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Contributors to the November Issue/Notes

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NOTES

AUTOMOBILES—LIABILITY OF PRIVATE OWNER OR OPERATOR TO OCCUPANT—CARE REQUIRED AND LIABILITY IN GENERAL.—In the law of Bailments three degrees of care have been used, in dealing with the liability of bailees, namely, slight, ordinary and extraordinary care. A failure to use slight care is denominated as "gross negligence." The

tendency today is to reject the division of negligence into degrees and to hold in effect that although the amount of care varies with the circumstances, the degree remains the same.¹

In using the term "gross negligence" as meaning a failure to use slight care, it is obvious that it designates a degree of care, that is, it is used in a relative sense. On the other hand, gross negligence is used to designate a serious type of conduct. It is used in this sense at the common law and in statutes. In statutes where the term is used it is generally considered as indicating a serious type of conduct and not merely a failure to use slight care.² In the so-called "guest" statutes, dealing with the liability of an owner or operator of a motor vehicle to an occupant (guest) therein, liability is limited to some serious type of conduct, and gross negligence is generally designated in them.

The terminology of the "guest" statutes differs somewhat in the various states that have such statutes. About half of the states now have such statutes limiting the liability of the motorist to his guest. In substance these statutes limit the liability of the motorist to his guest to gross negligence or some similar serious type of conduct, the phraseology differing somewhat. The terminology used in the statutes includes "intentional," "intoxication," "wilful, wanton disregard," "gross negligence and wanton misconduct," "heedlessness," and "reckless disregard of the rights of others."³ It is obvious that few guests will recover from the operator under such statutes. In some states the guest statutes have been declared unconstitutional.⁴ The Supreme Court of the United States held the Connecticut statute to be constitutional.⁵ In Kentucky, where the statute was held unconstitutional, the Act prohibited the guest from recovering damages except for *intentional* wrong.⁶ The Oregon statute deprived guest of any recovery, and it was held unconstitutional on the grounds that it denied to a person a right given to him by the constitution (to sue where he has been injured by the negligence of another).⁷

In a few states, in the absence of guest statutes, recovery has been allowed only where the operator was guilty of gross negligence. They recognize the two kinds of gross negligence, and very often the guest

¹ 31 YALE L. JOUR. 555.

² CLARK, THE LAW OF TORTS 134, citing *Lanci v. Boston Elevated Ry. Co.*, 197 Mass. 32, 83 N. E. 1 (1907).

³ Note, 23 KY. L. JOUR. 659.

⁴ *Ludwig v. Johnson*, 243 Ky. 534, 49 S. W. (2d) 347 (1932); *Stewart v. Hawk*, 127 Ore. 589, 271 Pac. 998 (1928).

⁵ *Silver v. Silver*, 280 U. S. 117 (1929).

⁶ *Ludwig v. Johnson*, *op. cit. supra* note 4.

⁷ *Stewart v. Hawk*, *op. cit. supra* note 4.

has been denied recovery because the quality of the act did not constitute gross negligence under the rule laid down by the particular court.⁸

In some states that have no guest statutes the motorist has been liable to his guest for acts which constitute ordinary negligence. This view is represented in a recent decision by *Spencer v. Jones*.⁹ The plaintiff's decedent, a hitch-hiker, after his car broke down, signaled to the defendant, who was passing by, to give him and his wife a ride. The defendant obliged, and the plaintiff's decedent was killed when the defendant's car, while on the wrong side of the road, collided head-on with a truck. The plaintiff, wife of the deceased, sued to recover damages from the driver of the car. The jury found for the plaintiff, and the decision of the lower court was affirmed on appeal, one judge dissenting. The court held that the plaintiff could recover on the grounds that a motorist owes a duty to exercise ordinary care toward a guest, whether self-invited, or host-invited. The reason the court made no distinction between host-invited and self-invited guests is that a guest of either class enters the host's car with the assent of the host.

The general rule at common law is well-settled that the owner or operator of a motor vehicle owes a duty to an invited guest to exercise reasonable care in the operation of the car so as not to unreasonably expose him to danger and injury by increasing the hazard of travel.¹⁰ The minority rule, often called the "Massachusetts rule," allows recovery only in cases where the operator was guilty of gross negligence. The latter rule is illustrated in the recent case of *Adamian v. Messerlian*.¹¹ The accident occurred about half past eleven o'clock on New Year's Eve. The streets were icy at the time, causing them to be very slippery. The defendant was descending a hill, without chains, going about forty-five to fifty miles an hour. The plaintiffs protested to the defendant as to his speed. The defendant turned to look at one of the protestants sitting on the back seat. The automobile began to skid, the defendant lost control, and the car crashed into a tree. The jury found for the plaintiffs, but the trial judge entered a verdict for the defendant, which decision was affirmed on appeal, the court saying, "There was evidence from which it might have been found that the defendant was driving at a greater speed than was reasonable and proper. This with all the other factors, while evidence tending to show negligence, does

⁸ See *Adamian v. Messerlian*, 198 N. E. 166 (Mass. 1935).

⁹ 179 Atl. 75 (Pa. 1935). But, see *Cody v. Venzie*, 107 Atl. 383 (Pa. 1919), where the court denied recovery. Although the case has not been expressly overruled, the court, in *Spencer v. Jones*, is loath to take such a narrow view.

¹⁰ See cases collected in the following Annotations: 20 A. L. R. 1014; 26 A. L. R. 1425; 40 A. L. R. 1338; 61 A. L. R. 1241; 65 A. L. R. 952.

