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Recent Decisions

RECENT DECISIONS

CARRIERS—AIRPLANES—PROVISION FOR EXEMPTION FROM LIABILITY FOR NEGLIGENCE.—Plaintiff's jewelry, valued at over $3,000, was lost on an interstate flight through the negligence of the defendant air carrier. The plaintiff sued to recover the value of the jewelry in the United States District Court for the Southern District of New York. The defendant contended that a provision of its tariff, duly filed with the Civil Aeronautics Board, exempted it from liability for the loss. Summary judgment was granted to the defendant. On appeal, *held,* one judge dissenting, judgment affirmed, on the ground that such exculpatory provision is not forbidden to air carriers and is properly authorized by the Civil Aeronautics Board. *Litchten v. Eastern Airlines, Inc.,* 189 F. 2d 939 (2d Cir. 1951).

Prior to 1906 there was no federal statute dealing with provisions in contracts of carriage whereby common carriers engaging in interstate commerce sought either to exempt or to limit themselves from liability, even that due to their negligence, toward the goods or passengers they carried. The validity of such provisions depended entirely upon the law of the forum in which they were contested. If a federal court acquired jurisdiction, and if there was no local statute on the subject, a provision limiting the carrier's liability to an amount stipulated by the carrier and the shipper would be upheld, but a provision totally exempting the carrier from all liability would be held void.[1] In banning exemption clauses by common carriers, the federal courts were in accord with the great majority of other jurisdictions which had dealt with the matter. Such clauses were almost uniformly disapproved.[2] However, there was considerable diversity in the state courts over the legal effect of a carrier's contract limiting its liability to a stipulated amount.[3] Accordingly, a federal court could apply its own permissive policy to a limitation provision, unless a local statute provided otherwise, in which event the controversy, despite its federal forum,

1. Compania De Havigacion La Flecha v. Brauer, 168 U.S. 104 (1897); New York, L. E. & W. R. R. v. Estill, 147 U.S. 591 (1893); Liverpool & G. W. Steam Co. v. Phoenix Insurance Co., 129 U.S. 397 (1889); Phoenix Ins. Co. v. Erie & W. Trans. Co., 117 U.S. 312 (1886); Hart v. Pennsylvania R.R., 112 U.S. 331 (1884); Bank of Kentucky v. Adams Express Co., 93 U.S. 174 (1876); Railroad Company v. Lockwood, 17 Wall. 357 (U.S. 1873).

2. See *e.g.,* Baughman v. Louisville, E. & St. L. R.R., 94 Ky. 150, 21 S.W. 757 (1893); Cox v. Central Vermont Cent. R.R., 170 Mass. 129, 49 N. E. 97 (1898); Yazoo & M. V. R.R. v. Grant, 86 Miss. 565, 38 So. 502 (1905); Echert v. Pennsylvania R.R., 211 Pa. 267, 60 Atl. 781 (1905).

Early New York cases were in accord. Cole v. Goodwin & Story, 19 Wend. 251 (N.Y. 1838). But exemption provisions were later sustained as purely private agreements. Door v. New Jersey Steam Navigation Co., 11 N.Y. 485 (1854); Crazin v. New York Central R.R., 51 N.Y. 61 (1872). This permissive policy was later reversed by N.Y. PERS. PROP. LAW § 189, and was fully repudiated by Strauss & Co. v. Canadian Pacific Ry., 254 N. Y. 407, 173 N.E. 564 (1930).

3. Limitation provisions by common carriers were held void as against public policy in Broadwood v. Southern Express Co., 148 Ala. 17, 41 So. 769 (1906); Baughman v. Louisville E. & St. L. R.R., 94 Ky. 150, 21 S.W. 757 (1893); Rhymer v. Delaware, L. & W. R.R., 27 Pa. Super. 345 (1905). Limitation provisions were held valid in Pierce v. Southern Pac. Co., 120 Cal. 156, 52 Pac. 302 (1898); Chicago, B. & Q. R.R. v. Miller, 79 Ill. App. 473 (1898); John Hood Co. v. American Pneumatic Service Co., 191 Mass. 27, 77 N.E. 638 (1906).

would be determined by the local statute.[4] If, however, jurisdiction was in a state court, and the law of the state, whether by statute[5] or by policy,[6] rendered such provision invalid, that state law would be decisive notwithstanding the interstate nature of the shipment[7] or the fact that federal case law was the direct contrary.[8] This diversity led to federal legislation which alone was able to produce uniformity of regulation on such an important element of interstate carriage.[9]

Congress, in 1906, enacted The Camack Amendment to the Interstate Commerce Act.[10] The Supreme Court of the United States construed this statute as prohibiting interstate rail carriers from exempting themselves, by contract or otherwise, from all liability, but allowing such carriers to limit that liability.[11] The Court observed that the Carmack Amendment was a statutory declaration of the rule administered by the federal courts prior to the federal statute.[12] All state law on exemption and limitation provisions by interstate rail carriers was superseded by the Carmack Amendment, by means of which Congress exercised its hitherto dormant, but conceded right to regulate this element of interstate commerce.[13] Similar statutes were later enacted by Congress applying to water[14] and motor[15] carriers engaged in interstate commerce.

