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ANNULMENT — PERSONAL JURISDICTION — COURT OF PLAINIFF’S DOMICILE HAS JURISDICTION OVER NONRESIDENT DEFENDANT SERVED BY REGISTERED MAIL.

*Perlstein v. Perlstein* (Conn. 1964)

Plaintiff husband, a domiciliary and resident of Connecticut, brought suit in a Connecticut court against his defendant wife, a domiciliary and resident of New Jersey, seeking a decree annuling their purported marriage on the ground that defendant was legally married to another when she went through a marriage ceremony with plaintiff in 1959. Service on defendant was by registered mail addressed to her in New Jersey. Defendant filed a plea in abatement and later a motion to erase on the ground that the action could be maintained only if defendant were personally served within Connecticut. Defendant’s demurrer to plaintiff’s answer was sustained by the trial court. On appeal the Supreme Court of Connecticut, in a unanimous opinion, reversed holding that constructive service on the defendant in New Jersey was sufficient to give the Connecticut court jurisdiction over her person. *Perlstein v. Perlstein*, 204 A.2d 909 (Conn. 1964).

Under the United States Constitution a state can affect interests only if it has jurisdiction. In order to annul a marriage, a court must have both subject matter and personal jurisdiction. In the instant case the former presented no serious problem since it could have rested upon any one of three independent bases. Initially, Connecticut was the state in which plaintiff was domiciled at the time of the suit, and it is almost universally held that the state of either party’s domicile has jurisdiction to

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1. The distinction between the terms “domicile” and “residence” should be noted. “That is properly the domicile of a person where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning.” *Story, Conflict of Laws* § 41 (8th ed. 1883). Residence, on the other hand, is simply bodily presence as an inhabitant in a given place with no particular intention that the place of habitation shall be the permanent abode. *Cf. Newcomb’s Estate*, 192 N.Y. 238, 84 N.E. 950 (1908). The particular significance of this distinction is that one who is merely a resident of a particular state cannot, without more, call upon its courts to annul his marriage, whereas one who is domiciled in that state can do so. This holds true even though courts frequently speak of annulling the marriage of a “resident.” *Cf. Williams v. North Carolina*, 317 U.S. 287 (1942); *Lamb v. Lamb*, 57 Nev. 421, 65 P.2d 872 (1937).

2. The source of a court’s power to annul a marriage is a subject of some dispute. Some states hold that a court has this power only if it is expressly conferred by statute, see, *e.g.*, *Becker v. Becker*, 58 App. Div. 374, 69 N.Y.S. 75 (1901), whereas others hold that the power to annul resides in a court as a part of the general equity power. See, *e.g.*, *Romatz v. Romatz*, 355 Mich. 81, 94 N.W.2d 432 (1959).

annul the marriage. The rationale behind this rule is that the state of present domicile has, as against all other possible forums, the greatest interest in the domestic relations of its citizens. Secondly, Connecticut was the state where the marriage was celebrated. A substantial body of authority supports power to annul in this state on the theory that "... the incidents of the procuring of a license and the performance of the marriage ceremony in this state give [its courts] jurisdiction of the subject matter. ..." Finally, Connecticut was the place of the parties' domicile at the time they went through the marriage ceremony. Although no sound reason appears why such a state should have jurisdiction, especially in preference to the forums mentioned above, there is some authority to support such a position. Here however, the court specifically rested jurisdiction on the first.

There was a distinct problem, however, with respect to the court's jurisdiction over defendant's person. Actions for divorce have traditionally been considered in rem, the res being the marital status of the plaintiff. Consequently, plaintiffs have been able to sue for divorce in the court of their domicile upon constructive service on nonresident defendants. Such service does not violate due process and a decree rendered thereon is entitled to full faith and credit. But, as the court admits, most courts deny that jurisdiction over a nonresident defendant in an annulment suit can be acquired by any form of constructive service. These courts argue that there is a fundamental distinction between an action for divorce and one for annulment in that the former admits the existence of a marital relationship, which is the res, and seeks to terminate it, whereas the latter

7. State ex rel. Pavlo v. Scoggin, supra note 6, at 114, 287 P.2d at 1000.
10. LEFLAR, supra note 4, §§ 25, 162; Storke, supra note 4, at 854-55.
12. Ibid.
action is brought to establish that no such relationship ever came into existence. The plaintiff in his petition, therefore is alleging that there is no relationship, that is, no res upon which to base an action in rem. In Gayle v. Gayle, the Kentucky Court of Appeals found this argument to be fatal to the plaintiff's case. On facts almost identical to those in Perlstein, the court held that constructive service on a nonresident defendant in an annulment suit did not confer personal jurisdiction on the court because "... the very allegations of the petition preclude the existence of the thing or res."17

In Owen v. Owen the conservatrix of the estate of a mental incompetent domiciled in Colorado, brought suit in a Colorado court for annulment of the incompetent's purported marriage to defendant, a resident of Texas, on the grounds that plaintiff's incompetent was insane when he went through a marriage ceremony with defendant in Texas. Defendant was personally served in Texas. The Supreme Court of Colorado affirmed the trial court's action in quashing the summons for lack of personal jurisdiction. Plaintiff's argument that an annulment action is one in rem, the res being the marital relationship which continues as a legal status until set aside by judicial decree was rejected in favor of defendant's contention that an annulment suit, unlike an action for divorce, is in personam and that jurisdiction over a defendant can be obtained only by personal service on him within the state or by his voluntary appearance in court.18

Bisby v. Mould dealt with a state service of process statute which provided that in certain enumerated cases, one of which was divorce, service by publication on a nonresident defendant was proper if personal service was not possible. Another statute provided that all provisions relating to divorce also applied to actions for annulment. The court reasoned that the statute permitting constructive service must be strictly construed and that since it provided for constructive service in only a few enumerated cases, one being "divorce," this specific expression of legislative intent controlled the general expression of intent that annulment suits should be governed by the same rules that governed divorce actions. Consequently, the trial court's refusal to issue an order permitting service by publication was affirmed.23 That the court misconstrued the intent of the

16. 301 Ky. 613, 192 S.W.2d 821 (1946).
17. Id. at 615, 192 S.W.2d at 822. The Kentucky Court of Appeals reaffirmed its position in Prothro v. Prothro, 265 S.W.2d 39 (Ky. 1953), wherein an annulment was sought on the grounds of fraud.
23. Contra, Piper v. Piper, 46 Wash. 671, 91 Pac. 189 (1907). In this case plaintiff, a domiciliary of Washington, sought an annulment on the ground that defendant's marriage to her was bigamous. Not knowing defendant's present whereabouts, plaintiff procured an order permitting service by publication on defendant's last known residence. The state of Washington intervened to prevent the prosecution of the annulment proceedings on the ground that service by publication was not permissible in such a suit. The trial court's dismissal of the action was reversed because the service
law-makers is evident from the fact that the statute was subsequently revised to specifically provide for constructive service on nonresident defendants in annulment suits.24

In *Gee v. Gee*25 a resident of California brought suit for annulment in a California court against a resident of Louisiana. Defendant in that case was personally served with process in Louisiana. Holding for plaintiff on defendant's motion to quash service the court said:

The action is one directly affecting the status of the parties and involving the existence of a res or thing. The res is exactly the same as that involved in an action for divorce, and the action and the judgment should be held to be in rem to the same extent, for the same reasons and to the same end and purpose.26

The case for allowing constructive service is stronger where the marriage sought to be annulled is "voidable" rather than "void." "In such a case the very purpose of the action is to end an existing status which would otherwise continue, rather than to declare that no such status ever existed."27 Thus, in the case of the voidable marriage there would appear to be a sufficient res upon which to base an action in rem and so acquire the right to use constructive service.

Although the court in the instant case distinguishes *Massei v. Cantales*28 in which it was held that a court having subject matter jurisdiction by reason of its being situate in the *locus celebrationis* cannot acquire personal jurisdiction over a nonresident defendant by constructive service, at least one case has held that such a court can so acquire jurisdiction over a nonresident defendant.29

The court's decision in the instant case may be open to two objections, both of which are rooted in the Constitution of the United States: first, that the form of service permitted by the decision is in contravention of the due process clause of the fourteenth amendment; second, that a decree rendered on such service is not entitled to full faith and credit. Both these objections have been dismissed in the case of divorce actions.30 Query, then, whether the pronouncements of the Supreme Court in the area of divorce can be extrapolated into the area of annulment? This question turns on whether there is a fundamental distinction between divorce and annulment.

of process statute specifically authorized service by publication in the case of divorce and the court found a general course of conduct on the part of the legislature to treat divorce and annulment similarly.

24. IOWA R. Civ. P. 60(i) provides:

After filing an affidavit that personal service cannot be had on an adverse party in Iowa, the original notice may be served by publication, in any action brought:

(i) for divorce or separate maintenance or to modify a decree in such action, or to annul an illegal marriage, against a defendant who is a nonresident of Iowa or whose residence is unknown. (Emphasis added.)

26. *Id.* at 882, 202 P.2d at 364 (1949).
30. See notes 12-14 supra.
Where, as in the present case, jurisdiction to annul is based upon plaintiff's being domiciled in the forum\textsuperscript{31} consideration must be given to \textit{Atherton v. Atherton}\textsuperscript{32} which clearly holds that the state which has always been the plaintiff's domicile and the only matrimonial domicile of the parties can, on constructive service of a nonresident defendant, render a decree of divorce which is as binding on the defendant as if he had been personally served with process within the forum. The Court rests its decision on certain language from the famous case of \textit{Pennoyer v. Neff},\textsuperscript{33} to wit:

\ldots we do not mean to assert, by anything we have said, that a state may not authorize proceedings to determine the \textit{status} of one of its citizens towards a nonresident, which would be binding within the State, though made without service of process or personal notice to the nonresident. The jurisdiction which every State possesses to determine the civil \textit{status} and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.\textsuperscript{34}

In \textit{Williams v. North Carolina I},\textsuperscript{35} in deciding that Nevada divorce decrees rendered on constructive service of North Carolina defendants were entitled to full faith and credit in North Carolina, Mr. Justice Douglas reasoned that since each state has a legitimate concern in the marital status of its citizens and since the marriage relation creates problems having wide social significance, each state can alter within its own borders the marriage status of the spouse domiciled there whether the other spouse is present or not. No constitutional barrier is presented so long as the form of the constructive service satisfies the requirements of due process.\textsuperscript{36}

Sufficient language has been quoted to illustrate that the Court's emphasis in actions involving the marriage relation has been upon the power of the state to determine the status of its citizens. So important, in fact, does the Court consider this power that it has rejected for marriage actions the traditional in rem—in personam dichotomy and has announced that jurisdiction in such suits is based not upon the existence of a res within the state but upon the fact that one of the parties to the marriage is domiciled there.\textsuperscript{37} If this be the criterion, surely there is greater need for the exercise of the state's power in the case of annulment

\textsuperscript{31} Where the court has jurisdiction to annul because it is sitting in the \textit{locus celebrationis} the case of Bell v. Bell, 181 U.S. 175 (1901), is instructive. The Court there said, "No valid divorce from the bond of matrimony can be decreed [on constructive service] by the courts of a State in which neither party is domiciled." \textit{Id.} at 177. By parity of reasoning, then, it would seem that the Court would have the same objection to a decree of annulment rendered on constructive service by the court of the \textit{locus celebrationis} unless, of course, one of the parties was domiciled in that state.

\textsuperscript{32} 181 U.S. 155 (1901).

\textsuperscript{33} 95 U.S. 714, 734–35 (1878).

\textsuperscript{34} Atherton v. Atherton, 181 U.S. 155, 163 (1901).

\textsuperscript{35} 317 U.S. 287 (1942).

\textsuperscript{36} \textit{Id.} at 298–99.

than in divorce. A party seeking annulment contends that he is not married; the records of the state, however, show that he is. Obviously his situation is extremely doubtful. He dares not exercise the right of the unmarried to take a spouse, because to do so would probably render him liable to prosecution for bigamy. On the other hand, a party seeking divorce is validly married and seeks only to terminate the existing relationship which has for one reason or another become distasteful to him. In terms of social policy it seems more important that the state be able to make certain the doubtful status of one of its citizens in order to permit him to conduct his affairs on the basis of his true status than that it be empowered to terminate a valid marriage relationship which has become onerous.

