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This was an action for damages sustained when an automobile driven by the defendant, but owned by his employer, collided with an automobile owned and driven by one of the plaintiffs. At trial, the complaint against the employer was dismissed pursuant to a stipulation between the employer and the plaintiff. Defendant-driver then made a motion for a directed verdict on the ground that a release of one joint tortfeasor releases all. The motion was denied, and after the jury returned a verdict for plaintiff, a judgment was entered by the District Court, City and County of Denver, against the defendant-driver. He appealed to the Colorado Supreme Court, which held that the employer was liable under the doctrine of respondeat superior for injuries caused by the negligence of his employee, but a release of the employer did not constitute a release of the defendant-driver. Hamm v. Thompson, 353 P.2d 73 (Colo. 1960).

A majority of jurisdictions treat the master and servant as joint tortfeasors per se. Some do so without any examination of the basis of their liability, while others recognize that they are not joint tortfeasors in

1. Plaintiff had executed and delivered to the employer, in consideration of seven hundred and fifty dollars, a document entitled “covenant not to sue,” which the court in the instant case construed to be a release. See note 10, infra for a discussion of the distinction between “covenant not to sue” and “release.”

2. The principles discussed in this note might well be applicable to other situations of primary and secondary liability, i.e. where the one primarily liable is so because of his active participation, while the one secondarily liable is so due to his relationship to the acting party. An obvious example, which some authorities would include in the master-servant relationship, is that of principal and agent. Other examples are seen in the situations where the retailer is liable for the sale of food which was prepared and sold to him by the wholesaler without disclosure of its condition; where the municipality is liable for the property owner’s negligent maintenance of the sidewalk; where the owner of property is liable for the negligence of others on the property.

3. It is important to note that there is a fundamental difference between joining parties in one action, and considering them as joint tortfeasors. The former is a procedural expedient, the latter a rule of substantive law. Therefore the mere joining of master and servant in a single action should not, by itself, designate them joint tortfeasors. Kabatchnick v. Hanover-Elm Bldg. Co., 331 Mass. 366, 199 N.E.2d 169 (1954).

the true sense. Consequently, these jurisdictions apply the same rules relating to release in the master-servant situation as they do in "true" joint tortfeasor situations. Most of these courts still follow the common law rule that a release of one joint tortfeasor releases all, whether or not the injured plaintiff has been compensated or has made a reservation, in the release, of his cause of action against the non-released joint tortfeasor. The modern trend however, has been to avoid this harshness, and hence some courts, in determining whether the release should be given its common law effect, inquire whether plaintiff has expressed any intention in his release to preserve his rights against remaining joint tortfeasors, or whether in fact the release actually has been a full satisfaction. Also, many courts have retreated from the strict rule of the common law by making a seemingly superficial distinction between a release and a "covenant not to sue." These courts treat a "covenant not to sue" as preservative of plaintiff's cause of action in contradiction to the harsh common law effect which they generally give a release. Some courts, as in the instant case, consider the master-servant relationship as deserving of special treatment, and will not apply the strict common law rule that a release of one joint tortfeasor releases all.

Although the tort liability of master and servant has some of the characteristics of the liability of "true" joint tortfeasors, there are substantial differences which indicate that the former relationship should receive preferential treatment. The master has participated neither in

6. By "true" joint tortfeasors is meant several persons each of whom is personally guilty of negligent conduct which is the legal cause of a single injury to another. This would exclude the master-servant relationship. The Restatement likewise takes this position, designating such tortfeasors as "contributing wrongdoers." See RESTATEMENT, TORTS § 875, comment a at 434 (1939). But see UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1, adopted in eight states, in which the master and servant are considered joint tortfeasors, but which does not give a release its common law effect.
7. See PROSSER, TORTS 243 (2d ed. 1955).
10. These courts reason that by a "covenant not to sue," plaintiff does not surrender his cause of action but merely agrees he will not enforce it, and that he becomes liable for an equivalent amount of damages if he does. However, these same courts consider that plaintiff, in executing a release has surrendered his cause of action. See PROSSER, TORTS 244 (2d ed. 1955).
12. The master and servant may be joined as defendants in a single action, or may be sued in separate actions at the option of the plaintiff. East Board Top Transit Co. v. Flood, 326 Pa. 353, 192 Atl. 401 (1937). Each is liable for the entire actual damages. A judgment against one is no bar to a suit against the other, and only satisfaction of the judgment extinguishes the claim against them. Sherwood v. Huber & Huber Motor Exp. Co., 286 Ky. 775, 151 S.W.2d 1007 (1941).
13. Of course if the master has participated he would be a "true" joint tortfeasor.
the planning nor in the consumption of the tort; his liability is based instead on the doctrine of respondeat superior, which has its origins in the law of agency.14 Thus the liability of the negligent employee is "primary"; that of the employer is "secondary."15 A difference also is evident in the master's right of reimbursement from the servant for all expenditures made in discharging his respondeat superior obligation.16 A negligent joint tortfeasor, however, by the weight of authority, has no right of contribution in the absence of statute,17 and if he does have this right, recovery will be limited to that amount expended beyond his pro rata share. Moreover, the liability of the master and servant is not interchangeable, and while the master may be liable although the servant alone committed the tort, the servant will not be liable where the tort has been committed solely by the master. Furthermore it should be noted that, though there are few cases giving special consideration to the problem of the release of the master, the general rule is that a release of the servant releases the master.18 The courts are aware of the uniqueness of the master-servant relationship in this situation, and recognize that the master's liability is predicated solely on that of his servant. In addition, were the master not released, he would be deprived of his right of indemnity from the servant, for the servant could set up the release as a defense of no liability.19

In the "true" joint tortfeasor situation, the modern trend has been away from the strict common law rule20 that a release of one joint tortfeasor releases all. It is suggested that this trend should be further accelerated when dealing with the master-servant release situation.21 In the true joint tortfeasor situation, all the tortfeasors actively take part in causing the injury of which the plaintiff complains. The acts of each,

19. Ibid.
20. Some of the reasons advanced for the dissatisfaction with the common law rule are: that the claimant must forego either compromise with one tortfeasor or his claim against the other where there is an opportunity to settle with one of the joint tortfeasors; that the rule stifles compromise; that it is a trap for the unwary releasor; that often it disregards the intent of the parties and also prevents full compensation; that it discharges the wrongdoer who does not contribute; and that its result is generally unjust and unintended. 12 Vand. L. Rev. 1415 (1959).
21. The Court in the instant case argued that if the master and servant are treated as joint tortfeasors, and a release of the master releases the servant, then the servant, who is the sole wrongdoer, would escape liability altogether. The master, after compensating the injured party, could not seek contribution by way of indemnification, there being no contribution among joint tortfeasors. However, this argument would seem to hold little weight, for as a rule all jurisdictions recognize the master's right of indemnification whether or not he be considered a joint tortfeasor. See Betcher v. McChesney, 255 Pa. 394, 100 Atl. 124 (1917); Uniform Contribution Among Tortfeasors Act § 6, which specifically preserves the right of indemnity though it considers master and servant as joint tortfeasors.
with their attendant liability, are interrelated with the acts of the others, and together result in an indivisible injury which defies separation of respective fault. 22 Therefore, when the proponents of the common law rule declare that the indivisible injury must exist or vanish in entirety, and that hence a release immediately affects this entirety, there is some merit to the argument. On the other hand, although the master and servant may both be liable for injury to the plaintiff, their degree of fault is easily separated. Their liability stems from different sources the servant’s from his tortious actions, the master’s out of the rule of respondeat superior. Each has a separate liability in himself, readily ascertainable by looking solely to the servant’s negligence. The common law rule is further justifiable on the basis that a plaintiff should not be able to create degrees of liability as between wrongdoers. 23 By releasing one and suing the other, it is said that one wrongdoer thereby receives favored treatment. In the master-servant relationship, however, the master is not a participating wrongdoer, and the servant, who is the sole cause of the injury and the sole negligent party, should not be heard to complain that the onus of the lawsuit has been placed on him. It is interesting to note that the main reason cited by courts who refuse to abandon the strict common law rule of release as applied in the master-servant situation, is that it will result in an inequity to the servant. 24 These courts reason that if the servant is not released he will be forced to pay the whole amount of the injury, in addition to the amount necessary to indemnify the master from any amount expended by the master in securing his release. This objection suggests a solution in the specific situation of the instant case, where a release of the master is involved. Courts, recognizing the separate identity of the parties, should not deem a release of the master to be a release of the servant unless the release so provides. Nevertheless, the release should reduce the claim against the servant to the extent of the amount of the consideration paid for the release. 25 Thus plaintiff would receive no more than the amount his injury is judged to be worth, and defendant-servant could not complain that the master’s exercise of his right of indemnification results in his paying more than his just due.