¹¹ *Op. cit. supra* note 8.

not warrant a finding of gross negligence."¹² The court found that there was nothing to indicate that the momentary turning of the defendant's head to look at one of the plaintiff's had any relation to the cause of the accident.¹³

The above are the two views, but the courts differ as to what acts constitute gross negligence and as to what a reasonable and prudent man would do under the circumstances. The minority rule seems to follow the gratuitous bailment theory, that a gratuitous guest could recover only upon proof of the exercise of so slight a degree of care as would constitute gross negligence.¹⁴ Quite naturally, the states following this view recognize degrees of negligence. The majority of the states have rejected the bailment theory because a human being is not the proper subject of the bailment relationship. In other words, a human being deserves greater care than an ordinary chattel. Another reason, which is more apparent than the first, is that the states which follow the majority rule do not purport to recognize degrees of negligence, and attach liability whenever the care demanded by the circumstances has not been exercised.¹⁵

However, the trend is definitely toward the Massachusetts rule. When this is not brought about by the passage of a guest statute, the courts to obtain the desired end put a more strict meaning on the term ordinary negligence. Some states adhering to the majority rule are bringing about the change by making the plaintiff prove he remonstrated to the driver and that he did not acquiesce in the driver's negligence.¹⁶ It is only reasonable to expect this attitude of the courts,

¹² But see *Cini v. Romeo*, 195 N. E. 732 (Mass. 1935), where the plaintiff recovered. The defendant committed seven different acts of negligence. The court said that "although no single incident of the driving was an act of gross negligence, the combination of acts in the circumstances was sufficient to warrant a jury in finding as a conclusion of fact from all the evidence that the defendant was heedless, that he utterly disregarded the rights of the plaintiff and so was grossly negligent."¹³

¹³ *Tucker v. Andrews*, 181 S. E. 673 (Ga. 1935) (defendant turned her head and while looking back the car struck a pole; recovery was denied); *Oney v. Binford*, 180 S. E. 11 (W. Va. 1935) (defendant turned his head toward plaintiff; recovery was denied).

¹⁴ *Masseletti v. Fitzroy*, 118 N. E. 168 (Mass. 1917).

¹⁵ *Galloway v. Perkins*, 198 Ala. 658, 73 So. 956 (1917); *Broyles v. Hagerman*, 180 S. E. 99 (W. Va. 1935); *Norfleet v. Hall*, 169 S. E. 143 (N. C. 1933); *Crupe v. Spicuzza*, 86 S. W. (2d) 347 (Mo. 1935); *Levesque v. Pelletier*, 131 Me. 266, 161 Atl. 198 (1932); *Bennett v. Edwards*, 239 App. Div. 157, 267 N. Y. S. 417 (1933).

¹⁶ *Broyles v. Hagerman*, 180 S. E. 99 (W. Va. 1935). In *Clise v. Prunty*, 152 S. E. 201 (W. Va. 1930), the court said that "where possible danger is reasonably manifest to an invited guest, and she sits by without warning or protest to the driver and permits herself to be driven carelessly to her own injury, she becomes a coadventurer in the risk, and is thereby barred of recovery."

—that a guest must exercise ordinary care for his own safety before he can recover. In the recent case of *Broyles v. Hagerman*¹⁷ the plaintiff was one of nine passengers in defendant's five-passenger automobile. The defendant "side-swiped" another car coming in the opposite direction. The jury found for the plaintiff, but the defendant was granted a new trial. The supreme court in affirming the action of the circuit court, in granting the defendant a new trial, held that the plaintiff consented to a negligent act of the defendant which was the overloading of the defendant's car.

It is interesting to note that of forty-seven cases examined, forty-two went to the jury and in thirty-eight the jury found for the plaintiff. In four cases the jury found for the defendant and the supreme court reversed the decisions. Five cases did not go to the jury, and the plaintiff was held to have no cause of action in three of them; the remaining two were decided on demurrers. It will be readily seen that the guest had the sympathy of the jury.

The tendency of the courts is to deny recovery, even in the states that follow the majority rule. The reasons no doubt for this modern trend are: first, to protect the hospitable host; second, to discourage hitch-hikers from bringing suit; and third, to make a distinction between paying and nonpaying guests. The third reason rests upon the gratuitous bailment theory. To accept this reason is to place a human being on the same basis as an ordinary chattel. In the recent cases no attempt is made to distinguish between host-invited or self-invited guests. Both are in the same position; the driver assents to their presence. It follows that just because the driver is doing the guest a favor, he should not be absolved from liability, as the car is under the control of the driver, and, since the subject of the "bailment" is a human being, the motorist ought to be bound to exercise at least ordinary care.

An underlying thought which is not expressed but seems to run through the cases where the guest was denied recovery is that since the host subjects himself to the same treatment as that given to his guest, the guest assumes the same risk as the driver. This may be the reason for the tendency to deny recovery by the guest except for acts of gross negligence on the part of the motorist.

Anthony W. Brick, Jr.

FORCIBLE ENTRY AND DETAINER—TRESPASS—ASSAULT AND BATTERY.—Under the ancient common law, the person entitled to possession had a right to enter upon and enjoy his own property, and if his real estate was in the possession of another who had no right to be

¹⁷ *Op. cit. supra* note 16.

there, the owner could use such force as was necessary to evict him from the premises.¹ This condition existed for nearly three hundred years, roughly speaking from the Norman Conquest down to the year 1381. The lawmakers of that time were beginning to realize that such a rule of law was harsh and tending to the public disturbance and individual conflict. If the right to use force be once admitted, it must necessarily follow as a logical sequence that so much may be used as shall be necessary to overcome resistance, even to the taking of human life. Consequently, the peace and good order of society required that the owner of premises should not be permitted to enter against the will of the occupant, but that the remedy must be sought through those peaceful agencies which a civilized community provides for all its members, namely a right of action in the legal tribunals of the country.