None of the arguments advanced by those courts which distinguish divorce and annulment suits for purposes of authorizing constructive service on nonresident defendants seem meritorious. They are based on hypertechnical and unrealistic distinctions. A party suing for annulment of his marriage is married in the eyes of the law until there is a judicial determination otherwise. No serious contention can be made that the allegations of his petition are sufficient to void his marriage or that a determination of the court that the marriage is a nullity will at the same time be a repudiation of the court's jurisdiction to hear the case because there was no res upon which to base jurisdiction.

It is submitted that Perlstein is to be applauded as a step out of a murky thicket of legal formalism into the clear path of common sense. Although presently in the numerical minority, the instant decision is in accord with the better case law and the provisions of several alert and progressive state legislative bodies.38

Edward C. Mengel, Jr.

CRIMINAL LAW — FELONY-MURDER — ROBBER CONVICTED OF MURDER WHEN CO-FELON WAS KILLED BY VICTIM.

People v. Washington (Cal. 1964)

Defendant was convicted of robbery and felony-murder.1 He and the decedent, his co-felon, had attempted to rob a service station. The owner of the station, warned by shouts of "robbery" by either his employee or


All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape,
the felons, took a gun from his desk. When the armed decedent entered the office, he was fatally wounded by the owner. The unarmed defendant was wounded while attempting to flee with the money.

The court, using the doctrine of proximate cause as expressed in *People v. Harrison,*² stated that it reasonably might or should have been foreseen by the defendant that the commission of or the attempt to commit the contemplated felony would be likely to create a situation which would expose another to the danger of death at the hands of a nonparticipant in the felony. His creation of such a situation was the proximate cause of the death and the killing, and therefore was first degree murder.

The court rejected the argument that the killing was justifiable,³ since the slayer's justification was personal to him and could not be used as a shield by the defendant who was causally responsible for his co-felon's death. *Commonwealth v. Thomas*⁴ was cited as authority although expressly overruled by *Commonwealth v. Redline,*⁵ the court stating that it was more persuaded by the reasoning in the former.

The court also rejected the defendant's use of the doctrine of supervening cause and stated: "It is merely a normal human response for the intended victim of a robbery, who is shot at or threatened by the robbers, to return their fire and this is not a superseding cause."⁶ The appeal was

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2. *People v. Harrison,* 176 Cal. App. 2d 330, 1 Cal. Rptr. 414 (1959). In this case, defendants attempted to commit a robbery in a cleaning establishment. The owner was killed by a shot fired by his employee who was shooting at one of the defendants.

3. *Cal. Penal Code* § 197 (1872), reads in the pertinent part:

Homicide is also justifiable when committed by any person in either of the following cases:

1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,

2. When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony.


In the case of *Lord Dacres*,\(^7\) considered one of the first important articulations of the felony-murder doctrine,\(^8\) the defendant and some friends went to hunt unlawfully in a forest. One hunter killed a keeper who accosted him. The others took no part in the killing but were convicted of murder and the defendant was hanged. In accord with this, Coke stated that a death resulting from an unlawful act was murder.\(^9\) The limitation of the doctrine to felonies was introduced when Blackstone held “... if one intends to do another felony, and undesignedly kills a man, this is also murder.”\(^10\) Various statutory and judicial limitations have been placed upon this early version in an attempt to narrow its application. One method has been to restrict its application to those felonies which generally endanger life, *i.e.*, malum in se rather than malum prohibitum.\(^11\)

The homicide statutes of California\(^12\) and Pennsylvania\(^13\) are mere restatements of the common law and declare all felony murders to be in the first degree. The New York statute, on the other hand, has redefined the doctrine by limiting it to those “killings” committed “by a person” *engaged* in a felony.\(^14\) Such a limitation has enabled New York to avoid such decisions as *Thomas* in Pennsylvania and *Harrison* and *Washington* in California. Wisconsin has limited the doctrine by creating a third degree murder offense, which provides for a penalty of not more than fifteen years’ imprisonment in excess of the maximum provided by law for the felony, when the death is a natural and probable consequence of the felony.\(^15\) A narrower application has also been achieved by limiting the time during which the felony can be said to be in the process of commission.\(^16\)

The basis of the felony-murder doctrine is constructive malice, the effect of which is the imputation of the mens rea which is regarded as essential to liability for murder. Classically, mens rea is the intention to kill or to do an act intrinsically likely to kill. Such imputation of mens rea of a felony to the killing is acknowledged to be a legal fiction. “The felony-murder rule is thus a rule for establishing the mens rea of murder; it is not a rule of causation, it does not bear upon the *actus reus* of


\(^{9}\) 3 *Coke Inst.* 56 (1797).

\(^{10}\) 2 *Blackstone Commentaries* 200–01 (Sharswood ed. 1881). See also, Regina v. Serne, 16 Cox C.C. 311 (1887); Rex v. Plummer, 12 Mod. 627, 88 Eng. Rep. 1565 (1699).

\(^{11}\) People v. Pavlic, 227 Mich. 562, 199 N.W. 373 (1924).

\(^{12}\) *Cal. Penal Code* § 189 (1872).


\(^{14}\) *N.Y. Penal Law* § 1044 (1909).

\(^{15}\) *Wis. Stat.* § 940.03 (1956).

homicide."  The seemingly logical conclusion which one must reach through this approach that the mens rea of murder is identical with the mens rea of larceny has been strongly criticized.

To obtain a verdict of first degree murder in the cases in which a co-felon is shot by a police officer, by a victim, by a co-felon other than the one charged, or in which a co-felon meets death through his own negligence, the courts have sought the aid of the tort theory of proximate causation or natural and probable cause. This is known as the probable consequences test; but the question of what constitutes a natural and probable consequence is shrouded with uncertainty. The doctrine of intervening cause is applied to show that the death was not the probable consequence of the defendant's act. Here, the test of foreseeability is used, that is, the defendant will be excused if he could not have foreseen the intervention as the probable result of his action. Since this is a question of fact to be determined by the jury, it has been observed that they are being called upon to determine the impossible.

England has solved the problem of proximate causation by abolishing the constructive malice rule and requiring the court to find the same malice aforethought, express or implied, as is required for the killing to amount to murder when not done in the furtherance of another offense. The Model Penal Code has rejected the felony-murder rule by creating a rebuttable presumption that such recklessness and indifference exist "...if the actor is engaged, or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape."

Although an all-out assault upon the felony-murder doctrine would be timely, that group of cases in which a co-felon is shot by anyone other than the accused represents the most unacceptable application of this rule. The felony-murder doctrine in its original form has been severely criticized.

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17. Morris, supra note 8, at 59.
18. Id. at 61.
22. The application of the proximate cause doctrine to the felony-murder rule is not limited to cases in which a co-felon is killed, but its use in such cases presents the most difficult problems.
24. Wharton, Homicide § 358 (2d ed. 1875).
25. Id.
"Though the purpose of deterring the commission of certain felonies is commendable, the means selected appears to be socially unwise and is based on reasoning not free from substantial analytic and historical errors." Malice should be proved, not inferred.

The various limitations placed upon the doctrine are intended to reduce the scope of liability for results that are unintended and only slightly probable, and in this respect the problem of causality in torts and criminal law is the same. However, in the vital respect that the grounds of policy which must govern the scope and limits of liability are different, the problem is not the same. When the courts came to the conclusion that problems of causation were inherent in the application of the felony-murder doctrine, the once simple rule became entangled with a multitude of uncertainties.

As the Model Penal Code indicates, the deterrent effect of such a decision is doubtful.

... the increased punishment strikes at the wrong thing — not at the harm intended, but at the slight chance an unintended greater harm; and emotions of vengeance are an insufficient justification for the fictional attribution of the mens rea of murder to one whose desire was quite certainly not a desire to kill.

Such a decision weakens the force and gravity of the finding of first degree murder for appreciably graver offenses.

The majority has extended the felony murder doctrine beyond the bounds of logical application and usefulness to society. In following the decision in Commonwealth v. Thomas which was expressly overruled by Redline, the court has dogmatically adhered to a doctrine which is neither historically nor analytically justified. Such a decision is valueless and a mockery of justice. It is submitted that a solution to these recurring problems spawned by this archaic doctrine is to replace it with the rebuttable presumption approach as expressed in the Model Penal Code.

If the defendant is unsuccessful in rebutting this presumption, his conviction would nevertheless be based upon a more substantial ground than that of the tenuous felony-murder fiction.

John A. Luchsinger

33. § 201.2(1) (b), comment (Tent. Draft No. 9, 1959).
34. Morris, supra note 8, at 80.
35. 1 Russel, CRIME 563 (10th ed. 1950).
In October of 1960 an airplane, on a scheduled trip from Boston to Philadelphia, plunged into Boston Harbor. As a result, a plethora of actions were commenced against the owners and manufacturers of the plane, as well as the maker of its engines. While the majority of litigants brought suit in the United States District Court for Massachusetts, some filed suit in the Eastern District of Pennsylvania. All of the actions pending in the latter court were assigned to Judge Francis L. Van Dusen. The defendants in the Pennsylvania actions, for reasons of convenience, moved under 28 U.S.C. § 1404(a) to transfer these actions to the Massachusetts Court. Judge Van Dusen granted the motion and plaintiffs petitioned for a writ of mandamus from the Third Circuit Court of Appeals to compel the reversal of the transfer order.

In response to the petition the Court of Appeals ordered Van Dusen to file an answer to the petitions. It subsequently held that he did not have power to transfer the actions, since they were not such as “might have been brought” originally in Massachusetts because the plaintiffs were not qualified to sue in Massachusetts as personal representatives at the time the death actions were brought in Pennsylvania.

The defendants, including Judge Van Dusen, then obtained certiorari to the Supreme Court, which reversed the Court of Appeals and held that the limiting words of § 1404(a) referred solely to the federal rules of venue and personal jurisdiction and not to any laws of the transferee state. The case was then remanded to the District Court so that it might reconsider whether the criteria of convenience and fairness, as pointed out by the Supreme Court, justified the transfer.

On remand to the District Court the plaintiffs petitioned Judge Van Dusen to disqualify himself from sitting in any further proceedings in the

2. Ibid.
3. As indicated in a footnote by the court in the instant case, some of the petitions described the writ sought as mandamus and prohibition and others as mandamus or prohibition, or both. The court indicates that it will refer to mandamus as including prohibition wherever appropriate.
4. In light of this the court left it open for Judge Van Dusen to reconsider the transfer of the two personal injury suits.
pending actions. Upon his refusal, plaintiffs addressed a mandamus petition to the Court of Appeals which sustained the petition and held that Judge Van Dusen should not hear the motions to transfer or any other subsequent phases of the litigation. *Barrack v. Van Dusen*, 33 U.S.L. Week 2304 (Dec. 16, 1964).

The basis for the Court of Appeals decision was that Judge Van Dusen's relationship with the defendant's counsel established an involvement which violated the purpose of 28 U.S.C.A. § 455 and thus compelled his disqualification from any further aspects of the litigation. That section provides as follows:

> Any . . . judge of the United States shall disqualify himself in any case in which he . . . has been of counsel . . . or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial . . . or other proceeding therein.

The crucial question in construing the statute lies in determining what "degree of involvement" is necessary to bring about an "of counsel" relationship.

In the instant cases Van Dusen designated the attorneys for defendants as his counsel to answer the petitions for mandamus regarding his transfer order. Additionally he conferred with them regarding the response and later joined as a petitioner in the certiorari application to the Supreme Court. These were the factual bases for his disqualification. Initially the decision of the Court of Appeals seems harsh and unwarranted, since the Judge was merely following the Court's command to answer the mandamus petition. Further analysis, however, demonstrates the necessity of the result.

Contrasting the degree of association in the current controversy which gave birth to the "of counsel" relationship with other disqualification cases reveals that the present decision is not a radical departure from previous decisions construing the "of counsel" criteria. The same Third Circuit had previously held that a district judge who had been district attorney during a defendant's trial and conviction was disqualified as to defendant's motion to vacate judgment. Additionally, in *United States v. Maher* it held that a United States attorney was "of counsel" in all criminal cases within his district regardless of the degree of direct involvement and must disqualify himself upon becoming a federal judge. The philosophy behind these cases was well stated by the Court of Appeals for the District of Columbia:10

> The fundamental requirements of fairness in the performance of such functions require at least that one who participates in a case on behalf

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of any party, whether actively or merely formally by being on pleadings or briefs, take no part in the decision of that case by any tribunal on which he may thereafter sit.