John V. Hasson

22. Hartigan v. Dickson, 81 Miss. 284, 83 N.W. 1091 (1900).
25. This was the solution promulgated in Losito v. Kruse, 136 Ohio St. 183, 24 N.E.2d 705 (1940). It is interesting to note that although the court in the instant case quoted from the Losito case, and used it as authority for its decision that a release would not extinguish the plaintiff’s cause of action, it did not seem to adopt Losito’s solution of pro tanto satisfaction.
CONSTITUTIONAL LAW—Freedom of Speech—Termination of Veteran’s Disability Benefits Because of Communist Speeches by Recipient.


Plaintiff, a World War II veteran receiving disability compensation for a war injury, had been convicted under the Smith Act for his Communist activities. Subsequently, at several Communist Party meetings during the Korean conflict, he made abusive speeches criticizing our participation in the conflict. Thereafter, the Administrator of Veteran’s Affairs, pursuant to a federal statute which empowered him to determine when a veteran had forfeited his V.A. benefits by rendering aid to an enemy of the United States, decided that plaintiff had lost his right to disability benefits. He based his decision solely on the anti-war speeches; evidence of plaintiff’s Smith Act conviction and Communist party membership was introduced only to show that his purpose in giving the speeches was to aid the Communist cause. Plaintiff appealed to the Board of Veteran’s Appeals, and after a full hearing the prior action was affirmed and a request for reconsideration denied. This action was brought in the District Court for the District of Columbia to set aside the termination of payments. Plaintiff moved for a summary judgment, claiming the statute was unconstitutional as a bill of attainder, an ex post facto law, as lacking in due process and as failing to formulate a definite standard of guilt. Defendant’s cross motion for summary judgment was granted by the court, which held that the statute does not seek to impose an additional punishment for the offenses therein enumerated, but merely prescribes additional qualification for eligibility to receive a gratuity. The dissenting opinion, however, argued that applying the statute to plaintiff’s speeches would be an obvious restriction on free speech, and thus would require a determination by the court of the constitutionality of such a limitation. Thompson v. Whittier, 185 F. Supp. 306 (D.D.C. 1960).

When a statute imposes punishment on a party for his actions there are certain constitutional restrictions placed on it; these limitations however, apply only to punitive statutes and not to those which merely set up standards for the qualification for, or termination of, privileges gratuitously granted. When the source of legislative concern appears to be the activity or status from which an individual is barred,

1. 72 Stat. 1240 (1958), 38 U.S.C. § 3504(a) (1958): “Any person shown by evidence satisfactory to the Administrator to be guilty of mutiny, sabotage, treason or rendering assistance to an enemy of the United States or of its allies shall forfeit all accrued or future gratuitous benefits under laws administered by the Veterans’ Administration.”
2. An appeal agency within the Veterans’ Administration.
3. E.g., it must not be a bill of attainder, an ex post facto law, etc.
his disqualification therefrom is not punishment even though it may bear harshly on the one affected; the contrary is true where the statute is evidently aimed at the person or class disqualified. It is this reasoning which has led to conclusions that deportation, disqualification from medical practice, and deprivation of social security payments were not punishments for past crimes; the court here has held that termination of disability benefits also is not basically punitive. However, unlike the other non-punitive disqualifications listed above, it would appear that the instant case involved a potential infringement upon free speech. Requiring a loyalty oath in order to use NLRB facilities, to obtain public employment, or as a condition for candidacy for public office have all been held to be abridgements of free speech. So also, the Supreme Court has said that there was not any doubt that denial of a tax exemption on account of certain speeches a party made was a limitation on that party's freedom of speech. Thus the logical inference would seem to be that denial of disability benefits due to speeches made by a veteran is a limitation on the veteran's free speech. The traditional test of the constitutionality of such a limitation has been that the words used must present a clear and present, or more recently a clear and probable, danger of bringing about an evil that the legislature has a right to prevent. The distinction previously made between those statutes specifically couched in speech terms and those which had general prohibitions which were applied to speech, has been glossed over recently with the clear and probable test being universally applied. However, indirect sanctions on speech may be allowable, regardless of the clear and probable test, when they result from regulation of an appropriate legislative subject, the importance of which overrides the resultant indirect limitations on speech.

5. Fong Yueting v. United States, 149 U.S. 698 (1892).
8. The basis is that the government can set up reasonable standards for the grant of a gratuity, and making sure that the recipient does not bite the hand that fed it is a reasonable condition.
9. Since the basis for the disqualification was the speeches made by plaintiff, the question arises whether it is a limitation of the First Amendment free speech guarantee to deny disability benefits on the basis of speeches made, where the statute permitting such is drawn in non-speech terms.
18. American Communications Ass'n v. Douds, 339 U.S. 382 (1950), which upheld a section of the LMRA requiring union officials who wanted to go before the NLRB to take oaths that they did not belong to the Communist Party nor believe in violent overthrow of the government.
It would appear that the court should have explored the speech issue more fully here, for where legislative regulation of a proper subject results in indirect, partial abridgement of speech, it is the court's duty to determine which interest demands the greater protection under the particular circumstances presented. Applying the "clear and probable" test to plaintiff's speeches, it appears unlikely that they were a sufficiently serious "rendering of aid to an enemy of the United States" to make them a proper subject for the statute's aims. The interpretation given in another case to the statute involved here was that Congress had sought to equate the four enumerated offenses as those tending to weaken our nation's position in the total war. It is difficult to see how plaintiff's speeches could have such an impact as appears necessary to sustain limitation upon them. True, Congress has the right to adopt a "do not bite the hand that fed you" doctrine in setting up qualifications for receiving a gratuity, but including in this classification anyone who opposes our participation in a war, and thereby encroaching upon freedom of speech, appears to be extending the doctrine too far. Treason, mutiny and sabotage are certainly serious enough "bites"; the speech involved here does not seem to be. Alternatively, it would seem that the question of the constitutionality of the speech limitation could have been avoided entirely by giving a different and seemingly more logical interpretation to the statute. It is reasonable to assume that the fourth category listed should resemble and be of about the same degree of seriousness as the first three. Therefore, since speech is not specifically mentioned therein, the statute should be construed as inapplicable to all critical speech, unless it would render substantial direct assistance to

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19. The Court held that the Administrator's action was not subject to judicial review. However, in *Wellman v. Whittier*, 259 F.2d 163 (D.D.C. 1958), it was held that if the Administrator's ruling depends on an erroneous interpretation of the law, it may be subject to review. Moreover, all the cases which were cited by the court in the instant case as holding that prohibited conduct can include speech alone involved treason trials in which the defendant had engaged in psychological warfare by broadcasting to the troops. They are distinguishable from the instant case since all held that such speech is much more serious than mere criticism of the government, and that only the former can amount to treason.

20. Ibid.

21. Among plaintiff's utterances were: "Mass action now can still halt a Police State"; "American imperialism is hiding behind the skirts of the Negro G.I. in Korea"; a demand for withdrawal of United States troops in Korea; criticism of the "gigantic armaments program" and its costs; "The way of life of the working people . . . daily becomes more cruelly affected and more viciously warped with each war move of the Wall Street bankers and the Washington politicians"; references to the war effort as "the savage Truman-MacArthur war of aggression"; etc.


