



1957

## Comments

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### Recommended Citation

Various Editors, *Comments*, 2 Vill. L. Rev. 224 (1957).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol2/iss2/4>

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## COMMENTS

### BILLS AND NOTES—STOP-ORDERS—FINAL PAYMENT

The first reported Anglo-American case involving a bill of exchange is believed by many authorities to be that of *Martin v. Boure*,<sup>1</sup> decided in 1602. Since then the use of bills of exchange generally, and checks in particular, has grown to phenomenal proportions. It has been estimated that ninety per cent of all business transactions in the United States are settled by check.<sup>2</sup> However, this method of paying one's obligations is not conclusive. It looks to the future, to the time when the drawee honors the check and makes final payment to the holder. In the interval between the giving of the check to the payee and the time when the drawee makes final payment, the drawer may order the bank to stop payment of the check. The purpose of this Comment is to examine the concept of "final payment" when used as a defense against the stop-order of the drawer.

#### I.

#### THE BANK MUST HONOR THE STOP-ORDER.

The law places on the bank a duty to its depositor to honor both his check and his stop-order.<sup>3</sup> If the bank disregards an effective stop-order and pays the holder of the check, it may not lawfully charge the drawer's account: it will have to pay twice.<sup>4</sup> Of course, where prior to the stop-

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1. Cro. Jac. 3 (1602).

2. BRITTON, BILLS AND NOTES § 1 (1943).

3. *Thomas v. First National Bank*, 376 Pa. 175, 101 A.2d 910 (1945).

"(1) A customer may by order to his bank stop payment of any item payable for his account but the order must be received at such time and in such manner as to afford the bank a reasonable opportunity to act prior to any action by the bank with respect to the item described in section 4-303.

(2) An oral order is binding upon the bank only until the customer has had reasonable opportunity to send the bank a written confirmation if the bank requests such a confirmation. A written order is effective for only six months unless renewed in writing.

(3) The burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a binding stop payment order is on the customer." UNIFORM COMMERCIAL CODE § 4-403.

4. *Edwards v. National City Bank*, 150 Misc. 80, 269 N.Y. Supp. 637 (N.Y. Munic. Ct. 1934); *German National Bank v. Farmer's Deposit Bank*, 118 Pa. 294, 12 Atl. 303 (1888). § 4-103 of the Code invalidates releases which limit the measure of damages for failure to exercise ordinary care. This is based on lack of consideration and public policy. See also *Thomas v. First National Bank*, 376 Pa. 175, 101 A.2d 910 (1945).

order, the bank has certified, or accepted the check, it may pay the check and charge the account of the drawer.<sup>5</sup>

The usual relief for mistake, *i.e.*, subrogation to such rights as the drawer might have against the payee of the check or the payee against the drawer, has been denied to a bank paying a check in disregard of a stop-order.<sup>6</sup> Under the Uniform Commercial Code, in the event of improper payment, the bank will be subrogated, to the extent necessary to prevent unjust enrichment, to the rights of any holder of the instrument, or to the rights of the drawer or payee on the underlying transaction.<sup>7</sup> The Restatement of Restitution takes a contrary position,<sup>8</sup> *i.e.*, in favor of finality of payment. The basis of this view is that banks are big businesses; they can be run efficiently; and that payment should conclude them except in cases of want of care or good faith on the part of the holder. The Code also provides that the customer has the burden of showing damages from improper payment.<sup>9</sup>

## II.

### THE DIFFICULTIES FACING THE BANK.

A bank must deal with both time pressure and the complexity of its own operation. The Federal Reserve Regulations require that the bank "pay" immediately upon receipt of the check through the clearing house, by a remittance draft or otherwise.<sup>10</sup> This is in furtherance of the Federal Reserve's policy of keeping down the "float," *i.e.*, checks in collection. But the bank, through deferred posting statutes, has the right to undo "payment" already made.<sup>11</sup> This privilege thus complicates the problem of what is final payment since the first "payment" by the bank upon receipt of the check can be undone. Still another problem of our modern banking system is that stop-orders are difficult to handle and may easily be overlooked in the daily rush of check payments. Upon arrival at the drawee-bank a check goes through a series of processes which may vary substantially with the size of the bank. Let us follow a check through a more or less typical bank collection process.

The check is usually received by the bank in a "cash letter", which is merely a roll of adding machine tape binding the checks, or in a bundle

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5. *Universal Supply Co. v. Hildreth*, 287 Mass. 538, 192 N.E. 23 (1934).

6. *Chase National Bank v. Battat*, 297 N.Y. 185, 78 N.E.2d 465 (1948); *Metropolitan Life Ins. Co. v. Bank of United States*, 259 N.Y. 365, 182 N.E. 18 (1932).

7. UNIFORM COMMERCIAL CODE § 4-407.

8. RESTATEMENT, RESTITUTION §§ 33, 34 (1937).

9. UNIFORM COMMERCIAL CODE § 4-403(3).

10. Regulation J, 12 C.F.R. § 210.4 (1949).

11. The usual deferred posting statute states that if a check is sent to a drawee-bank for collection and remittance or settlement, and either is made by the drawee-bank on the day it receives the check, it may return that check for credit or refund at any time prior to the midnight of the drawee's next business day following the day of receipt. For a representative deferred posting statute see ILL. REV. STAT. c. 98, § 207a (1953) and UNIFORM COMMERCIAL CODE § 4-301. The Federal Reserve Regulations have been amended to permit deferred posting. Regulation J, 12 C.F.R. § 210.5(d) (1949).

from the clearing house. Upon receipt the check is sent to the sorting and proving departments. When sorted and proved it may be photographed. Later it moves to the bookkeeping department where it is examined for alterations. Here also the signature of the drawer is examined. Then the records of the drawee are checked to ascertain the drawer's balance and whether payment has been countermanded. If at this point the bank finds that payment has been countermanded or that, for any other of the above reasons, it is under no duty to the drawer to pay the item, it may "charge-back" the item. That is, the bank may return it directly or through the collection process to the holder's agent bank and claim credit against the previous "payment." The charge-back then prevents the "payment" from being a final payment.

Suppose now that a depositor has drawn a check and delivered it to a holder. Subsequently, for some reason, or for no reason at all, he orders payment stopped. Will it be effective? Not if there has been acceptance, certification, or "final payment."

### III.

#### FINAL PAYMENT.

There is no substantial problem as to what constitutes acceptance or certification. The bank usually certifies a check by rubber-stamping, authenticating and returning it to the holder. Payment of cash over the counter, to a holder presenting the check in person, is clearly final payment,<sup>12</sup> although there is contrary authority.<sup>13</sup> The question considered in this Comment is when has there been final payment, *i.e.*, when will the bank no longer be permitted, as of course, to reverse the collection process and dishonor the item in compliance with the depositor's stop-order.

It has been held that a check is finally paid when the cashier of the drawee-bank draws a check to the payee for the amount of the proceeds, stamps the check "Paid," perforates it and puts it in his file. As a basis for this decision the court stated:

"When the bank, through its cashier, wrote upon the face of the note in its own name, as the indorsee and holder, that it was paid, and perforated it and put it in the files as a thing paid, nothing more was to be done as to the payment. By those acts there had been set apart and appropriated to the payment of the note so much of the deposit then standing to the credit of the makers as was sufficient for that purpose, just as though the makers had presented to the bank their check in payment of a claim due it from them. It is true that the proper records were to be made upon the books, but the payment is

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12. *Fidelity & Casualty Co. v. Planenscheck*, 200 Wis. 304, 227 N.W. 287 (1929); UNIFORM COMMERCIAL CODE § 4-213(1).

13. *National Loan & Exchange Bank v. Lachovitz*, 131 S.C. 430, 128 S.E. 10 (1925).

effected by the acts, and not by the record, and was valid even without records." 14

One court has held that the fact that the check is not stamped "Paid" is inconsistent with actual payment.<sup>15</sup> The fact that a check has passed through the drawee-bank and been returned to the drawer as a cancelled instrument is prima facie evidence of payment.<sup>16</sup>

In contrast to this, the Minnesota Supreme Court has held that, although there has been a stamping of the check "Paid" and the mailing of a remittance draft, a stop-order will still be effective since the postal regulations give the bank the right to withdraw the draft from the mails at any time before actual delivery to the addressee.<sup>17</sup> In this case the remittance draft was drawn and the check posted to the drawer's account. Subsequent to the mailing of the draft and before receipt by the addressee the drawer telephoned the drawee and sought to have payment stopped. The Code states that receipt and acceptance by the remitting bank is not conclusive despite this assertion by the Minnesota Court.<sup>18</sup> But, under the Code, there would have been final payment in this case at the time the drawer's account was posted.<sup>19</sup> This case has been criticized and it is extremely doubtful that this view will be adopted by other courts.

Some courts have held that if the amount of a check is entered in the passbook of the payee or the holder by the drawee-bank, it is paid, although the drawee-bank fails to make immediate entries on its books crediting the account of the payee or holder and charging the account of the drawer.<sup>20</sup> In this situation the courts use the fiction that the legal effect was the same as though money was first paid and then deposited. The Code treats these entries in the passbook as provisional credits and states that they in no way evidence the bank's decision to pay the item.<sup>21</sup> The Code, in this situation, allows the bank the right of charge-back.

From these cases it can be seen that the courts have rejected any idea that the determining event which signals final payment is the formation by the bank of an intention to pay. Rather, they look for an overt act by the drawee-bank. This is desirable because it is more readily proved.

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14. *Nineteenth Ward Bank v. First National Bank*, 184 Mass. 49, 52, 67 N.E. 670, 671 (1903). At least one court has held that the mere act of stamping a check and placing it on a spindle is not sufficient to constitute payment or to prevent the drawer from stopping payment. *Hunt v. Security Bank*, 91 Ore. 362, 179 Pac. 248 (1919).

15. *Guardian National Bank v. Huntington County State Bank*, 206 Ind. 185, 187 N.E. 388 (1933).

16. *Blair v. Union Savings Bank*, 119 Ohio St. 142, 162 N.E. 423 (1928). This is consistent with the midnight deadlines for return of an item as established in *NEGOTIABLE INSTRUMENTS LAW* § 137 and *UNIFORM COMMERCIAL CODE* § 4-302.

17. *Bohlig v. First National Bank*, 233 Minn. 253, 48 N.W.2d 445 (1951).

18. *UNIFORM COMMERCIAL CODE* § 4-213, comment 2; Note, 5 *OKLA. L. REV.* 475 (1952).

19. *UNIFORM COMMERCIAL CODE* § 4-303(d).

20. *State ex rel Las Vegas v. Sandoval*, 34 N.M. 50, 277 Pac. 31 (1929); *Noton v. Mercantile Bank & Trust Co.*, 51 S.W.2d 1062 (Tex. Civ. App. 1932).