Surely the degree of involvement and the directness of that involvement are much more pronounced in the case at bar than in the aforementioned cases. Here the Judge actively conferred with the defendant's attorney. In the cited cases there was only a possibility of creating an "of counsel" relationship, while here the involvement was direct and distinct.

A judge who is designated as a respondent in a mandamus proceeding may retain any counsel he desires to represent him. If he employs outside counsel he may freely discuss any or all issues of the case with him. But where he retains counsel who already represents one or more parties to the litigation and thereafter participates ex parte with such counsel in preparing or advising as to the defense of the petition, he has most definitely been "of counsel" and should be dismissed from the case. The need for impartiality is exceedingly great in this particular phase of the litigation since the essence of the instruction on remand from the Supreme Court was that the District Court "weigh" certain factors in re-examining the transfer petition. The delicate balancing involved in such discretionary activity requires as complete assurance as possible that the scales of justice will not be unevenly balanced in future aspects of the litigation. As Mr. Justice Frankfurter has stated, "... Justice must satisfy the appearance of justice." While the Court of Appeals' decision was undoubtedly a difficult one in light of its relationships with its judicial brethren, it was none the less necessary for the preservation of judicial equality.

The validity of the instant decision becomes more readily apparent upon examining Rule 20 of the proposed Federal Rules of Appellate Procedure. This new rule would require the Court of Appeals to order the judge as well as the other respondents to answer the petition within a fixed time, but would permit the judge who does not desire to contest the petition to so advise the clerk and parties by letter. In this event the petition would not be taken as admitted by the judge's failure to answer. The need for such an enlightened rule has been present for many years.

11. It is interesting to note that the modern use of the writ of mandamus has most definitely expanded to take in the "... supervisory control of the District Courts by the Courts of Appeals [which] is necessary to proper judicial administration in the federal system." La Buy v. Howes Leather Co., 352 U.S. 249, 259-60 (1957).

12. In the case at bar, Judge Van Dusen was represented by William T. Coleman, Jr., Esquire, who was an outside counsel.

13. The Supreme Court held that such a transfer would work no change in the applicable substantive law and Massachusetts would have to apply the Pennsylvania conflicts provision. The case was then remanded since this principle might affect such elements as the feasibility of consolidating the Pennsylvania and Massachusetts cases, the need for witnesses on various elements of damage and their convenience, and the appropriateness of the trial of a diversity case in a forum familiar with the applicable state law. Van Dusen v. Barrack, 376 U.S. 612 (1964).


In the great number of cases the trial court has no more concern in main-
taining the questioned order than in upholding one of its appealable orders; 
the interest is professional and not personal or legal. In these cases the 
judge is merely a formal party and thus should not be required to answer 
the petition.\textsuperscript{16} Such was the Supreme Court's position in \textit{Ex parte Fahey}:\textsuperscript{17} 
"Mandamus, prohibition and injunction against judges are drastic and 
extraordinary remedies. . . . They have the unfortunate consequence of 
making the judge a litigant, obliged to obtain personal counsel or to leave 
his defense to one of the litigants before him." The adoption of the 
Proposed Rule will serve to eliminate such purposeless litigation as is 
involved in the instant case. Thus the court was entirely correct in adopt-
ing the philosophy behind the proposed legislation and applying it in the 
pending cases.\textsuperscript{18} Simply because Judge Van Dusen was following a practice 
that has prevailed for "more than a century" is no reason to condone 
his actions.\textsuperscript{19} 

It has been suggested that the effect of the court's ruling will be to 
allow a party to select his own judge and thus increase the burden on the 
courts.\textsuperscript{20} The fallacy in such a premature worry, however, is apparent. 
It is only in those specific instances where the trial judge selects counsel 
from those attorneys litigating the case and then actively consults and 
advises with them that he should disqualify himself. If he fails to do so an 
action such as that brought in the instant case is in order. Even at the 
expense of "increasing the burden on already overburdened courts" a 
litigant should be granted an impartial judiciary. This decisive factor was 
properly recognized by the court in the present controversy. The Court 
in \textit{sustaining} the petition and removing Judge Van Dusen realistically 
appraised and preserved the ultimate goal of "fairness in the judiciary" in 
deciding a case of first impression in an enlightened fashion. 

"The guiding consideration is that the administration of justice should 
reasonably appear to be disinterested as well as be so in fact."\textsuperscript{21} 

\textit{Arthur M. Goldberg}
INSURANCE—DUTY TO DEFEND—INSURERS' UNCONDITIONAL TENDER OF POLICY LIMITS INTO COURT DURING INTERPLEADER ACTION TERMINATES THEIR DUTY TO DEFEND AS TO ALL ACTIONS.

Commercial Union Ins. Co. v. Adams (S.D. Ind. 1964)

Plaintiff insurance companies, having filed bonds for the full amount of their respective policy limits, sought to join the assureds and several hundred potential claimants as parties defendant in an interpleader action based on the federal statute. The basis for the multitude of lawsuits was a gas explosion caused by the assureds' alleged unlawful storage of explosive gas on the premises, resulting in the deaths of seventy persons and injuries to over three hundred. The total policy limits of the three insurers amounted to $1,020,000 while damages sought in the lawsuits filed at the time of this action exceeded $11,000,000, with the remaining prospective claims not having been instituted. The federal court in the Southern District of Indiana held that the jurisdictional requirements for statutory interpleader were met and that upon the unconditional tender of the policy limits into court the insurers' duty to defend the assureds was terminated as to all pending and future actions against their assureds including this action. Commercial Union Ins. Co. v. Adams, 231 F. Supp. 860 (S.D. Ind. 1964).

Interpleader is a well-established equitable remedy which existed long before the enactment of the federal statute or the adoption of the Federal Rules of Civil Procedure. One of the purposes of statutory interpleader is to establish an effective procedure by which insurers might be protected from the hazards of multiple liability on their policies when the adverse claimants are of diverse citizenship and not otherwise capable of being brought under the jurisdiction of one court at the same time so as to determine the respective rights and liabilities of the parties. Its liberal provisions as to jurisdiction, venue and nationwide service of process further demonstrate the legislative intent that the statute was designed to aid the harassed insurer in settling claims made under its policies.

Alternatively, Rule 22 of the Federal Rules of Civil Procedure operates to supplement the statute and its jurisdictional and procedural requirements are the same as in any other federal civil action. Thus the essential difference between the two is to be found on the matter of jurisdiction. Statutory interpleader is available if the amount in controversy exceeds $500 and there are two or more adverse claimants of diverse citizenship. Conversely,

1. 28 U.S.C. § 1335 (1948). The statute basically requires two or more adverse claimants of diverse citizenship who "are claiming or may claim" property of greater than $500 in value which is in the hands of the stakeholder who upon instituting the interpleader action must deposit the property into the court to abide its judgment. It further provides that the claims need not have a common origin nor be identical so long as they are adverse to and independent of one another.

2. Additionally, interpleader under Rule 22 will lie only when the claims of the defendants are such that the plaintiff "is or may be exposed to double or multiple liability."
Rule 22 requires complete diversity of citizenship between the stakeholder on the one hand and all of the claimants on the other with more than $10,000 in controversy.

This interpleader action, being based on the statute, was within the court’s jurisdiction despite the fact that virtually all of the claimants were citizens of Indiana since recent cases have held that “minimal diversity” is sufficient to meet jurisdictional requirements. Furthermore the court found the requisite adversity of claims by reasoning that since the claims far exceed the policy limits each claimant will be interested in reducing or defeating the claims of the other claimants so as to increase his proportionate share in the limited proceeds to be distributed by the insurers.

However, to completely satisfy jurisdictional requirements, it was necessary for the court to further determine that statutory interpleader would lie even though the adverse tort claims were still unliquidated. At the time of this action, over a hundred lawsuits had been filed against the assureds none of which had been litigated nor reduced to judgment. On this issue there is not complete unanimity among the federal courts. For example, a federal district court in Ohio recently considered the same issue and arrived at a completely different result. The present court relied basically upon Pan American Fire & Cas. Co. v. Revere to reach its conclusion. That case was a statutory interpleader action by an automobile liability insurer with the presence of a direct action statute being the only distinguishable factor from the present case. In an exhaustive opinion comparing the “may be exposed” clause of Rule 22 and the “may claim” clause of the statute, District Judge Wright concluded that the danger of exposure to multiple liability under Rule 22 need not be immediate nor even reasonably probable but rather any possibility of having to face claims in excess of policy limits, no matter how remote, would suffice to meet the requirements of the rule. The holding in the present case is the

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3. Haynes v. Felder, 239 F.2d 868 (1957) (Statutory interpleader was allowed where the adverse groups of claimants were comprised of a Texas citizen on the one hand opposed by three Texas citizens and one citizen from Tennessee on the other. The stakeholder was a Texas bank.); Girard Trust Co. v. Vance, 5 F.R.D. 109 (E.D. Pa. 1946). See the following notes approving the Haynes decision: 45 CALIF. L. REV. 543 (1957); 42 CORNELL L.Q. 570 (1957); 55 MICH. L. REV. 1183 (1957); 35 TEXAS L. REV. 859 (1957); 43 VA. L. REV. 727 (1957).


5. In National Cas. Co. v. Insurance Co. of North America, 230 F. Supp. 617 (N.D. Ohio 1964), an interpleader action brought by the insurer pursuant to Rule 22, the court determined that the “or may be exposed to double or multiple liability” clause of Rule 22 required a “reasonable probability” that the policy limits would be exhausted by the claims and that until one of the claims is reduced to a judgment then such reasonable probability could not be found to exist.


7. Id. at 480. However, the Ohio District Court chose to ignore Revere and relied exclusively on the other view found in American Indem. Co. v. Hale, 71 F. Supp. 529 (W.D. Mo. 1947), which refused to restrain local proceedings and compel the claimants to litigate in a federal court. There the insurer’s policy limits were $5,000 with claims exceeding $160,000. The court considered it mere speculation and conjecture whether the judgments against the assured would exceed the policy limits—a somewhat anomalous finding. The Ohio court found the presence of a direct action statute in Revere and its absence in Hale and in Ohio to be the critical factor. But its reasoning on this point is haphazard since the securing of a judgment against the
better approach and is more in accord with the basic underlying view that interpleader is remedial in its nature and should be liberally granted. The preference for this holding is further strengthened by the express approval given it by two of the foremost authorities on federal procedure.  

With the requirements for statutory interpleader being met, the court turned next to the primary issue of the case — whether the insurers' duty to defend the assureds in suits brought under their policies terminates upon the payment of the policy limits into court. The answer turns on whether the duty to defend is to be construed as being dependent on or independent of the duty to indemnify. In discussing the confusion which reigns in the federal courts on this issue, the court chose to follow the reasoning of its own Court of Appeals in a previous case which construed the clause "as respects insurance afforded by this policy" to have a limiting effect which terminates the duty to defend when no further insurance is afforded as a result of the payment of judgment or the settlement of claims. The court then concluded that the insurers' duty to defend terminated as to all pending and future actions against their assureds, including this action, upon their unconditional relinquishment of all interest in the stake. As a result, the insurers were dropped from the interpleader action upon their payment of the policy limits into court and the assureds were forced to provide their own counsel for the action.

In effect then, the court held that where the damages sought exceed the policy coverage the insurer could, as Appelman despairingly noted, "walk into court, toss the amount of the policy on the table, and blithely inform the insured that the rest was up to him." Such an extreme result would seem to exceed even the wildest expectations of counsel for insurance companies. They have continually argued that the duty to indemnify assured which is not met results in the claimant having a direct action against the insurer. A difference in time when the judgment is not satisfied should not be the basis for denying the insurer the right to interplead the claimants.

8. See Chafee, The Federal Interpleader Act of 1936, 45 YALE L.J. 1161, 1163-67 (1936), where Professor Chafee criticizes Klaber v. Maryland Cas. Co., 69 F.2d 934 (8th Cir. 1934), upon which the Hale case substantially relied in reaching its result. See Chafee, Federal Interpleader Since the Act of 1936, 49 YALE L.J. 377, 418-21, where approval is given to Standard Sur. & Cas. Co. v. Baker, 105 F.2d 578 (8th Cir. 1939), which was also relied upon by the present court along with Revere in granting interpleader. Finally, Professor Wright has expressly stated that interpleader should lie for insurers even where the tort claims are unliquidated. Wright, FEDERAL COURTS 279 (1963).

