CASE NOTES

BREACH OF WARRANTY—SPECULATIVE DAMAGES—SEEDS

Plaintiff brought an action for breach of warranty against defendant, a seed merchant, who had supplied plaintiff with milo maize seed instead of the requested "sargo" seed. The mistake became apparent when the seed sprouted. On appeal, *held,* judgment for defendant that evidence was insufficient to establish damages reversed. *Blackburn v. Carlson Seed Co.* _____Mo._____, (1959).

Damages cannot be recovered if speculative or contingent. *Griffin v. Colver,* 16 N.Y. 489, 69 Am. Dec. 718, (1858). However, mathematical precision is not required, *Brown v. McCloud,* 96 Ore. 549, 552, 190 P.2d 578 (1920), and recovery will not be denied because damages are difficult to ascertain. *United States Trust Co. v. O'Brien,* 143 N.Y. 284, 287, 38 N.E. 266 (1894). The test by which it is determined if damages are too speculative is whether there is sufficient data to determine with reasonable certainty the probable value the crop would have if matured. *Malone v. Hastings,* 193 Fed.1, (5th Cir. 1912). Ordinarily the measure of damages for a crop is its value at the time of loss. *Happy v. Kenton,* 362 Mo. 1156, 247 S.W.2d 698 (1952). The cases are not clear when losses result from seed not being true to name. 16 A.L.R. 885. Some jurisdictions allow damages for the difference in value between the crop raised and the value of the crop using the seeds requested in the year the seeds were sowed. *Johnson v. Foley Milling Co.,* 147 Minn. 34, 179 N.W. 488 (1920). Damages based on the loss of an unmatured crop as in the instant case are ascertained by consideration of the probable value of such crop at maturity minus cultivation, harvesting and marketing costs. *Vaughn Seed Store v. Stringfellow,* 56 Fla. 708, 48 So. 410 (1904). Evidence of the productivity of neighboring lands provides sufficient evidence of probable yield. *Faire v. Burke,* 363 Mo. 562, 252 S.W.2d 289 (1952).

The instant case demonstrates the willingness of the courts to strictly confine the concept of speculative damages when to do otherwise would clearly result in inadequate compensation to the plaintiff. Necessity may foster the requisite "certainty."

JOSEPH W. POPPER, JR.

CONSTITUTIONAL LAW—STATE TAXATION OF INTERSTATE COMMERCE

The defendant was a foreign corporation involved exclusively in interstate commerce. Only a sales office was maintained in the taxing state. All orders were shipped f.o.b. from Birmingham, Alabama. The Supreme Court of Georgia invalidated a statute permitting taxation of the net income of foreign corporations arising from activities within the state. The court reasoned that a state may not impose a tax on a foreign corporation which is engaged exclusively in interstate commerce. On appeal to the Supreme Court of the United States, *Held,* reversed. The net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the tax is not discriminatory and is properly apportioned to local activities within the taxing state forming sufficient nexus to support the same. *State Revenue Commissioner v. Stockham Valves and Fittings, Inc.,* ____U.S.____, 79 S.Ct. 357,____L.Ed.____ (1959).

The power to regulate interstate commerce is vested exclusively in the Congress and the failure of Congress to act on the subject in the area of taxation nevertheless requires that interstate commerce be free from any direct restrictions or impositions by the States. *Gibbons v. Ogden,* 9 Wheat. 1, 6 L.Ed. 23 (1824). The power to tax is the power to regulate and, therefore, any tax levied on interstate commerce is in violation of the Commerce Clause. *Brown v. Maryland,* 12 Wheat. 419, 6 L.Ed. 678 (1827). In the era of immunity from state taxation the form of the tax on interstate commerce was of no importance. *Leloup v. Port of Mobile,* 127 U.S. 640, 8 S.Ct. 1380, 32 L.Ed. 311 (1888). The courts gradually retreated from "immunity" from state taxation to allowance of state taxation, provided however, the tax took the proper form. Thus, it was held that while a state could not directly burden interstate commerce by levying a tax on such commerce it could impose a tax which only indirectly affected the income or profits from such commerce. *United States Glue Co. v. Town of Oak Creek,* 247 U.S. 321, 38 S.Ct. 499, 62 L.Ed. 1135 (1918). However, in order for the income derived from interstate transactions to be taxable it is necessary that the income be derived from property in or business done within the taxing state. *Shaffer v. Carter,* 252 U.S. 37, 40 S.Ct. 221, 64 L.Ed. 444 (1920). After an era of immunity, followed by an era of form, there emerged another era: an era of substance. The latter era began when it was held that multiple taxation of interstate commerce amounts to a discrimi-

nation against such commerce and therefore a regulation of that commerce which violates the Commerce Clause. *Western Livestock v. Bureau of Revenue,* 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823 (1937). From that decision it would seem that the form of the tax would be unimportant, the courts rather focusing on whether the tax is discriminatory. However, later cases indicated a return to the importance of form. It was held that the question of whether a state may validly make interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so. *Spector Motor Service v. O'Connor,* 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951). It appears, however, with the decision of the Stockham case, the courts have once again come forth with a test of "discrimination", i.e., a test of substance rather than form.

With the Stockham decision the Supreme Court has answered with finality the question of whether interstate commerce can be taxed. The test laid down in that decision is one of substance, i.e. discrimination. The form that a state tax on interstate commerce takes should no longer be important. The only requirements to be met by a state imposing such a tax are that the tax not discriminate against interstate commerce and that it be fairly apportioned. The several states not presently utilizing this field of revenue will be induced to do so by the Stockham decision. With these new statutes and cases arising thereunder, the courts should experience a change of focus from the problem of what can be taxed or how it shall be taxed to the problem of what constitutes discrimination and fair apportionment.