If an interstate air carrier, at any time before June 1938, the date of the Civil Aeronautics Act, sought to enforce a provision limiting its liability, it would find itself in the same position as other interstate carriers were before such matters were brought under federal statutes.[16] Up to May 21, 1938, federal courts, in the absence of a local or federal statute upon the matter, would find the basis for their invalidation of exemption provisions by air carriers, in a diversity of citizenship action, embedded in the "'general law' as to which federal courts exercised an independent judgment."[17] This foundation was swept away on that date, however, by the decision in *Erie R.R. v. Tompkins*.[18] Accordingly, if an air carrier sought validation of an exemption provision in the month period between the decision in *Erie R.R. v. Tompkins* and the date upon which the Civil Aeronautics Act became law, the applicable law would be that of the state where suit was brought, whether the court

4. Swift v. Tyson, 16 Pet. 1, 18 (U.S. 1842).

5. Chicago, M. & St. Paul Ry. v. Solan, 169 U.S. 133 (1898).

6. Pennsylvania R.R. v. Hughes, 191 U.S. 477 (1903).

7. "It is well settled that the State may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate traffic." *Id.* at 488. See also Adams Express Co. v. Croninger, 226 U.S. 491 (1913); Chicago, M. & St. Paul R.R. v. Solan, 169 U.S. 133 (1898).

8. New York Life Insurance Co. v. Hendren, 92 U.S. 286 (1875); Pennsylvania R.R. v. Hughes, 191 U.S. 477, 486 (1903).

9. Adams Express Co. v. Croninger, 226 U. S. 491 (1913).

10. 34 STAT. 593 (1906), 49 U.S.C. § 20 (11) (1951).

11. Adams Express Co. v. Croninger, 226 U. S. 491 (1913).

12. *Id.* at 511.

13. *Id.* at 506.

14. 27 STAT. 445 (1893), 46 U.S.C. § 190 (1951).

15. 49 STAT. 563 (1935), 49 U.S.C. § 319 (1951).

16. Adams Express Co. v. Croninger, 226 U. S. 491 (1913).

17. Erie R.R. v. Tompkins, 304 U. S. 64, 75 (1938).

18. 304 U. S. 64 (1938).

be federal or local. Were it not for the Civil Aeronautics Act of 1938, the exculpatory provision relied upon by the defendant in the instant case would be void under New York law,[19] and thereby, under the doctrine of *Erie R.R. v. Tompkins* the plaintiff would be entitled to recover. The issue in the instant case is how, if at all, the Civil Aeronautics Act changes the state of the law regarding exculpatory provisions for air carriers that existed prior to its enactment.

The majority holds that although the language of the Act is silent upon the subject, exemption provisions come within its purview, for Congress, seeking uniformity of rates and services in air transportation, desired that a single agency, rather than numerous courts operating under diverse laws, have primary responsibility for supervising such rates and services. Dissenting vigorously, Judge Frank denies that the scope of the Act extends to exculpatory clauses, contending that since the Act is silent on the matter of the validity of such provisions, there is no federal statute on the subject, and therefore the validity of the provisions must be determined by the law of the state in which they are contested. Further, the dissenting opinion declares that even if it were to be conceded, due to the desire of Congress that uniform rules should govern interstate air carriage, that the doctrine of *Erie R.R. v. Tompkins* did not apply, Congress could not have intended merely by remaining silent to authorize the Board to adopt a policy flatly at odds with the hitherto uniform federal policy denying validity to exculpatory provisions.

It is submitted that the most probable effect of Congressional silence is to leave those provisions outside the sphere of federal legislation, and thereby subject to state rulings. However, it is possible that Congress desired to encompass the entire enterprise of civil aeronautics, including all elements of its variegated structure, when it enacted the Civil Aeronautics Act. If that be the case, it would seem that in the absence of an express clause in the statute disposing of the legality of exculpatory provisions the intent of Congress must be assumed, in the absence of a compelling reason or a conspicuous statement in the statute's legislative history to the contrary, to have this element of interstate air carriage conform to the broad pattern of regulations by which Congress, in its prior dealings with similar provisions of non-air carriers, constantly refused to accord exculpatory clauses legal effect. Clearly, Congress may not be deemed to have intended, by remaining silent, to permit air carriers to enforce a contract provision for exemption of liability uniformly forbidden to all other types of carriers in the interstate scheme. Such an intention, imputed by the majority in the name of uniformity of national carriage, actually operates to introduce diversity. The sound reasons for prohibiting a common carrier from exempting itself from liability towards its cargo[20] apply equally to all carriers, regardless of the medium through which they are propelled.

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19. *Cf.* N. Y. PERS. PROP. LAW § 189. See also Strauss & Co. v. Canadian Pacific Ry., 254 N. Y. 407, 173 N. E. 564 (1930).