21. *UNIFORM COMMERCIAL CODE* § 4-303, comment 3.

The Code adopts an overt manifestation test by stating that a stop-order is effective until but not after the bank has :

- “(a) accepted or certified the item ;
- (b) paid the item in cash ;
- (c) settled for the item by separate remittance for the particular item ;
- (d) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith or otherwise has evidenced by examination of such indicated account and by action its decision to pay the item ; or
- (e) become liable for the item under section 4-302 dealing with the payor bank’s liability for late return of items.”<sup>22</sup>

Obviously the above section does not give a conclusive answer to the question of what constitutes a final payment which will render a subsequent stop-order ineffective. It gives no definition of what constitutes a “completed process of posting.” Nor does it define when a bank “has evidenced by examination of such indicated account and by action its decision to pay the item. . . .” The definitions will have to be supplied by the cases. If the courts define these clauses in light of the prior law, the Code will have been of little help. However, the draftsmen of the Code specifically tell us that “the comments . . . may be consulted in the construction and application of this act.”<sup>23</sup> They go on to say in the comments :

“Uniformity throughout American jurisdictions is one of the main objectives of this Code; and that objective cannot be obtained without substantial uniformity of construction. To aid in uniform construction these Comments set forth the purpose of various provisions of this Act, thus disclosing the uniform intent of the lawmaking bodies in enacting the Code. Therefore, subsection 3(f) recommends these Comments to the consideration of the courts to promote uniformity, to aid in viewing the Act as an integrated whole, and to safeguard against misconstruction by mistake of legislative intention. . . . The only safe guide to intent lies in the final text and comments.”<sup>24</sup>

Therefore, in defining a “completed process of posting” the courts would do well to resort to Comment 4 in section 4-213, which states :

“. . . the key point at which the decision of the bank to pay or dishonor is when the bookkeeper for the drawer’s account determines or verifies that the check is in good form and that there are sufficient funds in the drawer’s account to cover it. Except in rare cases, all

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22. UNIFORM COMMERCIAL CODE § 4-303.

23. UNIFORM COMMERCIAL CODE § 1-102(3) (f).

24. UNIFORM COMMERCIAL CODE § 1-102, comment 2.

previous steps in the processing are preliminary to this vital step and in no way indicate any decision to pay. However, a more tangible measuring point is desirable than a mere examination of the account of the person to be charged. The mechanical step that usually indicates the examination has been completed and the decision to pay has been made is the posting of the item to the account to be charged. . . . The phrase 'completion of the process of posting' is used rather than simple 'posting' because under current machine operations posting is a process and something more than simply making entries on the customer's ledger."<sup>25</sup>

The comments are useful in attempting to ascertain when a bank "otherwise has evidenced by examination of such indicated account and by action its decision to pay the item." The draftsmen of the Code say that this general "omnibus" language is necessary in order to cover the various types of bank action which it is impossible to specify. "Sight posting," *i.e.*, where the bookkeeper makes a decision to pay but postpones the actual posting, is given as an example of the type of action which this clause is intended to cover.<sup>26</sup> As a final caution on the interpretation of this clause the Code states:

"It is not intended to refer to various preliminary acts in no way close to a true decision of the bank to pay the item, such as receipt of the item over the counter for deposit, entry of a provisional credit in a passbook, making of a provisional settlement through the clearing house or the mailing of a general remittance covering a group of items including the one in question . . . any of these actions [are] provisional, and none of them evidences the bank's decision to pay the item."<sup>27</sup>

The Code is in harmony with those opinions which hold that entries in a check journal sheet and in a general journal of the bank are not admissible to prove payment.<sup>28</sup>

#### CONCLUSION.

Our investigation has revealed that it is difficult to determine when a check is finally paid so as to preclude a subsequent stop-order. The steps to be taken by a bank to enable it to interpose a defense of final payment against a stop-order will vary from one state to another. A stop-order coming at the same point in identical banking processes may be effective in one state and ineffective in another due to this variation. Because of

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25. UNIFORM COMMERCIAL CODE § 4-213, comment 4.

26. UNIFORM COMMERCIAL CODE § 4-303, comment 3.

27. *Ibid.*

28. *Guardian National Bank v. Huntington County State Bank*, 206 Ind. 185, 187 N.E. 388 (1933).

this confusion as to when a check is finally paid the hypothetical problem posed by this Comment must remain unsolved. One can only say that the answer will depend upon how far along the collection process the check has gone at the time the stop-order was issued. This often is a question of fact to be determined by the jury. Adding to the confusion is the fact that the "final payment" transaction involves some innate complexities. The term "final payment" is a misnomer and should perhaps instead be called the "termination of the privilege of charge-back."

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CRIMINAL LAW—CONSPIRACY—CHARACTER OF AGREEMENT—  
TACIT CONSENT.

It is axiomatic that one of the elements of a criminal conspiracy,<sup>1</sup> if not the bedrock itself, is an agreement or understanding between two or more persons whereby they become definitely committed to cooperate in attaining their criminal objective. This "agreement" is rarely formal. Potential conspirators do not preserve their meeting of the minds for posterity, nor do they publicize their plans. In most instances the existence of an agreement constituting a conspiracy is a matter to be deduced from acts of the alleged conspirators which are performed in pursuance of an apparent criminal purpose.<sup>2</sup> The cases are replete with statements to the effect that a conspiracy may be shown by an implied mutual understanding, by tacit agreement, or by tacit consent.<sup>3</sup> This Comment will be concerned with discovering, if indeed it is susceptible of discovery, the meaning of "tacit consent" as distinguished from "negative acquiescence." Such an object necessarily entails the examination of significant cases since the agreement born of tacit consent is to be inferred by a jury from a given set of facts and circumstances. Conspiracy statutes are of no assistance since they merely set forth the requirement that there be an agreement, but leave it to the cases to show when an agreement exists.

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1. One of the definitions of conspiracy is "a combination or an agreement between two or more persons, for accomplishing an unlawful end or a lawful end by unlawful means." BLACK, LAW DICTIONARY (4th ed. 1951).

2. 3 CHITTY, CRIMINAL LAW § 1441 (1819); 2 WHARTON, CRIMINAL LAW § 1665 (11th ed. 1912).

3. United States v. Glasser, 116 F.2d 690 (7th Cir. 1940), *modified*, 315 U.S. 60, *rehearing denied*, 315 U.S. 827 (1942); Marx v. United States, 86 F.2d 245 (8th Cir. 1936); Hoffman v. United States, 68 F.2d 101 (10th Cir. 1933); Gibson v. State, 89 Ala. 121, 8 So. 98 (1890); People v. Sagehorn, 294 P.2d 1062 (Cal. 1956); People v. Yeager, 194 Cal. 452, 229 Pac. 40 (1924); People v. Lawrence, 143 Cal. 148, 76 Pac. 893 (1904); Ingram v. State, 204 Ga. 164, 48 S.E.2d 891 (1948); State v. Porter, 199 S.W. 158 (Mo. 1917), *aff'd*, 276 Mo. 387, 207 S.W. 774 (1918); People v. Flack, 125 N.Y. 324, 26 N.E. 267 (1891).



## I.

## THE PROBLEM.

The state of the law of criminal conspiracy has been characterized as a "veritable quicksand of shifting opinion and ill-considered thought."<sup>4</sup> While it is true that there must always be an agreement before a conspiracy can be proved,<sup>5</sup> mere passive cognizance of the crime to be committed, or mere negative acquiescence is not sufficient to find the existence of a conspiracy.<sup>6</sup> The fundamental fact is that an agreement must be proved, either by direct or circumstantial evidence. Thus, the pivotal inquiry is how does a jury distinguish between the labels tacit consent and mere negative acquiescence?

## II.

## HISTORY.

In crimes involving two or more persons the possibilities of conviction are threefold: conviction of the substantive crime itself; conviction of an attempt to commit that crime; conviction of a conspiracy to commit that crime. The conspiracy indictment has grown in use over the years, and the prosecutor's liking for it can perhaps be partially explained by the fact that one may be adjudged guilty of conspiracy long before his act has come so near to completion as to make him liable for the attempted crime. From the days when only combinations to procure false indictments, bring false appeals, or maintain vexatious suits could constitute conspiracies,<sup>7</sup> to the modern-day employment of the indictment in practically every case involving two or more persons, the task of proving an agreement has remained beset with difficulties. "The picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age."<sup>8</sup> A consideration of some fact situations involving alleged conspiracies may illuminate the modern-day picture of conspiracy.

## III.

## PARTICIPATION WITH KNOWLEDGE.

When a jury has evidence before it that the accused actually participated in a common plan and that knowledge (actual or implied) of the end to be attained is implicit in accused's actions, a verdict of guilty can be

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4. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922).

5. Cousens, *Agreement as an Element in Conspiracy*, 23 VA. L. REV. 898, 910 (1937).

6. *Holmes v. United States*, 267 Fed. 529 (5th Cir.), cert. denied 254 U.S. 640 (1920); *State v. King*, 104 Iowa 727, 74 N.W. 691 (1898); CLARK, CRIMINAL LAW §§ 58-60 (3d ed. 1915).

7. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 396, 399 (1922).

8. *William Goldman Theatres, Inc. v. Loew's, Inc.*, 150 F.2d 738, 743 n. 15 (3d Cir. 1945).

predicted with confidence. It is not surprising to find courts reluctant to overturn jury findings leading to a conviction of conspiracy to commit murder. Verdicts are rarely upset in a murder situation,<sup>9</sup> and the tacit consent panacea is a common prescription to cure problems of proving agreement. However, the element of time is not to be overlooked. When two are charged with conspiracy in connection with the murder of a third person, an acquittal on the conspiracy count may well follow a showing that the incident leading up to the murder arose on the spur of the moment, was, therefore, unforeseen by any of the participants, and, hence, afforded them no opportunity to enter a felonious agreement, express or tacit.<sup>10</sup> As can be expected, the opposite view is not without merit. The court in the leading case of *People v. Yeager*<sup>11</sup> advanced the opinion that the law fixes no precise time at which the conspiracy must have arisen. The fact situation there is particularly illustrative of the jury's province of inferring an agreement through tacit consent. Yeager and one Terry were driving (Yeager at the wheel) when stopped by a motorcycle policeman who found several weapons and bottles of wine in the car. While the car was being searched Terry took a gun from under the seat, put it in his pocket, and later passed it to Yeager. The policeman was shot and both were found guilty of first degree murder. Error was claimed in admitting evidence designed to establish a conspiracy. The contention was that since the policeman was not known to them before he stopped their car, they could not have entered into a conspiracy to murder him. The court answered that during the time interval between the halting of the car and the killing there was abundant opportunity to form a mutual resolve to murder the officer rather than go to jail. The court further stated that it was for the jury to consider whether Terry in handing the gun to Yeager so that the officer would not see it, did so because there was a tacit understanding between them to use it on the deceased. The conviction was affirmed.