THOMAS H. MCPETERS

CONVEYANCES—ACTS CONSTITUTING ACCEPTANCE—MORTGAGE

Writ of entry to gain possession of two parcels of real estate. Joseph Toton, widower, employed demandant as a housekeeper. In 1934, after leaving his employment, she sued him for money lent and services rendered. She was awarded a judgment and execution was issued thereon the following day. The execution was invalid and Joseph conveyed by warranty deed, recorded April 28, 1936, the premises in question to his two sons, Max and Henry (tenants herein) who at that time were in their early twenties. The deed was recorded by Joseph's attorney and directed to be sent to Max at the family home. A second mortgage was executed on December 13, 1937, by Max and

Henry on the property in question as security for payment of a grain bill owed by the father. The first mortgage was held by the same mortgagee. After Joseph died on December 29, 1938 an administratrix of his estate was appointed on the petition of demandant as a creditor. The probate court granted the administratrix a license to sell property in question. The deed received by the demandant from said sale is the basis of this action. The superior court directed the jury to find demandant was not entitled to possession, thus finding in effect that there was delivery and acceptance of the deed from the father to the two sons. Demandant took exceptions. On appeal to the Supreme Judicial Court of Massachusetts, *held,* exceptions sustained. Evidence that neither of the grantees knew that grantor had given them a deed until after his death was sufficient to raise a question for the jury as to whether or not there had been an acceptance of the deed. *Juchno v. Toton,* 155 N.E.2d 162, (Mass. 1959).

Acceptance is an act by which a vendee vests himself with title to property. BLACK, LAW DICTIONARY (4th ed. 1951). There is a difference of opinion whether or not acceptance is an essential part of delivery. *Robinson v. Herring,* 75 Ariz. 166, 253 P.2d 347 (1953). A majority of the courts have held that to constitute a complete delivery of a deed, there must be an acceptance by the grantee. *Lancaster v. May,* 194 Ore. 647, 243 P.2d 268 (1952); see also: *Fitzpatrick v. Layne,* 291 Ky. 523, 165 S.W.2d 13 (1942); *Gibson v. Dymon,* 281 Mich. 137, 274 N.W. 739 (1937). Delivery embraces two distinct ideas; surrender by one, and acceptance by the other. BREWSTER, CONVEYANCES § 298 (1904). A few cases have held delivery is complete when the grantor has manifested his intention by parting with control. *Red Cedar Co. v. Cranshaw,* 169 Ala. 606, 53 So. 812 (1910); *Taylor v. Sanford,* 108 Tex. 340, 193 S.W. 661 (1917). Regardless of the definition we apply to acceptance, a completed delivery, or a separate act distinct from delivery, American courts require an acceptance of the deed by the grantee in order to pass title to land. *Chattaway v. City of New London,* 133 Conn. 377, 51 A.2d 917 (1947). English cases and a minority of American courts have held a conveyance is effective although the transferee did not assent thereto or know thereof. *Graham v. Suddeth,* 97 Ark. 283, 133 S.W. 1033 (1911); TIFFANY, REAL PROPERTY § 1056 (3rd ed. Vol. 4). The requirement of acceptance is often justified by stating that the law will not force one to take property against his will. *Reina v. Erassarrest,* 90 Cal. App. 418, 203 P.2d 72 (1949). The possibility of vesting title in one against his will was prevented under English law by allowing the grantee to disclaim the title which would then

revest in the grantor. *Thompson v. Leach,* 2 Vent. 198 (1691). The acceptance of a deed is a matter of intention of the grantee. *Fitzpatrick v. Layne,* supra. It is not essential that the grantee be present personally to accept. *Patterson v. Patterson,* 210 Ga. 359, 80 S.E.2d 310 (1954). There are no hard and fast rules to determine what constitutes a sufficient acceptance. *Lemon v. Madden,* 205 Ore. 107, 284 P.2d 1037 (1955). It has been generally held, however, that a grantee cannot assent to a deed while in ignorance of its existence. *Sun Building and Loan Association v. Gross,* 110 N.J. Eq. 179, 159 A. 401 (1932). Acceptance may be shown by acts of the grantee, *Canal Oil Co. v. National Oil Co.,* 19 Cal. App.2d 524, 66 P.2d 197 (1937); either by direct or circumstantial evidence, *Burkey v. Burkey,*_____Mo._____, 175 S.W. 623 (1915). The following have led courts to find a presumption of acceptance: recording of deed, *Goldberg v. Friedman,* 181 Misc. 983, 61 N.Y.S.2d 222 (1946); execution and recording, *Schenck v. Dibel,* 242 Ia. 1289, 50 N.W.2d 33 (1951); execution, acknowledgment, and recordation, *Lancaster v. May,* supra; passage of a beneficial interest, *Fonda v. Miller,* 411 Ill. 74, 103 S.E.2d 98 (1952); taking of possession by grantee, *California Trust Co. v. Hughes,* 111 Cal. App.2d 717, 245 P.2d 374 (1952); and where these presumptions are present they can only be repelled by actual evidence of dissent by grantee shown by clear and convincing evidence. BREWSTER, CONVEYANCES § 300 (1904). Where the grantee is an infant, *Staggers v. White,* 121 Ark. 328, 181 S.W. 139 (1915); or non compos mentis, *Egan v. Egan,* 301 Ill. 124, 133 N.E. 663 (1921), it is the duty of the court to declare an acceptance where the conveyance is beneficial. See cases, 26 *C.J.S.* DEEDS § 51. Acceptance may also be proved by acts of the grantee showing an intent to accept. *Blackwell v. Blackwell,* 196 Mass. 186, 81 N.E. 910 (1907); *Creeden v. Mahoney,* 193 Mass. 402, 79 N.E. 776. Some acts of the grantee which have been held to constitute acceptance are: going into possession of property, *Megason v. Boleyn Lumber Co.,* 140 La. 431, 73 So. 257 (1916); filing suit thereon, *Vaughan v. West,* 176 Ind. 177, 100 S.W.2d 166 (1936); passage of time in residence 8-14 years, *Nobel v. Nobel,* 151 Ia. 698, 130 N.W. 114 (1911); 60 years, *Kerr v. Watkins,* 234 Ky. 104, 27 S.W.2d 679 (1930); son returning home at request of father, *Downs v. Downs,* 89 W.Va. 155, 108 S.E. 875 (1921); on payment of stipulated sums to a 3rd party, *Peterson v. Graves,* 134 Kan. 505, 8 P.2d 308 (1932); by subsequent conveyance of property, *Washington Homes Ass'n v. Wanecek,* 252 Wis. 85, 32 N.W.2d 223 (1948); executory quit claim deed, *Flood v. Flood,* 295 Mich. 366, 294 N.W. 714 (1940); execution of a mortgage, *Black-*