20. The rationale of the cases cited in notes 1, and 2, *supra,* is that common carriers, as distinct from ordinary bailees, are powerful enough to extort for themselves inequitable exculpatory provisions from the public, and if allowed to do so, would not treat the public or its goods with care and diligence. The law, therefore, for reasons of public policy, steps between the parties and imposes upon one of them a liability that necessarily creates a high degree of care. What exists, therefore, between the parties, is a *relation* imposed by law, upon which the law insists and which cannot be abrogated by either or both of the parties.

CONTRACTS—DISPUTES CLAUSE IN GOVERNMENT CONTRACT—FINALITY OF DEPARTMENT HEAD'S DECISION IN ABSENCE OF FRAUD.—The plaintiff agreed to construct a dam for the United States under a government construction contract containing the standard "disputes clause" which provides that all disputes involving questions of fact shall be decided by the contracting officer, with the right of appeal to the head of the department "whose decision shall be final and conclusive upon the parties." A number of claims arising out of disputes were filed with the contracting officer whose decision insofar as it was adverse was appealed to the head of the department—in this instance, the Secretary of the Interior. Dissatisfied with the latter's resolution of the disputes, the contractor brought suit in the Court of Claims. That court set aside the decision of the department head in respect to one claim involving a question of fact on the ground that the plaintiff did not agree, by signing the contract, to be bound by arbitrary and capricious administrative decisions made in disregard of accepted practices of trade and proper accounting methods. The Supreme Court of the United States, reversing the Court of Claims, *held,* three justices dissenting, that the decision of the department head is conclusive unless impeached by proof of actual fraud. *United States v. Wunderlich* et al., 342 U. S. 98 (1951).

That a provision such as Article 15[1] is valid in both governmental and private contracts is well-settled.[2] Parties competent to make contracts are also competent to make agreements concerning the method of settling factual disputes.[3] Since the validity of the clause cannot be challenged, the essential issue is: to what extent may the courts overthrow a decision of a department head made in conformity with such provisions?

On its face, the disputes clause appears to be conclusive. By express terms, it is stated that all disputes concerning questions of fact are to be decided by the contracting officer and, if affirmed on appeal to the department head, the decision is to be final and conclusive on the parties. However, the courts have long recognized an exception to the finality of departmental findings of fact. Where the officer's decision has involved fraud or such gross mistake as would necessarily imply bad faith, judicial review has been granted. This exception was first expressed by the Supreme Court of the United States in 1854[4] and has since been reiterated in numerous Supreme Court, Court of Appeals, and Court of Claims decisions.[5] As late as 1950,

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1. Article 15. *"Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

2. United States v. Moorman *et al.,* 338 U. S. 457 (1950); Chicago, Santa Fe & Cal. R.R. v. Price, 138 U. S. 185 (1891); Martinsburg & Potomac R.R. v. March, 114 U. S. 549 (1885); Sweeney v. United States, 109 U. S. 618 (1883); Kihlberg v. United States, 97 U. S. 398 (1878).

3. United States v. Moorman *et al.,* 338 U. S. 457 (1950).

4. Burchell v. Marsh, 17 How. 344 (U. S. 1854).

5. See *e.g.,* Ripley v. United States, 223 U. S. 695 (1912); United States v. Gleason, 175 U. S. 588 (1900); see note 2 *supra.* See also Lindsay *et al.* v. United States, 181 F. 2d 582 (9th Cir. 1950); S. J. Groves & Sons Co. v. Warren, 135 F. 2d 264 (D. C. Cir. 1943); Great Lakes Dredge & Dock Co. v. United States, 90 F. Supp. 963 (Ct. Cl. 1950); Mitchell Canneries, Inc. v. United States, 77 F. Supp. 498 (Ct. Cl. 1948).

in *United States v. Moorman* et al.,[6] the Supreme Court of the United States confirmed this view by stating that such findings are " 'conclusive, unless impeached on the ground of fraud, or such gross mistake as necessarily implied bad faith.' "[7]

Subsequent to this decision, the Court of Claims in *Penner Installation Corp. v. United States*,[8] interpreted the decision in the *Moorman* case as not altering the time-honored exceptions, and continued to follow its customary position of reversing departmental decisions which were fraudulent or "so grossly erroneous as to show bad faith."[9] Where the contracting officer acted arbitrarily or capriciously, bad faith was implied. The Court of Claims pointed out that the contracting officer's decision, to be conclusive, must have been rendered with due regard to the rights of both the contracting parties.[10] "He must not act as a representative of one of the contracting parties, but as an impartial, unbiased judge."[11] Failure to do so would give the Court of Claims jurisdiction to set aside his decision. This view was endorsed by the Court of Claims in the present action.[12]

In the instant case, the majority of the Court held that under Article 15, the decision of the department head in a dispute involving a question of fact is final unless founded on fraud. To be set aside for fraud, fraud must be alleged and proved as it is never presumed.[13] "Arbitrary," "capricious," or "grossly erroneous" decisions are not the equivalent of fraud. Fraud is "conscious wrong-doing, an intention to cheat or be dishonest."[14] In the absence of fraudulent conduct so defined, the decision of the department head must stand as conclusive. The Court noted that if this standard is too limited, legislative action is the proper remedy.