A jury's inferential powers are not taxed to any great extent when confronted with evidence of rape where one restrains the victim while others attack her;<sup>12</sup> where it is shown that four acted together in stealing United States guns and ammunition for nonlicensed exportation to Mexico;<sup>13</sup> or where in transporting liquor illegally the defendants, as indicated by the evidence, procured the alcohol from the same source, transported it through the same agency, and used the same deceptions.<sup>14</sup> Conspiracy to use

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9. *People v. Lawrence*, 143 Cal. 148, 76 Pac. 893 (1904); *Ingram v. State*, 204 Ga. 164, 48, S.E.2d 891 (1948); *State v. Jimmerson*, 118 N.C. 1173, 24 S.E. 494 (1896).

10. *State v. Porter*, 199 S.W. 158 (Mo. 1917), *aff'd*, 276 Mo. 387, 207 S.W. 774 (1918).

11. 194 Cal. 452, 229 Pac. 40 (1924).

12. *State v. Harrison*, 263 Mo. 642, 174 S.W. 57 (1915); *State v. Sykes*, 191 Mo. 62, 89 S.W. 851 (1905).

13. *Holmes v. United States*, 267 Fed. 529 (5th Cir.), *cert. denied*, 254 U.S. 640 (1920).

14. *Blumenthal v. United States*, 88 F.2d 522 (8th Cir. 1937).

the mails to defraud in the sale of stock was found where defendants met and conferred concerning the organization of a new company to engage in dealing in oil and gas royalties.<sup>15</sup> A conspiracy to buy off United States prosecuting attorneys was found where, among other things, evidence pointed to the fact that one of the government attorneys recommended that a certain defense attorney be retained by the accused.<sup>16</sup>

While the era of Prohibition is a thing of the past, it may be well to keep in mind, with an eye to future cases, the feelings and undercurrents running through the cases involving the unlawful possession and sale of intoxicating liquors. A substitution of narcotics for liquor will bring us up to date, and fact situations making one a conspirator in the twenties may possibly be repeated in current times. The fact that one party made arrangements for the storage of illicit liquor in a warehouse, and informed the warehouseman that another person would deliver the liquor, and yet a third individual would haul it away, supplied the grand jury with enough material to draw a picture of conspiracy.<sup>17</sup> A similar result was reached as to a group which operated a number of roadhouses, sold whiskey therein, and arranged for the importation of a prostitute.<sup>18</sup> In another case where participation with knowledge could be readily inferred the accused was convicted of conspiracy to illegally possess and sell distilled spirits because it was introduced into evidence that he, without instructions or directions from anyone, drove a prospective buyer along a tortuous route to the very spot where delivery of the alcohol was to have been made.<sup>19</sup>

It is rather to be expected that if two men drive to a suspected informer's home, force him into the car, head for the country, and threaten their captive with physical harm should he expose them to the authorities for unlawfully possessing intoxicating liquors, they are inviting a conviction for conspiracy to injure, oppress, threaten, and intimidate.<sup>20</sup> In another case involving participation with knowledge a nightclub band-leader was served a drink with a sleep-inducing drug therein and a bartender's aide contemplated making such fact known immediately to the authorities. The nightclub manager: (1) threatened to discharge the aide should he carry out his intentions; (2) asked the bartender for the bottle containing the drug and secreted it in his pocket; (3) ordered another drink for the bandleader which drink was also tampered with; and (4) gave a false explanation of the bandleader's subsequent illness to investigating

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15. *Oliver v. United States*, 121 F.2d 245 (10th Cir.), *cert denied*, 314 U.S. 666 (1941); *Peitch v. United States*, 110 F.2d 817 (10th Cir.), *cert denied*, 310 U.S. 648 (1940).

16. *United States v. Glasser*, 116 F.2d 690 (7th Cir. 1940), *modified*, 315 U.S. 60, *rehearing denied*, 315 U.S. 827 (1942).

17. *Pearlman v. United States*, 20 F.2d 113 (9th Cir.), *cert. denied*; 275 U.S. 549 (1927).

18. *Telman v. United States*, 67 F.2d 716 (10th Cir. 1933), *cert. denied*, 292 U.S. 650 (1934).

19. *Marx v. United States*, 86 F.2d 245 (8th Cir. 1936).

20. *Hoffman v. United States*, 68 F.2d 101 (10th Cir. 1933).

policemen. From these facts the jury inferred that the manager was a party to an unlawful agreement with the two waiters and the bartender who actively participated in mixing and serving the poisoned drinks.<sup>21</sup>

The foregoing cases lead but to one conclusion—the step between an actual knowing participation and tacit consent showing the existence of an agreement is indeed a short one. What conspiracies, one may justly ask, are more grievous today, in the eyes of the general public, than those in violation of the Smith Act,<sup>22</sup> *i.e.*, to advocate the violent overthrow of the government of the United States? Here, oddly enough, the language of tacit agreement is apparently abandoned. Conspiracies to violate the Smith Act are thought of not as tacit agreements, but as partnerships in criminal purposes, or as organizations for furthering such purposes. Guilt is established only when an organization with such criminal purposes is shown to have existed and defendants are shown to have joined it with knowledge of such purposes.<sup>23</sup>

#### IV.

##### PARTICIPATION WITHOUT KNOWLEDGE.

Unless the evidence is so strong that it indicates the accused must have had knowledge of what was going on it seems that participation alone will not support an inference of implied consent. The conspirator's consent consists in part of an approval of the purpose of the conspiracy. Naked action without more will not make one a conspirator. There must be a *mens rea*. Otherwise every victim who was forced to lend assistance would be included in the conspiracy. The following cases concern the presence or absence of *mens rea*.

A conviction of conspiracy to unlawfully possess intoxicating liquor was reversed as to one whose automobile was left without his knowledge as security for use of a yacht chartered for the purpose of making trips to Canada to pick up the liquor.<sup>24</sup> The court reasoned that it did not appear the automobile owner knew his name had been used in chartering the boat or that he had the remotest interest in it, and that the evidence was not sufficient to submit the case against him to the jury. The fact that the car was no longer at the owner's disposal was not deemed significant.

Defendants *A* and *B* operated a drug store at which defendant *C* was employed as a clerk. Some confirmed drug addicts made their headquarters at a hotel operated by defendant *D*, and it is charged that defendant *E* stored the drugs at a dairy. Government agents purchased morphine from the addicts who testified that they had procured the morphine from some of the defendants. Conviction of all defendants of conspiring unlaw-

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21. *People v. Torres*, 84 Cal. App. 2d 787, 192 P.2d 45 (1948).

22. 18 U.S.C. § 2385 (1952).

23. *Frankfeld v. United States*, 198 F.2d 679 (4th Cir. 1952), *cert. denied*, 344 U.S. 922 (1953).

24. *Lewis v. United States*, 11 F.2d 745 (6th Cir. 1926).

fully to possess narcotics was reversed.<sup>25</sup> The court felt that the proof disclosed only a series of isolated transactions and that there was no proof that the isolated acts were committed in furtherance of any criminal scheme. This is a 1926 case; it is questionable whether the same result would be reached today when public indignation over illicit traffic in narcotics has reached the boiling point.

Running throughout the entire field of agreements by implied mutual understanding is the possibility that the inference drawn by a jury may be upset by the appellate court's view of the circumstantial evidence. In *Robertson v. State*,<sup>26</sup> defendant was convicted of conspiring to steal and carry away a safe. There was sufficient evidence of probative value together with certain facts from which a jury might have inferred the following: (1) the safe was stolen; (2) it was broken open and abandoned; (3) defendant owned the truck in which the stolen safe was transported; (4) defendant spent a few minutes a number of days before the theft in the tavern from which the safe was stolen; (5) two of the alleged coconspirators were also in the same tavern following defendant's visit; (6) defendant was acquainted with the alleged coconspirators—they were seen together in defendant's truck on occasion, and at one time in his home; (7) one of the two alleged coconspirators had some connection with the theft. Yet the conviction was reversed because of lack of evidence showing "cooperative conduct" between defendant and either of the other two, that is, cooperative conduct to steal the safe. Only a relationship and association was established, only a suspicion of guilt was raised, and this was held to be insufficient to sustain a conviction.

In considering the subject of mens rea it is appropriate to point out that involved in many conspiracy cases, but having added significance in those concerning narcotics, is the question of whether the "seller" is a coconspirator with the "buyer." The answer depends in large measure on the nature of the commodity sold. In *United States v. Falcone*,<sup>27</sup> jobbers sold sugar to wholesale grocers who in turn sold to illicit distillers of liquor. The jobbers were found innocent of a charge of conspiring to possess and manufacture intoxicating liquors. Conversely, in *United States v. District Sales Co.*,<sup>28</sup> a corporate manufacturer of drugs, which sold morphine sulphate tablets to a physician in such volume that it was bound to know (mens rea?) he could not use them in the legitimate practice of medicine, was held a party to a conspiracy unlawfully to distribute narcotics. In distinguishing the *Falcone* case (sugar) from the *District Sales Co.* case (morphine), Justice Rutledge indicated that the former case means that one does not become a party to a conspiracy by aiding and abetting it

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25. *Graham v. United States*, 15 F.2d 740 (8th Cir. 1926), cert. denied, *O'Fallon v. United States*, 274 U.S. 743 (1927).

26. 231 Ind. 368, 108 N.E.2d 711 (1952).

27. 44 F. Supp. 623 (W.D. S.C.), aff'd, 131 F.2d 835 (4th Cir. 1942), aff'd, 319 U.S. 703 (1943).

28. 109 F.2d 579 (2d Cir.), aff'd, 311 U.S. 205 (1940).

through sales of supplies unless he knows of the conspiracy, and that the inference of such knowledge cannot be drawn merely from knowledge that the buyer will use the goods illegally.<sup>29</sup> The distinction between sugar and narcotics, the Justice felt, was like that between toy pistols or hunting rifles and machine guns. The difference is important, he concluded, in showing that the seller knows of the buyer's intended illegal use, and to show that by the sale the seller intends to further, promote, and cooperate in the illegal use.<sup>30</sup> The underlying thought is that all articles of commerce do not, by their very nature, embody the same capacity for giving the seller notice that the buyer will use them unlawfully.

## V.

### LACK OF ACTIVE PARTICIPATION.

Using the formula that mere knowledge, acquiescence, or approval of an act, without cooperation or agreement to cooperate, is not enough to constitute conspiracy, an appellate court reversed a conviction of conspiring to injure another.<sup>31</sup> The evidence against the accused indicated that he knew an acquaintance intended to assault one who had, on a previous occasion, struck the accused with a cane during an altercation. The defendant advised his friend only to slap the intended victim's mouth, whereupon the former proceeded to administer a severe beating to the latter, although not in the presence of defendant.

