See \textit{Henningsen v. Bloomfield Motors Inc.}, 32 N.J. 358, 161 A.2d 69, 79 (1960).
\item \textsuperscript{30} American Motors' (Rambler) new warranty reads:

\begin{quote}
The Manufacturer warrants each new motor vehicle manufactured by it, to be free from defects in material and workmanship under normal use and service, its obligation under the warranty being limited to making good at its factory any part or parts thereof, including all equipment or trade accessories (except tires, battery and normal service maintenance operations) supplied by the Motor Vehicle Manufacturer, which shall, within 12 months after making delivery of such vehicle to the original purchaser or before such vehicle has been driven 12,000 miles, whichever event shall first occur, be returned to it with transportation charges prepaid, and which its examination shall disclose to its satisfaction to have been thus defective; this warranty being expressly in lieu of all other warranties express or implied and of all other obligations or liabilities on its part.
\end{quote}

American Motors advertisements all contain the phrase: "With The Strongest Guarantee in Auto History." Ford, the first of the automobile manufacturers to extend their warranty period, apparently believes that credit should be given where credit is due: "Ford Dealers were the first to extend their warranty on '61 cars to 12,000 miles or one full year; whichever comes first. Ask your dealer for details."
duration of the warranty. The new warranty retains the illusory character of the old. Under the old warranty the buyer received nothing. Under the new he receives three times nothing. \(^{31}\)

_Thomas Kavadas, Jr._

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\(^{31}\) It is of course too early to observe the impact of _Henningsen_ on other courts. About the time _Henningsen_ was before the New Jersey Court, the Supreme Courts of Massachusetts, Oklahoma and Washington, and the Tennessee Court of Appeals, had cases involving actions against automobile dealers wherein the standard warranty was asserted as a defense. The Oklahoma and Washington Courts had no difficulty in upholding judgments for the dealers based upon the disclaimer clause. The Massachusetts Court did reach the same conclusion, but remarked that "this is not the kind of an agreement which commends itself to the sense of justice." Hall v. Everett Motor, Inc., 165 N.E.2d 107 (Mass. 1960); Norton Buick Company v. E. W. Tune Co., 351 P.2d 731 (Okla. 1960); Dimoff v. Ernie Mayer, Inc., 347 P.2d 1056 (Wash. 1960). The Tennessee Court of Appeals circumvented the standard warranty by holding that the radio, television, magazine and newspaper advertisements of the automobile manufacturer extolling the virtues of the manufacturer’s product became a part of the warranty. General Motors Corp. v. Dobson, 338 S.W.2d 665 (Tenn. App. 1960), _cert. denied_ by Tennessee Supreme Court, 338 S.W.2d 665 (1960).