The outgrowth of this was the passage of the statute of 5 Rich. II, in 1381,² which provided that "none from henceforth make an entry into any lands and tenements but in case where entry is given by law and in such case not with strong hand or multitude of people but only in peaceable and easy manner." To be sure, this Statute was criminal in nature, but it has been the basis for our modern statutes on forcible entry and detainer, under which provision for both criminal and civil liability exist in many jurisdictions. But since a civil action furnishes the injured party a more speedy and efficient remedy, it has caused the criminal proceedings to fall into disuse in some of these states.³

Forcible entry and detainer consists in violently taking possession of lands or tenements by means of threat, force, or arms and without authority of the law. As the right to maintain the action is not dependent upon title, it follows that it may be maintained by any person whose possession of real property is forcibly taken from him.⁴ By "possession" is meant a peaceable possession, and it is absolutely indispensable that the plaintiff should have been in the peaceable possession of the property when the entry was committed thereon. In a general sense, it may be said that a party is in possession of property when he exercises dominion or control over it.⁵

¹ POLLOCK, THE LAW OF TORTS (12th ed.) 388.

² 10 COMPLETE STATUTES OF ENGLAND 310.

³ Commonwealth v. Shattuck, 4 Cush. (Mass.) 141 (1849); Larkin v. Avery, 23 Conn. 304 (1854); Entelman v. Hagood, 95 Ga. 390 (1894).

⁴ Hammond v. Doty, 184 Ill. 246, 56 N. E. 371 (1900).

⁵ Potts v. Magnes, 17 Colo. 364, 30 Pac. 58 (1892); Hardin v. Sangamon County, 71 Ill. App. 103 (1896); Hinniger v. Trax, 67 Mo. App. 521 (1896); Gallagher v. Connell, 35 Neb. 517, 53 N. W. 383 (1892).

In a series of cases starting with *Newton v. Harland*⁶ the courts in England decided that under the Statute of Richard II the owner of a house or of land was not entitled to use force to obtain possession thereof, as this conduct was unlawful under the Statute. If he did use force to obtain possession, he was liable in an action of assault and battery. The majority of the judges in *Newton v. Harland* seemed to be of the opinion that there would not be liability in *trespass quare clausum fregit* because as to him the person who was in possession had no right to the possession of the property and the owner had the title to the premises. Recently, however, in *Hemmings v. Stoke Poges Golf Club*⁷ the English Court of Appeal overruled *Newton v. Harland*, thus, in effect, reinstating the rule that was supposed to have been the common law prior to 1840, namely, that no civil action whatever lay against one entitled to possession for a forcible entry and eviction of the occupant. This is the law in England today. Though *Newton v. Harland* is no longer the law in England, it has greatly influenced the law on that subject in the United States, as is hereinafter shown.

Where the entry by the person entitled to possession is wrongful, then the question arises as to the remedy of the person who has possession at the time of the wrongful entry. The numerical weight of authority in this country holds that an action of *trespass quare clausum fregit* will not lie on behalf of a tenant ejected without process, since the right of possession was in the landlord at the time of his entry, and he can accordingly justify under a plea of *liberum tenementum*; that is, a plea in justification by the defendant in an action of *trespass quare clausum fregit* by which he claims that he is the owner of the close described in the declaration.⁸ The judicial authority which adheres to this line of reasoning seems to proceed upon the theory that it is a manifest inconsistency to concede one to be the owner of a piece of land, with the right to the immediate possession thereof, and yet maintain that if he enters upon the land thus owned by him, he may, by doing so, become liable in trespass to one who has neither a right of property therein nor a right to the possession.

In *Low v. Elwell*,⁹ a Massachusetts case, where the one in possession was a tenant holding over after the expiration of his tenancy, which

⁶ 1 M. & G. 644, 133 Eng. Rep. 490 (1840).

⁷ [1920] 1 K. B. 720.

⁸ *Tribble v. Frame*, 7 J. J. Marsh (Ky.) 599, 23 Am. Dec. 439 (1832); *Stearns v. Sampson*, 59 Me. 568, 8 Am. Rep. 442 (1872); *Gower v. Waters*, 125 Me. 223, 132 Atl. 550, 45 A. L. R. 309 (1926); *Sampson v. Henry*, 13 Pick. (Mass.) 36 (1832); *Low v. Elwell*, 121 Mass. 309, 23 Am. Rep. 272 (1876); *Levy v. McClintock*, 141 Mo. App. 593, 125 S. W. 546 (1910); *Sterling v. Warden*, 51 N. H. 217 (1871); *Ives v. Ives*, 13 Johns. (N. Y.) 235 (1816); *Souter v. Codman*, 14 R. I. 119, 51 Am. Rep. 364 (1883); 1 WASHBURN ON REAL PROPERTY (3rd ed.) 538; Annotation, 45 A. L. R. 324, 325.

⁹ *Op. cit. supra* note 8.

made him a mere tenant at sufferance, with no right of possession as against the landlord, it was said that "the tenant cannot maintain an action in the nature of *trespass quare clausum fregit*, because the title and the lawful right to the possession are in the landlord, and the tenant, as against him, has no right of occupation whatever."

But there is a substantial judicial dissent from this view, adhering to the doctrine that an action of *trespass quare clausum fregit* may be brought by the person in possession against the owner of the premises who has made a forcible entry.¹⁰ The reasoning back of this doctrine is pointed out by the Illinois court in *Reeder v. Purdy*.¹¹ The court said that "the statute of forcible entry and detainer forbids a forcible entry, even by the owner, upon the actual possession of another. Such an entry is therefore unlawful. If unlawful, it is a trespass and an action for the trespass must necessarily lie. It is urged that the only remedy is that given by the statute, namely, an action for the recovery of the possession. But the law could not expel him who has entered, if his entry was a lawful entry, and if not lawful, all the consequences of an unlawful act must attach to it." The court then held that *trespass quare clausum fregit* would lie by a tenant holding over, against the landlord, for such forcible entry.

From the foregoing discussion, we see that the authorities in this country are in conflict as to the right of the person in possession to maintain an action of *trespass quare clausum fregit* against the one entitled to possession who makes a forcible entry. The same conflict exists as to the right of the person in possession to institute a civil action for an assault or a battery inflicted in the course of a forcible entry.