23. Mutiny, sabotage, treason and rendering aid to an enemy of the United States.

24. The Court held in the *Wellman* case that Communist Party membership is insufficient to support the charge of rendering help to the enemy and in *dicta* suggested activities that weakened troop morale or interfered with the enlistment program as conduct which might be sufficient.
our enemies or is accomplished by conduct which would constitute a crime. This construction then would require a finding that the Administrator exceeded the discretion vested in him, and result in the more desirable holding that the termination be set aside.

Frederick M. Lavin

CONTRACTS—OFFER AND ACCEPTANCE—SEALED BID INTERPRETED AS ACCEPTANCE.


The Fidelity-Philadelphia Trust Co. circulated a letter in which it requested interested parties to submit sealed bids on certain real estate which it owned as trustee. This property had been offered for sale on the real estate market since March, 1956, and the trustees had carried on separate negotiations with a number of parties but had been unable to secure an acceptable price. The letter stipulated that on June 24, 1956, the bids were to be opened and that an agreement of sale would be tendered “to the highest acceptable bidder whose offer is in excess of 92,000 dollars.” The trustee also reserved to itself the right to “approve or disapprove of any or all offers” and further recited its fiduciary duty to recommend “the most advantageous offer.” Plaintiff submitted an unqualified bid of 92,500 dollars, and when Fidelity-Philadelphia Trust Co. refused to effect an agreement of sale, plaintiff sued for specific performance. The court of common pleas dismissed the bill, but on


1. During April, 1959, Fidelity-Philadelphia Trust Co. offered to sell this real estate to the plaintiff for $85,000. The plaintiff submitted a counter-offer of $82,500 which the trustee declined.


3. Ibid.

4. Ibid.

5. Esso Standard Oil Co. was the only other party which had submitted a bid. It also bid $95,600, but its bid was conditioned upon approval by its New York office, and upon the granting of a zoning variance to permit the construction of a gasoline filling station on the property in question. Jenkins Towel Service, Inc. v. Fidelity-Philadelphia Trust Co., 400 Pa. 98, 102, 161 A.2d 334, 336 (1960).

appeal the Pennsylvania Supreme Court reversed, holding that the trustee’s letter was ambiguous and, construing it most strongly against the author, that it amounted to an offer to sell real estate which the appellant accepted by submitting an unqualified sealed bid in excess of the required minimum. Jenkins Towel Service, Inc. v. Fidelity-Philadelphia Trust Co., 400 Pa. 98, 161 A.2d 334 (1960).

The principles of interpretation used by the court, namely that a written contract which contains an ambiguity is construed most strongly against the party drawing it, and that the entire fact complex may be considered in ascertaining the intention of the parties, have found almost universal acceptance. Alternatively, the proposition that a bid is merely an offer to enter into a contract has likewise been generally undisputed. This principle originally developed in cases involving public auction sales, and has since been applied with equal vigor to more restricted contractual transactions effectuated by competitive bidding.

A request for competitive bids in which the seller reserves the right to accept or reject any or all bids has long been categorized as preliminary negotiation. A sale at auction in which it is announced that the item will be sold to the highest bidder is regarded as a sale without reserve, and the highest bid submitted then operates as an acceptance. There are, however, some early decisions which have held that a sale at auction which is accompanied by such an announcement is a mere declaration of intention to hold an auction at which bids will be received. Pennsylvania recognizes, by statute, the distinction between auction sales with and without reserve and presumes a sale to be with reserve. The fact that the bids are to be sealed does not of itself vary the status of the


instrument soliciting such bids, or of the bids themselves. Moreover, it is not unusual for an instrument of preliminary negotiation of contracts by competitive bidding to include particulars of the agreement which will eventually bind the parties, but still retain its status as an instrument of preliminary negotiation.

The Pennsylvania Supreme Court, in construing as an offer Fidelity's letter requesting the submission of sealed bids, ignored the fact that the bids were referred to as offers on four occasions in the body of the letter. The court regarded Fidelity's letter as ambiguous because it promised, on the one hand, to sell to the highest acceptable bidder, but also stated clearly that it reserved the right to accept or reject any or all bids. The court did not regard as significant that Fidelity's alleged promise was to sell to the highest acceptable bidder; however, if the term acceptable meant that Fidelity could sell to any party which it deemed acceptable, there would be no conflict between this alleged promise and the subsequent reservation to the trustee of the power to approve or disapprove of any or all bids. The court's interpretation of the reservation clause as being operative only prior to the reception of the bids is difficult to accept in view of the fact that such a clause would be useless until the bids were opened and the terms of each were known. The assertion that this clause might also operate if a bid did not conform to the conditions specified in the trustee's letter also is objectionable, because a bid which did not conform to those conditions could not qualify as an acceptance. The court, it would seem, has used rules governing the interpretation of contracts to re-write into an offer, an instrument which appears on its face to be merely a solicitation of offers. Whether the peculiar prior negotiations between the parties, and the stipulation of a minimum bid, which was 7,000 dollars in excess of the price at which Fidelity had previously offered to sell the property to the plaintiff, were sufficient reasons for this interpretation is at least debatable. The majority of the court regarded the fact that the bids were sealed as a factor which substantiated its conclusion that the plaintiff's bid operated as an acceptance. It would seem likely that this assertion could very well lead to a declining use of calls for sealed bids so as to avoid the danger that such a solicitation might be interpreted as an offer. Moreover,

19. The designation of a communication as an offer is not conclusive of its status as such. Green v. Smith, 146 Va. 442, 131 S.E. 486 (1926). However, repeated reference to a communication as an offer is certainly strong evidence of the fact that the communication was made with that purpose in mind.
20. Iselin v. United States, 271 U.S. 136 (1926); Broch v. Matterson, 298 Ill. 387, 131 N.E. 804 (1921); Lewis v. Tohrson, 123 Minn. 409, 143 N.W. 1127 (1915).
while it would appear that the instant case should be restricted to its peculiar set of facts, its effect in future contract negotiations may well be to discourage a seller from expressing his intention to accept the highest bid in order that such an expression of intention would not be misinterpreted by the courts to be a commitment.

John Fields

CONTRACTS—Specific Performance—Confirmation by Court of Arbitration Award Granting Specific Performance of Building Contract.


Plaintiff and defendant entered into an agreement whereby defendant, owner of real estate, was to construct thereon a building to be leased by plaintiff for use as a retail department store. The store was to be part of a shopping center and the estimated cost of construction was five million dollars. The agreement contained an arbitration clause whereby any disputes were to be settled in accordance with the rules of the American Arbitration Association. After excavation was begun, defendant, unable to obtain necessary mortgage money, refused to continue building unless plaintiff agreed to pay an increase in rent. The plaintiff refused and the dispute was taken to arbitration. The arbitrators granted specific performance ordering the defendant to proceed in accordance with the agreement. The trial court confirmed the award and on appeal the supreme court, appellate division, affirmed the decision. The court of appeals also affirmed and held it was within the discretion of the court to confirm the award of an arbitration board granting specific performance of a building contract. Grayson-Robinson Stores, Inc. v. Iris Const. Corp., 8 N.Y. 2d 133, 168 N.E.2d (1960).