well v. Blackwell, supra. While acceptance is a part of delivery, the acts which constitute the offer to deliver and accept need not be simultaneous, *Fitzpatrick v. Layne,* supra. The grantee may ratify a conveyance by acts done subsequent to delivery, *Lyon v. Lyon,* 70 Cal. App. 607, 233 P. 988 (1925).

In distinguishing this case from the *Blackwell* and *Creeden* cases, *supra,* both holding that mortgaging is an unequivocal act of acceptance, this court states there is evidence here which would tend to show neither Max nor Henry was aware of the conveyance to them at the time they executed the mortgage. It would seem the lower court was in a much better position to determine the value of the evidence submitted before it. The lower court in this case undoubtedly found the evidence of non-knowledge offered by the demandant was insignificant and held as a matter of law that in this case the validly executed mortgage was an unequivocal act of acceptance.

TOM DEMARTIN

CRIMINAL LAW—NATIONAL MOTOR VEHICLE THEFT ACT—ANIMUS FURANDI

Defendant was charged with violation of the National Motor Vehicle Theft Act after he used his own credit card in New Jersey on August 17 to rent a car for a week, stating that he did not intend to take the car out of the state. He kept it three weeks and then abandoned it in a garage in New York City where it was found on Oct. 2. *Held,* not guilty. Neither the use of a valid credit card, even if done with fraudulent intent to abuse the credit extended by the organization issuing the credit card, nor the subsequent breach of the permission granted by the standard commercial contract of a company in the business of renting cars supports a finding of intent to deprive the owner of the rights of ownership necessary to warrant conviction under the Act. *United States v. Golden,* 166 F. Supp. 799 (S.D. N.Y. 1958).

"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years or both." National Motor Vehicle Theft Act (Dyer Act), 18 U.S.C. 2312. The purpose of this Act is to prevent the successful theft of automobiles by moving them under their own power to a different police jurisdiction thus making detection more difficult. *Brooks v. United States,* 267 U.S.

432, 45 S.Ct. 345, 69 L.Ed. 699, 37 A.L.R. 1407 (1925). For many years the decisions were divided on whether the word "stolen" as used in the Act was restricted to common law larceny, *Murphy v. United States,* 206 F.2d 571 (5th Cir. 1953), or was to be given a broader meaning, *Davilman v. United States,* 180 F.2d 284 (6th Cir. 1950), but it is now settled that "stolen" pertains to property obtained by embezzlement and false pretenses as well as by common larceny. *Turley v. United States,* 352 U.S. 408, 77 S.Ct. 397, 1 L.Ed.2d 430, 45 A.L.R. 2d 1300 (1957). Common to these offenses is the requirement of *animus furandi,* the intent to steal, to permanently deprive the owner of his property. *State v. Casey,* 207 Mo. 1, 105 S.W. 645 (1907). It is this intent which distinguishes a criminal trespass from mere civil liability. *Barton v. State,* 227 S.W. 317 (Texas 1921). For violation of the National Motor Vehicle Theft Act it is immaterial whether this felonious intent is present at the time of obtaining the property or arises later, so long as it has been formed before the automobile is transported across a state line. *United States v. Adcock,* 49 F. Supp. 351 (N.D. Ky. 1943). The intent with which a criminal act is committed need not be shown by direct proof but may be inferred from the act itself and from the circumstances under which the act was committed. *State v. Williams,* 66 Iowa 573, 24 N.W. 52 (1885). A taking of property with the intention of using it temporarily and not depriving the owner permanently does not meet the requirement of *animus furandi, Hurley v. State,* 22 Ariz. 211, 196 P. 159 (1921), but abandonment may involve a "reckless exposure to loss" and therefore support the finding that a permanent deprivation of property was intended. *State v. Ward,* 19 Nev. 297, 10 P. 133 (1886). A vague, uncertain intent, or even a definite intent where the property is not for sale, to pay for property taken is not inconsistent with *animus furandi.* PERKINS, CRIMINAL LAW 225 (1957). The requisite felonious intent for conviction under the National Motor Vehicle Theft Act has been found in the following situations: where the defendant borrowed a car and sold it in another state, *United States v. Sicurella,* 187 F.2d 533 (2d Cir. 1951); where the defendant's wife rented a car for two days and the defendant was found in possession of it several months later in another state, *Davilman v. United States, supra;* where defendant obtained the car by use of a worthless check and sold it in another state, *Boone v. United States,* 235 F.2d 939 (4th Cir. 1956); and where the defendant was hired by a firm in the business of furnishing drivers to car dealers, to drive a dealer's car from Chicago to San Francisco and was found several months later in Colorado with the

car still in his possession. *O'Dell v. United States,* 251 F.2d 704 (10th Cir. 1958). In an insurance case where the borrower of a car had abandoned it in another state, the court held that this was as effectual a conversion as if the borrower had sold the car and appropriated the proceeds. *Federal Insurance Co. v. Hiter,* 164 Ky. 743, 176 S.W. 210 (1915).