In a strong dissenting opinion, Mr. Justice Jackson pointed out that the majority view not only reads out of the heretofore undisputed exception the important phrase "or such gross mistake as necessarily implies bad faith,"[15] but adds an exceedingly rigid meaning to the word "fraud." While contracting parties are at liberty to place the decision of their disputes in the hands of one of them, it is observed that one who bargains to be made judge of his own cause impliedly covenants to do justice. The door to judicial relief should not be closed on the victim of arbitrary action who is unable to prove conscious fraud.

Mr. Justice Douglas correctly observes in his dissenting opinion that "the instant

6. 338 U. S. 457 (1950). The Moorman case involved the conclusiveness of the findings of the contracting officer on a question of contract interpretation; specifically, whether or not the work demanded of the contractor was outside the requirements of the contract. The court considered whether this was a question of law or fact, but felt it unnecessary to decide the point. It was held that certain provisions in the specifications making the Secretary of War's decision on this issue final were not in conflict with or limited by Article 15, for the latter expressly excepts methods of settlement otherwise specifically provided in the contract. The court concluded that in either event the denial of the contractor's claim was final and not subject to reconsideration by the Court of Claims.

7. *Id.* at 461.

8. 89 F. Supp. 545 (Ct. Cl.), *aff'd per curiam*, 340 U. S. 898 (1950).

9. *Id.* at 547.

10. Citing Ripley v. United States, 223 U. S. 695 (1912).

11. Penner Installation Corp. v. United States, 89 F. Supp. 545, 547 (Ct. Cl.), *aff'd per curiam*, 340 U. S. 898 (1950).

12. See Wunderlich *et al.* v. United States, 117 Ct. Cl. 92 (1950).

13. United States v. Colorado Anthracite Co., 225 U. S. 219 (1912).

14. United States v. Wunderlich *et al.*, 342 U. S. 98, 100 (1951).

15. United States v. Moorman *et al.*, 338 U. S. 457, 461 (1950).

case reveals only a minor facet of the age-long struggle" against "the unlimited discretion of some civil or military official, some bureaucrat."[16]

It is submitted that the dissenting opinions enunciate a more liberal and healthy rule. Despite the express terms of the contract clause, even the narrow view espoused by the majority in the principal case permits an exception—fraud. The contractor is not held absolutely to his bargain. The question of judicial review thus becomes one of degree, not of principle.

If intentional fraud is the sole basis for setting aside an administrative decision, one who contracts with the government is put at the mercy of any arbitrary, capricious, or negligent official whose actions fall short of fraud.[17] As Mr. Justice Douglas ably points out in his dissenting opinion, "the rule we announce has wide application and devastating effect. It makes a tyrant out of every contracting officer . . . even though he is stubborn, perverse or captious."[18] Unless the Supreme Court of the United States modifies this rule, legislation would seem to be the only recourse.[19]

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—VALIDITY OF LEGISLATION REGULATING SEGREGATION OF INTRASTATE PASSENGERS ON BUSES.—Plaintiff, a Negro, boarded a bus operated by the defendant bus company, holding a ticket from Suffolk to Norfolk, both cities within the state boundaries of Virginia. At the time an almost equal number of Negroes and whites were seated in the bus, with only one vacant seat and that in the front part of the bus next to a white woman. Plaintiff seated himself in the only available seat. Upon noticing the situation, the driver, acting in accordance with the Virginia statutes which require state motor carriers to segregate white and Negro passengers, asked the plaintiff to move. The plaintiff refused to move, and when the driver offered to return his fare this was also refused. When police assistance failed to remove him, the driver emptied the bus and then let everyone reenter but prevented plaintiff from doing so. Plaintiff brought a proceeding before the State Corporation Commission to enjoin the defendant bus company from discriminating against him because of his race and color. Upon appeal from the denial of his petition, *held,* one justice dissenting, order affirmed. The enforcement of the Virginia segregation statutes did not violate the plaintiff's right to the equal protection of the laws guaranteed by the Fourteenth Amendment to the United

16. United States v. Wunderlich *et al.*, 342 U. S. 98, 101 (1951).

17. One of the plaintiff's principal objections in the instant case was to the assignment by the contracting officer of arbitrary hourly figures for the cost of repairs and maintenance of machines. For example, he awarded substantially the same hourly rate for a $200 jack hammer as for a $20,000 tractor.

18. See note 16 *supra.*

19. On January 22, 1952, Senator McCarran introduced S.2487 which would specially overrule the unfortunate decision in the principal case by providing that the disputes clause shall not be construed "to limit judicial review of any such decision only to cases in which fraud by such Government officer or such head of department or agency or his representative is alleged."