In general, courts do not grant specific performance of building and construction contracts. The sufficiency of money damages and the degree of supervision necessary for enforcement are the two major reasons

1. Defendant was refused mortgage money at twenty-seven different lending institutions.
2. The parties had agreed that the arbitrators should have the power to give any just and equitable remedy including specific performance.
5. Stanton v. Singleton, 126 Cal. 657, 59 Pac. 146 (1899). In Standard Fashion Co. v. Siegal-Cooper Co., 157 N.Y. 60, 51 N.E. 408 (1898) it was held that supervision is prohibitive when the contract calls for the performance of varied and continuous acts or acts which require the exercise of special skill and judgment.
why the courts are reluctant to deviate from this time honored rule. However, since it is within the discretion of the court\textsuperscript{6} to grant such action there are exceptions to the general rule. The relationship of the parties is often an important factor in determining whether specific performance will be granted.\textsuperscript{7} For example, if the contract calls for defendant to build on land controlled by the plaintiff, money damages usually furnish an adequate remedy.\textsuperscript{8} But when, as in the instant case, the defendant has agreed to build on land in his control, the courts are less hesitant to grant specific performance.\textsuperscript{9} In fact, there has been a trend toward providing such a remedy whenever the difficulties of enforcement are not extreme.\textsuperscript{10} Here, however, the court is not affirming a decree of a trial court, but is confirming an award made by arbitrators.\textsuperscript{11} Generally, an arbitration award will not be enforced if it is contrary to public policy\textsuperscript{12} or if it shocks good conscience.\textsuperscript{13} Although the arbitrators' award in the present case complies with the provisions of the New York statute\textsuperscript{14} dealing with arbitration and award it appears this is the first time that specific performance of a construction contract of such magnitude was awarded either as a result of arbitration or an initial proceeding in the courts.\textsuperscript{15}

The court in the instant case can be criticized because it avoids deciding whether the court must confirm an arbitration award if the award complies with the New York statute concerning arbitration. If the court were duty bound by this statute to confirm, there would be no purpose in reviewing the decision. However, it does not appear from reading the statute that the court was compelled to confirm the award. Therefore, assuming that the court did have the power within its discretion to overturn the award, it would appear at least arguable that the court, by failing to do so, abused its discretion, especially considering the degree of supervision necessary to enforce the construction of this

\textsuperscript{7} Jones v. Parker, 163 Mass. 506, 40 N.E. 1044 (1895).
\textsuperscript{8} McCormick v. Cemetery of Mt. Auburn, 385 Mass. 548, 189 N.E. 585 (1934).
\textsuperscript{10} Zygmunt v. Avenue Realty Co., 108 N.J. Eq. 462, 155 Atl. 544 (1931). "[T]he court usually weighs on one side the difficulties of enforcing and supervising the execution of the decree and on the other side of the balance, the importance of specific performance to the complainant and the inadequacy of action for damages." See also 5 Corbin, Contracts 1172 (1951), 5 Williston, Contracts 1423 (rev. ed. 1937).
\textsuperscript{11} In Fredyberg Bros. Inc. v. Corey, 177 Misc. 560, 31 N.Y.S.2d 10 (1941), it was held that arbitrators are not bound by rules of law, but can grant relief where courts of equity could not do so.
\textsuperscript{14} N.Y. Civ. Prac. Act § 1458, § 1460, § 1462. It does not appear from a reading of the cited sections that there was any basis in the statute to overturn the award of the arbitrators. 
\textsuperscript{15} 5 Corbin, Contracts 1172 (1951); 5 Williston, Contracts 1423 (rev. ed. 1937).
five million dollar building project. As the dissenting judge indicates, it would seem that the arbitrators did not adequately consider the difficulty of judicial supervision and thus the court is burdened with the result of the arbitrators' insufficient study of the matter. Moreover, since the defendant was unable to obtain the necessary mortgage money he could not possibly continue to build. The decision thus presents an anomaly, for if it is financially impossible for defendant to comply with the award, his failure to do so is not willful and therefore he should not be subject to contempt. Judging from the difficulties which the confirmation of the award presents, it would appear more desirable that courts retain their discretionary power, unless of course prohibited by statute, to overrule unwise arbitration awards rather than act merely as a "rubber stamp." 16

Denis V. Brenan

EVIDENCE—DISCOVERY—RIGHT OF ACCUSED TO INSPECT PRE-TRIAL STATEMENTS OF STATE'S WITNESSES.


Defendant was convicted of assault and robbery. On appeal the defendant assigned as error, *inter alia*, the refusal of the trial court to grant a motion, made at the beginning of the trial, to allow him to inspect all relevant reports in the hands of the prosecution made by those who were to testify on its behalf. 1 Further, on cross-examination of the victim of the criminal acts, the defendant learned that the witness had given a signed statement to the police soon after the event. Thereupon, the defendant moved that the trial court order the state to produce any such statement of the witness which was related to the subject matter of his testimony. 2 This motion and others made at the commencement of cross-examination of other state's witnesses, were denied by the trial

16. It should be noted that this would not diminish the efficacy of arbitration proceedings in regard to reducing the congestion of the courts because whenever there is a dispute over the award, the party seeking enforcement thereof must appeal to the court.

1. "... order the State to produce for the inspection by the respondent all reports of investigators, police officers and informers who are to testify at the trial... touching the events and activities as to which they are to testify in the trial... and... that any relevant statements or reports in the State's possession of the State's witnesses touching the subject matter at the trial be given to the respondent for inspection." *State v. Lavallee*, 163 A.2d 856, 857 (Vt. 1960).

2. "... to order the State to produce any statements of the witness in the possession of the State which relate to the subject matter as to which the witness has testified." *Id.* at 858.
court. The Supreme Court of Vermont dismissed these assignments of error, holding that an accused is not entitled to inspect, at the opening of the trial, the statements of state witnesses. The court indicated inspection would be granted, however, after a determination of relevancy by the trial judge, upon the commencement of cross-examination of the witness. *State v. Lavallee*, 163 A.2d 856 (Vt. 1960).

At common law, an accused was not permitted to inspect documents in the hands of the prosecution before trial, and notice of the testimony of any witness to be called by the prosecution was not required to be given the accused. A number of jurisdictions profess adherence to the view of the common law in this respect whether the accused asks to inspect documents possessed by the prosecution before trial, or at the commencement of the trial. An ever increasing number of courts, however, have modified the common law rule. In fact, a number of states allow the accused to inspect pre-trial statements of prosecution witnesses in the possession of the state not only prior to the trial, but also upon the conclusion of the witness' direct testimony. In *Jencks v. United States*, the Supreme Court laid down the rule for the federal courts, and held that an accused is entitled as of right to inspect the pre-trial statements of a witness for the prosecution after the witness has testified on direct examination, but that this right is restricted solely to statements relating to the matters testified to on direct examination. The Court said that the statements were to be given directly to the

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3. 6 Wigmore, Evidence § 1859(g) (3d ed. 1940).
4. Id. § 1850.
8. Marby v. State, 110 So. 2d 260 (Ala. 1959), cert. dismissed, 110 So. 2d 260 (Ala. 1959). In People v. Estrada, 355 P.2d 641 (Cal. 1960) the court ruled that the accused need lay no foundation, nor even show the statement was signed or acknowledged by the witness as accurate. *State v. Hutchins*, 138 A.2d 342 (Del. Super. 1957). State v. Weston, 232 La. 766, 95 So. 2d 305 (1957) (available only after foundation for impeachment has been laid). People v. Salimone, 263 Mich. 486, 251 N.W. 594 (1933). In *State v. Hunt*, 25 N.J. 514, 138 A.2d 1 (1958) the court ruled that the accused need not show the prior statement of the witness is inconsistent with his testimony, it being sufficient that the prior statement relates to the subject matter of his testimony. In People v. Walsh, 262 N.Y. 140, 186 N.E. 422 (1933), where the witness admitted on cross-examination that he previously gave a statement to the district attorney, and the trial judge inspected it and found it inconsistent with his direct testimony, the court said that it should usually be given to the accused unless it is privileged. *Contra*, State v. Yee Guck, 99 Ore. 231, 195 Pac. 363 (1921), but the reason for this decision is not clear since the witness was neither subscribed to nor authorized by the witness and could not be used as substantive evidence or to impeach.
accused, not first to the trial judge for a determination of relevancy,\textsuperscript{10} emphasizing that if the Government refused to turn the statements over to the defendant after having been ordered to do so by the trial court the criminal action would have to be dismissed. Because of the furor this case caused, especially with the Federal Bureau of Investigation which feared this decision would force it to divulge the names of their secret agents and informers and thus hamper their work, Congress in 1957 passed the so-called "Jencks Act."\textsuperscript{11} That this statute is now the exclusive means by which production of the pre-trial statements of a Government witness can be obtained in the federal courts was clearly pointed out in \textit{Palermo v. United States}.\textsuperscript{12} By way of comparison, it is interesting to note the English view on the subject under discussion. By statute, the accused is present when testimony is given before the examining justices, who decide whether the accused should be committed for trial. The accused is then permitted to ask the witnesses questions.\textsuperscript{13} Furthermore, at trial, the accused is permitted to inspect all depositions, present in court, which have been taken against him.\textsuperscript{14} In the principal case, the Vermont court considered the federal rule, and appeared to accept the principle that an accused should be permitted to see the statements of a witness after he has testified on direct examination, but qualified this right by requiring such statements to be first turned over to the trial judge for his inspection and determination of relevancy.