The instant case is especially interesting because of the present widespread use of credit cards. This is the first time the question as to whether the use by its holder of a valid credit card but with no intention of paying the charges incurred is theft within the meaning of the National Motor Vehicle Theft Act. The holding of the court on this point, although immaterial to the decision due to the *Turley* case, *supra,* appears sound since the rental agency actually relied on the credit of the organization issuing the card and not on the credit of the defendant, thereby distinguishing the bad check cases. But justification of the court's holding as to the defendant's subsequent acts is not as certain. If the defendant formulated his subsequent line of conduct before he entered New York, a violation of the Act should be sustainable. Instead of a "minor deviation," the abandonment of the car in another state should be termed quite a serious breach of the permission to use it one week in the state where it was rented and then return it. The fact that the car was finally restored to the owner is not an infallible measure of the risk of loss involved in the abandonment nor of the defendant's intent when he moved the car from New Jersey to New York. Why should the consequences of the defendant's acts be the criteria of his guilt—or intent?

JOLINE B. WILLIAMS

DISCOVERY—DEFENDANT'S LIABILITY INSURANCE

In a personal injury action arising out of an automobile collision, defendant objects to certain interrogatories propounded by plaintiff, *Held,* plaintiffs were not entitled by discovery process to discovery whether defendant had liability insurance and therefore, neither the name of the company nor the limits of the policy. In this case of first impression in Delaware, the Superior Court finds that not only would such discovery be prejudicial to the defendant, but that there is also "a complete lack of any showing of relevancy to the issues as framed by the pleadings or otherwise indicated by the plaintiff." *Ruark v. Smith,* ____ Del. Super. Ct.____, 147 A.2d 514, (1959).

The Delaware Code, substantially like Rule 26 (b), of the Federal Rules of Civil Procedure, states in effect, that anything may be examined in pre-trial interrogatories which is not privileged, and which is relevant to the subject matter involved in the pending action, and further that it is not grounds for objection that the testimony sought would be inadmissible at the trial, if said testimony appears reasonably calculated to lead to the discovery of admissible evidence. Rule 26 (b), Del. Code Anno. In *Hickman v. Taylor,* 329 U.S. 495, 67 Sup. Ct. 385, 91 L.Ed. 451, (1947), the Supreme Court held that the purpose of the Federal Rules is to narrow down and clarify the basic issues between the parties and to ascertain facts related to these issues. In an often cited case the Kentucky Court of Appeals, admitting that the Kentucky rules on discovery are substantially the same as the Federal rules, found that since the question of liability insurance would be relevant to the subject matter of the action if the plaintiff prevailed and his judgment was unsatisfied, it would be equally so while the action is pending. *Maddox v. Grauman,* (Ky. 1954) 265 S.W.2d 939, 41 A.L.R. 2d 964. A California court went even further by allowing discovery of liability insurance limits and reasoning that such discovery was an aid to plaintiff in enforcing a judgment "expected" to be recovered in a pending personal injury suit against the insured and the insurer. *Superior Ins. Co. v. Superior Court,* 37 Cal.2d 749, 235 P.2d 833 (1951). In an attempt to adhere to the Federal Rules of Civil Procedure and noting the increasing number of financial responsibility laws in various states, a federal district court in Tennessee held that policies required under these state laws are definitely relevant to the subject matter of pending actions. *Brackett v. Woodall Food Products,* 12 F.R.D. 4, (1951). In another federal district court case the amount of insurance was held relevant issues. *Orgel v. McCurdy,* 8 F.R.D. 585 (1948). Holding contra to the above cited cases the principal case relies heavily on *McClure v. Boeger,* 105 F. Supp. 612, (U.S. District Ct., E. D. Penn. 1952), in which the court, after discrediting any direct relevancy, held that evidence of the presence of liability insurance would not lead to disclosure of the kind of information which was the objective of the discovery process. Such information would not effect the position of either party as to the issues involved but would be an unfair advantage to the plaintiff. The matter to be discovered must be such as might be used at the trial or lead to matters which might be used at trial. *Gallimore v. Dye,* 21 F.R.D. 283 (U.S. Dist. Ct., E.D. Ill. 1958). Courts in general have not seen fit thus far to allow the matter of liability insurance to be introduced

before the jury unles its direct relevancy is proved. *Houston v. Taylor,* 50 Ga. App. 811, 179 S.E. 207 (1935), and some have held that limits of liability insurance are not proper matters subject to discovery. *Brooks v. Owens,* (Fla. 1957), 97 So.2d 693.

There has been no definite trend toward a majority holding in these cases. The Supreme Court of the United States has not yet ruled on this question when presented, possibly because of the conflict between upholding or overruling the Federal Rules of Civil Procedure on one hand and subjecting the defendants to a possible infringement of their rights under the 14th Amendment to the United States Constitution by depriving them of property without due process. Until such a ruling, however, the courts, both Federal and state, should realize that the rules of discovery are set up to afford a speedy, just, and inexpensive determination of actions and their purpose is not to place one party in a more strategic position than the other.