On January 24, 1952, Representative Celler introduced a similar bill, H. R. 6214, adding to chapter 19 of Title 28 of the United States Code a new section providing that the Court of Claims or any District Court may disregard a decision by a federal officer under the disputes clause if it "was founded on fraud or involved such gross mistake as necessarily implied bad faith, or was arbitrary or capricious." These bills, which would restore the law to the status which prevailed prior to the instant decision, are now in Committee.

States Constitution. *Commonwealth* ex rel. *Raney v. Carolina Coach Co. of Virginia*, 66 S. E. 2d 572 (Va. 1951).

The statutes of Virginia provide for separation of the white and colored races[1] in passenger vehicles but require that there be no discrimination in either quality or convenience of the separate accommodations.[2] The statute also expressly states "but no contiguous seats on the same bench shall be occupied by white and colored passengers at the same time."[3]

There are many similar statutes[4] and many precedents in the decisions[5] upholding the validity of state racial segregation statutes. In *Mobile & O. R. R. v. Spenny*[6] it was held that statutes providing for equal but separate accommodations on passenger trains for white and Negro races was not a violation of the Fourteenth Amendment. But a state is required by the equal protection clause of the Fourteenth Amendment, to extend to citizens of the white and colored races substantially equal treatment in all facilities or privileges provided for by public funds. A state may, however, choose the methods by which equality is to be maintained and is not required to provide privileges for the members of both races in the same place,[7] nor is it necessary that the privileges extended be identical; if they are equal it is sufficient.[8] Racial distinctions of all types may furnish legitimate grounds for separation under some conditions of social and governmental necessities[9] and where the method adopted does not amount to a denial of fundamental constitutional rights, the segregation of races, whether by statute or by private agreement, is not against public policy.[10]

Intrastate and interstate commerce have been held to be distinctly severable and, therefore, each is subject to different authority and regulations.[11] Thus when the

1. VA. CODE ANN. § 56-326 (1950).

2. VA. CODE ANN. § 56-327 (1950).

3. VA. CODE ANN. § 56-328 (1950).

4. See *e.g.*, KY. REV. STAT. § 276.440 (1948); TENN. CODE ANN. §§ 5518, 5527 (Michie 1938); OKLA. STAT. ANN. tit. 47, § 201 (1951); ALA. CODE ANN. tit. 48, §§ 196, 197 (1940); MISS. CODE ANN. § 7784 (1942), § 7785 (Supp. 1950); ARK. STAT. ANN. tit. 73, §§ 1614, 1615 (1947); GA. CODE ANN. §§ 18-206, 18-207, 18-210 (1935); LA. REV. STAT. § 45:528 (1950); S. C. CODE ANN. § 8530-1 (1942); N. C. GEN. STAT. ANN. §§ 60-135, 60-136 (1943).

5. See *e.g.*, Payne v. Stevens, 260 U. S. 705 (1922); Chesapeake & O. Ry. v. Commonwealth, 179 U. S. 388 (1900); Bowie v. Birmingham Railway & Elec. Co., 125 Ala. 397, 27 So. 1016 (1900); Mobile & O. R.R. v. Spenny, 12 Ala. App. 375, 67 So. 740 (1914); Bradford v. St. Louis I. M. & S. Ry., 83 Ark. 244, 124 S. W. 516 (1910); Patterson v. Taylor, 51 Fla. 275, 40 So. 493 (1906); Hillman v. Georgia R.R. & Banking Co., 126 Ga. 814, 56 S. E. 68 (1906); Commonwealth v. Illinois Cent. R.R., 144 Ky. 502, 133 S. W. 1158 (1911); Ohio Valley Ry's. Receiver v. Lander, 104 Ky. 431, 48 S. W. 145 (1898); Illinois Cent. R.R. v. Redmond, 119 Miss. 765, 81 So. 115 (1919); Morrison v. State, 116 Tenn. 534, 95 S. W. 494 (1906).

6. 12 Ala. App. 375, 67 So. 740 (1914). *Cf.* ALA. CODE ANN. tit. 48, §§ 196, 197 (1940).

7. Pearson v. Murray, 169 Md. 478, 182 Atl. 590 (1936).

8. Daviess County Board of Education *et al.* v. Johnson, 169 Md. 478, 182 Atl. 590 (1918).

9. Porterfield v. Webb, 195 Cal. 71, 231 Pac. 554 (1924); Piper *et al.* v. Big Pine School District *et al.*, 193 Cal. 664, 226 Pac. 926 (1924).