The court in the instant case apparently felt bound by the restrictive rule of the common law in disposing of the motion made at the opening of the trial, but evidenced a willingness to deviate from this rule when considering the motion made after direct examination. In denying the latter motion for the reasons stated, the court appears to have disregarded the purpose of evidentiary regulation. The rules of

\textsuperscript{10} The Court felt that only the accused could determine if these pre-trial statements were relevant.

\textsuperscript{11} 18 U.S.C. § 3500 (1958). The statute modifies the holding in the Jencks case as follows: (1) it allows the trial judge to make an in camera inspection of the statement if the Government claims it does not relate to the subject matter of the direct testimony, and to delete those portions which the court finds do not so relate before giving the statement to the defendant, (2) unless the interests of justice require a mistrial, to be decided by the judge in his discretion, if the Government disobeys an order of the court to turn the statement over to the defendant, the court will strike the testimony of the witness from the record and the trial will proceed, and (3) the statute defines what is meant by "statement."


\textsuperscript{13} The Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2 c. 55, § 4(3). Dean Wigmore comments that by modern practice no witness can be called by the prosecution who was not examined before the trial. 6 \textit{Wigmore, op. cit. supra} note 3, § 1850, at 394.

\textsuperscript{14} The Trials for Felony Act, 1836, 6 & 7 Will. 4, c. 114, § 4. Noting the English practice, Dean Wigmore says: "This practice represents a belief that such inspection is in many situations nothing less than is required by fairness to an innocent accused. . . ." 6 \textit{Wigmore, op. cit. supra} note 3, § 1850, at 395.
evidence are exclusionary rules which become operative only when determining the admissibility of evidence. Therefore, no relevancy question is presented by the motion in the instant case, and to require such a determination before allowing inspection is seemingly premature. The dichotomy which permeates the court’s opinion is not easily reconciled or grounded in reason. The difference between the two motions is merely one of timing and not of substance. Since the court is evidently satisfied that the main objections to a relaxing of the common law rule, namely that it would reveal the identity of informers and encourage perjury by the accused or his witnesses, are inapplicable when considering a motion made after direct examination, it is difficult to perceive why these objections are more substantial when the motion is made at the opening of, or before the trial.\footnote{15} It is apparent that virtually all jurisdictions have overcome the fear of perjury in civil cases, where pre-trial discovery is commonplace, and there seems to be no valid reason why such anxiety should prevail in criminal cases.\footnote{16} A fortiori, such apprehension is baseless when the motion to inspect statements of prosecution witnesses is made at the trial.\footnote{17} Since the accused is asking to inspect only statements of those who are to testify on behalf of the prosecution, there can be no injurious consequence to effective law enforcement by divulging the identity of informers. The prosecution has chosen to reveal the identity of the informer at trial, so it matters not that he is made known through this discovery process. Perhaps the time has come when the prohibitory rule of the common law concerning criminal discovery, at least as applied to motions like those in the instant case, should be examined and re-evaluated in the light of reason and contemporary standards of justice.

\textit{Lewis H. Gold}

\footnote{15. Needless to say, the third main objection to criminal discovery, namely that it will not work both ways since in many cases the accused will have the protection of the Fifth Amendment, is not worthy of extensive discussion. The court implicitly rejected this contention in laying down the rule as to discovery after direct examination, and it would seemingly be just as inapplicable when inspection is requested earlier.}

\footnote{16. Since the consequences of an adverse verdict in a criminal case are more severe than a similar verdict in a civil case, it is argued that there is more reason for the criminal defendant to perjure himself. Although this may be true in some cases, the very basis of this contention presents a cogent reason for allowing criminal discovery; i.e. the gravity of the punishment dictates a trial free from secrecy and surprise.}

\footnote{17. As Dean Wigmore has said: "... why should there remain a privilege to withhold \textit{at the trial} when the danger of fabrication of false counter-evidence has passed." WIGMORE, \textit{Evidence} § 2224 (3d ed. 1940).}
HUSBAND AND WIFE—CONSORTIUM—WIFE DOES NOT HAVE A
CAUSE OF ACTION FOR NEGLIGENT INJURY TO HUSBAND.


Plaintiff's husband sued for injuries incurred in an automobile accident alleging negligence on the part of the defendants, operators of two vehicles involved. Plaintiff joined in the action and sought recovery for the loss of her husband's consortium, brought about by the injuries he received. The trial court sustained a demurrer and a motion to strike from the complaint the prayer of the plaintiff, Mrs. Neuberg. On appeal, the Supreme Court of Pennsylvania, with Justice Musmanno dissenting, affirmed the trial court, and *held* that there is no cause of action, *in Pennsylvania*, by a wife for the loss of her husband's consortium caused by the negligent act of a third party. *Neuberg v. Bobowicz*, 401 Pa. 146, 162 A.2d 662 (1960).

Historically and according to the great weight of authority, although a husband could maintain an action for the loss of his wife's consortium due to negligent injury, the wife could not avail herself of a similar remedy if her husband was negligently injured. Although in most jurisdictions a wife is allowed to recover for an intentional interference with her consortium, this remedy has not been extended to allow her to recover for a negligent interference. At common law when a woman married she lost certain rights, such as the right to keep her earnings, to hold property in her own name, and to sue in her own name for injuries she received. Because of this inability to sue, the question of a wife's right to an independent cause of action for the loss of her husband's consortium never arose. With the passage of the Married Women’s Acts and the increasing trend towards women’s independence and equality with men, suits for loss of consortium began to come before the courts. The courts have expressed varied reasons in refusing to allow the relief sought in the instant case. The most conservative view for not allowing this cause of action has been that it is against the weight of authority, and if any change in this area is desirable or demanded by altered social conditions it is the duty of the legislature to act and to

2. *Prosser, op. cit. supra* note 1, at 690-92. An overwhelming majority of jurisdictions allow a wife to recover in actions for alienation of affections and criminal conversation for an intentional interference with her consortium.
3. The instant court’s view of marriage is: “By marriage the husband and wife are one person and the husband is that one.” *Neuberg v. Bobowicz*, 401 Pa. 146, 150, 162 A.2d 662, 664 (1960).
authorize such a recovery. Another ground advanced for the denial of this action has been that even though the Married Women's Acts allow a woman, during coverture, to have contractual and legal relationships as if single, these acts merely removed the disability to sue and did not create any new causes of action. The fear that damages will be duplicated, because in the computation of the husband's damages, the jury may take into account the value of his services to his wife and the impairment of his ability to give his spouse care, comfort, and sexual companionship, has deterred courts from granting this relief. The possibility that allowing the wife to recover in these circumstances would open the door to others who had a close relationship with the injured party, such as his children, to bring similar suits for their loss of companionship is an additional inducement to refuse recovery. Some courts, moreover, have determined that such an injury to the wife is indirect and consequential and have on that basis denied the wife's right to this cause of action. It has been argued also that judicial recognition would work retroactively and destroy the effect of many releases obtained in negligence actions, because the wife who was not a party to such release would now have a right to sue the negligent party.