JOHN SIDNEY FLOWERS

INSURANCE—INTEREST AFTER JUDGMENT

Plaintiff recovered judgment in a former personal injury action for an amount larger than defendant's insurer's limit of liability. Fourteen months after date of judgment, insurer tendered its limit of liability, which was refused by plaintiff. This action against the insurer is for interest from the date of judgment on the total amount of judgment. The liability policy provided that the insurer will " . . . pay *all interest* accruing after entry of judgment until the company has paid, tendered, or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon." It also provided that "The amounts incurred under this insuring agreement, except settlements of claims and suits, are payable by the company in addition to the applicable limit of liability of this policy." Plaintiff recovered judgment for interest on the entire judgment from the date of the former judgment to the date of the final order in this action. On appeal, *held,* reversed and remanded with interest on the total amount of the judgment from the date of the former judgment to the date of tender. The ambiguity of the phrase "all interest" does not make the rest of the section ambiguous. *River Valley Cartage Co. v. Hawkeye-Security Ins. Co.,* 18 Ill. App. 2d 454, 152 N.E.2d 603 (1958).

There are two opposite views on the amount of interest due by a liability insurer after judgment in excess of its policy limits, against

the assured. The first view is that the insurer should be liable, in addition to its limit of liability, for interest on the entire judgment. In support of this view, it is said that the assured has no control over the case, *United Servs. Auto. Ass'n. v. Russom,* 241 F.2d 296 (5th Cir. 1957); that the phrase "all interest" is ambiguous, and ambiguities are usually construed most strongly against the insurer, *Underwood v. Buzby,* 236 F.2d 937 (3rd Cir. 1956); that the company may end the accrual of interest at any time by its tender, *Maryland Cas. Co. v. Wilkerson,* 210 F.2d 245 (4th Cir. 1954); and that "all interest" means total interest, as the insurer did not set any limit on the amount of interest as it did with the release of attachment bond coverage in the same policy, *Highway Cas. Co. v. Johnston,* 104 So.2d 734 (Fla. 1958). The second view is that the insurer should *only* be liable for interest on its limit of liability, in addition to its limit of liability. The courts holding thus say that the insurer would be penalized for encouraging the assured to appeal, *Standard Acc. Ins. Co. of Detroit, Mich. v. Winget,* 197 F.2d 97, 34 A.L.R.2d 250 (9th Cir. 1952); that since the parties limited the amount of the insurer's liability, it is unlikely that they intended it to pay interest on a greater amount, *Sampson v. Century Indem. Co.,* 8 Cal.App.2d 476, 66 P.2d 434, 109 A.L.R. 1162 (1937); that it would be an imposition of vicarious liability to force the insurer to pay interest on an amount in excess of its policy limits, *Home Indem. Co. v. Corie,* 206 Misc. 720, 134 N.Y.S.2d 443 (Sup. Ct.), *aff'd.,* 286 App. Div. 996, 144 N.Y.S.2d 712 (1955); and that since the assured had the use of the money in excess of the policy limits from the date of judgment, and since interest is compensation for the use or detention of money, the insurer should not have to pay interest on this excess, *United States Fid. & Guar. Co. v. Hotkins,* 8 Misc. 2d 296, 170 N.Y.S.2d 441 (Sup. Ct. 1957).

The instant case follows the first of the two irreconcilable views and allows interest on the entire judgment, but the second view, based on the intent of the parties and the definition of interest, would seem somewhat more logical. The insurance industry has alleviated this problem as to individually owned private passenger automobiles, by providing in its new Standard Family Automobile Policy that it will " . . . pay, in addition to the applicable limits of liability: . . . , and all interest on the entire amount of any judgment therein . . . ."

JEROME L. KAPLAN

TORTS—AUTOMOBILE GUEST OR INVOLUNTARY OCCUPANT

Plaintiff, a guest in defendant's automobile, alleged that she was not a guest under the guest statute at the time of an accident, wherein she was injured, because she had protested against defendant's negligent driving and had demanded to be let out of the car, which, she contended, made her an involuntary occupant, and therefore defendant owed her a minimum of ordinary care. The trial court let the jury decide whether plaintiff was an involuntary occupant for whom defendant should have exercised ordinary care, or whether defendant was guilty of gross negligence and liable therefor. The jury returned a general verdict for the plaintiff. On appeal, *held,* affirmed; the question was properly submitted to the jury. *Andrews v. Kirk,* _____Fla._____., So.2d 110 (1958).

The majority of the states now have automobile guest statutes which limit the liability of the host to a gratuitous guest. These statutes vary greatly in their language, but in general provide that the host is not liable to the guest unless his conduct is "willful," "wanton," "reckless," "grossly negligent," "in disregard of the safety of others," or the like. SMITH & PROSSER, CASES ON TORTS 817 (2d ed. 1957). There are usually two reasons given for the enactment of guest statutes: 1) To prevent a host from being liable to a gratuitous guest for ordinary negligence, *Nelson v. McVillan,* 151 Fla. 847, 10 So.2d 565 (1942); and 2) To prevent fraud and collusion between the parties resulting in unjust charges to automobile liability insurers for injury or death of the guest *Weber v. Pinyan,* 9 Cal. App. 2d 226, 70 P.2d 183, 112 A.L.R. 407 (1937). Because the guest statutes change the common law they are to be construed as strictly as possible without defeating the expressed purpose of the statute. *Chaplowe v. Powsner,* 119 Conn. 188, 175 Atl. 470, 95 A.L.R. 1177 (1934); *Bateman v. Ursich,* 36 Wash. 2d 729, 220 P.2d 314, 18 A.L.R.2d 1440 (1950). The general rule is that when one becomes a guest, he becomes a guest for the entire trip and does not terminate the host-guest relationship by his demands. *Akins v. Hemphill,* 33 Wash. 2d 735, 207 P.2d 195 (1949); *Taylor v. Taug,* 17 Wash. 2d 533, 136 P.2d 176 (1943); 5 Clev.-Mar.L.Rev. 101 (1956).