9. The policies on which the claims were based provided:

With respect to such insurance as is afforded by this policy, the company shall:

(a) defend any suit against the insured... even if such suit is groundless, false or fraudulent; but the company may make such... settlement of any claim or suit as it deems expedient...

These provisions are identical to those adopted by the National Bureau of Casualty Underwriters in 1955 as part of the standard liability insurance policy.

10. Denham v. LaSalle-Madison Hotel Co., 168 F.2d 576 (7th Cir. 1948). However, the insurer settled many of the claims directly and paid the balance up to the policy limits into court to be allocated as the court might determine since the amount of damages far exceeded the assured's policy limit. This was done for the purpose of pro-rating the assets available to the claimants since the assured was not financially able to pay the remaining claims.

12. 7A APPelman, INSURANCE LAW AND PRACTICE § 4685, at 470 (1962).
their assured is their primary obligation and that their duty to defend is subordinate to and dependent thereon which terminates when the duty of indemnity has been fulfilled. But never have they advocated, as this court would seemingly permit, relief from their defense obligation merely by tendering its policy limits into court. In construing the defense clause as being designed for the protection of the insurer as a natural concomitant of its duty to indemnify the assured and not as being independent of that duty, the court thus extended the holdings of previous cases which had similarly determined the duty to defend to be dependent on the duty to indemnify, but which had never attempted to reach the result of the present case.

In complete contrast to this case, there is a view, deemed by some to be the majority one, which declares that the obligation of the insurer to defend suits brought under its policy is a valuable right of the assured for which he pays and that such obligation is entirely independent of the obligation to indemnify. This view was completely adopted by the Ohio district court in *National Cas. Co. v. Insurance Co. of North America.*

To further substantiate its holding, the court applied the rule of previous Ohio cases which had held that the insurer is required to defend regardless of the possible outcome of the action or the potential liability to the assured if the petition stated a claim within the ambit of the policy. These cases are clearly distinguishable, however, because in each the issue concerned whether the petition stated a cause of action which, under the terms of the policy, the insurer was bound to defend. There had been no tender of the policy limits into court in an attempt to escape defending the assured but rather the insurer was denying the duty to defend on the grounds that the claimant's cause of action was outside the coverage of the policy.

14. In *Lumbermen's Mut. Cas. Co. v. McCarthy,* 90 N.H. 320, 8 A.2d 750 (1939), the first case to directly confront this issue, the court held that the duty to defend was not independent of the duty to indemnify and that such duty terminated upon the insurer's payment of a judgment which exhausted the policy limits. In that case, the insurer defended two actions brought by the injured plaintiff and his parent which resulted in a judgment for the plaintiff in excess of the policy limits but a new trial was ordered as to the parent's action. Upon paying the policy limits to satisfy the plaintiff's judgment, the court held that the insurer would not have to defend the assured in the subsequent new trial by the parent. However, the court strongly intimated that a different result might occur if the insurer attempted to tender the policy limits to the assured at the beginning of such actions and thus cast the entire burden of defense upon his shoulders.
16. 230 F. Supp. 617 (N.D. Ohio 1964). Although the policy written by the insurer was not before the court, it was assumed that the usual defense provisions were contained therein.
18. Thus it is clear that these Ohio cases stand only for the generally accepted rule that the insurer's duty to defend is determined from the claimant's pleadings and when the cause of action is brought within the coverage of the policy the insurer must defend the assured regardless of its ultimate liability to the assured.
Because of this misapplication of Ohio law, the weight to be accorded the National Cas. Co. decision is fairly debatable. Perhaps a better expression of this “majority” view may be found in American Employers Ins. Co. v. Goble Aircraft Specialties, Inc., wherein the court held the insurer obligated to defend despite a prior exhaustion of policy limits by payment, in the absence of policy language making the defense provisions dependent upon exhaustion of the coverage. This was based on the notion that an insurance policy, being a contract of adhesion, should be construed against the insurer whenever a genuine ambiguity arises. But this should not result in the straining of the meaning of the language in order to bind the insurer nor to invent ambiguity where none exists.

In the final analysis, the strength of the “majority” view that the duty to defend is independent of the duty to indemnify is materially weakened by its reliance on the generally accepted rule that the duty to defend is broader than the duty to pay; moreover, its vitality is completely sapped when it interprets the defense provisions to be for the benefit of the assured. First, the proposition that the obligation to defend is broader than the obligation to indemnify relates particularly only to groundless, false or even fraudulent lawsuits which the insurer is obligated to defend if by the pleadings the claims come within the purview of the coverage. Thus, it is on the issue of whether the cause of action is within the terms of the policy to which this principle is properly restricted. Its extension by some of the cases to the duty to defend where the policy limits have been exhausted is erroneous and detracts substantially from their validity.

Secondly, the proposition that the defense provisions are for the benefit of the assured may be refuted by reference to any standard liability insurance policy which gives the insurer the absolute right and control over the defense of the litigation and the freedom to negotiate any settlements thereunder in good faith. Of course, the assured derives benefit from this provision since it obviates the necessity of seeking counsel, but it is the insurer’s potential liability under the policy which makes its interest in the outcome substantially greater than that of the assured and which gives it the absolute control over the defense. Otherwise an assured facing litigation where the damages sought are less than the policy limits would


20. A question as to the validity of this case may be raised because of its failure to consider the effect of the clause “as respects the insurance afforded by the other terms of this policy.” As noted before, the Denham case construed a similar clause to be a limiting one. This seems to be the more reasonable interpretation.


in effect be a disinterested party since there would be no danger of liability accruing to him and the result could well be a haphazard defense leading to the insurer's ultimate liability. Conversely, when the policy limits have been exhausted by prior payments on judgments or settlements, the insurer would then be a disinterested party as to the final result and could be subject to charges of the unlawful practice of law.\textsuperscript{23}

It is clear that neither the approach adopted in the present case nor the one used in \textit{National Cas. Co.} is satisfactory. Under either approach substantial hardship to one of the parties is the necessary result. Between these two extreme positions, a better and more justiciable course is desirable. If it is admitted that the duty to defend is correlative with the duty to indemnify, then it is possible to chart such a course from a re-examination of the first case which directly involved this issue, \textit{Lumbermen's Mut. Cas. Co. v. McCarthy}.\textsuperscript{24} There the court admitted the interdependence and co-extensiveness of the obligations to pay and defend and held that this latter obligation continues until the duty of payment has been fully performed. Furthermore, this duty would not be satisfied in the court's view merely by tendering the policy limits into court nor may the insurer abandon its defense in mid course under circumstances prejudicial to the rights of the assured.

To illustrate this view, if the insurer is simultaneously required to defend two claims against the assured both of which seek damages far in excess of the policy limits and one claim results in a verdict for the claimant which exhausts the policy limits, then the insurer should not be permitted, by tendering the policy limit, to bow out in the middle of the pending suit because of the necessary prejudice to the assured. Alternatively, if, as in the \textit{McCarthy} case, a judgment has been obtained which exceeds the policy limits, then upon the payment by the insurer of the policy limits, it should not be obligated to defend a subsequent action against the assured since it would no longer have any financial interest in the outcome. Such a rule requiring the insurer to undertake the defense of its assured until actual settlement of claims or payment of judgments has exhausted the policy limits and then permitting withdrawal provided no prejudice accrues to the assured would be fair to both the insurer and the assured and would obviate the hardships occurring under the other views. Furthermore, the basic rule of contract law that a writing should be interpreted in a manner which best reflects the actual intention of the parties would be achieved since the clause "with respect to such insurance as is afforded by the policy" is designed to limit the defense provisions up to the policy limits.

\textsuperscript{23} \textit{In re} Brotherhood of Railroad Trainmen, 13 Ill. 2d 391, 150 N.E.2d 163 (1958).

\textsuperscript{24} 90 N.H. 320, 8 A.2d 750 (1939). See, \textit{supra}, note 14. This case was subsequently approved in Ocean Acc. & Guar. Corp. v. Peoples Wet Wash Laundry, 92 N.H. 260, 29 A.2d 418 (1942), and Travelers Indem. Co. v. New England Box Co., 102 N.H. 380, 157 A.2d 765 (1960), with the latter case construing the clause "with respect to such insurance as is afforded by this policy" to mean that the duty exists only while "such insurance" is still afforded; \textit{i.e.}, it has not been paid out in satisfaction of a claim.
The future vitality of Commercial Union is questionable. On the granting of statutory interpleader where the tort claims were unliquidated, the court took a position which should gain greater acceptance by the federal courts. On the “duty to defend” issue the court departed radically from the mainstream of judicial thinking; however in so doing their liberal interpretation has accomplished the purpose of statutory interpleader to prevent harrassment of insurers. Whether a similar result would occur if only one or two persons were suing the assured is uncertain.

Thomas J. Tomalis

LANDLORD AND TENANT — NOTICE OF TERMINATION IMPLIES RIGHT OF LANDLORD TO EXHIBIT THE PREMISES IN A REASONABLE MANNER.

Gronek v. Neuman (Ill. 1964)

After defendant lessee notified lessors of his intention to terminate his month-to-month tenancy, he refused to allow the lessors to display the premises to prospective tenants. The lessors sued to recover a month’s rent or damages for this refusal. The lessee maintained that he had not, by any affirmative act on his part, prevented the lessors from finding a new tenant, basing his refusal to permit inspection on his common law right of exclusive possession and the absence of an agreement reserving such a right. In construing the lease’s notice provision, the Appellate Court of Illinois held that, the lessor had an implied right to reasonably exhibit the premises and imposed on the lessee a corresponding duty to permit such exhibition. It further ruled that a breach of this duty subjects the lessee to liability for a maximum of one month’s rental if such loss were actually sustained by the lessor. Gronek v. Neuman, 52 Ill. App. 2d 250, 201 N.E.2d 617 (1964).

This case was one of first impression in the Illinois and perhaps in any appellate court of the United States.1 As such, its rationale must necessarily be analyzed on the basis of analogies to, rather than strict comparisions with, general property concepts. Initially, since a tenant has a right to exclusive possession of demised premises as against the whole world, including the owner,2 the lessor retains no possessorry rights over the demised premises3 unless he reserves such rights by expressing in clear

1. Neither the court nor this author was able to find a case which was parallel. Perhaps the limitation on damages is a deterrent to further action in appellate court.
3. 2 BLACKSTONE, COMMENTARIES 180, 191 (1870).
and definite terms the nature of the restriction. In the absence of such restrictions the lessor’s unauthorized entry constitutes a trespass quare clausum fregit or its statutory equivalent; for such action the lessor would be liable to the lessee for damages. Even where the lessee authorizes the lessor to enter for certain purposes, the lessor may not exceed the license given or enter in disregard of any condition imposed by the lessee.

The lessor has a right to enter onto the demised premises for certain limited purposes, including entry to demand rent or to levy a distress. While there is some authority granting the right to enter and make repairs to avoid waste, generally, in the absence of an agreement to the contrary, a lessor has no such right of entry during the term. He may not investigate to determine if repairs are needed or even to make necessary repairs. In some jurisdictions, however, the lessor is given the right to enter to comply with police regulations imposing a duty on the owner by statute. Additionally, there is a division of authority as to whether the lessor may enter, when the lessee has abandoned the premises, to prevent harm to the reversion.

Summarizing therefore, it is obvious that the courts have jealously protected the possessory rights of the lessee by both narrowly construing leases and by allowing few exceptions to the rule of exclusive possession.

The court in the present case, by implication from the required notice provision, found that the lessor was entitled to enter onto the demised premises to reasonably exhibit them to prospective tenants. The obvious reason for requiring notice from the lessee was to prevent hardship to the lessor which would result from a hasty vacating of the premises. Nevertheless, this point, conceded by the defendant, does not necessarily require the result found in Gronek. In First Nat’l Realty Corp. v. Oliver, where the lessor sued for an additional month’s rent because of the lessee’s failure

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8. Ibid.
10. See, 32 AM. JUR. LANDLORD AND TENANT § 196 (1941).
12. Corwin v. Hamilton, 154 Cal. App. 2d 829, 317 P.2d 139 (1957), wherein it is stated at 142, “... the owner of property which is leased, has a right to come on the property if he finds that the tenants have moved, and take steps to protect his property. ...” But cf. First Stamford Nat’l Bank & Trust Co. v. Pierce, 161 Misc. 756, 293 N.Y.S. 75 (N.Y. City Ct. 1937), at 79. “An entry by the landlord before the expiration of a term on premises demised is unlawful, though the tenant has removed from the premises, unless such right is reserved.”
to give notice as required by statute, the court interpreted the legislative intent of the statute: "while a tenant who fails to give notice may be liable for another month's rent, the purpose of the Code section is not to penalize the tenant but to give the landlord an opportunity to find a new tenant."