A few cases, despite the reasons posed, have allowed a wife to recover for the loss of her husband's consortium. In the first of these, *Hitaffer v. Argonne Co.*, a federal circuit court recognized the right of a wife to this cause of action, placing stress upon the spiritual and sentimental aspects of

11. Deshotel v. Atchison, Topeka & Santa Fe Ry., *supra* note 10; Ripley v. Ewell, 61 So. 2d 420 (Fla. 1952). Because the statute of limitations would bar most of these actions, this objection is for the most part academic.
13. Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 852 (1950). In so far as this case allowed recovery to the wife for loss of consortium due to negligent injury it is still good law, but it has been overruled, to the extent that it allowed this recovery when the husband is covered by Workman's Compensation, by Smither & Co. v. Coles, 224 F.2d 220 (D.C. Cir. 1957), *cert. denied*, 354 U.S. 911 (1957). Recovery for loss of consortium was allowed the wife previously in Hipp v. E.I. Du Pont De Nemours & Co., 182 N.C. 9, 108 S.E. 318 (1921), and Griffin v. Cinn. Realty Co., 27 Ohio Dec. 585; but subsequently this recovery was denied and these cases were respectively overruled by, Himant v. Tidewater Power Co., 189 N.C. 120, 126 S.E. 307 (1925), and Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N.E. 204 (1915).
The decisions in the field of negligent interference with consortium are in a state of flux. The common law view that the husband had a cause of action but the wife did not, though still followed by a majority of jurisdictions, is losing favor. The courts that have repudiated this inequitable doctrine have gone to two extreme poles. One group, stressing the sentimental aspects of consortium, has allowed both the husband and wife to recover.\textsuperscript{14} The other, stressing the right to services which was the view that the common law took of consortium, not only have refused the wife the right to recover but have also abrogated the husband's cause of action.\textsuperscript{15} The court in the instant case says that the husband's cause of action is based on outworn theory and its very existence degrades and makes the wife inferior to her husband; therefore it would appear very possible that in the future it will follow the second view and abolish the husband's right to recover.\textsuperscript{16} Nevertheless, the relationship of husband and wife is an important one to our society. The family is the foundation of our strength and the unit which educates our youth for the future. It is evident that the marriage contract is considered as on a higher plane than most ordinary contracts, for the state intervenes in the formation of the marital bond and ordinarily allows rescission only for the most grievous reasons. The rights which the parties receive to love, companionship and sexual relations are much higher than the rights which the parties to a contract would receive.\textsuperscript{17} It is a union that is safeguarded and protected by our laws and it would seem that any outside interference with the rights of the parties should be redressed. It would appear the better rule, because of the unique and solemn character of marriage, to follow the decision of the Hitaffer case and allow both husband and wife to recover for a negligent interference with consortium, the right to which is central to the marriage contract.

\textit{James G. Lepis}


\textsuperscript{16} "If the husband's own right had first come in question as res integra today, it would probably have been negatived." Neuberg v. Bobowicz, 401 Pa. 146, 157, 162 A.2d 662, 667 (1960).

\textsuperscript{17} Justice Musmanno, in his dissent argues that the right to her husband's consortium is a right which the wife receives by the marriage contract. She has a legally recognized right to his companionship, protection, and devotion and the law should grant an adequate remedy for any violation of this right. Neuberg v. Bobowicz, 401 Pa. 146, 160, 162 A.2d 662, 670 (1960) (dissenting opinion).
LABOR LAW—INJUNCTIONS—EFFECT OF TAFT-HARTLEY ACT ON INJUNCTION PROVISIONS OF NORRIS-LAGUARDIA ACT.

Teamsters Union v. Yellow Transit Freight Lines, Inc.
(10th Cir. 1960).

Appellee, an interstate motor carrier, brought an action in the district court under Section 301 of the Labor Management Relations Act of 1947 (Taft-Hartley Act) to enjoin appellant labor union from peacefully picketing appellee's terminal in violation of a collective bargaining agreement. The agreement was between appellee as employer and the union as bargaining representative of appellee's drivers, dockmen, and warehousemen. Elaborate grievance procedures were established for the settlement of all disputes arising under the agreement, which provided that there would be no resort to "strike, lock-out, tie-up, or legal proceedings" without first exhausting all possible means of settlement as provided by the agreement. The union, in an attempt to organize appellee's office and clerical employees, initiated peaceful picketing of appellee's terminal facilities; union members honored the picket line, with the result that appellee's terminal operations were tied-up. The union contended that since the controversy involved a "labor dispute" within the meaning of Section 13(c) of the Norris-LaGuardia Act, the court was deprived of jurisdiction to give injunctive relief by Section 4 of that Act. The district court found that the union was in violation of the collective bargaining agreement, and held that the controversy did not constitute a "labor dispute" under Norris-LaGuardia. The court of appeals affirmed, holding that Section 301 gives federal courts jurisdiction to enjoin violation of a no-strike clause in a collective bargaining agreement, notwithstanding the restrictions of the Norris-LaGuardia Act.


1. Labor management Relations Act (Taft-Hartley Act) § 301(a), 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958) : "Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

2. Norris-LaGuardia Act § 13(c), 47 Stat. 73 (1932), 29 U.S.C. § 113(c) (1958) : "The term 'labor dispute' includes any controversy . . . concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment . . . ."

3. Norris-LaGuardia Act § 4, 47 Stat. 70 (1932), 29 U.S.C. § 104 (1958) : "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts: (a) Ceasing or refusing to perform any work or to remain in any relation of employment, . . . ."
The relationship of the anti-injunction provisions of the Norris-LaGuardia Act with other federal labor legislation is a difficult and controversial problem of long standing. Although the instant case raises this problem in relation to the Taft-Hartley Act, considerable prior litigation in this field has involved apparent conflict between Norris-LaGuardia and the Railway Labor Act. In those cases, the United States Supreme Court has consistently sought to effectuate the underlying policy of the Railway Labor Act rather than the literal provisions of Norris-LaGuardia. The court has held, "... that the Norris-LaGuardia Act did not deprive the federal courts of jurisdiction to compel compliance with the positive mandates of the Railway Labor Act..." Thus, the courts may compel a railroad to "treat" with the certified representative of its employees as required by Section 2, Ninth, of the Railway Labor Act. In a series of cases involving racial discrimination, the court construed the Railway Labor Act as placing a positive obligation upon labor unions not to make employment contracts which discriminate against employees belonging to racial minorities, and it held further that this obligation could be injunctively enforced upon petition of the injured parties. In Brotherhood of Railroad Trainmen v. Chicago Riv. and Ind. R.R., perhaps the most significant case yet decided in this field, the Supreme Court held that Norris-LaGuardia does not preclude a federal court from enjoining a railway strike over a "minor dispute," that is a dispute over the application of an existing collective bargaining agreement. The Railway Labor Act provides for the submission of such disputes to the National Railroad Adjustment Board, the decisions of which are binding upon both parties. On this basis, a district court has said that it has jurisdiction to enjoin a strike over a "major dispute," that is one involving the

12. See note 10 supra.
negotiation of a collective bargaining agreement, if the parties have not exhausted all the means provided by the Railway Labor Act for the peaceful settlement of such disputes.  

The Norris-LaGuardia problem assumed a new dimension with the enactment of Section 301 of the Taft-Hartley Act of 1947. By conferring jurisdiction upon the federal courts in cases arising from violations of collective bargaining agreements, without specifying whether such jurisdiction extends to the issuance of injunctions, Congress created a serious ambiguity in our national labor policy. In the landmark case of Textile Workers v. Lincoln Mills, the Supreme Court held that Section 301 not only gives the federal courts jurisdiction in these cases, but also authorizes them to construct a body of federal law for the enforcement of collective bargaining agreements. Specifically, the court held that this section embraced the power to fashion a remedy and to compel specific performance of an agreement to arbitrate disputes. The difficulty of Norris-LaGuardia was disposed of on the ground that the Act was never intended to apply to judicial enforcement of arbitration agreements. The court reasoned that a refusal to observe such an agreement is not one of the acts protected by Section 4, that the procedural requirements of Section 7 are “inapposite” to such a case, and that Section 8 clearly indicates a congressional policy in favor of arbitration of labor disputes. This analysis has found general acceptance as far as arbitration agreements are concerned.  

Prior to Lincoln Mills however, the courts were unwilling to apply similar reasoning to cases involving enjoinder of strikes or peaceful picketing. Since the decision in that case, at least one
court has adhered to its former position. In the instant case however, the court reaches an opposite conclusion, and holds that specific enforcement of "no-strike" agreements is within the "body of federal law" to which the Supreme Court referred in *Lincoln Mills*. This is, as yet, clearly a minority position, but it is one which draws considerable support from both the Railway Labor Act cases discussed above and from the *Lincoln Mills* holding.