An alleged conspirator's inaction can operate against him as well as active participation. The uncontroverted fact that a lottery operator, who by his own admission could not stay in business without police protection, was never arrested for his operations was evidence to show that he and four policemen conspired to give bribes in return for protection.<sup>32</sup> Another case where failure to act was as incriminating as action involved a mayor who was convicted of conspiring for the unlawful establishment of slot machines in his city.<sup>33</sup> The prosecution's theory was that the machines were protected from police interference in that the mayor never permitted a raid until after a sufficient delay enabling the operator to receive notice and take down his machines. The jury was permitted to infer an agreement existed and that the mayor was a party thereto.

## VI.

### PRESENCE AND SILENCE.

Presence on the scene cannot, in itself, make one a conspirator. If the opposite were true the policeman on the beat or an innocent passerby might readily be found to be a conspirator with a "lookout" or "wheelman." Mere presence must be accompanied by a duty to speak which duty is not

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29. *United States v. District Sales Co.*, 319 U.S. 703, 710 (1943).

30. *Ibid.*

31. *State v. King*, 104 Iowa 727, 74 N.W. 691 (1898).

32. *State v. Smith*, 237 N.C. 1, 74 S.E.2d 291 (1953).

33. *Commonwealth v. Jermyn*, 101 Pa. Super. 455 (1930).

met. There must be a failure to object. Bodyguards who stand mute while their more loquacious companion accepts extorted money will not be heard to say that there was no evidence of agreement or concerted action among them.<sup>34</sup>

Three men were convicted of conspiracy to kidnap, and of kidnaping, a prostitute from a brothel in Kentucky and bringing her to Illinois, presumably to force her to ply her trade there.<sup>35</sup> When one of the defendants entered the brothel two companions accompanied him, and, each with a hand in his pocket, took a position by the door. The court recognized that three inferences could be drawn in reference to the companions: (a) they were guarding the door to keep the girl from running away and thus assisting in the kidnaping; (b) they didn't want anyone to interfere in a lovers' quarrel; (c) they were just waiting for their friend to leave. The jury drew inference (a). If a jury can draw, beyond a reasonable doubt, the inference that the accused either failed in a duty expressly to dissent, or that he stood ready to act though perhaps not called on to do so, a verdict of guilty is permissible.<sup>36</sup>

But just when solid ground is in view, the quicksand makes one final surge. For example, two cases in the Eighth and Sixth Circuits reached different results on an almost identical set of facts. In each case a driver of a liquor-laden car and another person present in the car were convicted of conspiring unlawfully to transport whiskey. No evidence was offered to prove a conspiracy other than that the two were riding in the same car. The defense, in each case, offered no testimony whatever. The Eighth Circuit<sup>37</sup> upheld the jury's right to infer that the defendants had agreed to possess and transport the whiskey, and it affirmed the conspiracy conviction. The Sixth Circuit<sup>38</sup> reversed the conspiracy conviction on the rationale that there was no evidence tending to show when or under what circumstances the "passenger" entered the car, and that while his presence in the car was a suspicious circumstance, suspicious circumstances do not constitute proof of guilt beyond a reasonable doubt. Perhaps it is of more than passing significance that in this case the driver jumped out of the car and started to run away. In any event, the latter decision clearly seems to be the better reasoned.

## VII.

### CONCLUSION.

It is fairly clear that the more serious the crime involved the less activity will be required of a defendant in order to label him a conspirator. Our initial inquiry as to how a jury distinguishes between that nebulous

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34. *People v. Walczak*, 315 Ill. 49, 145 N.E. 660 (1924).

35. *United States v. Bazzell*, 187 F.2d 878 (7th Cir.), *cert. denied*, 342 U.S. 849, *rehearing denied*, 342 U.S. 889 (1951).

36. *Gibson v. State*, 89 Ala. 121, 8 So. 98 (1890); *People v. Anderson*, 90 Cal. App. 2d 326, 202 P.2d 1044 (1949).

37. *Murry v. United States*, 282 Fed. 617 (8th Cir. 1922).

38. *Stafford v. United States*, 300 Fed. 537 (6th Cir. 1924).

something called "tacit consent" and that equally vague concept of "negative acquiescence" is largely left unanswered. We have seen that presence accompanied by silence when there is a duty to dissent is enough to show tacit consent, or mutual implied understanding.

Instead of handing the jury two labels (tacit consent and negative acquiescence) perhaps the court could instruct the jury that if there exists no reasonable hypothesis to account for the defendant's conduct except that he approved the purpose of the conspiracy and stood ready to act or forbear to act in furtherance of it, then the jury should return a verdict of guilty on the charge of conspiracy. One thing is perfectly clear. As long as the jury's prerogative to draw inferences from circumstantial evidence is protected, a defendant is indeed extended in establishing his defense. Unless he can show by extremely forceful evidence that he (a) had nothing to do with anything or anybody connected with the alleged conspiracy, or (b) is alone guilty of planning the substantive offense charged, a conspiracy conviction can almost be assured. However sad the commentary it seems to be true that if you cannot convict on anything else, given two defendants, you can convict on conspiracy.

*Joseph F. Monaghan*

TORTS—RIGHT OF PRIVACY—UNREASONABLE  
DEBT COLLECTION METHODS.

More than a decade ago Vice-Chancellor Kays of the New Jersey Court of Chancery said:

"It is now well settled that the right of privacy having its origin in the natural law, is immutable and absolute, and transcends the power of any authority to change or abolish it. It is one of the 'natural and unalienable rights' . . . ." <sup>1</sup>

Recent litigation illustrates that the right of privacy is not "immutable and absolute" as Chancellor Kays so optimistically stated. In *Housh v. Peth*,<sup>2</sup> a case of first impression,<sup>3</sup> the Ohio Supreme Court recognized the existence of the right of privacy as a separate and distinct right entitled to legal protection. However, faced with the same question, the Wisconsin Supreme Court reiterated its view that the right of privacy does not exist in Wisconsin.<sup>4</sup>

1. McGovern v. Van Riper, 137 N.J.Eq. 24, 33, 43 A.2d 514, 519 (1945).

2. 133 N.E.2d 340 (Ohio 1956).

3. The lower courts of Ohio had acknowledged the existence of the right but this was the first time the question was presented to the supreme court.

4. Yoeckel v. Samonig, 75 N.W.2d 925 (Wis. 1956).



The purpose of this Comment is to examine cursorily the nature of the right of privacy; some of the reasons for the refusal of our courts to recognize its existence and finally, to look at one group of cases in which the right of privacy has been asserted, namely, the debt collection cases.

### I.

Our first inquiry will be into the nature of the right of privacy. This much disputed right, variously defined as "the right of an inviolate personality";<sup>5</sup> "the right to be let alone";<sup>6</sup> and the "right to be free from unwarranted publicity"<sup>7</sup> was unknown to the common law. No mention of it is found in either Blackstone or Kent. While the basic concept appeared in some older English cases<sup>8</sup> the first mention of it as an independent legal right appears in an article by Samuel Warren and Louis Brandeis in the year 1890 in the Harvard Law Review.<sup>9</sup> This highly praised and widely cited article, according to one authority, ". . . enjoys the unique distinction of having initiated and theoretically outlined a new field of jurisprudence."<sup>10</sup>

In this article the authors trace the development of the law in its protection of individual rights from the days when "liberty" meant only freedom from actual physical restraint to a time when it is perceived that "a man's feelings are as much a part of his personality as his limbs."<sup>11</sup> It is further pointed out that the courts, although basing their decisions in these cases on the technical ground of infringement of property rights, breach of implied contract or breach of trust, were in reality protecting the right of an "inviolable personality" which, in a sense, transcends these property or contract rights. In conclusion it is said:

"We must therefore conclude that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world; and, as above stated, the principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense. The principle which protects personal writings, and any other productions of the intellect or emotions, is the right of privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts and to personal relation, domestic or otherwise."<sup>12</sup>

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5. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205, 211 (1890).

6. COOLEY, TORTS p. 29 (1879).

7. *Smith v. Doss*, 251 Ala. 250, 37 So.2d 118, 120 (1948); *McGovern v. Van Riper*, 137 N.J.Eq. 24, 32, 43 A.2d 514, 518 (1945).

8. *Tuck v. Priestester*, 19 Q.B.D. 639 (1887); *Pollard v. Photographic Co.*, 40 Ch. Div. 345 (1888).

9. Warren and Brandeis, *supra* note 5.

10. Larremore, *The Law of Privacy*, 12 COLUM. L. REV. 693 (1912).

11. Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 363, 364 (1915).

12. Warren and Brandeis, *supra* note 5 at 213.

The development and fruition of the right of privacy has been attributed to the "eternal youth" of the common law with its "beautiful capacity for growth" to meet the demands of a society which has become increasingly complex.<sup>13</sup> Without venturing into the jurisprudence of the relationship between the common law and the natural law, it should be noted that some authorities have asserted that the right of privacy "has its foundations in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence."<sup>14</sup>

If this right has its basis in the natural law and "consciousness" establishes its existence the question immediately arises—why have many of our courts refused or neglected to call this witness? An examination of some of the reasons for the refusal to call this witness is in order.

## II.

One reason given for refusing to recognize this right is the fear that to do so would open the floodgates of litigation.<sup>15</sup> The validity of this reason, as an answer to the assertion of the right of privacy, need not detain us. It is axiomatic that our courts should not sacrifice the rights of individuals in order to decrease crowded dockets. Conceding that spurious claims of violation of the right will arise, we must, as we have in the past, trust our judges to make short shrift of these false claims. Truly the gates of litigation would be opened but we must rely on the skill of our judges to see that only the deserving are permitted to pass through them.

Another reason frequently asserted in connection with the court's refusal to recognize the right is the lack of precedent.<sup>16</sup> Immediately the question arises—Must there be a precedent for the recognition of a right which "has its foundations in the instincts of nature." In answer to this question it has been stated that the absence of an exact precedent for an asserted right ". . . should have the effect to cause the courts to proceed with caution before recognizing the right, . . . but such absence, even for all time, is not conclusive of the question as to the existence of the right."<sup>17</sup>

While emphasizing the "eternal youth" of the common law the above quotation also explicitly recognizes the long-standing conservatism of the judiciary. This conservatism has been advanced as another reason for the

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13. Warren and Brandeis, *supra* note 5 at 193, 195. See also Nizer, *The Right of Privacy: A Half Century's Developments*, 39 MICH. L. REV. 526 (1941).

14. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 194, 50 S.E. 68, 69 (1905). See also McGovern v. Van Riper, 137 N.J.Eq. 24, 33, 43 A.2d 514, 519 (1945); Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 725, 731 (1937).