In considerably more than one-half of the American jurisdictions which have passed on the question it has been held that an entry on real property accomplished by the application of force to the person constitutes a civil wrong as well as a crime. This was the rule in England, as stated in *Newton v. Harland*, and though no longer the law in that country, the following states have adopted or expressed strong approval of that rule: Connecticut,¹² Georgia,¹³ Illinois,¹⁴ Kansas,¹⁵

¹⁰ *Mason v. Hawes*, 52 Conn. 12, 52 Am. Rep. 552 (1884); *Entelman v. Hagood*, 95 Ga. 390, 22 S. E. 545 (1894); *Whitney v. Brown*, 75 Kan. 678, 90 Pac. 277, 11 L. R. A. (N. S.) 468 (1907); *Jones v. Pereira*, 13 La. Ann. 102 (1858); *Reeder v. Purdy*, 41 Ill. 279 (1866); *Mosseller v. Deaver*, 106 N. C. 494, 11 S. E. 529, 8 L. R. A. 537, 19 Am. St. Rep. 540 (1890).

¹¹ *Reeder v. Purdy*, *op. cit. supra* note 10.

¹² *Larkin v. Avery*, 23 Conn. 304 (1854).

¹³ *Entelman v. Hagood*, 95 Ga. 390, 22 S. E. 545 (1894).

¹⁴ *Reeder v. Purdy*, *op. cit. supra* note 10.

¹⁵ *Whitney v. Brown*, *op. cit. supra* note 10.

Louisiana,¹⁶ Minnesota,¹⁷ Missouri,¹⁸ New Jersey,¹⁹ New York,²⁰ North Carolina,²¹ Oklahoma,²² Tennessee,²³ Texas,²⁴ Vermont,²⁵ and Washington.²⁶ The United States Supreme Court has also followed this rule.²⁷

The Minnesota court discusses this principle in *Lobdell v. Keene*.²⁸ Pending an appeal in dispossession proceedings, the defendant forcibly ousted the plaintiff who sued for assault and battery. The court, in holding for the plaintiff, said that the object and purpose of the legislature in passing the forcible entry and unlawful detainer statute was to prevent those claiming a right of entry from redressing their own wrongs by entering into possession in a violent and forcible manner. Such acts tend to a breach of the peace. The law does not permit the owner of land to be the judge of his own rights, but puts him to his remedy under the statute.

On the other hand, nine of the states which have passed on this question follow the present English rule in *Hemmings v. Stoke Poges Golf Club*,²⁹ and hold that no civil action for assault and battery is available to one who has been forcibly ousted by the person entitled to possession, even if the force used was not reasonable. Those states are: Arkansas,³⁰ California,³¹ Maine,³² Maryland,³³ Massachusetts,³⁴ New Hampshire,³⁵ Oregon,³⁶ Pennsylvania,³⁷ and Rhode Island.³⁸

It is apparent that the courts in this country are not at all in accord on the question of whether an entry on real property, accomplished by the application of force to the person constitutes a civil wrong. The American Law Institute, in the *Restatement of the Law of*

16 Thayer v. Littlejohn, 1 Rob. (La.) 140 (1841).

17 Lobdell v. Keene, 85 Minn. 90, 88 N. W. 426 (1901).

18 Levy v. McClintock, *op. cit. supra* note 8.

19 Thiel v. Bull's Ferry Land Co., 58 N. J. L. 212, 33 Atl. 281 (1895).

20 Bristol v. Burr, 120 N. Y. 427, 24 N. E. 937 (1890).

21 Mosseller v. Deaver, *op. cit. supra* note 10.

22 Weatherly v. Manatt, 72 Okla. 138, 179 Pac. 470 (1919).

23 Noel v. McCrory, 7 Cold. (Tenn.) 623 (1868).

24 Sinclair v. Stanley, 69 Tex. 718, 7 S. W. 511 (1888).

25 Dustin v. Cowdray, 23 Vt. 631 (1851).

26 Spencer v. Commercial Company, 30 Wash. 520, 71 Pac. 53 (1902).

27 Denver & R. G. R. R. v. Harris, 122 U. S. 597 (1889).

28 *Op. cit. supra* note 17.

29 *Op. cit. supra* note 7.

30 Vinson v. Flynn, 64 Ark. 453, 43 S. W. 146 (1897).

31 Walker v. Chanslor, 153 Cal. 118, 94 Pac. 606 (1908).

32 Gower v. Waters, *op. cit. supra* note 8.

33 Manning v. Brown, 47 Md. 506 (1878).

34 Low v. Elwell, *op. cit. supra* note 8.

35 Sterling v. Warden, *op. cit. supra* note 8.

36 Smith v. Reeder, 21 Ore. 541, 28 Pac. 890 (1892).

37 Overdeer v. Lewis, 1 W. & S. (Pa.) 90 (1841).

38 Allen v. Keily, 17 R. I. 731, 24 Atl. 776 (1892).

Torts, has adopted the view that such an entry does constitute a civil wrong and the person who is in possession may maintain an action for assault and battery.³⁹ It is this writer's opinion that the view set out there is correct, and that the public interest and welfare demand such a rule. It is for the public good that there exists a freedom from the breaches of the peace which are likely to arise out of forcible entries and which may ultimately become serious and even deadly, and such an interest should be paramount to the interest of the owners of real property in obtaining immediate possession of their property. The person entitled to possession has been given a summary remedy for gaining possession of his property by statute in many states,⁴⁰ so there is no ground for maintaining that he should be allowed to recover it in a violent or forcible manner. If he does so, he should be answerable for his wrong.