The court in the instant case argues that such purpose would be frustrated if it were not accompanied by a right in the lessor to enter and exhibit the premises since few prospective tenants would be interested in property they could not inspect. The general rule of caveat emptor would apply; in the absence of misrepresentation or concealment there would be no implied warranty of fitness for purpose intended or tenantable conditions.

The court, earlier in the opinion, had restated the principle that a lessor's invasion of the lessee's possessory rights constituted a trespass, but limited this idea to cases of "senseless intrusion." It went on to state: "We cannot conceive of substantial interference with the tenant's enjoyment of the premises by his cooperation in permitting the premises to be shown at his convenience. . . . An action at law lies for the breach of this duty." Here the court speaks of cooperation and permission of the lessee and yet simultaneously imposes an involuntary duty upon him. The language concerning substantial interference of the lessee's enjoyment seems out of point. The lessee is defending his rights against the lessor on the basis of trespass, not for breach of the implied covenant of quiet enjoyment. There is no need for an act to be a substantial interference with the offended party's rights to constitute a trespass.

As the dissent states: "The tenant is under no obligation to permit the lessor to disturb his possession, enjoyment, and use during his tenancy, by showing the premises to prospective tenants. . . ." This is the more acceptable view in that it denies any duty by the lessee and speaks not of substantial interference, but of disturbance of his rights. This is consistent with the common law concept of trespass.

It is submitted that such a right should not be given to the lessor. Allowing it is against all precedent and contrary to the rules of construction of leases; it would have been simple for the lessor to reserve this right. The court, by allowing this exception to the rule of exclusive possession, is impugning the right of the lessee to hold the premises "as he would have . . . if he had purchased the fee simple title to the land."

J. Edmund Mullin

15. Id. at 327.
18. Id. at 619. (Emphasis added).
19. See, e.g., the following excerpt from a form lease printed by Yeo and Lukens Co., 11 N. 13th St., Phila., Pa.: "... 6th. The lessor reserves the right at all times to visit and inspect the demised premises, personally or by agent, and to cause any repairs to be made which he may deem proper; also the right at any time to put up a 'For Sale' sign in such place on the premises as he may eject, and a 'For Rent' sign immediately, in case notice to quit is given. Prospective purchasers or tenants authorized by Lessor may inspect the premises at reasonable hours at any time."
LOTTERIES — CONSIDERATION NOT SATISFIED BY BENEFITS FLOWING TO THE PROMISOR OR BY MERE INCONVENIENCE OR DISADVANTAGE TO PROMISEE.

People v. Eagle Food Centers, Inc. (Ill. 1964)

Defendant, operator of thirteen retail food markets, initiated into his business a “game” known as “Split the Dollar.” Each time a person visited one of the defendant’s stores he could procure, free of charge, a coin which when opened would reveal a number, for example, 1-2-3-6-9. When the person had collected numbers that combined to read 1-9-6-2 or 1-9-6-3, he was then qualified to receive a one dollar award for the first combination or a one hundred dollar award for the second. The prize was awarded in the event that he could correctly answer a question. Supposedly more arduous questions had to be dealt with when one was striving for the one hundred dollar award. It was necessary to visit one of the defendant’s stores in order to gain possession of one of the split dollars; but the distribution was limited to one per person and there was no requirement of purchase or passage through a check-out counter in order for one to become eligible for a prize.

The Illinois Supreme Court, in reversing the lower decision, strictly construed the Illinois statute prohibiting lotteries and held that since there was no “paid or promised consideration” in the transaction, there was no lottery. People v. Eagle Food Centers, Inc., 202 N.E.2d 473 (Ill. 1964).

Since the term “lottery” has no explicit meaning in the law, general usage is usually relied upon to furnish its definition and elements. The term is generic in creation and probably best left without exact definition since, “no sooner is it defined by a court than ingenuity evolves some scheme within the mischief discussed, but not quite within the letter of the definition given.” The only restriction that has been agreed upon is that the three elements of chance, prize, and consideration must be present in order to constitute a lottery. Consideration has become the most popular

2. ILL. REV. STAT. ch. 38, § 28-2(b) (1961). A “lottery” is any scheme or procedure whereby one or more prizes are distributed by chance among persons who paid or promised consideration for a chance to win such prizes, whether such scheme or procedure is called a lottery, raffle, gift, sale or some other name. (Emphasis added.)

Actually, the defendant was found guilty of conducting a lottery in violation of ILL. REV. STAT. ch. 38 § 28-1(a)(7) and fined two hundred dollars. But the issue remained whether the scheme conducted by the defendant was a lottery as defined by the statute.

4. But see, Herald Publishing Co. v. Bill, 142 Conn. 53, 111 A.2d 4 (1955). A food store wished to adopt a plan by which persons entering the store would register their names, have the names placed in a box and then have prizes given to those persons whose names were withdrawn. There was no requirement that the person be present at the drawing in order to receive a prize, nor was a purchase at the store required. It was argued by the plaintiff that the absence of actual payment of consideration for participation and the absence of the requirement that the winner be present at the drawing put the activity outside the scope of the statute. CONN. GEN.
means for escape from the characterization of lottery because anything of value constitutes a prize and even though "skill" is distinguished from "chance," any need for a great degree of skill in a promotion scheme would decrease the number of participants.

There are three distinct views as to the meaning of consideration when applied to this problem. One is that there must be actual payment of consideration and that mere incidental benefits flowing to the merchant in the form of increased sales is not enough. Another defines consideration according to the contractual theory, that is, where one does something he is not legally bound to do or refrains from something he is legally free to do. Finally, there is the view that no consideration in any form is required—that the aggregate of prize and chance alone produces a desire "to get something for nothing" and that that result, per se, is contrary to public policy as embodied in the prohibition of "lotteries."

Before the instant decision, it was considered safe to assume that an activity such as "Split the Dollar" would have been prohibited as a lottery in Illinois. An earlier Illinois decision held that a gas and oil distributor's scheme for promoting business by distributing cards which qualified the holder to participate in a drawing for a cash prize at the end of each month was illegal as a lottery. It reached this result despite the fact that the plan contemplated the free distribution of cards to any auto owner requesting them.

Another Illinois case concerned an advertising scheme given the designation of "Bank Night." Under this plan, any person could register for a prize at plaintiff's theatre without buying a ticket or giving consideration of any kind. The winner did not have to be inside the theatre, but any winner did have to reach the stage in three minutes in order to claim his prize. The plaintiff admitted the existence of prize and chance, but con-

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11. Iris Amusement Corp. v. Kelly, 365 Ill. 256, 8 N.E.2d 648 (1937). It was emphasized that this case came before the court by way of managers seeking aid from a court of equity which had granted an injunction rather than as a criminal prosecution.
tended that the element of consideration was lacking because persons not
attending the theatre and who paid no admission fee had a chance to win.
The court found that "Bank Night" was a lottery, stating: "It is certain
that the prize money came from the pockets of those who patronized the
theatre, and that without patrons there would be no prizes. In actual opera-
tion, those who paid to get in, paid for those on the outside in so far as
those on the outside had a chance to win, and the giving of free chances to
those who did not come in could not alter the basic and essential character
of the transaction. ..."12

The common law view of lotteries in Illinois was reinforced by a 1963
case13 holding that:

"Valuable consideration" as an element of a lottery consists of some
right, interest, profit or benefit accruing to one party, or some for-
bearance, detriment, loss, or responsibility, given, suffered or under-
taken by the other and it is immaterial whether one party sustains
an actual pecuniary loss or the other an actual pecuniary benefit.14

Following the ostensible dictate of Illinois law in this area, the Appel-
late Court resolved the instant case in predictable fashion.15 It held that a
scheme which involved a person obtaining qualifying numerals as a result
of many visits to defendant's grocery store and answering questions to
obtain a cash award was a lottery under the statute. In its effort to
enunciate a definitive meaning of "consideration," the court said, "the time
and effort involved in making many visits to one of defendant's markets
to obtain numerals to qualify for obtaining cash awards and the advantage
to the defendant obtained by numerous persons making frequent visits to
the markets constituted consideration within the lottery statute and the
plan is an illegal lottery."16

In the light of this apparently cloudless state of the law, the Illinois
Supreme Court reversed the lower court and held that "Split the Dollar"
was not an illegal lottery since the element of "consideration" could not be
found in indirect benefits accruing to the storeowner or in the physical
efforts expended by its customers to obtain the split dollars. The court
noted that the acquisition of merchandise did not enhance the opportunity
to win a prize; that food prices had not been raised nor quantity or quality
lowered; and that the money given away was derived from the profits of
the store. Obviously, the court concluded, "the purpose of the program
was to attract new customers and to stimulate more frequent visits and
purchases by established trade."17

12. Supra note 11, at 651.
14. Supra note 13, at 653.
Many states handle this type of situation with gift enterprise provisions in their
statutes. The gift enterprise reads consideration as passing in connection with the
purchase of merchandise rather than the outright purchase of a lottery ticket. See
But the nexus of the court's decision was their contention that prior to the 1961 statute there was no statutory definition of lottery and that although the common law had been codified by the statute in question, the words "paid or promised consideration" required a new determination as to the meaning of the element of consideration. "A penal statute," the court stated, "is to be strictly construed in favor of the accused, and nothing is to be taken by intendment or implication against him beyond the obvious or literal meaning of such statutes." The court in applying this rule to the words of the lottery statutes relating to consideration found that benefits flowing to the promisor did not constitute necessary consideration. Using stronger language the court said, "... it would be stretching the statute to the breaking point, to construe it as meaning to embrace the technical concepts of consideration applicable in the law of contracts.

The dissent agreed that the new Illinois statute was a codification of the common law. Furthermore, it examined the common law and found it to be most favorable to its opinion. The dissent stated that even if the statutory definition of lottery required more than consideration in the contractual sense, the concrete effort required of the promisee in the present case fulfilled the requirement.

The differing views espoused by the Appellate and Supreme courts of Illinois present the dilemma confronting many of our courts in deciding what constitutes consideration in a lottery. The answer to the quandry might be best served by referring to the motivation behind the prohibition of lotteries. The existence of such prohibitions is based on the cupidity, jealousy, and envy that result from such schemes and sought to be avoided by an enlightened public policy. Add to this the need to protect the public from the possibility of inferior goods being grudgingly accepted in lieu of the ancillary benefits that might arise from such a scheme and one recognizes the need to ground the rule on effect rather than technique. The appellate court's result is more suitable to the above analysis. It attacks the effect of a lottery while disregarding the manipulations of clever people attempting to avoid the prohibition. Its conclusion is that the definition of a lottery must remain under a penumbra in order for effective statutory control.

18. Supra note 2.
19. See Midwest T.V., Inc. v. Waller, 44 Ill. App. 2d 401, 194 N.E.2d 653, 657 (1963). This court rejected this precise reasoning saying, "We certainly may not assume... the legislature intended to depart from or alter the public policy of this state toward gambling. Absence of any language limiting the 'consideration paid or promised' to money would seem to indicate legislative recognition of the fact that promoters of lotteries resort to unpredictable schemes designed to conceal the elements of consideration. Thus the definition of consideration must remain flexible." The court adopted the concept that "if the controlling inducement is lure of an uncertain prize, then the business is a lottery."
21. Supra note 20, at 475.
22. Supra note 20, at 476.
25. Supra note 20, at 476.
The other argument, as exemplified by the instant case, is based on a reluctance to apply the strict discipline of the lottery law to business situations. There are myriad techniques by which a concern meets its competition. Some may attempt to attract customers by staging a performance by a talented entertainer, while others may give away prizes. In the framework of the commercial world this type of activity is not equivalent to the operation envisaged as an evil begetting lottery. Realistically, "Split the Dollar," is just another means of advertisement, analogous to newspaper ads or radio commercials. The rule that the court is trying to pronounce is that a game of chance used as an extension of a business is allowable, but, a business that acts as an extension of a game of chance is not. The court is not abdicating its power over lotteries; it is adopting a sane approach to the ramifications of a competitive system. If the decision is read with regard to this economic background, it does not denude the lottery law of its power; it only places it in its proper perspective when applied to the business community.