10. Corrigan *et al.* v. Buckley, 299 Fed. 899 (D. C. Cir. 1924), *appeal dismissed*, 271 U. S. 323 (1926).

11. New v. Atlantic Greyhound Corp. *et al.*, 186 Va. 726, 43 S. E. 2d 872 (1947).

application of a state statute amounts to a burden on interstate commerce, as regulated by the Interstate Commerce Act,[12] the statute as applied to interstate commerce will be invalid. Despite its invalidity with regard to interstate commerce the statutes are deemed severable in their application and legal effect can be given to the part affecting intrastate commerce alone.[13]

Accordingly in its decisions the Supreme Court of the United States has upheld state segregation statutes when applied to intrastate commerce. In *Plessy v. Ferguson*[14] the plaintiff, a Negro traveling intrastate in Louisiana was requested to move from a coach reserved for whites to one reserved for colored. Upon his refusal, he was arrested. The Court held that the state segregation statute was valid and constitutional and that physical separation of the races does not imply inferiority of either race and is within the state's police power in preserving public peace and good order. The Court stressed the fact that while the accommodations may be separate, they must be equal, to be within the Fourteenth Amendment.

In dealing with the question of equal accommodations the Supreme Court has said, "It is the individual who is entitled to the equal protection of the laws,"[15] and not merely a group or class as such. Therefore it is no defense that such discriminatory action is exceedingly rare and only affects an individual occasionally under a peculiar set of facts.[16] In *New v. Atlantic Greyhound Corp.*[17] the court said, "no party shall be required to give up a seat for one of poorer quality or convenience in accommodation for such traveling passenger."[18] Thus in *Mitchell v. United States* et al.[19] the plaintiff, a Negro, who was traveling first class was denied an available Pullman car seat due to state segregation laws and was forced to ride second class. Upon hearing the plaintiff's complaint the Interstate Commerce Commission found as a fact that requests by Negroes for Pullman accommodation were negligible and found that coach and drawing rooms met the Interstate Commerce Act's requirements for equality. In reversing the decision the Supreme Court of the United States held that the volume of traffic cannot justify the denial of a fundamental right of equality of treatment. In *Henderson v. United States*,[20] the plaintiff, a Negro traveling first class on an interstate railroad, entered the dining car and found all the seats taken but one at a table where three white persons were seated. The plaintiff was refused the vacant seat and there being no other available seats, was forced to go without eating. Upon reversing the decision below the Supreme Court indicated that so long as there are accommodations a person could not, without a violation of the Fourteenth Amendment, be denied service. The court stated: "The appellant here was denied a seat in the dining car although at least one seat

12. 24 STAT. 380 (1887) as amended, 41 STAT. 479 (1920), 49 U. S. C. § 3(1) (1929). The statute states that it shall be unlawful for any common carrier to give any undue or unreasonable preference or advantage to any particular description of traffic, or to subject the same to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

13. New v. Atlantic Greyhound Corp. *et al.*, 186 Va. 726, 43 S. E. 2d 872 (1947).

14. 163 U. S. 537 (1896).

15. Mitchell v. United States, 313 U. S. 80, 97 (1941).

16. Henderson v. United States, 339 U. S. 816 (1950); McCabe v. Atchinson, T. & S. F. Ry., 235 U. S. 151 (1914).

17. 186 Va. 726, 43 S. E. 2d 872 (1947).

18. *Id.* at 875.

19. 313 U. S. 80 (1941).

20. 339 U. S. 816 (1950).

was vacant and would have been available to him, under the existing rules, if he had been white."[21] The Court held that the plaintiff's right to the equal protection of the laws had been violated.

Although it appears that no such conduct as encountered in the instant case has ever before presented itself in intrastate commerce, it has presented itself under rather similar circumstances and has been condemned by the Supreme Court of the United States in interstate commerce. In view of those decisions it would seem that plaintiff's constitutional rights as guaranteed by the Fourteenth Amendment were clearly violated.

Discrimination as such is the same as far as the individual's rights are concerned whether encountered in interstate or intrastate commerce; and when found in the former, as in the instant case, the statute ought to be regarded as a violation of the fundamental and inalienable rights guaranteed by the Fourteenth Amendment.

The principal case presents the unique circumstance of such a distribution of the races in the bus that only one seat was available and the only one standing was a member of the other race. Separation here would prevent equal treatment and equal treatment would violate separation. The court unfortunately preferred separation to equality of treatment. Where segregation and equal treatment conflict the latter must prevail.

Assuming that segregation is supportable on the theory of the police power of the state in the promotion of public peace and good order[22] the present decision seems vulnerable. The state now permits occupancy of contiguous seats on the same bench by white and colored passengers if all other seats are occupied in the case of transportation by electric railways.[23] Why the propinquity of races should be objectionable in motor vehicles and not in those propelled by electricity is not clear. It would seem that public peace and good order would not be jeopardized by an amendment to the statute in issue to conform with the electric railway statute.

CRIMINAL LAW—CRIMINAL NEGLIGENCE—DRIVER WHO KILLS PERSON WHILE STRICKEN BY RECURRENCE OF PAST ILLNESS AS GUILTY OF CRIME.—Defendant had received treatment for an ailment diagnosed as Meniere's Syndrome, a disturbance of the semicircular canals of the ear, which might cause him at any time to lose consciousness or "black out" without warning. Upon his discharge by his physician, on July 26, 1949, defendant was advised that the disease might recur at any time and was further advised to be very careful while driving and if possible never to drive alone. On July 1, 1950, fifteen months after the first and only of such attacks, defendant suffered a second attack while driving and crashed into another automobile fatally injuring the driver. He was convicted of a misdemeanor, waiving trial by jury. Upon appeal, *held,* one judge dissenting, conviction affirmed. *State v. Gooze,* 14 N. J. Super. 227, 81 A. 2d 811 (1951).