In those jurisdictions where a civil action for damages may be maintained, the question arises as to the measure of such damages. Although the person in possession at the time of the forcible entry may maintain trespass against the owner for the unlawful entry, yet he can recover only such damages as have directly accrued to him through the wrongful invasion of his possession. But a person having no title to the premises clearly cannot recover damages for any injury done to the realty by him who has title.⁴¹ Therefore, in an action for *trespass quare clausum fregit* for such an entry, where this remedy exists, the person in possession could recover only nominal damages, because the entry was unlawful, but he can recover nothing more.⁴²

If the unlawful entry resulted in damage to either the person or the personal property of the one in possession, he is allowed, as a general rule in this country, to recover the actual damage for such injury.⁴³ The courts will allow recovery of exemplary damages, if the unlawful act was done in a wanton and reckless manner, or where the purpose of the entry was unlawful.⁴⁴ The measure of damages in each case must be controlled by these principles.

James H. Levi.

INJUNCTION—BOYCOTTS—STRIKES—In a recent Massachusetts case, *Service Wood Heel Co., v. Mackesy*,¹ the plaintiff brought a bill in equity to enjoin the defendants, officers and members of the United

³⁹ RESTATEMENT, TORTS, COMMENTARIES, No. 3, p. 20.

⁴⁰ See 26 C. J. 811, notes 37 and 41, and cases there cited.

⁴¹ *Hoots v. Graham*, 23 Ill. 79, 82 (1859).

⁴² *Reeder v. Purdy*, *op. cit. supra* note 10.

⁴³ *Mosseller v. Deaver*, *op. cit. supra* note 10.

⁴⁴ *Reeder v. Purdy*, *op. cit. supra* note 10.

¹ 199 N. E. 400 (Mass. 1936).

Shoe & Leather Workers Union, from doing acts to prevent sales by the plaintiff under an existing contract with the Simon Shoe Company. Early in March, 1934, a general strike was called by the defendant union involving virtually all the shoe manufacturers in Haverhill, Massachusetts. In April, 1934, the strike was terminated by written agreements between the several manufacturers, including the Simon Shoe Company, and the defendant union. These agreements were for closed shops and fixed wages and hours of employment, and they contained a provision to the effect that after June 1, 1934, the wood heels placed on all types of shoes were to be made by union heel makers. A local of the defendant union in Haverhill was engaged in making wood heels. The plaintiff was engaged in the manufacture of wood heels, and had for several years furnished wood heels to the Simon Shoe Company. It had, at the time of the strike and the making of the contracts by the defendant union aforesaid, an existing contract with the Simon Shoe Company to supply it with wood heels. Its employees had no connection with the defendant union, although in the spring of 1934 they had organized an independent union. In June, 1934, the defendant union informed the Simon Shoe Company that the defendant would not recognize its contract with the plaintiff and that it would have to purchase union made heels or else there would be a strike or walkout. Thereupon the Simon Shoe Company ceased to do business with the plaintiff, and this bill in equity was brought to restrain the interference with the plaintiff's contract. The injunction was granted.

It is well-settled that equity will take jurisdiction, and, by means of injunction, protect contracts between individuals² where there is no lawful excuse for interference with them. As a general rule in this country, this principle applies not only to employment contracts but to other contracts as well.³ In some instances, however, recovery has been confined to acts inducing the breach of a contract of employment.⁴

In Massachusetts a distinction has been made between the right of a person to make contracts without interference and the right to be protected from interference with rights under a contract already in existence.⁵ It was said in *Beekman v. Marsters*⁶ that "where the plaintiff comes into court to get protection from interference with his

² Note, 11 L. R. A. (N. S.) 202.

³ *Beekman v. Marsters*, 195 Mass. 205, 80 N. E. 817, 11 L. R. A. (N. S.) 201, 122 Am. St. Rep. 232 (1907); Note, 97 Am. St. Rep. 923, 924, 925, 926.

⁴ *Glencoe Land, etc., Co. v. Hudson Bros. Comm. Co.*, 138 Mo. 439, 40 S. W. 93, 36 L. R. A. 804, 60 Am. St. Rep. 560 (1897).

⁵ *Beekman v. Marsters*, *op. cit.* *supra* note 3.

⁶ *Op. cit.* *supra* note 3.

right of possible contracts, that is, with his right to pursue his business, acts of interference are justified when done by a defendant for the purpose of furthering his (the defendant's) interests as a competitor." Some courts, however, have protected the interest in freedom from interference with prospective contractual relations, that is, contracts which the plaintiff has a reasonable expectation of making.⁷ This interest has not been accorded as wide-spread a protection as that in existing contractual relations.⁸ The Massachusetts rule appears to be that the right to recover for interference with contractual relations depends upon the following conditions: (1) that the plaintiff had at the time of the defendant's alleged wrongful conduct an existing contract with the third person; (2) that the defendant had knowledge or notice of that contract; (3) that with knowledge or notice of that contract the defendant induced the third person to break that contract; and (4) that there was no justification for the defendant's interference. With regard to malice, the Massachusetts court has stated definitely that in regard to intentional interference with existing rights under a contract malice means nothing more than absence of legal justification. Such a situation is not similar to that in which there is an abuse of what, if done in good faith, would have been a justification.⁹

Before considering further the justification for the defendant's interference with the existing rights of the plaintiff in the case¹⁰ under discussion, it is necessary for us to examine the principles which our courts have laid down whereby economic pressure exerted by a labor union upon employers or third parties is justified or not justified. It is evident that any exertion of pressure by a labor group is bound to curtail the interest of an employer, a nonunion employee, or the public at large. The problem before the courts is to determine which of these curtailments are justifiable. In speaking on this subject, Justice Holmes tells us, "There are various justifications,"¹¹ but that "in all such cases the ground of decision is policy; and the advantages to the community, on the one side and the other, are the only matters really entitled to be weighed."¹² In determining justification for labor pressure affecting contract rights the courts have consistently arrived at their decisions by the balancing of the interests in the case—the interests of labor, the interests of the employer and the interests of the public. While the philosophy of the individual justices or the pe-

⁷ *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230, BOHLEN, *CASES ON TORTS* (3rd ed.) 962; HARPER, *THE LAW OF TORTS* (1933) 479.