Jeffrey Averett Brodkin

PRICE DISCRIMINATION — ROBINSON-PATMAN ACT — DEMONSTRABLE CONSUMER PREFERENCE IS DISTINGUISHING FACTOR UNDER LIKE GRADE AND QUALITY OF SECTION 2(a).

*Borden v. F.T.C. (5th Cir. 1964)*

Petitioner, a corporation engaged in the manufacture, processing, distribution and sale of food, dairy and chemical products, was charged by the Federal Trade Commission\(^1\) with price discrimination in violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act\(^2\). Petitioner sold its own label evaporated milk on a delivered price basis which was uniform throughout the country. It also sold private label evaporated milk, under labels owned by its customer, on an F.O.B. plant basis, with prices determined under a cost-plus formula which was always substantially lower than Petitioner's own brand price. As a result of an expansion by Petitioner of its private label operations into two areas that it

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2. 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958), which provides in relevant part: "It shall be unlawful . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce. . . ."
had not previously served, it obtained some private label business that had been served by other packers.

The private label milk sold by Petitioner was chemically identical to its brand milk and was packed in the same way except that private labels belonging to the customer were attached, instead of Petitioner's own label. The Commission charged that Petitioner had discriminated between purchasers of products of like grade and quality as prohibited by the Act. A cease and desist order was issued and litigation ensued.\(^3\)

Petitioner contended that since the grade and quality of a product might vary because of "demonstrable consumer preference," there was no violation of the Act because the jurisdictional requirement of "like grade and quality" had not been met. The Commission rejected this defense basing its determination of "like grade and quality" solely on the physical properties of the products without regard to their brand names or their relative public acceptance.

The Court of Appeals for the Fifth Circuit reversed, holding that the manufacturer's evaporated milk which bore its own label, and manufacturer's milk which bore private labels, were not products of "like grade and quality" within the Robinson-Patman Act provision prohibiting price discrimination between different purchasers of commodities of like grade and quality, where the manufacturer's brand name had demonstrable commercial significance. \(Borden\ \text{Company} \ v. \ F.T.C., \ 339\ F.2d \ 133\) (5th Cir. 1964).

The Robinson-Patman Amendment, enacted in 1936, is aimed at the practice of price discrimination. It does not arbitrarily prohibit all price discrimination; Section 2(a) confines the statute to price discriminations "between purchasers of commodities of like grade and quality." This legislation prohibited price discriminations with adverse competitive effects,\(^4\) but excepted differentials "on account of differences in the grade, quality, or quantity of the commodity sold."\(^5\) Under the Act, the determination of "like grade and quality" is a jurisdictional requirement. Any legally cognizable difference in either grade or quality of a product supposedly makes the Act inapplicable.

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3. The Hearing Examiner found Borden had discriminated, but that this practice had not injured competition, and that the difference in price had been cost justified. He ordered the complaint dismissed, but the Commission reversed the examiner and found potential injury in both the primary and secondary lines of competition and rejected Borden's cost justification defense.

4. The purpose of price discrimination legislation is to protect the livelihood of independent businessmen who must deal in the market place with large chains. The ability of the chain store to obtain goods at lower cost than independents is an outstanding feature of the growth and development of chain stores, which facilitates the destruction of the competitive market. Without the restriction of a price discrimination law, a chain store could completely dominate a market, with eventual adverse effects on all phases of the economy.

5. "It is of course, clear that the 'like grade and quality' concept is relevant solely to compare two or more items sold by one seller to his several customers, and not to measure the similarity of his goods with those of a competitor." Report of the Attorney General's National Committee To Study The Antitrust Laws 157 n.100 (1955).
There are many references to the concept of "like grade and quality" in Congressional hearings and debates, Commission cases and court cases, but there is relatively little illuminative material as to the correct meaning of the term, or the criteria to be used in determining what goods are within its scope.

The prevailing doctrine as to determining "like grade and quality" is that applied by the Commission, that is, a physical comparison test. The Commission takes the position that products manufactured of the same substance with the same care for the same consumer purpose are of "like grade and quality" irrespective of the fact that some are sold under the manufacturer's own brand, while some are sold under the purchaser's private brand.

The Commission considers this test to be the most effective means of implementing the intent of the legislators. By subjecting the goods to an analysis of their physical components, the Commission can easily determine whether the products are the same. At the present time, keeping in mind both the basic purpose of the statute and the difficulties encountered in a determination of "like grade and quality," the physical comparison test is the best proposed.

The major objection to this test has been that it does not recognize business actualities, more specifically, economic differences due to significant consumer preference. Its critics emphasize that in some industries heavy national advertising and sales promotions have cultivated significant consumer preference in the brand-conscious American public. Therefore, they conclude that a price discrimination law can consider heavily advertised and anonymous or private-brand merchandise on an equal footing only at a serious distortion of economic facts and that economic differences should be evaluated under the statutory term "grade," as distinct from any purely physical consideration of "quality."

The reason the commission has retained the physical-comparison test has been that its abandonment in favor of a marketing comparison test of intrinsically identical goods [which would evaluate brand name as a factor] might not only enmesh the administrators of the statute in complex economic investigations for every price discrimination charge, but would

6. See, Hearings before a Subcommittee of the House Committee on the Judiciary, on Bills to Amend the Clayton Act, 74th Cong., 2d Sess. 421 (1936).
7. Champion Spark Plug v. F.T.C., 50 F.T.C. 30 (1953); Standard Oil Co., 49 F.T.C. 923 (1953); International Salt Co., 49 F.T.C. 138 (1952); U.S. Rubber Co., 46 F.T.C. 998 (1950); E. Edelman & Co., 51 F.T.C. 978 (1955). There are few court cases that have dealt with this problem, but those that have, have accepted the Commission's approach and have applied the physical-comparison test. Bruce's Juices, Inc. v. American Can Co., 87 F. Supp. 985 (S.D. Fla. 1949); Moog Industries, Inc. v. F.T.C., 238 F.2d 43 (8th Cir. 1956); Midland Oil Co. v. Sinclair Refining Co., 41 F. Supp. 436 (N.D. Ill. 1941).
8. This is the minority opinion as expressed in the Report of the Attorney General's National Committee To Study the Antitrust Laws 158 (1955).
also encourage easy evasion of the statute through artificial variations in the packaging, advertising or design of goods which the seller wishes to distribute at different prices.\(^9\)

In the present case, the Fifth Circuit recognized consumer preference as a factor to be considered under “like grade and quality.” The court rejected the physical-comparison test in favor of a marketing comparison standard, and stated that “consideration must be given to all commercially significant distinctions which affect market value, whether they be physical or promotional.”\(^10\)

Apparently the court did not recognize the ramifications of its rejection of the established policy of the Commission and the courts in applying the physical-comparison test. That test had been formulated to prevent the complete emasculation of the statute by those who would make artificial distinctions in their products to circumvent its “like grade and quality” requirement. The decision in the instant case will allow just such avoidance of the statute that the Commission intended to prevent.

The Court stated that “the legislative history of the Act is of little assistance on this point,” and completely dismissed it. Although correct in its statement that there is little to be found in the legislative history, the court has treated this history very lightly in dismissing it so abruptly. Evidence found in the Congressional Hearings and Debates does demonstrate that the wording was carefully chosen to prevent the result herein reached. The addition of the word “brand” to the requirement of “like grade and quality” was initially proposed in order to protect the distribution of privately branded products. The draftsmen of the Act denounced the proposal as “a specious suggestion that would destroy entirely the efficacy of the bill against larger buyers” who could negotiate for a special brand on top of a price concession from the seller.\(^11\) Yet the *Borden* court found it possible to discard legislative intent and accomplish a result diametrically opposed to that intent.\(^12\)

In the mind of the public, consumer preference, manifest in brand name, is an intangible ingredient that differentiates one product from another. The legislature realized that economically, brand names may differentiate products, but nevertheless rejected a consideration of economic

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9. *Ibid.* The Commission also points out that these factors can be considered under the injury or cost justification provisions of the statute.


11. *Hearings before a Subcommittee of the House Committee on the Judiciary, on Bills to Amend the Clayton Act, 74th Cong., 2d Sess. 421* (1936). Other instances in the legislative history where additions to this provision were discussed and rejected include: 80 CONG. REC. 8115 (1936); 80 CONG. REC. 8234–235 (1936); H.R. REP. Nos. 2287, 2951, 74th Cong., 2d Sess. (1936).

12. “The purpose of the proposed legislation is to restore, so far as possible, equality of opportunity in business ... by protecting trade and commerce against ... unlawful price discrimination, and also against restraint and monopoly for the better protection of ... independent producers. H.R. Rep. No. 2287 (1936), 74th Cong., 2d Sess.
factors that would render ineffective a strong price discrimination law. Brand names should be significant factors in justifying price discriminations only when a manufacturer or supplier can show that the cost of promotion of the brand name has caused the price difference. The legislature gave the manufacturer the benefit of a justifiable price discrimination under the cost justification defense of the statute\textsuperscript{13} which recognizes promotion costs within its scope. The manufacturer, therefore, can get the benefit of his consumer preference without circumventing the jurisdictional requirement of the statute. If the price discrimination cannot be justified under the defenses within the statute,\textsuperscript{14} the practice is unlawful and should be prohibited.

By including "demonstrable consumer preference" in the jurisdictional test of the statute, the court has permitted the large manufacturer who commands a consumer preference, to change the label on his product, lower the price in a specific area for the private label product, and completely annihilate local competition. There can be no check on the price discrimination since the manufacturer can show "demonstrable consumer preference" due to brand name, which makes one product different from the other.\textsuperscript{15} This is the result the legislature feared — an emasculation of the statute.\textsuperscript{16}

The court, in an attempt to further justify its position, stated that the Commission recognizes consumer preference under the "meeting competition" defense of Section 2(b), and continued: "We cannot approve of the Commission's construing the Act inconsistently from one case to the next as appears most advantageous to its position in a particular case."\textsuperscript{17}

\textsuperscript{13} 15 U.S.C. § 13(a) (1958), providing in relevant part: "That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

\textsuperscript{14} Other defenses within the statute are within § 13(a), if it can be shown that there is no injury to competition; and § 13(b), which permits discrimination "made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

\textsuperscript{15} An example of this practice is illustrated in 49 Nw. U.L. Rev. 225, at 231 n.43 (1955): "This so-called 'private brand' selling is illustrated by the case of a tire manufacturer who sells tires to mail order houses or chain stores at lower prices than it sells tires of like grade and quality to independent dealers or retailers (assuming no cost justifications). The subterfuge is consummated by putting the favored buyer's own brand name or trademark on the lower-priced tires, while other tires are sold under the manufacturer's standard label. When the consumer public learns that the two brands of tires do not differ in grade and quality, and consequently, when consumer preference is motivated by price differential rather than by brand name, the effects of discrimination became most injurious to non-favored buyers." See, Goodyear Tire and Rubber Co., 22 F.T.C. 232 (1936), 101 F.2d 620 (6th Cir. 1939), cert. denied, 308 U.S. 557 (1939) (under original section 2 of the Clayton Act).

\textsuperscript{16} It should also be noted that under this interpretation of "like grade and quality," cases that have been hailed as the foundation of the price discrimination area would be erroneous. \textit{E.g.}, Goodyear Tire & Rubber Co., 22 F.T.C. 232 (1936), 101 F.2d 620 (6th Cir. 1939), cert. denied, 308 U.S. 557 (1939); U.S. Rubber Co., 46 F.T.C. 998 (1950); Page Dairy Co., 50 F.T.C. 395 (1953); E. Edelman v. F.T.C., 51 F.T.C. 978, 239 F.2d 152 (1956); Boss Mfg. Co. v. Payne Mfg. Co., 71 F.2d 768 (8th Cir. 1934).