The statute under which the defendant was convicted provides: "Any person who shall cause the death of another by driving any vehicle carelessly and heedlessly in willful or wanton disregard of the rights of safety of others shall be guilty of a misdemeanor. . . ."[1] Before the enactment of the statute in 1935 all cases which in-

21. *Id.* at 824.

22. Plessy v. Ferguson, 163 U. S. 537 (1896)

23. See VA. CODE ANN. § 56-392 (1950).

1. N. J. STAT. ANN. § 2: 138-9 (1935).

volved circumstances similar to the instant one were provided for by the manslaughter section of the statutes.[2] A survey of the convictions and acquittals under the "automobile manslaughter" statutes of this and other states indicates that the motivating force behind the statute was to facilitate convictions since juries had been reluctant to convict for manslaughter feeling the guilt of the defendant to be slight.[3] The former statute subjected the convicted to a fine of one thousand dollars and/or imprisonment up to ten years, whereas the instant statute reduced the term to three years while retaining the same fine.[4] The legislature, however, while establishing the present statute endeavored to retain the old common law qualifications for manslaughter.

Criminal negligence, derived from common law manslaughter, requires proof of a *mens rea*,[5] which is, essentially, the state of mind of one who persists in a course of conduct (act or omission) foreseeing its probable consequences of harm to others but with no desire to bring them about. This mental state has been narrowed to the simple term "recklessness,"[6] which is distinguished from both negligence and intent.[7] To sustain a conviction there must be more than ordinary civil negligence,[8] while intent requires a will on the part of the actor that the result occur.[9] Courts today try to suggest the connotation of criminal negligence in such phraseology as "gross negligence," "wanton conduct," "culpable negligence," and "criminal negligence."[10]

The term "criminal negligence" implies that in addition to a consciousness of the probable consequences there must be created by the conduct an unreasonable risk of bodily harm to another.[11] Because of the serious penalties imposed therefor it has been much discussed by the courts and the journals, but as yet there is no generally accepted definition of the term and some writers have gone so far as to call it indefinable.[12] However, in every attempt to make the term comprehensible

2. N. J. STAT. ANN. § 2: 138-5 (1898).

3. Riesenfeld, *Negligent Homicide, A Study in Statutory Interpretation*, 25 CALIF. L. REV. 1 (1936). "Complaints have been made that petty juries are obstinately unwilling to convict motorists for manslaughter. The word manslaughter suggests to many lay minds some kind of brutal criminality; they find an incongruity in associating it with a prisoner of respectable appearance." Turner, *Mens Rea and Motorists*, 5 CAMB. L. J. 61 (1933).

4. N. J. STAT. ANN. § 2: 103-6 (1898); N. J. STAT. ANN. § 2: 138-5 (1898).

5. However, there are some authorities who disagree with the *mens rea* theory and suggest that criminal negligence does not require a *mens rea* but rather disregards the mental state. See MORELAND, A RATIONALE OF CRIMINAL NEGLIGENCE 39 (1944).

6. See Turner, *supra* note 3.

7. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 232 (1947).

8. State v. Blaine, 104 N. J. L. 325, 140 Atl. 566 (Ct. Err. & App. 1928); State v. Schutte, 87 N. J. L. 15, 93 Atl. 112 (Sup. Ct. 1915), *aff'd*, 88 N. J. L. 396, 96 Atl. 659 (Ct. Err. & App. 1916); People v. Angelo, 246 N. Y. 451, 159 N. E. 394 (1927).

9. People *ex rel.* Hegemen v. Corrigan, 195 N. Y. 1, 13, 87 N. E. 792, 796 (1909). Where criminal intent is required, it cannot be legally presumed from the act. Morissette v. United States, 72 Sup. Ct. 240, 255 (1951).

10. 2 RESTATEMENT, TORTS § 500 (1934); Andrews v. Director of Public Prosecution, [1937] A. C. 576. It has been suggested, in an attempt at more precise definition, that these terms are not the noun "negligence" qualified by adjectives, but rather new compound nouns with a different meaning. Turner, *Mens Rea and Motorists*, 5 CAMB. L. J. 61 (1933).

11. 2 RESTATEMENT, TORTS § 500 (1934).