⁸ HARPER, *op. cit. supra* note 7.

⁹ *Beekman v. Marsters*, *op. cit. supra* note 3.

¹⁰ *Service Wood Heel Co. v. Macksey*, *op. cit. supra* note 1.

¹¹ Holmes, *Privilege, Malice, and Intent* (1894) 8 HARV. L. REV. 1, 3; HOLMES, *COLLECTED LEGAL PAPERS* (1920) 120.

¹² Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 9; HOLMES, *COLLECTED LEGAL PAPERS* 120.

cularities of the individual cases might, on occasion, have unduly tilted the beam, still from the numerous cases and decisions it is not difficult to draw general principles—principles that are flexible enough to be easily applied and exact enough to be serviceable. In examining these principles of justification we will limit ourselves to a consideration of justification from the standpoint of the purposes and motives of various types of economic pressure. While the means and methods employed frequently serve as a basis for deciding on justification, there seems to be nothing in the case¹³ under discussion that would warrant the pressure brought by the defendants as being unjustifiable from that standpoint.

California appears to be the only state in the United States in which all strikes, regardless of their purpose, are held lawful and justifiable.¹⁴ The other states that have dealt with this problem draw a distinction between strikes and other forms of economic pressure whose purpose is to secure directly benefits for the individuals engaged in the particular form of pressure, and strikes or other activities whose purpose is to secure stronger unions and better "bargaining strength," and more power by which, sooner or later, benefits for those engaged in the dispute, or for others, can be more easily obtained. All jurisdictions agree that the former type, the form of action whose purpose is to obtain benefits directly, is justifiable. When the objectives of the pressure are higher wages, shorter hours, or improved working conditions, the benefit to the workers is direct and obvious,¹⁵ and the right to combine for such purposes is universally recognized.¹⁶ However, when employees bring pressure which is more remote in its purpose than the obtaining of direct and obvious benefits, namely, to strengthen their union "as a preliminary and means to enable it to make a better fight on questions of wages or other matters of clashing interests,"¹⁷ courts immediately begin to differ in their conclusions. There is a sharp division into two camps—those who hold that pressure to secure more "bargaining strength" is justifiable, and, in fact, necessary to the welfare of labor, and those who hold that such pressure is not justifiable. Strikes which have for their purpose the strengthening of the union have come up for the consideration of the courts more frequently in Massachusetts than in any other state, and it is in this State that such strikes have been most frequently con-

¹³ *Service Wood Heel Co. v. Mackesy*, *op. cit. supra* note 1.

¹⁴ *Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027 (1908).

¹⁵ FRANKFURTER AND GREENE, *THE LABOR INJUNCTION* (1930) 26.

¹⁶ *Amer. Foundries v. Tri-City Council*, 257 U. S. 184, 209 (1921); *OAKES, ORGANIZED LABOR AND INDUSTRIAL CONFLICTS* §§ 263, 266.

¹⁷ *Holmes, C. J., in Plant v. Woods*, 176 Mass. 492, 505 (1900).

demned as being unjustifiable.¹⁸ The courts of Massachusetts have not held that all strikes for the discharge of certain workmen are unjustifiable, but they declare that it is the right of the courts to decide whether such strikes are justifiable. They have consistently refused to regard the motive of strengthening the union as sufficient to justify such a strike.¹⁹ This question has come up for a great deal of consideration in the courts of New York, but they have been far more liberal with labor than the courts of Massachusetts. In general they have recognized the justification for a strike or other form of economic pressure whose purpose is to increase the "bargaining strength" of labor.²⁰ "The New York and Massachusetts courts have reached opposite conclusions upon this issue, which has long been one of the most debated in the entire law of labor combinations."²¹ In the other states of the union this question has not come before the courts so many times, and a majority of the state supreme courts have never decided whether or not strikes whose purpose is to strengthen the union are justifiable.²² Where this question has been presented to the courts they have been about evenly divided between the New York and the Massachusetts rules. Connecticut, New Hampshire, New Jersey, Pennsylvania, Vermont, Maryland, and Delaware take the same position as Massachusetts, while Arkansas, California, Indiana, Oklahoma, Illinois, and the Supreme Court of the District of Columbia (an inferior court) have held to the rule as laid down by New York.²³ In the celebrated *Hitchman* case²⁴ the Supreme Court of the United States enjoined the defendants, a union, from inducing the employees of the plaintiff to stop working in order to join the union of the defendants. The plaintiff operated a mine in the Panhandle district of West Virginia. Contracts were made between the plaintiff and the employees by which the employees were "free" to join a union, but if they did so they would have to stop working for the plaintiff. Union organizers worked among the miners working for the plaintiff and persuaded them to sign statements agreeing to join the union and promising to strike when called upon to do so. The plaintiff sought an injunction against this activity on the part of the union organizers, and to enjoin them (the union organizers) from interfering with the contract between the plaintiffs and the workers. "The conduct was

18 WITTE, *THE GOVERNMENT IN LABOR DISPUTES* (1932) 23.

19 *Plant v. Woods*, *op. cit. supra* note 17; *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603 (1905); *Smith v. Bowen*, 232 Mass. 106, 121 N. E. 814 (1919).

20 *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297 (1902); *Exchange Bakery & Restaurant, Inc. v. Riffkin*, 245 N. Y. 260, 157 N. E. 30 (1927).