Most courts manage to get around the guest statute when they want the defendant to be liable in this type situation by finding that defendant's refusal to comply with plaintiff's demand to be let out of the automobile can amount to gross negligence, or such negligence that will qualify under the statute to make defendant liable. The signifi-

cance of this case is that it goes against what has been stated to be the general rule as derived from a very limited number of cases deciding the particular point involved here. In fact the number of cases is so few that the rule in the present case is probably the majority rule now with the addition of this decision.

LARRY BRYANT

STATUTORY CONSTRUCTION—AUTO OWNER'S LIABILITY ACT—NECESSITY OF OWNER'S CONSENT FOR USE

Plaintiff sued defendant for injuries resulting from an accident involving defendant's automobile while it was being driven by a parking lot attendant, with the knowledge and consent of defendant. The action was brought under the act approved March 4, 1955, stating that, "Every owner of a motor vehicle operated upon the public highways, roads or streets of this state shall be liable and responsible for the death, or injuries to, person or property resulting from negligence in the operation of such motor vehicle, if said motor vehicle is being used in the prosecution of the business of such owner or if said motor vehicle is being operated for benefit of such owner." Ga. L. 1955, pp. 454, 455, Ga. Code Ann. § 68-301 (1957 Rev.). The trial court overruled defendant's demurrers. On appeal, *held*, reversed. The statute is unconstitutional. Making the owner of a vehicle liable for injuries arising from its negligent use by another without the owner's consent is an arbitrary and capricious imposition of vicarious liability. *Frankel v. Cone*, 214 Ga. 733, 107 S.E.2d 819 (1959).

As a general rule, in the absence of a statute to the contrary, the owner of a motor vehicle is not liable for injury to another resulting from the negligence of his bailee in the operation of the vehicle. *Brooks v. McNutt Auto Delivery Co., Inc.*, 214 N.Y.S. 562 (1926). However, liability may be imposed on the owner for the acts of the hirer or borrower when the hirer or borrower is acting as agent or servant of the owner. *Sharples v. Watson*, 157 Miss. 236, 127 So. 779 (1930). Where the operator is a prospective purchaser from the owner, the owner is not responsible for negligence of the operator, their relationship being regarded as that of bailor and bailee. *Harris v. White Hall Chevrolet*, 55 Ga. App. 130, 189 S.E. 392 (1936). The courts have upheld the validity of statutes which impose liability on the owner of a motor vehicle for injuries resulting from the negligence of another using the vehicle with the consent, express or im-

plied, of the owner. See: *Young v. Masci,* 289 *U.S.* 253, 53 Sup Ct. 599 77 *L.E.* 1158 (1933); *Manica v. Smith,* 138 Cal. App. 695, 33 P.2d 418 (1934); *Robinson v. Bruce Rent-a-Ford* Co., 205 Iowa 261, 215 N.W. 724 (1927), and in order to hold an owner liable for the negligence of another operating the vehicle, it is essential to show that such person was in legal contemplation the owner of the vehicle. *Graf. v. Harvey,* 79 Cal. App. 2d 64, 179 P.2d 348 (1947). The purpose of such statutes is to protect innocent third persons from the careless use of motor vehicles, *Burgess v. Cahill,* 26 Cal.2d 320, 158 P.2d 393 (1945), and to make the owner with whose consent the vehicle is used liable where no liability would otherwise exist. *Mills v. Gabriel,* 18 N.Y.S.2d 78 (1940). A statute similar to that involved in the principal case was declared unconstitutional in Michigan, as depriving the owner of his property without due process of law, since the owner is liable for injuries caused by the negligent operation thereof by a mere stranger or trespasser, not sustaining to such owner the relation of servant, agent, or employee, without reference to how careful the owner has been himself. *Daugherty v. Thomas,* 174 Mich. 371, 140 N.W. 615 (1913).

The courts have consistently upheld statutes which impose liability upon automobile owners for the negligence of another using the vehicle with the consent of the owner. The statute under which the action in the principal case was brought was apparently invalidated because it lacked this element of consent, even though the automobile involved in the injury was being used with the consent of the defendant. Where the owner receives the benefit from another using his automobile, it is submitted that he should then bear the burden of loss for injuries arising from its negligent use. This should be true regardless of consent, where the object of the use is owner's benefit. The effect of the statute was to impose liability on the owner whose automobile was being used for his *benefit* when the injury to plaintiff occurred. That being so, the only consideration should be the benefit to the owner.

G. DARRELL FENNELL

TORTS—FAMILY PURPOSE DOCTRINE—LIABILITY OF HUSBAND TO WIFE FOR TORT OF THEIR MINOR CHILD

Plaintiff, wife of defendant, received injuries resulting from the negligent operation of defendant's auto by their unemancipated minor son who had general authority to use the automobile. Plaintiff re-

covered a judgment against defendant under the Family Purpose Doctrine, including an amount for doctor and hospital bills. On appeal, *held,* judgment set aside and case remanded with directions only to reduce the judgment by the amount of doctor and hospital bills. *Silverman v. Silverman,*_____Conn._____, 145 A.2d 826 (1958).