15. Roberson v. Rochester Folding Box Co., 171 N.Y. 540, 545, 64 N.E. 442, 443 (1902).

16. Brunson v. Ranks Army Store, 161 Neb. 519, 73 N.W.2d 803, 806 (1955); Milner v. Red River Valley Pub Co., 249 S.W. 2d 227, 229 (Tex. Civ. App. 1952).

17. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 194, 50 S.E. 68, 69 (1905). See also Roberson v. Rochester Folding Box Co., 171 N.Y. 540, 561, 64 N.E. 442, 449 (1902) (dissenting opinion).

reluctance of the courts to accept the right of privacy.<sup>18</sup> A brief examination of the protection afforded personal rights in the equity courts illustrates the adverse effect which judicial conservatism has had on the development of the right of privacy.

The leading case of *Gee v. Pritchard*,<sup>19</sup> established the rule that equity provides no protection against interferences with personal rights but only property rights. While this case has been the subject of much criticism<sup>20</sup> and many inroads have been made on its doctrine, it has not been completely abandoned.<sup>21</sup> In an almost blind adherence to the dictum of Lord Eldon in the *Gee* case the courts have conjured up property rights in order to permit equity to grant the desired relief. The cases abound with such statements as "the term 'property right' is not to be taken in any narrow sense."<sup>22</sup> Even the leading case of *Vanderbilt v. Mitchell*,<sup>23</sup> which led the attack on this restricted notion of equity jurisdiction, was decided on the "technical basis that the jurisdiction we are exercising is the protection of property rights."<sup>24</sup>

Judicial conservatism and adherence to precedent have long been associated with the common-law system and have played an important part in its development. However, these two principles must not be permitted to impede the development of the common law. They must, on occasion, give way to more aggressive and abrupt changes in the law. The words of Justice Cobb of the Supreme Court of Georgia clearly illustrate this point:

"The valuable influence upon society and upon the welfare of the public of the conservatism of the lawyer, whether at the bar or upon the bench, cannot be overestimated; but this conservatism should not go to the extent of refusing to recognize a right which the instincts of nature prove to exist, and which nothing in judicial decision, legal history, or writings upon the law can be called to demonstrate its non-existence as a legal right."<sup>25</sup>

It might also be noted that concern over precedent in the area of a developing right of privacy seems particularly futile. The varied applications of which the doctrine is susceptible makes attempts to find exact precedent almost ludicrous.

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18. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 213, 50 S.E. 68, 78 (1905).

19. 2 Swan. 402, 36 Eng. Rep. 670 (1818).

20. Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 668-673 (1916); Note, 25 MICH. L. REV. 889, 890 (1927).

21. *Bank v. Bank*, 180 Md. 254, 23 A.2d 700 (1942); *Chappell v. Stewart*, 82 Md. 323, 33 Atl. 542 (1896). See also McCLINTOCK, EQUITY § 148 (2d ed. 1948).

22. *Edison v. Edison Polyform Mfg. Co.*, 73 N.J.Eq. 136, 144, 67 Atl. 392, 395 (1907).

23. 72 N.J.Eq. 910, 67 Atl. 97 (1907).

24. *Id.* at 919, 67 Atl. at 100.

25. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 213, 50 S.E. 68, 78 (1905).

Some courts have refused to recognize the right of privacy “. . . for fear that they may thereby invade the province of the lawmaking power. . . .”<sup>26</sup> The Wisconsin court in rejecting the right said:

“In view of what we said and held in the two cases referred to with respect to our lack of power to create a right for the violation of which recovery was there sought, as it is in this case, and particularly because of the refusal of the legislature at two sessions to recognize even a limited right of privacy, we are compelled to hold again that the right does not exist in this state.”<sup>27</sup>

In a case as strong as this perhaps we can not be too critical of the court for bowing to its fear of the label “judicial legislation.” However, the assertion that “such a right should be provided for by action of our legislature and not by judicial legislation on the part of our courts” has been found in less strong cases.<sup>28</sup>

The ultimate solution to the problem lies in a candid recognition of the fact that judges do legislate and that many of our better laws have been promulgated through this process. The words of Professor Corbin reflect this view:

“It is the function of our courts to keep the doctrines up to date with the mores by continual restatement and by giving them a continually new content. This is judicial legislation, and the judge legislates at his peril. Nevertheless, it is the necessity and duty of such legislation that gives to judicial office its highest honor; and no brave and honest judge shirks the duty or fears the peril.”<sup>29</sup>

In the case of *Brunson v. Ranks Army Store*, the court said that it was necessary and desirable that a right such as this be provided by the legislature “in view of the nature of the right . . . under which right not even the truth of the allegations is a defense.”<sup>30</sup>

A discussion of the relationship of the law of libel and slander to the right of privacy is both unnecessary and beyond the scope of this Comment. It is sufficient to note that it has been asserted that the right of privacy should have a narrow application because the law of libel and slander provides adequate protection to the individual.

The inadequacy of such reasoning is clearly demonstrated in the leading case of *Brents v. Morgan*.<sup>31</sup> The defendant in this case placed a five foot by eight foot sign in his garage window which stated that “Dr. Morgan

26. *Id.* at 193, 50 S.E. at 69.

27. *Yoeckel v. Samonig*, 75 N.W.2d 925, 927 (Wis. 1956).

28. *Brunson v. Ranks Army Store*, 161 Neb. 519, 73 N.W.2d 803, 806 (1955).

29. Comment, 29 *YALE L. J.* 767, 771, 772 (1920). See also *CARDOZO, THE GROWTH OF THE LAW*, p. 133 (1924).

30. 161 Neb. 519, 73 N.W.2d 803, 806 (1955). See also *Judevine v. Benzies-Montayne Fuel & Warehouse Co.*, 222 Wis. 512, 527, 269 N.W. 295, 302 (1936).

31. 221 Ky. 765, 299 S.W. 967 (1927).

owes an account here of \$49.67. And if promises would pay an account this account would have been settled long ago." The debt was in fact owed and Kentucky had a statute making truth a complete defense to an action for libel. Yet the court in rendering its judgment held that the sign constituted an invasion of the plaintiff's right of privacy.

Some courts have declined to recognize the right on the ground that it would result in a restriction of the first amendment liberties of speech and press.<sup>32</sup> The answer to this lies in a recognition that neither the right of free speech nor the right of privacy is unlimited. Each limits the other. However, the limitation is not upon the *existence* of the right but only the *extent* of it.<sup>33</sup> The case of *Pavesich v. New England Life Ins. Co.*,<sup>34</sup> throws some light on the problem:

"The right to speak and the right of privacy have been coexistent. Those to whom the right to speak and write and print is guaranteed must not abuse this right, nor must one in whom the right of privacy exists abuse this right. The law will no more permit an abuse by the one than by the other. Liberty of speech and of the press is and has been a useful instrument to keep the individual within limits of lawful, decent and proper conduct; and the right of privacy may well be used within its proper limits to keep those who speak and write and print within the legitimate bounds of the constitutional guarantees of such rights. One may be used as a check upon the other, but neither can be lawfully used for the other's destruction."<sup>35</sup>

Finally, the objection has been advanced that where the injury, as in the case of a violation of one's right of privacy, is only to the feelings or emotions or consists only of mental anguish, the law will offer no redress. Fifty or seventy-five years ago such an objection might be feasible. Today such an objection would be ludicrous. As early as 1936 Judge Calvert Magruder said:

"All in all, it is fair to say that the courts have already given extensive protection to feelings and emotions. They have shown a notable adaptability of technique in redressing the more serious invasions of this important interest of personality. No longer is it even approximately true that the law does not pretend to redress mental pain and anguish 'when the unlawful act complained of causes that alone.'"<sup>36</sup>

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32. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 540, 556, 64 N.E. 442, 447 (1902). See also *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 202, 50 S.E. 68, 73 (1905).

33. *Ragland, The Right of Privacy*, 17 Ky. L. J. 85 (1929).

34. 122 Ga. 190, 50 S.E. 68 (1905).

35. *Id.* at 202, 205, 50 S.E. at 73, 74.

36. Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1067 (1936).

In contrast to the refusal of some to recognize the right of privacy because it involves only injury to the feelings, Justice Schwartz in the case of *Eick v. Perk Dog Food Co.*, said: "Far from being a brake on the development of the right of privacy, the law with respect to actions for the infliction of mental suffering threatens to surpass and absorb the privacy cases in its expansion."<sup>37</sup>

As if to silence this objection forever one authority has said that there is no real problem as to whether relief should be given for mental suffering but only the practical problem of assessing damages so as to avoid "pure guesswork."<sup>38</sup>

### III.

The typical case involving a violation of the right of privacy is the unauthorized use of a person's name or picture for advertising purposes. Due to the prevalence of such cases some states have felt compelled to legislate in this area.<sup>39</sup> However, the doctrine has also been applied in the so-called "debt collection" cases. While the volume of litigation in this area has been greatly reduced by the enactment of a federal statute<sup>40</sup> prohibiting the mailing of debt notices designed to attract attention the problem of the overzealous debt collector remains.

A creditor may pursue reasonable methods in an effort to collect a debt.<sup>41</sup> The problem lies in determining the reasonableness of the collection methods. A single written or oral notification to the debtor is clearly reasonable. A number of written or oral notices may also be reasonable. The creditor or his collection agency runs into trouble when the court finds, in the words of the Ohio Supreme Court, "a deliberately initiated systematic campaign of harassment."<sup>42</sup> Still the problem remains of distinguishing between reasonable methods and a "deliberately initiated systematic campaign of harassment." The Nebraska Supreme Court has thrown some light on the problem in holding that "the distinction seems to be in all of the cases as between an act or series of acts done wilfully and purposefully or maliciously and acts which are merely the result of negligence."<sup>43</sup> Surely this language presents no conclusive rule capable of use in all situations. However, it furnishes a guide to be used by the trier of fact in determining the reasonableness of the collection methods employed in a given case.

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37. 347 Ill. App. 293, 106 N.E.2d 742, 747 (1952).

38. Moreland, *The Right of Privacy Today*, 19 Ky. L. J. 99, 120 (1931).

39. N.Y. CIV. RIGHTS LAW §§ 50, 51; UTAH CODE ANN. §§ 76-4-7 to 76-4-9 (1953); VA. CODE ANN. § 8-650 (1950).

40. 18 U.S.C. § 335 (1952).

41. *Bennett v. Collection Service Co.*, 214 Iowa 1303, 242 N.W. 25 (1932); *LaSalle Extension University v. Fogarty*, 126 Neb. 457, 253 N.W. 424 (1934).

42. *Housh v. Peth*, 133 N.E.2d 340, 344 (Ohio 1956).