21 WITTE, *op. cit. supra* note 18, at 25.

22 WITTE, *op. cit. supra* note 18, at 26.

23 WITTE, *op. cit. supra* note 18, at 26.

24 *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, L. R. A. 1918C, 497, Ann. Cas. 1918B, 46, BOHLEN, *CASES ON TORTS* (3rd ed.) 942.

enjoined, on the ground that the plaintiff had the right to require its employees not to join the union, and that, even in the absence of a contract for a definite term of employment, the plaintiff had a pecuniary interest, protected by equity, that the workers should continue on the job.”²⁵ Holmes, Brandeis, and Clark, JJ., dissented in this case and, in so doing, pointed out that there was no breaking of a contract and no interference with the contract between the plaintiff and the miners. The contract provided that the workers could not work for the plaintiff and be members of the labor union. Thus, by enticing the workers from their jobs and into the labor union, the defendants were following the stipulations of the contract rather than breaking them. Only if the workers joined the union and attempted to remain in the employ of the plaintiff would the contract be broken. There could not be enticement of the miners from work and at the same time a breaking of the contract, for enticement would be taking the workers out of the employment of the plaintiff and breaking the contract would be keeping the workers in the employ of the plaintiff. In spite of this logical and strong dissent, the majority of the Supreme Court of the United States enjoined the defendants from continuing their organization activities among the employees of the plaintiff on the ground that they (the defendant’s) were enticing the employees from work and thus breaking their contract. The decision in the *Hitchman* case had a profound effect upon subsequent decisions involving the right of labor unions to work for the increase of the “bargaining strength” of the union. Although the activity enjoined in this case was not a strike, yet it was activity whose sole purpose was to strengthen the union, and the reasoning and philosophy of this case has strongly influenced some other courts in their decisions to enjoin action on the part of labor in which the only motive was the increasing of the power of the union. The opinions of the court in the *Hitchman* case were landmark opinions — “opinions that directed the line of future decisions in the federal courts, and by force of example, if not authority, in many state courts.”²⁶ The opinions of the Supreme Court of Illinois as handed down in the case of *Kemp v. Division No. 241*²⁷ represent the legal and social philosophy of those opposed to the *Hitchman* case. In the *Kemp* case the union employees threatened to strike unless the employer discharged the nonunion employees. The nonunion employees (plaintiffs) attempted to enjoin the union employees (defendants) from striking, but the Supreme Court of Illinois refused to issue the injunction. In the decision Cooke, J., said: “It is the right of every workman, for any reason which may seem sufficient

²⁵ FRANKFURTER AND GREENE, *op. cit. supra* note 15, at 38.

²⁶ FRANKFURTER AND GREENE, *op. cit. supra* note 15, at 37.

²⁷ 255 Ill. 213, 90 N. E. 389, Ann. Cas. 1913D, 347, BOHLEN, CASES ON TORTS (3rd ed.) 969.

to him, or for no reason, to quit the service of another, unless bound by contract. This right cannot be abridged or taken away by any act of the legislature, nor is it subject to any control by the courts, it being guaranteed to every person under the jurisdiction of our government by the thirteenth amendment to the Federal constitution, which declares that involuntary servitude, except as a punishment for crime, shall not exist within the United States or any place subject to their jurisdiction." Justice Cooke in the *Kemp* case further declares: "If it is proper for workmen to organize themselves into such combinations as labor unions, it must necessarily follow that it is proper for them to adopt any proper means to preserve that organization. If the securing of the closed shop is deemed by the members of a labor union of the utmost importance and necessary for the preservation of their organization . . . and if to secure that is the primary object of the threat to strike . . . that object does not become unlawful." About half of the courts who have declared themselves on the question of whether or not action by labor unions to strengthen the union is justifiable have agreed with the reasoning and the legal philosophy of the *Kemp* case. In short summation, then, we have seen that all jurisdictions hold that union activity that has as its object the securing of better pay, better hours, and better working conditions is justifiable. Of those jurisdictions that have declared on the justification of labor activity in which the purpose is the strengthening of the union, the improvement of "bargaining strength," about half the jurisdictions hold that such activity is justifiable and about half hold that it is not. Assuming for the moment that the Massachusetts court was correct in concluding, in the case under discussion, that the purpose of the union was the increasing of its power, it is interesting and enlightening to consider the aspects of this case in the light of the legal opinions that hold sway in the rest of the country.

Robert J. Schmelzle.

MASTER AND SERVANT—PERSONS ENTITLED TO COMPENSATION FOR DEATH OF EMPLOYEE (DEPENDENTS)—RIGHT OF A WOMAN WHO MARRIES A MAN TO COMPENSATION AS HIS WIDOW OR SURVIVING WIFE UNDER WORKMEN'S COMPENSATION LAWS.—The right of a woman who marries a workman subsequent to the time at which he is injured in the course of his employment and who dies as a result of his injuries, to compensation under the Workmen's Compensation Laws is a question that has occasioned a great amount of difficulty on the part of the courts that have attempted its adjudication. This is due to the variety of statutory provisions under which she has claimed compensation. Under some statutes her claim is based on the fact that she is a

"surviving wife"; under others, she has claimed as a "widow"; under other statutes, she has claimed as a "legal beneficiary"; and under a fourth group, she has claimed compensation as a "dependent."

In New York her claim has been considered, in interpreting the Act, with respect to both her status as a "surviving wife" and as a "dependent." In *Crockett v. International R. Co.*¹ it was held that she was entitled to compensation as a "surviving wife" and that that part of the Act relating to "dependency" did not apply to her because the Legislature intended her to receive compensation irrespective of the question of dependency. The court reasoned, also, from analogy to the wrongful death statute, saying: "Before the enactment of this Statute (Workmen's Compensation Act) a widow was entitled to recover for her husband's death as the result of negligence irrespective of the question whether the relation of husband and wife arose before or after the accident."