The common law concept of unity of husband and wife resulted in the rule that tort actions could not be maintained by one spouse against another. *Thompson v. Thompson,* 218 U.S. 611, 31 S.Ct. 111, 54 L.Ed. 1180, 30 L.R.A. (NS) 1153 (1910). This rule of immunity between husband and wife is based on a policy of preserving domestic peace and felicity. *Yellow Cab Co. v. Dreslin,* 86 App. D.C. 327, 181 F.2d 626, 19 A.L.R. 2d 1001 (1950). However, a growing minority of courts, PROSSER, TORTS 675 (2nd ed. 1955), have construed Married Women's Acts to permit an action by one spouse against the other for a personal tort. *Brown v. Brown,* 88 Conn. 42, 89 A. 889 (1914), construed Public Acts 1877, c. 114, now Conn. General Statutes, c. 366, pt. 1 (1949), to allow an action by a wife against her husband. Actions have been allowed for intentional torts, *Johnson v. Johnson,* 201 Ala. 41, 77 So. 335, 6 A.L.R. 1031 (1917) (assault and battery), as well as negligent torts. *Bushnell v. Bushnell,* 103 Conn. 583, 131 A. 432, 44 A.L.R. 785 (1925). A majority of courts, HARPER AND JAMES, THE LAW OF TORTS § 8.11, at 648 (1956), hold that actions between parent and unemancipated minor child for personal torts are inconsistent with the parent's status and legal duties, and the dependence of the minor upon the parent. *Schneider v. Schneider,* 160 Md. 18, 152 A. 498 (1930). "The injury to public welfare resulting from the family friction involved in such litigation is held to outweigh the loss caused to the individual parent . . . ." *Shaker v. Shaker,* 129 Conn. 518, 29 A.2d 765 (1942). However, there is some authority to the contrary, *Wells v. Wells,* 48 S.W. 2d 109 (Mo. App. 1932) (an automobile tort case where the mother recovered against her son for his negligent operation of the vehicle). At common law, the mere relation of parent and child imposes no liability on the parent for the torts of the minor child, *Gray v. Meadows,* 24 Ala. App. 487, 136 So. 876 (1931), but a parent may be liable upon the relation of principal and agent. *Murphy v. Loeffler,* 327 Mo. 1244, 39 S.W. 2d 550 (1931). From this concept arose the Family Purpose Doctrine based on the theory that when an automobile is maintained by the owner for the pleasure or convenience of his family, a member of the family using it for his own pleasure or convenience, is the agent of the owner, and the latter is responsible for his negligence.

Gossett v. Van Egmond, 176 Ore. 134, 155 P.2d 304 (1945). This doctrine may also be predicated upon the theory of *respondeat superior, Thompson v. Lassiter,* 246 N.C. 34, 97 S.E.2d 492 (1957), which is but a species of agency. *Vaughn v. Booker,* 217 N.C. 479, 8 S.E.2d 603 (1940). Approximately one-half of the American courts have accepted this doctrine, PROSSER, TORTS 369 (2d ed. 1955). Other states have specifically rejected it, holding that there is no liability unless evidence is produced showing a principal-agent or master-servant relation. *Hartough v. Brint,* 101 Ohio App. 350, 140 N.E.2d 34 (1955). In a case similar to the instant case, the court ruled that the wife could not recover from her husband for injuries resulting from the negligent operation of an automobile by their daughter to whom the husband had entrusted the auto. *Corren v. Corren,* 47 So.2d 774 (Fla. 1950). The court found no need to discuss the Family Purpose Doctrine or to consider whether the daughter was a minor, but decided solely upon the common law concept that a wife cannot have a cause of action in tort against her husband.

The holding in the instant case depended upon the co-existence of the Family Purpose Doctrine with a construction of a Married Women's Act to allow personal injury suits by one spouse against the other. Both of these concepts have been questioned in various jurisdictions, and the judicial trigonometry found in this case may not often be necessary. There was no mention of liability insurance in the *Silverman* case. However, it should be noted that rarely is liability insurance mentioned in the reports on inter-family suits. The courts may not need to consider it, for where there is insurance there would be a minimum of family friction as the duty of compensation would rest upon the insurer, an outsider to the family relation. Conversely, the parties probably would not bring the suit in the absence of insurance. Whatever the reasoning, it seems clear that liability insurance has altered the legal concept of public policy in inter-family suits.

PAUL CLIFFORD ARMITAGE

TORTS—NEGLIGENCE—ASSUMPTION OF RISK BY CADDY ON GOLF COURSE

This action was brought by an 11-year-old caddy and his father against a golfer and a country club for injuries suffered by the caddy after being struck by a golf ball while in a practice fairway. The caddy was instructed to "shag" balls for a lady golfer and was doing so 125 yards from the practice tee. While the lady golfer was practicing the

club champion began driving golf balls diagonally across the practice fairway and in so doing struck the caddy in the eye. On appeal, *held,* that the defendant's defense of assumption of risk by caddy could not be sustained as caddy was unaware defendant was on tee trying to drive over his head and had no knowledge of the risk which he was said to have assumed. *Jesters v. Taylor,* 105 So.2d 569 (Fla. 1958).

That area of negligence law known as assmuption of risk has long been a nebulous and uncertain field. "The plaintiff makes the choice at his own risk, and is taken to consent that the defendant shall be relieved of responsibility. The legal position is then that the defendant is under no duty to protect the plaintiff." PROSSER, TORTS §51 at 376, (1st ed. 1941). Cases of this nature are in agreement for the most part with the contention that a caddy by voluntarily participating in the sport assumes the risk of injury from the ordinary and usual hazards inherent in the activity. *Campion v. Chicago Landscape Co.,* 295 Ill. App. 225, 14 N.E.2d 879 (1938). But negligence of defendant is not usually considered an ordinary and usual hazard the risk of which is assumed by the plaintiff. *Toobey v. Webster,* 97 N.J.L. 545, 117 A. 838 (1922). However, once plaintiff is fully informed or is made aware of such negligence the risks arising from such negligence may be assumed. PROSSER, TORTS 385 (1st ed. 1941). A recent Georgia case, however, held that an unknowing injured plaintiff, playing 125 yards away in an adjacent fairway, could not recover because "people who are on a golf course must assume the risk of being injured from a deflected or hooked or sliced ball." *Rose v. Morris.* 97 Ga. App. 764, 104 S.E.2d 485 (1958).