43. *LaSalle Extension University v. Fogarty*, 126 Neb. 457, 253 N.W. 424, 426 (1934).

A device frequently encountered in debt collection cases is notifying the debtor's employer of the existence of the debt, and in some cases the solicitation of his help in the collection of it. It is generally held that notifying the debtor's employer of the fact the debt is owed is not, of itself, an invasion of privacy.<sup>44</sup> The reasoning of the courts is illustrated in the following words:

"It must be borne in mind that an employer has a natural and proper interest in the facts relative to debts owed by his employees. . . . He has the right to hire only those who pay their debts and may take a pardonable pride in the reputation of his employees in that respect."<sup>45</sup>

In addition the courts have said that informing the debtor's employer of the existence of the debt is not giving undue or oppressive publicity to the debt. The fact that in the usual course of business the communication may pass through the hands of clerks or stenographers in the employment of the addressee or the writer does not alter the rule. In *Patton v. Jacobs*, the court said:

"He [the employer] is not in a category with the general public which cannot have any legitimate interest in a purely private matter between a creditor and a debtor.

"In other words an employee has no right of privacy as against his employer in the matter of the debts he owes and a creditor who gives such information to the employer, unaccompanied by slanderous, libelous, defamatory or coercive matter, incurs no liability in so doing."<sup>46</sup>

In objection to the right of the creditor to notify the debtor's employer of the debt it has been suggested that the legislatures in passing garnishment statutes<sup>47</sup> intended that creditors resort to them rather than coerce payment by informing the debtor's employer.<sup>48</sup> The assumption may be reasonable but it does not solve the problem. Frequently the cost of initiating the garnishment proceedings is prohibitive in comparison to the amount of the debt. Thus the notifying of the debtor's employer may well be the creditor's last resort.

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44. *Patton v. Jacobs*, 118 Ind. App. 358, 78 N.E.2d 789 (1948); *Lewis v. Physicians and Dentists Credit Bureau*, 27 Wash.2d 267, 177 P.2d 896 (1947).

45. *Patton v. Jacobs*, 118 Ind. App. 358, 78 N.E.2d 789, 792 (1948). *Contra*, *Hawley v. Professional Credit Bureau*, 76 N.W.2d 835, 843 (Mich. 1956) (dissenting opinion).

46. *Patton v. Jacobs*, 118 Ind. App. 358, 78 N.E.2d 789, 792 (1948).

47. ILL. ANN. STAT. c.62, § 4, 14 (Smith-Hurd 1954); MO. ANN. STAT. § 525.290, 525.300 (Supp. 1954).

48. Note, 40 KY. L. J. 456 (1952).

## CONCLUSION.

The state of the law in regard to the right of privacy has recently been described as “. . . that of a haystack in a hurricane.”<sup>49</sup> However, there are indications that the winds are subsiding and reclamation process has begun. Two such indications are found in the recent recognition of the right by the states of Ohio and Iowa.<sup>50</sup> Most of the important jurisdictions which have passed on the question have affirmed the existence of the right.<sup>51</sup> In this age of concern over civil rights and individual freedom it can be predicted that the list of states according recognition to the “right to be let alone” will continue to grow.

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WAGES AND HOURS—PORTAL TO PORTAL ACT OF 1947—  
PRELIMINARY AND POSTLIMINARY ACTIVITIES.

The problem of portal-to-portal pay has arisen under the provisions of the Fair Labor Standards Act of 1938.<sup>1</sup> Section 7(a)<sup>2</sup> of this act provides that any employee engaged in commerce or in the production of goods for commerce, shall not be employed in excess of forty hours a week, unless such employee is compensated at a rate not less than one and one-half times his regular rate of pay for all hours worked in excess of forty.<sup>3</sup> The statute did not define compensable time, although section 3(g)<sup>4</sup> stated broadly that to employ “includes to suffer or permit to work.” A great deal of controversy developed when employees began to claim compensation for activities preliminary or postliminary to their principal duties, such as changing clothes, washing up, or traveling to and from their usual work-place.<sup>5</sup>

Portal-to-portal pay was judicially established by the United States Supreme Court in the leading decision of *Tennessee Coal, Iron & R.R. Co. v. Mucoda Local 123*,<sup>6</sup> where it was held that iron-ore workers were “at work” within the meaning of the act while they were engaged in under-

49. *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 485 (3rd Cir. 1956).

50. *Bremmer v. Journal-Tribune Publishing Co.*, 76 N.W.2d 762 (Iowa 1956); *Housh v. Peth*, 133 N.E.2d 340 (Ohio 1956). See also PA. STAT. ANN. tit. 12 § 2090.1 (Supp. 1955); *Hull v. Curtis Publishing Co.*, 125 A.2d 644 (Pa. 1956).

51. PROSSER, TORTS § 97 (2d ed. 1955).

1. 52 STAT. 1060 (1938), as amended, 29 U.S.C. § 203 (1952).

2. 52 STAT. 1063 (1938), as amended, 29 U.S.C. § 207 (1952).

3. See Ralston, *Portal to Portal Pay*, 21 TUL. L. REV. 407 (1947).

4. 52 STAT. 1060 (1938) (later amended by 60 STAT. 1095, 29 U.S.C. § 203 (1952)).

5. Livengood, *Compensable Working Time Under the Fair Labor Standards Act*, 30 N.C.L. REV. 113 (1952).

6. 321 U.S. 590 (1944).



ground travel between the mine shaft and the working area of the mine. In that case, "work" was defined as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."<sup>7</sup>

Relying upon the above definition and the principle of that case, in addition to the case of *Jewell Ridge Coal Corp. v. Local 6167, United Mine Workers*,<sup>8</sup> the Supreme Court rendered a far-reaching decision in *Anderson v. Mt. Clemens Pottery Co.*,<sup>9</sup> by holding that the minimum time necessarily spent in walking between the time clock and the employees regular workplace, as well as in various other "make-ready" activities,<sup>10</sup> must be included in compensable working time. In reaching its decision, the Court reasoned as follows:

"Such time was under the complete control of the employer, being dependent solely upon the physical arrangements which the employer made in the factory. Those arrangements in this case compelled the employees to spend an estimated two to twelve minutes daily, if not more, in walking on the premises. Without such walking on the part of the employees, the productive aims of the employer could not have been achieved."<sup>11</sup>

This decision evoked a flood of lawsuits demanding portal-to-portal pay in the amount of some six billion dollars. The potential effect of these suits on the economy of the nation led to the enactment of the Portal to Portal Act of 1947.<sup>12</sup>

The immediate effect of the act was to relieve employers of certain liabilities under three federal statutes<sup>13</sup> by barring claims existing prior to its passage.<sup>14</sup> Preliminary and postliminary activities were rendered non-compensable unless it could be established that such activities were recognized by custom, contract or practice and considered compensable prior to the passage of the act.<sup>15</sup> The entire act, especially this retroactive provision, has withstood numerous constitutional attacks.<sup>16</sup>

7. *Id.* at 598.

8. 325 U.S. 161 (1945).

9. 328 U.S. 680 (1946) On remand the employer prevailed and the employees recovered nothing. 69 F. Supp. 710 (E.D. Mich. 1947).

10. *E.g.*, putting on overalls, taping or greasing arms, preparing equipment, turning switches, laying out tools, and opening windows.

11. 328 U.S. 680, 691 (1946).

12. 61 STAT. 84 (1947), 29 U.S.C. § 251-263 (1952).

13. Fair Labor Standards Act, 52 STAT. 1060 (1938), as amended, 29 U.S.C. § 201 (1952); Davis-Bacon Act, 46 STAT. 1494 (1931), as amended, 40 U.S.C. § 276a (1952); Walsh-Healey Public Contracts Act, 49 STAT. 2036 (1936), as amended, 41 U.S.C. § 35 (1952).

14. 61 STAT. 85 (1947), 29 U.S.C. § 252 (1952).

15. *McComb v. C. A. Swanson & Sons*, 77 F. Supp. 716 (D. Neb. 1948).

16. *Frank v. Wilson & Co.*, 172 F.2d 712 (7th Cir. 1949); *Tipton v. Bearl Spratt Co.*, 175 F.2d 432 (9th Cir. 1949); *Battery Workers' Union, Local 113 v. Electric Storage Battery Co.*, 78 F. Supp. 947 (E.D. Pa. 1948); *Plummer v. Minneapolis—Mo Line Power Implement Co.*, 76 F. Supp. 745 (D. Minn. 1948); *Sinclair v. United States Gypsum Co.*, 81 F. Supp. 365 (W.D.N.Y. 1948).

Generally, determination of hours worked is now controlled by section 4 of the Portal Act,<sup>17</sup> supplemented by section 3(o) of the Fair Labor Standards Act as amended in 1949.<sup>18</sup> However, many of the older "working time" tests developed by the Wage and Hour Administrator and the courts remain controlling. Neither the Portal Act nor the 1949 amendment to the Fair Labor Standards Act affect the compensability of the employees' time during their regular working hours. In defining working time, both these provisions relate solely to incidental activities before or after the regular workday.<sup>19</sup>

### I.

#### PRINCIPAL ACTIVITIES.

Section 4 of the Portal Act<sup>20</sup> excludes from the concept of "hours worked," those functions preliminary or postliminary to the employees' principal duties, unless such functions are compensable by contract, custom or practice. This necessitates an understanding of the term "principal activity" as distinguished from that which is preliminary or postliminary. Neither the presence nor the absence of a contract, custom or practice can affect the compensable status of the employees' principal activities under the Fair Labor Standards Act, although existing compensation practices may help to establish what constitutes a "principal activity" as that term is used in the Portal to Portal Act.<sup>21</sup>

The Wage and Hour Administrator in attempting to define the term includes those functions which the employee is engaged to perform; any work of consequence regardless of when performed; such activities as are indispensable to the performance of productive work; and all labor which is an integral part of the principal activity.<sup>22</sup> It has also been said that the term as used in section 4 clearly refers to the productive work which is the object of the employment.<sup>23</sup> Consequently, work performed before or after the regular working period, which is so closely connected with the principal activities as to form an integral part thereof, does not come within the scope of the Portal Act, and the rules evolved under the Fair Labor Standards Act still apply.

### II.

#### PRELIMINARY AND POSTLIMINARY ACTIVITIES.

The Wage and Hour Administrator defines preliminary activity as "an activity engaged in by an employee before commencement of his principal

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17. 61 STAT 86 (1947), 29 U.S.C. § 254 (1952).

18. 52 STAT. 1060 (1938), as amended, 29 U.S.C. §203 (1952).

19. 29 C.F.R. § 790.6(b) (1949).

20. 61 STAT. 86 (1947), 29 U.S.C. § 254 (1952).