\textsuperscript{17} 339 F.2d 133, at 138, stating: "The Commission has given full recognition to the significance of higher prices commended by premium products in holding that a
Superficially the fact that the Commission denies the recognition of consumer preference under Section 2(a), and recognizes it under Section 2(b), appears inconsistent; however, an analysis of the underlying philosophy of the Act shows this not to be the case. The purpose of the Act is to restore equality of opportunity to independent businessmen. This is accomplished by proscribing direct and indirect price discriminations which cannot be justified by cost differentials, meeting competition in good faith or by changing market conditions. Section 2(a) is directed at secondary line competition, as well as at primary line competition as was the original section of the Clayton Act. Through its denial of recognition of consumer preference under this section, the Commission has prevented an avoidance of the jurisdictional requirement of the Act, thereby strengthening it and securing the scope of those who come within its provisions. Section 2(b) is directed at primary-line competition; its defense of “meeting competition in good faith” was expressly created by the Act for the benefit of manufacturers. If consumer preference were not recognized here, the manufacturer who is selling the consumer preferred article could match exactly the price of the local manufacturer and assert Section 2(b) as his defense. If this were accepted the large manufacturer would have frustrated the purpose of the statute since he is effectively undercutting his competitor. By recognizing consumer preference under Section 2(b), the Commission is consistent in its policy of preventing circumvention of the legislative intent to protect independent manufacturers, producers and businessmen.

The court states that its decision is in harmony with the “broader antitrust policies handed down by Congress,” but it fails to enunciate what these policies are. It has been the long-established responsibility of our Judicial system to implement the law as it has been enacted by Congress and as evidenced by legislative history. Here the court has dismissed that history and taken upon itself the responsibility of determining what was intended, and reached a result contrary to legislative intent. The ramifications of this decision may render ineffective the entire Robinson-Patman Act. It cannot be too strongly urged that the courts investigate the purpose of the Act before discarding case precedent and reversing legislative policy.

Joseph A. Tate

seller who reduces the price of his premium product to the level of his nonpremium competitors is not merely meeting competition, but undercutting it,” citing Callaway Mills Co., 3 Trade Reg. Rep. Ph. 16800 (F.T.C., Feb. 10, 1964), and Anheuser-Busch, Inc., 54 F.T.C. 277 (1957).

18. Other legal theorists, who have found this inconsistency are: Rowe, Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act, 66 Yale L.J. 1 (1956), at 17; and the minority of Attorney General’s National Committee to Study the Antitrust Laws.


SALES — WARRANTY — EMPLOYEE WHO PURCHASED WINE IS "BUYER" WITHIN WARRANTY PROVISIONS OF UNIFORM COMMERCIAL CODE § 2-318.

Yentzer v. Taylor Wine Company (Pa. 1964)

Plaintiff, a hotel manager, personally purchased four bottles of champagne from a state liquor store on behalf of his employer. The wine was intended for consumption by guests at a wedding party at the hotel. While plaintiff and other employees were preparing to serve the wine, a cap suddenly ejected and struck plaintiff in the eye, resulting in serious injury. Plaintiff instituted suit against defendant, the producer and bottler of the wine, alleging breach of implied warranties that the goods: (1) were adequately and safely packaged and, (2) were fit for the ordinary purposes for which such goods were sold. The complaint was dismissed on the ground that plaintiff was not within the scope of the statutory warranty protection,¹ as defined in a recent case.² On appeal, the Supreme Court of Pennsylvania, reversing the decision, held plaintiff could maintain the action as a "buyer" within the statutory term.³ Yentzer v. Taylor Wine Company, 414 Pa. 272, 199 A.2d 463 (1964).

Historically, the concept of warranty has been a rather ambivalent creature of the law. Though initially conceived as a tort, somewhat in the nature of deceit, it arose primarily in contracts of sale. Because a warranty, as distinguished from deceit, could arise from an innocent misrepresentation, the implication of warranties in the contract of sale was facilitated. Courts reasoned that "a purchaser has a right to expect a saleable article"⁴ and imposed on the seller an obligation to provide such an article, merely from the existence of the contract.⁵ The warranty concept, being thus absorbed into the law of contracts, was subjected to traditional privity limitations, that is, the purchaser alone could maintain an action for breach, and that, only against his immediate vendor. This dual limitation being imposed, warranty protection was extremely limited.⁶

Though it seemed settled that the warranty concept was contractual, further scrutiny revealed a similar anomaly in respect to the harm consequent from a breach of warranty. When personal injury to the purchaser resulted, the courts recognized that such harm was of the type traditionally com-

pensated by tort liability. Negligence counts were often incorporated when suits were instituted on warranties. Such counts, however, were generally subjected to similar privity limitations. In 1916, in *MacPherson v. Buick Motors Co.*, 7 "the assault upon the citadel of privity" 8 was commenced when a duty was recognized between a manufacturer and a remote vendee of an article which "is reasonably certain to place life and limb in peril when negligently made." 9 Though the privity limitation was thus pierced, the purchaser yet had the burden of showing negligence on the manufacturer's part, often a difficult task. But the law concerning manufacturer's liability to the ultimate consumer proceeded at an intense pace and currently appears as an almost generic concept, involving many distinct policy considerations from those involved in ordinary negligence actions or previous warranty actions, and often imposing absolute liability. 10


(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property, is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
(a) The seller is engaged in selling such a product, and
(b) It is expected to reach the user or consumer in the condition in which it is sold.

(2) The rule stated in subsection (1) applies although
(a) The seller has exercised all possible care in the preparation and sale of his product, and
(b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.

The section proposes the suggested generic concept which, if adopted by the courts would impose absolute liability in a situation such as the main case. Some of the Reporter's comments bear directly on the problems here involved:

Comment (g) . . . No reason is apparent for distinguishing between the product itself and the container in which it is supplied; and the two are purchased by the user or consumer as an integrated whole. When the container is unreasonably dangerous, the product is sold in a defective condition. Thus a carbonated beverage in a bottle which is so weak, or cracked, or jagged at the edges, or bottled under such excessive pressure that it may explode or otherwise cause harm to the person who handles it, is in a defective and dangerous condition . . .

Comment (I) User or Consumer . . . It is not even necessary that he shall have purchased the product at all. He may be a member of the family of the final purchaser, or his employee, or a guest at his table, or a mere donee. The liability stated is one in tort, and does not require any contractual relation, or privity of contract, between the plaintiff and the defendant. (Emphasis added.)

Comment (m) . . . There is nothing in this section which would prevent any court from treating the rule stated as a matter of "warranty" to the consumer. But if this is done, it should be recognized and understood that the "warranty" is a very different kind of warranty from those usually found in the sale of goods.
The social policy which gave rise to the duty in the manufacturer's liability cases proceeded from considerations of the practical workings of our mass production and distribution methods. Recognizing that the ultimate consumer was obviously the one most likely to be affected by a faulty product and that it had become impossible for the consumer to deal directly with the manufacturer, many courts found it necessary to discard the privity limitation as outmoded and inappropriate for actions based on negligence in manufacture.

In conjunction with modern distribution processes, there necessarily arose mass media advertising methods. Such advertising, being directed at consumers, provided the means for New York to evade the privity limitation when a consumer sought compensation from a remote vendor for the decrease in value of a defective product. This expansion was made in a suit couched in the clear language of express warranty. The further expansion to absorb implied warranties within the same reasoning appears, in effect, to have been taken by at least one court. In any event, the Pennsylvania rule seems established that a manufacturer will be held strictly liable to consumers for harm resulting from a defective product, at least in food cases.

The progressive depletion of the efficacy of the privity limitation thus becomes apparent. But, discussion to this point has dealt only with parties directly in the distributive chain. Courts have been even more hesitant to extend warranty protection to collateral parties, that is, non-purchasers who have suffered harm from the breach. Here again, some inroads have been made, though limited primarily to food cases. It is interesting to

and it is not subject to the various contract rules which have grown up to surround such sales.

The Reporter further notes that such liability has been extended beyond those products designed for "intimate bodily use" to the following, among others:


note that the harm suffered by collateral parties would almost necessarily be personal injury, which is very closely associated with tort liability. It seems this made social policy a prime factor motivating the courts to seek a means to evade the privity limitation and grant recovery.\textsuperscript{14}

Several theories were proposed by the courts for sustaining this expansion, the most notable of which was the recognition of a wife as an agent in purchasing food for family consumption, thereby permitting recovery by members of the family.\textsuperscript{15} That the expansion involved a true exercise in "legal gymnastics" is emphasized by the fact that when the wife suffered harm, \textit{she} was considered the \textit{buyer}.\textsuperscript{16} The principal case represents a continuation of such gymnastics in a statutory context.\textsuperscript{17}

The Uniform Commercial Code sought to clarify this area of the law by its provisions concerning the beneficiaries of warranties.\textsuperscript{18} The extension of warranty coverage to include the buyer's family and household, as well as guests in his home is limited by two considerations: (1) the harm must be personal injury, and (2) use of the product by this plaintiff must have been foreseeable. Such limitations clearly indicate an undercurrent of social policy in accord with those general theories of tort liability. The comments to the section\textsuperscript{19} indicate that its purpose is to eliminate "technical

\textsuperscript{14} Cf. James, \textit{Products Liability II}, 34 \textit{Texas L. Rev.} 192, 193-96. For a discussion of some policy considerations involved in this expansion, see Note, 26 \textit{N.Y.U.L. Rev.} 352 (1951), which deals with the 1950 Uniform Commercial Code.


\textsuperscript{17} Whether the plaintiff in the main case could be considered a "buyer" within the statutory language (infra n.21) is a proposition open to severe criticism as will be noted in the text infra.

\textsuperscript{18} \textit{Uniform Commercial Code} § 2-318, provides:

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

\textsuperscript{19} \textit{Uniform Commercial Code} § 2-318, comment 2, states in pertinent part:

The purpose of this section is to give the buyer's family, household and guests the benefit of the same warranty which the buyer received in the contract of the sale, thereby freeing any such beneficiaries from any technical rules as to "privity." It seeks to accomplish this purpose without any derogation of any right or remedy resting on negligence. . . . Implicit in the section is that any beneficiary of a warranty may bring a direct action for breach of warranty against the seller whose warranty extends to him.

Comment 3 states:

This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.

The court, in applying the section, recognized that the Pennsylvania rule would extend warranty protection to the plaintiff's employer. If plaintiff falls within the section as a beneficiary, in light of comment 3 he would be a proper party to maintain suit against a defendant, a remote vendor. The court did not rely on this since they considered plaintiff a "buyer" within the statutory language.
rules of privity" insofar as the named beneficiaries are concerned. There is little doubt that it is effective so far as it goes;\textsuperscript{20} the question remains whether it has gone far enough. In light of the manipulations executed by the court in the main case, it seems their answer, at least, would be in the negative.

The precise problem presented to the court in the instant case was whether the policy behind the Code's elimination of technical privity barriers to recovery by collateral parties at the consumer level should be applied at an earlier step in the distributive chain. It appears that the court decided this in the affirmative, then proceeded to distort the statutory language to justify the result. The justification was effected through the interpretation of the statutory term "buyer"\textsuperscript{21} in a manner broad enough to encompass the plaintiff, who had merely performed the physical act of buying for his employer. Thus, in the court's opinion, the plaintiff was, rather than an excluded collateral party, the party directly in the distributive chain.\textsuperscript{22} Such interpretation can only lead to results quite as anomalous as arose from considering a wife an agent in the "food cases."\textsuperscript{23}

The case was distinguished from the recent Pennsylvania decision in Hochgertel v. Canada Dry Corporation,\textsuperscript{24} where recovery was denied an employee who brought a warranty action in a similar situation. The distinguishing factor was that the plaintiff in Hochgertel had not performed the physical act of purchase. There, the court was rather emphatic in denying recovery, relying on Loch v. Confair\textsuperscript{25} for the "inescapable conclusion . . . that no warranty will be implied in favor of one who is not in the category of a purchaser."\textsuperscript{26} Yet, in the instant case, the court attempts to evade the effect of their own words through a perversion of the statutory language. The dissent of Mr. Justice Eagen, in the main case, inadvertently points out the perversion by contending that plaintiff was not within the term "purchaser"\textsuperscript{27} since he acquired "no interest in


\textsuperscript{21} PA. STAT. ANN. tit. 12A, § 2-103 (Supp., 1963), defines "buyer" as "a person who buys or contracts to buy."

\textsuperscript{22} When this is considered within the context of the statute, PA. STAT. ANN. tit. 12A, § 2-318 (Supp., 1963), which extends warranty protection to "... any natural person who is in the family or household of his buyer, or who is a guest in his home..." the fallacy of such interpretation becomes clear. Certainly it is not the employee's household the statute seeks to protect.

\textsuperscript{23} See cases cited supra, n.15; Cf. PROSSER, op. cit. supra, n.16.


\textsuperscript{25} 361 Pa. 158, 63 A.2d 24 (1949). The plaintiff had removed a bottle of ginger ale, manufactured by defendant, from a shelf in a super market when it exploded and glass stuck in his wife's' leg. Recovery was denied because no contract had been completed.