The court relied upon both the *Lincoln Mills* case and the Railway Labor Act cases in reaching the instant decision, but it will be seen that this approach is not free of difficulty. The holding in *Lincoln Mills* was a narrow one, and it does not necessarily follow that, because an agreement to arbitrate is specifically enforceable, an agreement not to strike is enforceable in the same way. Work stoppages and picketing are among the acts specifically exempted from restraining orders and injunctions by Section 4 of Norris-LaGuardia; failure to arbitrate is not. On the contrary, Section 8 of that statute expresses congressional favor of arbitration. The procedural limitations which Section 7 of the Act places upon the courts in the issuance of injunctions are, by their nature, applicable to the enjoining of positive unlawful acts, such as violent picketing, rather than to negative acts such as a refusal to arbitrate.

In *Local 205, UEW v. General Elec. Co.*, Judge Magruder, speaking for the First Circuit, held arbitration agreements specifically enforceable; in *W. L. Mead, Inc. v. International Bhd. of Teamsters*, the same jurist concluded that a strike in violation of a collective bargaining agreement could not be enjoined. In the former case, Judge Magruder pointed out that Norris-LaGuardia was aimed at "the traditional labor injunction, typically an order which prohibits or restricts unilateral coercive conduct of either party to a labor dispute," an accurate description of the order in the instant case. He went on to add that, "... an order to compel arbitra-

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See also McCarrol v. Council of Carpenters, 49 Cal. 2d 45, 315 P.2d 322 (1957),
22. See note 17 supra.
23. See note 16 supra.
24. "These provisions were obviously aimed to limit injunctions to cases involving violent or destructive acts. . . . The enumerated requisites . . . are not at all compatible with the situation where one party merely demands that the other be compelled to arbitrate a grievance in accordance with a contract provision for arbitration, in which latter situation the required findings seldom, if ever, could be made either affirmatively or negatively." *Local 205, UEW v. Gen. Elec. Co.*, 233 F.2d 85, 92 (1st Cir. 1956).
tion of an existing dispute . . . seems to have a different character whatever name is given to it."28

The analogy drawn between the instant case and the Railway Labor Act cases would also seem to be a questionable one. The Railway Labor Act created a comprehensive regulatory scheme, designed not only to promote the peaceful settlement of disputes and prevent interruptions to the flow of commerce, but also to protect the rights and interests of railway workers.29 In the matter of labor disputes, the act provides special machinery designed to compromise them to protect the interests of all parties.30 There are no comparable provisions for the peaceful settlement of disputes in Taft-Hartley, except in the case of labor disputes constituting a "national emergency."31 In the words of Mr. Chief Justice Warren, "... the machinery of the Railway Labor Act channeled these economic forces, in matters dealing with railway labor, into special processes intended to compromise them."82 The Taft-Hartley Act does not purport to accomplish such a channeling. It provides no similar processes for the settlement of "major disputes" and "minor disputes." Railway labor enjoys the benefit of these "special processes," and, until it has exhausted them, does not require the protection of Norris-LaGuardia. However, in the case of strikes outside of the railway labor field, there is no comparable machinery for peaceful settlement provided by Taft-Hartley, in the event such strike is enjoined. The need for protection against the "labor injunction" is clearly greater in the Taft-Hartley cases than in the Railway Labor Act cases.

The court in the instant case rejects the position of the district court that the controversy involved did not arise out of a statutory "labor dispute,"33 a conclusion which would seem to be demanded by the broad provisions of Section 13(c) of Norris-LaGuardia.34 Its holding, therefore, can be sustained only upon the conclusion that Section 301 of Taft-Hartley amounted to a pro tanto repeal of Norris-LaGuardia. This position, previously rejected by the First and Second Circuits,35 amounts,


34. See note 2 *supra*. See also Aetna Freight Lines v. Clayton, 228 F.2d 384 (2d Cir. 1955), holding peaceful organizational picketing to be within the scope of § 13(c).

35. A.H. Bull S.S. Co. v. Seafarer's Int'l Union, 250 F.2d 326 (2d Cir. 1957); W. L. Mead, Inc. v. International Bhd. of Teamsters 217 F.2d 6 (1st Cir. 1954).
in the language of Judge Magruder, to a repeal by implication of "a significant and tremendously important piece of legislation which the Congress evidently had specifically in mind when it came to enact the Labor Management Relations Act in 1947." The theory of implied repeal is further weakened by the fact that Taft-Hartley specifically waives the limitations of Norris-LaGuardia in certain instances. The *Lincoln Mills* decision points out that agreements not to strike are frequently *quid pro quo* for agreements to arbitrate; on this basis the court in the instant case concluded that if the latter are specifically enforceable, the former should be also. This, however, does not eliminate the obstacle of the specific provisions of Section 4 of Norris-LaGuardia, and the merits of such an argument are clearly for Congress to determine. It would seem, therefore, that if this important and well-settled principle of national labor policy is to be changed, it should be done by act of Congress, rather than by "judicial legislation or inventiveness."

John J. Cannon

**TRADE REGULATIONS—FAIR TRADE—MAJOR OIL PRODUCER MUST SHOW FREE AND OPEN COMPETITION TO OBTAIN INJUNCTIVE RELIEF FROM PRICE CUTTING BY NONSIGNER DEALER.**


Gulf Oil instituted this action against Claude Mays, an independent Gulf dealer, to enjoin sales of Gulf gasoline at prices lower than those stipulated by Fair Trade agreements between Gulf and other Pennsylvania dealers. Gulf alleged in its complaint that it was in free and open competition with gasoline produced by others, and this allegation was admitted by Mays' answer. Consequently no evidence on this point was presented at the final hearing before the Common Pleas Court of Berks County at which Gulf was granted a permanent injunction. On appeal the Pennsylvania Supreme Court, without directing itself to any of Mays' defenses and with two justices dissenting, reversed and remanded with instructions that Gulf must prove to the satisfaction of the court

37. Thus the provisions of Norris-LaGuardia are expressly waived by § 10(h) of Taft-Hartley in actions by the National Labor Relations Board for the enjoining of unfair labor practices, 61 Stat. 149 (1947), 29 U.S.C. § 160(h) (1958), and by § 208(b) of that Act in actions by the Attorney General for the enjoining of a "national emergency" strike, 61 Stat. 155 (1947), 29 U.S.C. § 178(b) (1958).
that it is in fact engaged in free and open competition. Because of a necessity for strict compliance with the letter of the Fair Trade laws and because of the state's interest in preventing unlawful price fixing, the court would not accept a stipulation by the parties as satisfying this statutory condition imposed upon Fair Trade agreements. 1 Gulf Oil Corp. v. Mays, No. 157 Jan. Term, Sup. Ct. Pa., October 10, 1960.

In the absence of Fair Trade statutes, price fixing agreements are per se violations of the Sherman Act and adverse to the economic philosophy of antitrust legislation. 2 Prior to 1937 several states had enacted Fair Trade Acts similar to that of Pennsylvania, but without federal accord these statutes could apply only to articles of intra-state commerce. In 1937 Congress lowered that barrier to Fair Trade by passing the Miller-Tydings amendment as an "exception" to the Sherman Act, 3 thus allowing states to sanction vertical price fixing 4 where there is a brand or trade mark to be protected which is in free and open competition. In 1952 the McGuire amendment to the Federal Trade Act enlarged the scope of this antitrust exception to permit enforcement of Fair Trade prices against nonsigning distributors and dealers. 5 The constitutionality of this type of legislation has withstood attacks under the due process and equal protection clauses of the Constitution, on the grounds that it is a valid exercise of the police power protecting the producer's interest in his trade mark, and eliminating "loss-leader" selling. 6 Pennsylvania's Fair Trade Act 7 was passed in 1941 and amended in 1956. Its constitutionality has been upheld on the same grounds. 8 Although the Pennsylvania court has passed on several aspects of the Fair Trade Act, 9 until the case of Sinclair Refining Co. v. Schwartz, 10

1. Majority opinion, page 6. "Even though the admission here is made in an adversary proceeding, still the state's interest in seeing that unlawful price fixing is not indulged in is of such importance that the mere admission by the adversary is not sufficient to provide the essential prerequisites necessary to invoke the statutory rights and exemptions provided by the act."


4. Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936). A vertical price fixing agreement is one between enterprises in successive stages of economic activity, i.e., between manufacturer and wholesalers, or either of these and retailers. Horizontal price fixing agreements are between parties on the same economic level, i.e., between manufacturers or between wholesalers or between retailers.


6. Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 193-95 (1936). Drastic price cuts on one product to attract customers and encourage sales of other products are called "loss-leader" sales. This practice hurts the producer because the public is no longer satisfied to buy at the regular market price of other dealers.


9. Olin Mathieson Chemical Corp. v. L & H Stores, Inc., 392 Pa. 221, 139 A.2d 897 (1958). Injunctive relief was considered the only effective means of enforcing the Fair Trade Act. Damage to the producer is not necessary where "good will" is shown and the injury thereto will ordinarily be presumed if there is price cutting. Lentheric, Inc. v. F. W. Woolworth Co., 338 Pa. 523, 13 A.2d 12 (1940). Woolworth was enjoined from selling rebottled perfume (but still under the
it had not directly considered the question of free and open competition. In that case the court found no problem in accepting gasoline as within the protection of the Act as a commodity, but reversed a decree granting preliminary injunctive relief to Sinclair and remanded with instructions that Sinclair show that it suffered sufficient harm to warrant such relief, and that it was engaged in free and open competition. Unlike the instant case, Sinclair's allegation of a competitive market had been contested in the lower court. It does not appear that other courts have handled the question of free and open competition in the gasoline industry or in any industry of similar marketing structure. In the few cases concerning construction of the requirement, the courts indicate that the provision is intended as a safeguard against price fixing where one producer has a monopoly, even a lawful monopoly, and against horizontal price fixing which is unlawful per se. Standards to be applied in determining the presence of this required competitive field are far from established.

The majority in the instant case joins with numerous authority in asserting that uniform business conduct, often called "conscious parallelism," is probative — but not conclusive — evidence of price fixing. Some courts have held that price leadership, high price levels, price similarity and/or high producer profits are not proof of lack of competition and are open to conflicting inferences. One court observed that price is not the sole factor: "Quality, appearance, effectiveness, service

Lentheric trade mark) at 10 cents for bottles containing less than one ounce. The Fair Trade price was 50 cents for all such bottles.

Bristol-Myers Co. v. Lit Brothers, Inc., 336 Pa. 81, 6 A.2d 843 (1939). The court held that the distribution of trading stamps was not a price cut and could be given without violation of stipulated prices.


11. Id. at 63, 157 A.2d at 64. Mr. Justice Bok said: "We are told that gasoline has not yet been before our courts, and that appears to be so. There is no difficulty about accepting it within the protection of the Act, since Section 4 defines "commodity" as "any subject of commerce," and the subject of the Act is "any commodity."

12. Id. at 63, 64, 157 A.2d at 64.

13. Eastman Kodak Co. v. F.T.C., 158 F.2d 592 (2d Cir. 1946), cert. denied, 330 U.S. 828 (1947). Kodak color film was not in free and open competition when no one else produced color film, nor was Kodak's film magazine when only that film would fit Kodak's camera.


15. ATT"Y GEN. NAT'L COMM. ANTITRUST REP., 36-42 (1955). "'Conscious parallelism' is a phrase of uncertain meaning and legal significance. For some it is an inartful label for one type of evidence which may or may not be relevant in proof of conspiracy. In this sense, 'conscious' may mean no more than knowledge that a particular course of conduct has been followed by competitors. And 'parallelism' may be used as a synonym for 'collusion' or only to signify uniformity of business behavior, where 'uniformity' is a neutral term."

and many other factors figure in the competitive picture." But, since here the burden is placed upon the party claiming under the Act, it may be that not even these vague standards apply, for they are directed at disproving rather than proving competition. If the opinion is to be narrowly interpreted it may be sufficient that Gulf show that it is not in competition with Mays and that it is not a party to any agreement or conspiracy to fix prices. However, proof of such negative propositions would be an extremely difficult undertaking in even the most competitive markets. If the opinion is given a broader interpretation the lower court is faced with an unprecedented problem of determining what Gulf must prove to qualify for fair trade, and Gulf still faces the same and perhaps impossible challenge of producing such proof. Since it is doubtful that the court would intentionally sanction such chaos, the narrower construction, which at least draws some guide for court and parties, appears more realistic.

Remanding for further proof of a fact admitted below by both parties in an adversary proceeding is, to say the very least, unique. However, for the purpose of this limited discussion it is assumed, but with no foreclosed conviction, that perhaps such action is not an abuse of power where the court would prefer to consider what may be a major policy question on a proved rather than hypothetical fact situation. Whatever may have prompted the remand, when the instant case is considered against the background of the Sinclair case, it becomes fairly obvious that the court intends to severely test and scrutinize the exercise of Fair Trade price fixing by the petroleum industry. This examination may continue even if Gulf is successful in proving free and open competition. Dicta in the majority opinion hint that the constitutional underpinnings of the nonsigner provisions are not yet settled as applied to the petroleum market. The court expressed doubt that the dangers of "loss-leader" practices and trade mark prestige damage are really present in the industry. Their doubts are predicted upon the court's own assumptions that "loss-leader" sales cannot occur where a station carries only one brand of products, and that often the gasoline sold is not that of the company whose name appears on the pump. It is difficult to see a significant distinction between a price cut on gasoline to attract a larger oil.

18. "A fact alleged in a bill of complaint which is expressly admitted in the answer requires no proof." 8 STANDARD PENNSYLVANIA PRACTICE § 357 (Supp. 1957). However, most cases cited in support of this proposition are ones where some evidence was introduced. Drab v. Jaffe, 351 Pa. 297, 41 A.2d 407 (1945); Allegheny Gas Co. v. Kemp, 316 Pa. 97, 174 Atl. 289 (1934). It must be granted that there are no express holdings that the court cannot or will not remand in the present situation. Still, the extension of the instant case could develop absurd problems in determining what admitted facts must still be proved.

It should be noted that it was to this question that Mr. Justice Jones, B. R., directed his dissenting opinion in the instant case, with which Mr. Justice Bell concurred.
tire and battery business, and a price cut on canned corn to stimulate sales of other normally stocked grocery products. Even though the automotive products may share their production source and brand name, though this is not always the situation, it still seems unavoidable that the evils of "loss-leader" sales remain imminent. Nevertheless, even if these assumptions can be established factually, it does not necessarily follow that there is no longer a need for trade mark protection. As long as Gulf's name appears on the pump, its vulnerability to prestige damage remains constant and does not vary with the unknown name of the producer of the fuel within the pump. It may also be worthy of note that some courts and commentators are turning away from the original Fair Trade justifications of safeguarding producers and their trade marks, and are favoring justification on the basis that small businesses and the consuming public are the chief recipients of Fair Trade protection. The Pennsylvania court has not yet been committed to support or reject this embryonic theory.

The majority opinion further observes that it has not yet investigated "whether the overriding federal legislation [the Miller-Tydings and McGuire Acts] exempted gasoline from antitrust condemnation." If the court is concerned, as they apparently are, over whether these acts included gasoline within their scope, such alarm can be easily quieted. These acts, in effect, sanction the Fair Trade acts and policies of the several states where they include and combine the required elements. If the gasoline is characterized by a brand name and is sold in free and open competition, then the only question is whether gasoline as a product is also included within the scope of the Pennsylvania act, which question the court has already answered in the affirmative.

Perhaps the court is troubled by an underlying problem the solution of which does not rest within its power. Although the Fair Trade Acts appear to include all brand name products that are in free and open competition, the production and marketing structure of some industries renders them unsuited for price maintenance. The petroleum industry and similar oligopies may exist in such a climate and perhaps the widely inclusive language of the state and federal statutes should be particularized. But to effect this goes beyond the scope of judicial construction, requiring legislative selection from conflicting theories of economics.

James L. McHugh, Jr.

20. Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 194 (1936). "Appellants own the commodity; they do not own the trade mark or the good will that the trade mark symbolizes. And good will is property in a very real sense. . . ."
22. See supra, note 10.