21. Livengood, *supra* note 5.

22. 29 C.F.R. § 790.8 (1949). See also 93 CONG. REC. 2296-2300 (1947).

23. McComb v. C. A. Swanson & Sons, 77 F. Supp. 716 (D. Neb. 1948); Berkowitz v. All Service Laundry Corp., 276 App. Div. 870, 93 N.Y.S.2d 414 (2d Dep't 1949).

activity" and, conversely, he defines postliminary as meaning "activity engaged in by an employee after completion of his principal activity."<sup>24</sup>

The Portal to Portal Act does not establish any rules for determining which activities are preliminary and postliminary. The absence of congressional regulation in this sphere makes it necessary to turn to the rulings and interpretations of the Wage and Hour Administrator and to court decisions which relate to specific activities performed during the workday. The precedential value of decisions relating to the compensability of time spent on incidental activities, which were rendered prior to the enactment of the Portal Act should not be overlooked. However, cases which involved activities performed during the regular workday or those affected by a contract, custom or practice are of no assistance in predicting the result of cases of first impression under the Portal Act as they are not within the scope of the statute.

#### A.

##### Traveling Time.

Section 4(a)(1) of the Portal Act<sup>25</sup> designates as noncompensable such preliminary and postliminary activities as "walking, riding or traveling to and from the actual place of performance of the principal activity which the employee is employed to perform." The language of this section and the legislative history of the act indicate that the walking, riding or traveling time referred to in this section is that which takes place in the course of the employee's trips between his home and the actual place where he works. However, such walking, riding and traveling does not include travel from the place of performance of one principal activity to the place of performance of another, nor does it include travel during the employee's regular working hours.<sup>26</sup>

Ordinarily, the travel to which Section 4 relates includes travel by the employee on the employer's premises until he reaches the area of his principal employment and return travel at the end of the workday. For example, the time spent in walking to and from a dressing room to change into required uniforms is not compensable.<sup>27</sup> Likewise, an oil pumper whose work began and ended at the place of performance was held not entitled to compensation for the time spent in going to and coming from his home.<sup>28</sup> The Administrator has, however, made it clear that this section should not be applied to such persons as repairmen, messengers, meter readers or similar outside men.<sup>29</sup> This view appears to be in harmony with a number of cases decided under the Fair Labor Standards Act

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24. 29 C.F.R. § 790.7(b) (1949).

25. 61 STAT. 86 (1947), 29 U.S.C. § 254 (1952).

26. 29 C.F.R. § 790.7(c) (1949).

27. *McComb v. C.A. Swanson & Sons*, 77 F. Supp. 716 (D. Neb. 1948).

28. *Blakely v. Fresno Oil Co.*, 208 S.W.2d 902 (Tex. Civ. App. 1948) (The Court stated that this case didn't involve portal to portal time).

29. 29 C.F.R. § 790.7(c) (1949).

which involved truck drivers. Time spent by truck drivers and helpers in traveling from the employer's place of business to freight terminals to pick up a cargo, was held to be compensable,<sup>30</sup> as was time, regardless of any employment contract to the contrary, during which employees were required to drive trucks and equipment from the work site to the employer's warehouses before they were relieved of their duties.<sup>31</sup>

Prior to the passage of the Portal Act, much of the litigation involving travel time was centered around the question of transportation furnished by the employer. Time spent by employees in traveling to and from places of work on transportation furnished by the employer as an optional accommodation was, as a general rule, held not to be hours worked.<sup>32</sup> However, one decision under the Fair Labor Standards Act<sup>33</sup> held such travel to be compensable when it was necessary in the conduct of the employer's business, and the physical or mental exertion controlled by the employer met the test of "work" as set forth in the *Tennessee Coal & Iron* case.<sup>34</sup> In addition, the Administrator has ruled that time spent in traveling in company boats to and from work would be compensable time if the employees were required by the employer's orders or by the lack of a practical alternative to utilize the transportation.<sup>35</sup> The validity of these interpretations would now seem to be questionable in the light of the specific language of section 4.

Under the Portal Act, the Administrator has ruled that riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted would be considered preliminary or postliminary activity.<sup>36</sup> This statement by the Administrator indicates that the "work" test has not survived the Portal Act. However, the time required of a logger to carry a portable saw or other heavy equipment to the cutting area is said to be compensable. In such a situation, the traveling is said not to be separable from the simultaneous performance of his assigned work.<sup>37</sup> The situation where men, after reporting for work, are transported from one place to another where they continue working is not within the scope of the Portal Act because such activity is not preliminary or postliminary to the workday proper. Such cases would be decided

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30. *Walling v. Dunbar Transfer & Storage Inc.*, 7 Labor Cases ¶ 61,565 (W.D. Tenn. 1943).

31. *Walling v. Mid-Continent Pipe Line Co.*, 143 F.2d 308 (10th Cir. 1944); *Walling v. Partee Lumber Co.*, 8 Labor Cases ¶ 62,351 (W.D. Ark. 1944).

32. *Harrington v. Empire Construction Co.*, 71 F. 324 (D. Md. 1947); *Bulot v. Freeport Sulphur Co.*, 45 F. Supp. 380 (E.D. La. 1942); *Walling v. Dierks Lumber & Coal Co.*, 6 Labor Cases ¶ 61,432 (W.D. Ark. 1942); *Walling v. Peavy-Wilson Lumber Co.*, 49 F. Supp. 846 (W.D. La. 1942); *Dollar v. Caddo River Lumber Co.*, 43 F. Supp. 822 (W.D. Ark. 1941).

33. *Walling v. Anaconda Copper Mine Co.*, 66 F. Supp. 913 (D. Mont. 1946).

34. 321 U.S. 590 (1944).

35. 3 CCH LAB. L. REP. (4th ed.) ¶ 25,345.942, citing Wage and Hour Opinion Letter, July 17, 1941.

36. 29 C.F.R. § 790.7(f) (1949).

37. 29 C.F.R. § 790.7(d) (1949).

under the Fair Labor Standards Act, and the Administrator has expressed the view that such time would be considered hours worked.<sup>38</sup>

Walking time was among the litigated questions which flooded the courts prior to the Portal to Portal Act. Time spent by employees traveling from the gate of the plant to the time clock, thence to the work site, and time so spent at the end of the day was held to constitute hours worked.<sup>39</sup> One court did recognize that two and one-half minutes required for such walking would not be compensable.<sup>40</sup> The climax of this litigation was the now famous *Mt. Clemens Pottery* case wherein it was said that if an employee must walk to work on the employer's premises following punching of the time clock, and walk back to the time clock at the end of his shift, his workweek should include the minimum time necessarily spent in walking, at an ordinary rate, along the most direct route between the time clock and the place of work.<sup>41</sup>

The weight and effect of these decisions was completely erased by the passage of the Portal to Portal Act. Section 4<sup>42</sup> expressly makes such time preliminary and postliminary to the principal activity, irrespective of whether such walking occurs on or off the premises of the employer, or before or after the employee has checked in or out. The phrase, "actual place of performance," as used in section 4(a), thus emphasizes that the ordinary travel at the beginning and end of the workday to which the section relates, includes the time of the employee's travel on the employer's premises until he reaches the area where he commences his principal activity.<sup>43</sup>

#### B.

##### Showering and Changing Clothes.

Time spent in changing clothes, at the start and finish of the workday, constituted hours worked under the Fair Labor Standards Act<sup>44</sup> only if the employees were required to make such a change.<sup>45</sup> The 1949 amendments added a new rule with respect to such activities. Under section 3(o), time so spent need not be counted as hours worked if "excluded from measured working time during the week involved by the express terms of, or by custom or practice under a bona fide collective bargaining agreement applicable to the particular employee."<sup>46</sup>

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38. 3 *id.* ¶ 25, 345,946, citing Wage and Hour Opinion Letter, July 21, 1942, March 24, 1941.

39. *Lasater v. Hercules Powder Co.*, 73 F. Supp. 264 (E.D. Tenn. 1947), *aff'd*, 171 F.2d 263 (6th Cir. 1948); *Ulle v. Diamond Alkali Co.*, 10 Labor Cases ¶ 62,813 (N.D. Ohio 1945).

40. *McIntyre v. Joseph E. Seagram & Sons*, 72 F. Supp. 366 (W.D. Ky. 1947).

41. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

42. 61 STAT. 86 (1947), 29 U.S.C. § 254 (1952).

43. 29 C.F.R. § 790.7(e) (1949).

44. *Alberts v. Porter*, 10 Labor Cases ¶ 62,809 (N.D. Ill. 1945); *Ulle v. Diamond Alkali Co.*, 10 Labor Cases ¶ 62,813 (N.D. Ohio 1945).

45. 3 CCH LAB. L. REP. (4th ed.) ¶ 25,345,915, citing Wage and Hour Release R-1739, February 5, 1942.

46. 52 STAT. 1060 (1938), as amended, 29 U.S.C. § 203 (1952).

Under normal conditions, changing clothes outside of the regular workday is an activity for which the employer is relieved of responsibility by the Portal Act.<sup>47</sup> However, if the employee cannot perform his principal activities without putting on certain clothes, *changing* on the employer's premises is an integral part of the principal activity, and is subject to the rules laid down under the Fair Labor Standards Act without regard to the Portal Act.<sup>48</sup> Under section 4, employers are also relieved from liability for time spent by employees in washing up or showering, before or after the regular workday, when that activity is performed under conditions normally present.<sup>49</sup>

What constitutes "normal conditions" is the question which is left open. The Court of Appeals for the Second Circuit has held that cosmetic workers were precluded by section 4 from recovering overtime compensation for the time spent in changing clothes and washing up after their regular working time had ended.<sup>50</sup> Therefore, the fact that a specific type of uniform is worn which is not absolutely necessary to the performance of the work, does not hinder the operation of the statute. Relief was likewise denied in a case where employees in the coating department of a carbon paper manufacturer spent five minutes upon arrival at the place of employment to change into work clothes, and twenty minutes before leaving to bathe and change clothes.<sup>51</sup> In rendering its decision, the court stated:

"Here the clothes changing and bathing, while highly desirable, cannot be said to be indispensable to the effective performance of the work for which these employees were hired."<sup>52</sup>

An indication of what would not be considered normal conditions was given by the United States Supreme Court in the recent case of *Steiner v. Mitchell*.<sup>53</sup> In that case, workers in a battery plant had to use dangerously caustic and toxic materials and were compelled by circumstances, including vital considerations of health, to change clothes and shower in facilities which the employer was required by state law to provide. Such activities were held to be an integral and indispensable part of the principal activity and compensable as such. The Court of Appeals for the Eighth Circuit, in one instance, has refused to draw an analogy between the facts of this case and one involving the employees of a munitions plant.<sup>54</sup> In the latter case, changing clothes and the taking of showers were required of the

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47. 29 C.F.R. § 790.7(g) (1949).