In Washington she has been held to be entitled to compensation under the Compensation Act of that State as a "widow." It was said that the Act contained no provision to the effect that the status of the claimant had to be determined at the date of the accident.²

In Texas she has been held to be entitled to compensation as a "legal beneficiary." The Legislature was said to have intended that the right of the surviving wife to compensation for the death of her husband should not depend in any degree on the existence of the marital relation at the time he received the fatal injuries.³

In *McBride v. Industrial Commission*⁴ the Colorado Act under construction provided for compensation for "dependents" and that the right to death benefits should become fixed as of the date of the accident to the injured employee "irrespective of any subsequent change in conditions"; and that a "wife," living with the injured employee at the time of his injury or death should be conclusively presumed to be wholly dependent. The claimant had married the injured employee during the period between his injury and death. It was held that she was entitled to compensation under the Act, and that the phrase "irrespective of any subsequent change of conditions" referred to dependents, rather than to the injured employee.

In Ohio the statute provides that a wife shall be presumed to be wholly dependent for support upon a husband (the deceased employee) with whom she lives at the time of his death. In *State v. Industrial*

¹ 162 N. Y. S. 357, 176 App. Div. 45 (1916).

² *McKay v. Department of Labor and Industries*, 180 Wash. 191, 29 Pac. (2d) 997 (1934).

³ *Reagh v. Texas Indemnity Ins. Co.*, 67 S. W. (2d) 233, *reversed*, 70 S. W. (2d) 465 (Tex. Civ. App. 1934).

⁴ 97 Colo. 166, 49 Pac. (2d) 386 (1935).

*Commission*⁵ the relator married the injured employee who died as the result of injuries received in the course of his employment in the service of a company about a year after the injuries and about a year before he died. The Industrial Commission denied her application for compensation on the ground that she had failed to show that she was a *dependent*. The court held that she was entitled to compensation under the Act as she was lawfully married to the deceased employee and was living with him at the time of his death. While a presumption in the Compensation Act that she was a dependent may have been overcome by the evidence, yet the statute of Ohio placed an express obligation upon the husband to support his wife. The Court said that "dependency is based upon a right to support, rather than upon the actual fact of support."

A woman claiming compensation for the death of an injured workman whom she had married subsequent to the time of his injury, knowing that he was totally incapacitated and was dying, was held to be a "dependent" within the meaning of the Workmen's Compensation Act in the English case of *Brazewell v. Emmott and Hallshaw*,⁶ which Act provided that "dependents" are such members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death, or would, but from the incapacity resulting from the accident, have been so dependent.

Like Ohio, Utah fixes dependency at the time of death of the injured workman as the determinative factor on her claim to compensation. In the case of *Sarich v. Industrial Commission*,⁷ where a woman married an injured workman while he lay in a hospital bed, with no hope of recovery, ten days prior to his death, the court held that the plaintiff could not bring herself within the provisions of the statute which required that she be living with him at the time of his death. Although there was a presumption in her favor that she was a dependent, she had to show that she was living with her husband at the time of his death.

Alabama, in its Workmen's Compensation Act,⁸ brings in the wife as being conclusively presumed to be wholly dependent, unless she was voluntarily living apart from her husband at the time of his injury or death, or unless she was not married to the deceased at the time of the accident or for a reasonable time prior to his death.

Three states, Nevada, Wisconsin, and Massachusetts, set the fact of dependency at the time of the injury as the determining factor in the claim of a woman to compensation for the death of her injured

⁵ 126 Ohio St. 85, 183 N. E. 920 (1932).

⁶ [1929] W. C. & Ins. Rep. (Eng.) 148 C. A.

⁷ 227 Pac. 1039, 35 A. L. R. 1062 (Utah, 1924).

⁸ Acts 1919, p. 217.

husband, and deny her claim when she married him subsequent to the time at which he received the injury. Nevada, in the case of *Dahlquist v. Nevada Industrial Commission*,⁹ denied to a woman who had married an injured workman one day after the injury, the right to come in as a "dependent," since the statute declared that "dependency shall be determined as of the date of the accident . . . irrespective of any subsequent change in conditions." Interpreting this latter phrase to refer, not to dependents, as did the Colorado court, but to the injured workman, the Nevada court used the phrase to bolster the argument against the plaintiff, saying that the Legislature inserted it through "a superabundance of precaution" to reinforce the idea that dependency shall be determined as of the date of the accident, and "to put its expression beyond all cavil."

The Wisconsin Statute, as set forth in the case of *Kuetbach v. Industrial Commission of Wisconsin*,¹⁰ which holds against the right of a woman marrying an injured workman, ordains that no claimant can bring himself within the provisions of the Act except by establishing that he was, on the date of the accident, either a member of the family of the deceased employee, or a divorced spouse who has not remarried, or one who bears to the injured employee either the relation of husband or widow, or lineal descendant, or ancestor, or brother, or sister, and in the case of a wife, that she was living with him at the time of his death. Thus this woman, because of the use in the statute of the word "widow," is placed in the unenviable position of establishing as a fact that on the day on which this living workman was injured, he had a widow, and that she was this "widow" of a living man! If she could establish that fact, she would indeed be entitled to all the compensation the state could award!

Gleason's Case,¹¹ in the state of Massachusetts, denying an award of compensation to a woman marrying a workman subsequent to his injury who did not live with him at the time of his death, determined that the date of injury is the decisive factor in the statute which defines "dependents" as members of the employee's family or next of kin who were wholly or partially dependent upon the earnings of the employee for support at the time of the injury. Among those conclusively presumed to be wholly dependent is a "wife upon a husband with whom she lives at the time of his death." This latter section, however, merely determines which dependents shall be conclusively presumed to be wholly dependent, and since the claimant herein could not establish that she was a dependent at the time of the injury her claim failed.

⁹ 46 Nev. 107, 206 Pac. 197 (1922).

¹⁰ 166 Wis. 378, 165 N. W. 302, L. R. A. 1918F, 476 (1918).

¹¹ 269 Mass. 583, 169 N. E. 409 (1930).