\textsuperscript{26} 409 Pa. 610, 615, 187 A.2d 575, 578 (1963).

\textsuperscript{27} PA. STAT. ANN. tit. 12A, § 1-201 (Supp., 1963)

\textsuperscript{(32)} "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property. (Emphasis added.)

\textsuperscript{(33)} "Purchaser" means a person who takes by purchase.
the property.”28 The term used by the section under consideration29 is "buyer" and not "purchaser" so reliance on the latter term was improper. However, it seems clear that the term "buyer" applies only to Article 2, covering sales of goods, while "purchaser" applies to the various other transactions covered by the Code generally.30

One subsequent case in Pennsylvania31 recognized the main case as a severe threat to the rule announced in Hochgertel. While recognizing that the main case "formally reaffirmed" Hochgertel the court continued, stating, "the Yentzer case foreshadows perhaps the ultimate decay of the limitation recognized in Hochgertel."32 In light of such an interpretation of the main case, the court felt themselves constrained to hold, as a matter of law, that an employee, under facts similar to Hochgertel, could not maintain the action on the warranty count. However, this determination was effected by means of an "interlocutory summary adjudication"33 limiting the issues for trial to the negligence count. The court noted that such determination "has the virtue that if subsequent developments in this changing area of Pennsylvania law make it appropriate, the conclusion here reached may be reconsidered at the pre-trial conference or at the trial."34

A recent California case35 extended warranty coverage to an employee of the purchaser in the absence of any statutory expansion. Though they relied on a rather loose definition of privity, that is, successive right to possession and use, the court reasoned that such employee was a member of the buyer's industrial family to whom harm could reasonably be foreseen and so should be protected.36 Thus the court arrived at a result comparable to the main case by pure judicial expansion. Although the propriety of the industrial family concept is questionable at best, and would appear a similarly unwarranted expansion of statutory language should the Pennsylvania courts seek to so construe their provision,37 it is submitted that the same policy considerations motivated both courts. With the statute conferring protection on collateral parties at the consumer level, an analogous argument extending coverage to employees, such as the plaintiff in the main case, who will almost necessarily handle the articles, does not appear unwarranted.38

30. This would appear to be borne out not only by the definitions, quoted supra, n.21 and n.27, but also by the fact that the definition of "purchaser" appears in article 1 of the Code, "General Provisions" while the definition of "buyer" appears in article 2, the Sales article.
32. 35 F.R.D. at 227.
34. 35 F.R.D. at 227.
36. 190 Cal. App. 2d at 43, 11 Cal. Rptr. at 829.
37. See supra, n.18.
The comments to the section\(^{89}\) indicate an intent not to limit the developing case law extending coverage to remote parties in the distributive chain. This does not seem to imply that the drafters did intend to limit any collateral expansion, in fact, it is submitted, the opposite would be the more logical inference in light of the general tenor of the provision. It is submitted that a statutory amendment should be formulated; if the courts wish to expand coverage in the interim, they should do so expressly and not attempt to camouflage the expansion in such verbiage as will render the statute quite as anomalous as the prior case law.

Richard H. Zamboldi


Busk v. Hoard (Wash. 1964)

Plaintiff mortgagee, responding to a broker's newspaper advertisement offering investments in real estate mortgages and contracts, made $7,500 available for such a transaction with the defendant mortgagors. The negotiations were handled through the broker, who received a $1,500 commission for procuring the funds for the borrowers. When this foreclosure action was instituted by the lender, the defense of usury was raised by the defendants, who claimed that the broker's commission taken together with the contracted interest of ten percent exceeded the statutory limits.\(^1\) The Supreme Court of Washington reversed plaintiff's judgment for the unpaid balance on the mortgage,\(^2\) holding that the combination of con-


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Any rate of interest not exceeding twelve percent per annum agreed to in writing by the parties to the contract, shall be legal, and no person shall directly or indirectly take or receive in money, goods or thing in action, or in any other way, any greater interest, sum or value for the loan or forbearance of any money, goods or thing in action than twelve percent per annum.

2. The contract to pay $7,500 to the lender was not rendered void but, pursuant to Rev. Code of Wash. Ann. tit. 19, ch. 19.52.030 (1961), the court took the net
tracted interest and the commission together was usurious and that the lender, as principal to the broker, was subject to the defense of usury even though he had no actual knowledge of or benefit from the commission paid by the borrowers. Busk v. Hoard, 396 P.2d 171 (Wash. 1964).

Usury is one of the oldest problems of civilization. Originally, it applied to the exaction of any interest on the use of property. As far back as the Old Testament the practice was forbidden as unbrotherly; Aristotle condemned it as unnatural; Shakespeare poignantly emphasized its tendency to become a forfeiture; it was prohibited by the early laws of the Chinese and Hindus as well as by the Koran; among the Romans interest charges were limited by the Twelve Tables; and the Roman Catholic Church after the Reformation, while approving of interest charges in general, qualified that approval to moderate rates guided by equity and charity.

Aside from legislative regulation of maximum charges, conventional mortgage interest rates are determined almost completely by market conditions. "While possibly justifiable in times of national emergency, arbitrary price-fixing, both from the economic and the moral standpoints, represents a philosophy generally at odds with the concept of a private-enterprise peacetime economy."

Nevertheless, usury statutes in general have been upheld as a valid exercise of the state police power for the protection of public interests and promotion of the general welfare.

proceeds which had actually gone to the borrower ($6,000), and deducted the commission paid to the broker and double the amount of interest already paid as well as all unpaid interest as penalties so that the lender recovered less than half of his original investment.

3. The finding of agency was justified on the basis of Comment 1(b), Restatement (Second) Agency § 1 (1958), which provides that "... an agency exists although the parties did not call it agency and did not intend the legal consequences of the relation to follow" as long as the required factual elements existed. In finding the presence of these factual elements, the court stressed that the plaintiff was a carpenter who had no knowledge of mortgage transactions, never having invested before; that the broker had selected the borrower, prepared all the required papers and obtained the necessary title insurance; and, finally, that the broker followed up all the collections until default, at which time he sent notice of intent to foreclose to the borrowers.

4. The four dissenting justices, however, viewed the transaction as a purchase of the debt from the broker, emphasizing the lack of intent by the plaintiff to commit usury. They also held that a lender does not make a broker his agent merely by turning over money to him to be transmitted to the borrower and accepting in return a note and mortgage in which he is designated as payee and mortgagee. They relied upon Clemson v. Best, 174 Wash. 601, 25 P.2d 1032 (1933), in which there was no agency relation between lender and broker, and, consequently, no usury.


6. Aristotle, Politics I, ch. 10 (Bolland ed. 1877).

7. The Merchant of Venice, Act IV, Scene 1, 190-211 (Bigelow, Smith & Co., 1909).


Today, all but two states have usury laws with maximum rates varying from six to thirty per cent and penalties for violation including forfeiture of all interest, possibly deducted from the principal, total loss of the right to recover on the usurious contract, and even fines and imprison-

ment. Although the primary target of such statutes undoubtedly is the loan-shark racket, the problem of usury has arisen in many other areas. As can be seen from the principal case, a finding of usury and the placement of responsibility therefor are two separate and often difficult problems to resolve.

The existence of usury laws has sparked the development of numerous subterfuges in order to impart an air of legitimacy to certain borrowing transactions. Evasive tactics include discounts, bonuses, commissions, extra charges of all sorts, brokerage fees, procuring fees; attorney’s fees and side agreements. Generally a court, in determining whether a contract or transaction is usurious, will disregard its form and look to its substance, condemning it upon finding elements of usury present, regardless of the disguises they may wear. Although usury is a statutory matter, it has certain basic elements:

These requisites are: (1) An unlawful intent; (2) the subject-matter must be money or money’s equivalent; (3) a loan or forbearance; (4) the sum loaned must be absolutely, not contingently, repayable; (5) and there must be an exaction for the use of the loan in excess of what is allowed by law. If all these requisites are found to be present, the transaction will be condemned as usurious. . .

Consequently, this defense may be raised when the total of all charges, placement fees and commissions plus the interest set forth in the instrument exceed the statutory maximum and are all chargeable to the same individual with or without an agency relationship. Obviously a lender cannot be charged with usury on account of any commission paid by the borrower to his own agent or to an independent broker for services in negotiating or procuring the loan.

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12. For a graphic survey of state usury statutes see Comment, 10 CLEV.-MAR. L. REV. 343, at 361 (1961).
13. For a vivid description of loan shark interest rates (up to 272%), techniques and collection methods see Alaniz, Texas Loan Shark Technique Described by State Representative, 14 PERS. FIN. L.Q.R. 142 (1960).
Even though the broker may be considered as the agent of the lender, if it is clear that, in procuring the loan, he was acting as agent for the borrower, a commission paid to him for these services may not be added to the contractual interest rate for purposes of determining usury. Some cases add the additional requirement that the lender must, nevertheless, have no knowledge of or interest in the commission.

Even if there is no basis for finding an agency relationship between the broker and borrower, most courts will not find usury when the lender’s agent charges a commission for procuring the loan in excess of the maximum legal rate of interest without the lender’s knowledge, either actual or implied. It is only a minority of jurisdictions that penalize one who places funds in the hands of a special agent to be loaned out when the latter exacts a commission, despite any lack of knowledge by the principal.

In Busk, the court claims that Washington follows the majority view and requires knowledge by the lender, either express or implied, that the broker is charging a commission before that amount will be attributed to him. The Washington statute, in addition to providing that the acts and dealings of an agent in loaning money will be binding on the principal, states that “. . . where the same person acts as an agent of the borrower and lender, he shall be deemed the agent of the lender for the purposes of this act.” Consequently, if the facts indicate a dual agency, there apparently arises a presumption that he was acting for the lender. It is submitted that the decision of the Washington court based on this presumption was erroneous. This presumption is not a conclusion of law; it may be rebutted by evidence. In the instant case, in addition to testimony by both lender and broker that no agency was intended, the majority admits that the defendants applied for the mortgage loan before the plaintiff ever became associated with the broker. It further concedes that the defendants, as a result of similar past transactions with the same broker anticipated and actually did promise to pay a certain percentage of the loan as a commission for procuring the funds. Even more important


22. 396 P.2d 171, 175 (Wash. 1964).


is the finding of the trial court that, as far as this phase of the entire transaction was concerned, the broker was not acting for the lender at all. "... [I]t was the province of the jury to weigh the facts and decide whether the promissory note was tainted with usury."25 "... [I]f we were of the opinion that the trial court should have resolved the factual dispute the other way, the constitution does not authorize this court to substitute its finding for that of the trial court."26

Although the dissent in Busk stretches the facts when it declares that the broker was a "seller" of the investment to the lender--"buyer," there seems to be no justification for a finding of agency between those parties at the time defendants contracted to pay the broker's commission.27

Assuming that there was a substantial basis for so finding, Washington still requires that the principal have knowledge, either express or implied, of the broker's activities before he can be charged with usury. Since it is admitted that plaintiff had no actual knowledge of the procurement fee, he must have been charged with implied knowledge. But the fact that at this juncture the broker was acting solely for his own benefit might mitigate against charging the lender with knowledge since: "The fact that an agent has interests so adverse to those of the principal that he would be unlikely to reveal relevant knowledge may prevent its imputation to the principal."28

The borrowers were in a far better position to protect themselves when they applied for the loan. They were aware at that time that they would be required to pay both the broker's commission and the interest on the loan, which were two separate and distinct propositions.

The Busk decision imposes unfortunate consequences upon the lender who, after all, was not the first one to deal with the middleman. Proceeding further upon the premise that there was a true agency relationship between lender and broker, plaintiff could no doubt recover for breach of duty since "... an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency."29 However the broker does not appear to have been a party to the principal case and would not be bound by its findings if they were asserted against him.30 Consequently in another action by the "principal," the question of agency supposedly being one of fact for the jury in Washington,31 it is conceivable

27. Due to plaintiff's total reliance upon the broker's business experience in preparing the papers and handling the collections, there can be no doubt that an agency relationship between them arose after plaintiff had determined to invest his money.
30. "Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action. ..." Restatement, Judgments § 68 (1942).
and even likely that there would be a finding of no agency, no duty of loyalty and no liability to the lender who stands to lose over half of his investment. Thus it is submitted that while the public interest requires a strong stand against the evils of usury, the existing law should be applied so that only those who can be properly charged with responsibility for a usurious transaction will be penalized.

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