48. 29 C.F.R. § 790.8(c) (1949).

49. 29 C.F.R. § 790.7(g) (1949).

50. *Bonner v. Elizabeth Arden Inc.*, 177 F.2d 703 (2d Cir. 1949).

51. *Mitchell v. Southeastern Carbon Paper Co.*, 228 F.2d 934 (5th Cir. 1955).

52. *Id.*, at 938.

53. 350 U.S. 247 (1956).

54. *Ciernoczolowski v. Q.O. Ordnance Corp.*, 228 F.2d 929 (8th Cir. 1956) (Judgment was reaffirmed on rehearing granted to a limited number of claims of production line operators. 233 F.2d 902 (8th Cir. 1956)).

employees to prevent sparks which would endanger lives and also to protect the employees' health. In holding such activities to be preliminary and postliminary, the court stated:

"We do not understand, however, that the import of *Steiner v. Mitchell* is that those facts would compel the conclusion that in every case where the changing of clothes was required as a protection to the health of the employees the activity was a part of the principal activity if other cogent facts were present which prevented a finding that the greater weight of the evidence established the hypothesis that the activities in question were principal activities."<sup>55</sup>

In addition, they said that "the necessity of an activity to the performance of the principal activity will not alone make the former a part of the principal activity."<sup>56</sup>

From the foregoing, it seems that no rule or guide has evolved from the decided cases. Aside from an apparent desire on the part of the courts to fulfill the purpose of the Portal Act in limiting recovery, each case seems to rest upon its own facts. Even if the interpretation of section 4 does not preclude recovery of compensation for such activities, the doctrine of *de minimis non curat lex* has been held applicable to defeat the liability of an employer where preliminary activities consumed approximately four minutes and postliminary activities between five and six minutes.<sup>57</sup>

### C.

#### Waiting Time.

Under the Fair Labor Standards Act,<sup>58</sup> time spent by employees in waiting for work was not considered hours worked where they were free to report or not to report as they saw fit.<sup>59</sup> Time spent by an employee in remaining after working hours at the request of the foreman to discuss the proficiency of his work was said by the Administrator to be hours worked regardless of whether the employee's work was satisfactory or not.<sup>60</sup> Similarly, where an employee was required to stand in line a considerable length of time to punch a time clock, the time so spent was said to be compensable,<sup>61</sup> although a period of only three minutes a day waiting in line was held not to be working time.<sup>62</sup>

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55. 228 F.2d 929, 932 (8th Cir. 1956).

56. *Id.* at 933.

57. *McComb v. C.A. Swanson & Sons*, 77 F. Supp. 716 (D. Neb. 1948).

58. 52 STAT. 1060 (1938), as amended, 29 U.S.C. § 201 (1952).

59. *Gordon v. Paducah Ice Mfg. Co.*, 41 F. Supp. 980 (W.D. Ky. 1941); *Jackson v. Mid-Continent Petroleum Corp.*, 6 Labor Cases ¶ 61,208 (E.D. Okla. 1942).

60. 3 CCH LAB. L. REP. (4th ed.) ¶ 25,345.978, citing Wage and Hour Opinion Letter, March 13, 1941.

61. 3 *id.* ¶ 25,345.972, citing Wage and Hour Opinion Letter, April 9, 1941.

62. *Cameron v. Bendix Aviation Corp.*, 65 F. Supp. 510 (E.D. Pa. 1946).

The Administrator has stated that under the Portal Act checking in and out of a plant and waiting in line to do so, are preliminary and post-preliminary activities.<sup>63</sup> Waiting to start work is also a preliminary activity when the employee voluntarily arrives earlier than is either required or expected. However, where the employee is required to report at a particular hour at the place where he performs his principal activity, but for some reason beyond his control there is no work for him to perform, waiting for work is an integral part of the principal activity. The difference in the two situations is that in the second, the employee was engaged to wait while in the first, he waited to be engaged.<sup>64</sup> The claims of a foreman and an assistant foreman were not barred by the act where they were requested to report at least thirty minutes prior to the start of the shift to confer with the foreman and assistants about to go off duty as to the progress of work and problems to be encountered or anticipated. Recovery was also had for time spent by them in passing out gate passes at the end of the shift.<sup>65</sup> In a case in which rural telephone operators recovered for waiting and sleeping time, the court made the following observation regarding a general rule governing these cases:

"It is not possible to lay down any arbitrary rule as to whether time spent in waiting or even sleeping time is or is not working time. There are many attending circumstances to be taken into consideration, among them the number of consecutive hours the employee is subject to call without being required to perform active work, the extent to which he is free to engage in personal activities during periods of idleness, whether he is required to remain on or about the premises during such time, or whether he can leave work where he may be reached in the event of a call and is not required to remain in a particular place."<sup>66</sup>

#### D.

##### Miscellaneous Activities.

Where necessities of the business require the employee, after arriving at the work place, to engage in certain activities preliminary to the commencement of actual production work, cases under the Fair Labor Standards Act held that the employer was required to include such time in hours worked unless it was insubstantial and insignificant.<sup>67</sup> Less than ten minutes was held to be within the doctrine of *de minimis*<sup>68</sup> while ten to

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63. 29 C.F.R. § 790.7(g) (1949).

64. 29 C.F.R. § 790.7(h) (1949).

65. *United States Steel Corp. v. Burkett*, 192 F.2d 489 (4th Cir. 1951).

66. *Central Missouri Telephone Co. v. Comwell*, 170 F.2d 641 (8th Cir. 1948).

67. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946); *United States v. Ewald Iron Co.*, 67 F. Supp. 67 (W.D. Ky. 1946); *Walling v. Frank*, 62 F. Supp. 261 (W.D. Ky. 1945); *Philpott v. Standard Oil Co.*, 7 Labor Cases ¶ 61,697 (N.D. Ohio 1943).

68. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).



twenty minutes was held compensable.<sup>69</sup> Employees engaged as plant patrolmen or guards, were held entitled to compensation for the time required to be spent in excess of the regular working period in certain preliminary activities including standing roll call and inspection, receiving instructions, orders, and assignments and attending lectures and meetings.<sup>70</sup>

The test of compensability under the Portal to Portal Act is whether the activity is an integral part of the principal activity within the meaning of section 4.<sup>71</sup> In a case where a contract between the government and the employer provided that hours worked should be interpreted as actual working time and that an employee should be considered to be working if he was required to be on duty, it was held that the contract did not contemplate payment for essential preparations by the employee for the day's employment or for such time as might have been consumed in preparing to leave the place of employment at the end of the day.<sup>72</sup> On the other hand, another court has held that employees must be paid for certain clean-up activities which they voluntarily performed, prior to their regular shift, in order that the remaining duties, which they were to perform on their shift, would not be as difficult. Notwithstanding the fact that the clean-up was a part of their regular duties the court held it to be part of the principal activity regardless of when it was done.<sup>73</sup>

The *de minimis* rule was applied to services rendered by a cashier who was required to report a sufficient length of time before his shift began, to receive and count two hundred dollars, and to receive any information which the outgoing cashier had to communicate.<sup>74</sup> The court also noted that, regardless of the insignificance of the time consumed, such activities were preliminary thereby bringing them within section 4. In a recent Supreme Court case,<sup>75</sup> it was held that knifemen employees of a meat packing company should be compensated for the time spent in sharpening their knives either before or after the work shift. The Court found that such activity was an integral part of, and indispensable to, the principal activity of butchering. The evidence showed that the meats were prepared and packed on a production line and that the entire process would be delayed considerably unless the knives employed were "razor sharp."<sup>76</sup>

Although this case and the one involving the cashier are poles apart on their facts, it seems that an analogy may be made. Disregarding the

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69. *Walling v. Bonifas-Gorman Lumber Co.*, 9 Labor Cases ¶ 62,383 (W.D. Mich. 1944).

70. *Yellow Truck & Coach Mfg. Co. v. Edmondson*, 155 F.2d 367 (6th Cir. 1946); *Bartlett v. General Motors Corp.*, 12 Labor Cases ¶ 63,623 (E.D. Mich. 1947); *Blazier v. Western Pipe & Steel Co.*, 12 Labor Cases ¶ 63,640 (S.D. Cal. 1946); *Ballard v. Consolidated Steel Corp. Ltd.*, 61 F. Supp. 996 (S.D. Cal. 1945).

71. 61 STAT. 86 (1947), 29 U.S.C. § 254 (1952).

72. *Bumpus v. Remington Arms Co.*, 77 F. Supp. 94 (W.D. Mo. 1948).

73. *Tobin v. Alma Mills*, 92 F. Supp. 728 (W.D. S.C. 1950), *modified on other grounds*, 192 F.2d 133 (4th Cir. 1951).

74. *E.I. DuPont De Nemours & Co. v. Harrup*, 227 F.2d 133 (4th Cir. 1955).

75. *Mitchell v. King Packing Co.*, 76 Sup. Ct. 337 (1956).

76. *Id.* at 339.

*de minimis* rule for a moment, it would seem that counting a sum of money with which to begin operations is as indispensable to the cashier, who undoubtedly must make an accounting at the end of the shift, as the sharpening of knives is to the meat packer. The meat packing case reached the Supreme Court due to a conflict between the circuits and it is within the realm of probability that another circuit would reach the opposite result in the case of a cashier provided a substantial period of time was involved.

### III.

#### CONCLUSION.

Aside from remedying the acute problem which faced employers in the form of multi-billion dollar liabilities for overtime pay, the Portal Act has given clear definition to heretofore troublesome areas. However, this is not to say that there are no questions remaining unanswered. Determination of preliminary and postliminary activities must be made by examining the cases within each particular area.

Future litigation on the subject of travel time is now only remotely possible because of the specific provisions of the statute. This is attested to by the almost complete lack of decisions on the topic. In addition, the Administrator, in his regulation, has covered this area with great particularity. It seems that the conflict as to travel-time pay which gave rise to the portal-to-portal doctrine is now a thing of the past.

Unfortunately, other areas are not so settled. Accurate prediction of future cases involving showering, changing clothes and waiting time seems impossible due to the lack of definitive decisions. The cases which have been decided seem to stand on their own facts because the courts carefully scrutinize the activities of the individual employee involved in relation to his particular job, thus making it difficult to generalize concerning a particular activity in any given industry. The Administrator has interpreted the statute only in general terms as to these areas principally because the possible situations that may arise are too varied. Therefore, it is necessary to allude to decisions prior to the Portal Act to see what specific evils were intended to be remedied. By comparing these cases with the general language of the administrative regulation, the practitioner can gain some insight into the courts' statutory interpretation with regard to his particular problem.

It should be noted also that the attorney may prevent many cases involving these activities from arising by making provisions for such situations in collective bargaining agreements.

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