Although questions involving assumption of risk have always been strictly construed, it would seem that knowledge of the risk should be the basis of assumption of the risk, and cases denying recovery even where plaintiff had no knowledge of immediate danger would seem to declare open season on caddies and golfers merely because they have chosen to work and play on a golf course. The flight of a golf ball is unpredictable and uncertain and where there is a danger of striking someone golfers should use at least ordinary care. Therefore it would seem only fair that a plaintiff who was unaware of the immediate risk should not be denied recovery because of an allegation of assumption of risk.

ROBERT L. STEED

TORTS—RELEASE OF ONE JOINT TORT-FEASOR—COVENANT NOT TO SUE

Plaintiff broker sued defendant purchaser of property for commissions lost as a result of an alleged conspiracy between the vendor and purchaser. Defendant made an offer to the vendor, which was rejected. Subsequently, without knowledge of plaintiff, vendor and purchaser consummated the transaction. Prior to this action plaintiff sued vendor for brokerage commission and after extensive litigation, the parties settled their controversy. Vendor paid plaintiff a portion of the commission allegedly lost and plaintiff executed a general release discharging the vendor from any claim growing out of the sale of the property. The trial court's granting of defendant's motion for summary judgment was reversed by the Appellant Division. On appeal, *held,* affirmed. The case presented a fact question as to whether a release given by the broker to the vendor had been intended to discharge the purchaser as well as the vendor, and as to whether the broker had been fully compensated. *Green v. Peck,* 28 N.J. 351, 146 A.2d 665 (1958).

At common law, a release of one joint tort-feasor was a release of the remaining joint tort-feasor, whether the injured plaintiff had been compensated or not. 76 C.J.S., Release §50 (1952). This was so because the release was held to have extinguished the cause of action, *Stires v. Shirwood,* 75 Ore. 108, 145 P. 645 (1915), and because permitting the plaintiff to sue the other tort-feasor would allow plaintiff to obtain more than full compensation for his injury. *Pinkham Lumber Co. v. Woodland State Bank,* 156 Wash. 117, 286 P. 95 (1930). Most courts continue to hold that a release of one of two concurrent tort-feasors is a complete surrender of any cause of action against the other, without regard to the sufficiency of compensation received. PROSSER, TORTS 243 (2d ed. 1955). The common law doctrine of release has been severely criticized. It has been said that the rule that the release of one joint tort-feasor is a release of all others is "merely a surviving relic of the Cokian period of metaphysics." Wigmore, 17 Ill. L. Rev. 563 (1923). A departure from the common law release is a most needed reform because (1) the rule stifles expeditious settlements—each joint wrongdoer is inclined to wait for the other to settle first; (2) the defendant is given an advantage inconsistent with the nature of his liability; (3) a wrongdoer who makes no attempt to settle is rewarded at the expense of one who makes partial satisfaction; (4) a trap is set for an innocent plaintiff whereby he may be deprived of full compensation. 1958 NOTRE DAME LAW. 292. Dissatisfaction with the common law release

rule has led many jurisdictions to develop expedients to side step its effect. HARPER AND JAMES, TORTS §10.1 (1956). The device commonly accepted is that of a covenant not to sue by which the plaintiff does not surrender his action but merely covenants that he will not bring action against the covenantee. *Pellett v. Sonotone Corp.*, 26 Cal. App. 2d 705, 160 P.2d 783, 160 A.L.R. 863 (1945). If the instrument is framed in the usual language of a release rather than a covenant not to sue, but reserves the right to bring suit against another joint tort-feasor, courts in many jurisdictions interpret the instrument as a covenant not to sue. *Gilbert v. Finch*, 173 N.Y. 455, 66 N.E. 133 (1903). Treating releases as covenants not to sue whenever any justification whatsoever could be found has been aptly termed "judicial fudging." 36 TEXAS L. REV. 56. The covenant not to sue is at best an artificial creature which has little place in a legal world which is tired of fiction. Prosser deems the covenant a technical evasion which renders the form of the instrument highly important in some jurisdictions, allowing only the draftsman who uses language of a covenant to prevail. PROSSER, TORTS 245 (2d ed. 1955). A few jurisdictions in attempts to solve the inadequacies of the common law release doctrine and its modification, the covenant not to sue, have enacted statutes to the effect that the release of one joint tort-feasor does not necessarily release the other. 76 C.J.S., Release §50 (1952). Other jurisdictions such as New Jersey, have not waited for legislative action. In 1957, the common law rule wherein the release of one joint tort-feasor operates as the release of all others was held to be the New Jersey law and the federal law. *Dura Elec. Lamp Co. v. Westinghouse Elec. Corp.*, 249 F.2d 5 (3d Cir. 1957). The principal case, affirmed by unanimous decision and followed, *Daily v. Somberg*, 28 N.J. 372, 146 A.2d 676 (1958), has definitely established that the law of New Jersey is that a release of one joint tort-feasor does not work a discharge of the other, unless it was so intended or unless consideration given constituted full satisfaction of the claim.

It is submitted that the law as promulgated by the Supreme Court of New Jersey is the desired and just solution to the release problem. Settlements will be encouraged because the plaintiff knows that he does not thereby prejudice his case against remaining defendants. Defendants, too, will be more eager to settle, as it will be to no one's advantage to hold out for another to secure a release.

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