12. Riesenfeld, *Negligent Homicide, A Study in Statutory Interpretation*, 25 CALIF. L.

and workable, courts have emphasized the aforementioned connotation of recklessness.[13]

In the leading New Jersey case of *State v. Blaine*,[14] it was held that to establish criminal negligence it is necessary to show that one, with knowledge of existing conditions and conscious from such knowledge that injury will naturally or probably result from his conduct and with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injurious result. This would seem a proper statement of the law, and is relied upon by the majority of the court in the principal case. Yet it is doubtful whether such test was properly applied there. One can hardly be considered reckless and acting in complete indifference to a probable result of injury to others if, after having been free for fifteen months from any symptom of the infirmity which may cause him to lose control of his faculties, during which time he regularly discharged his daily duties, he drove his automobile alone. Any inference from such uncontradicted circumstances of "a wanton disregard of the rights of safety of others" would seem to be unwarranted.[15]

The majority of the court held that it was forseeable by the defendant that if he blacked out while driving, the probable consequence might be injury to others. This may be true as a generality but does not appear to be the test of criminal negligence under the facts of the instant case. Such a conclusion under the instant facts would be permissible only if, as the dissenting opinion observed, the defendant was proven to have been mentally aware that at a time reasonably near the time of the fatal occurrence he would "black out" with the probable consequences. No such proof existed.

The facts under consideration are unique. No reported case has been found involving a death caused by an affliction similar to this.[16] Perhaps the most analogous are those dealing with the consequence of driving a car despite obvious somnolence or the knowledge that one is an epileptic. In *State v. Olsen*,[17] the court affirmed a verdict for involuntary manslaughter by a truck driver who, while driving in a residential area, fell asleep, after realizing a sensation of drowsiness, and killed a child. The basis for upholding the conviction was that while one cannot be responsible for what he does during the unconsciousness of sleep, he is criminally negligent for allowing himself to go to sleep under the surrounding circumstances.[18] In cases where the defendant is suffering from epilepsy the deciding factor appears to be whether he knows of the fairly frequent nature of his attacks.[19] The decisions in such cases do not support the holding in the principal one.

REV. 1 (1936); Turner, *The Mental Element in Crimes at Common Law*, 6 CAMB. L. J. 31 (1936).

13. State v. Linarducci, 122 N. J. L. 137, 3 A. 2d 796 (Sup. Ct. 1939); Eatley v. Mayer, 9 N. J. Misc. 918 (Cir. Ct. 1931), *aff'd*, 10 N. J. Misc. 219, 158 Atl. 411 (Sup. Ct. 1932); Smith v. State, 197 Miss. 802, 20 So. 2d 701 (1945). See also State v. Harlow, 6 N. J. Misc. 149, 140 Atl. 438 (Sup. Ct. 1928).

14. 104 N. J. L. 325, 140 Atl. 566 (Ct. Err. & App. 1928).

15. State v. Linarducci, 122 N. J. L. 137, 3 A. 2d 796 (Sup. Ct.) *aff'd per curiam*, 123 N. J. L. 228, 8 A. 2d 576 (Ct. Err. & App. 1939), the court in convicting the defendant said that mere carelessness even in the violation of a vehicle traffic law is not enough to satisfy the statute.

16. See State v. Gooze, 14 N. J. Super. 227, 81 A. 2d 811, 816 (1951).

17. 108 Utah 377, 160 P. 2d 427 (Sup. Ct. 1945).

18. See Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432 (1925).

19. See Tift v. State, 17 Ga. App. 663, 88 S. E. 41 (1916), where the court approved

A more realistic and effective protection for the traveling public from the ill-advised driving of those physically incapable of safety driving alone would be to enact specific legislation preventing those with such maladies as that suffered by the defendant from being issued a driver's license.[20] They would then not be tempted to over-assess their own degree of health.

TAXATION—EARNINGS OF NON-RESIDENT UNITED STATES CITIZEN.—Taxpayer, a resident of Oklahoma, entered into a contract in 1944 with a Brazilian Corporation to work on the construction of a refinery plant in Saudi Arabia. The length of employment was to be eighteen months but it was understood that the taxpayer could work longer if he desired. Taxpayer left the United States in December 1944 and worked in Saudi Arabia until May 1946 when, having become dissatisfied with certain personnel changes he returned to the United States. The corporation provided living quarters in barracks and meals. Taxpayer's wife remained in the United States all the time he was abroad. No taxes were paid to the government of Saudi Arabia and the income earned in Saudi Arabia was included in his income tax return for 1945 and tax paid on it. No action having been taken on his claim for refund he then brought an action against the Collector of Internal Revenue to recover the amount paid on the ground that he was a bona fide resident of a foreign country during an entire taxable year and therefore such income was exempt from tax under Section 116 (a) of the Internal Revenue Code.. The District Court entered a judgment for plaintiff. On appeal, *held,* one judge dissenting, reversed and remanded on the ground that the taxpayer was not a bona fide resident of Saudi Arabia for the entire taxable year 1945 and his income was therefore not exempt from taxation. *Jones v. Kyle,* 190 F. 2d 353 (10th Cir. 1951).

Section 116 (a) of the Internal Revenue Code provides for exemption from tax income derived from sources outside the United States by a citizen who establishes to the satisfaction of the Commissioner of Internal Revenue that he was a bona fide resident of a foreign country during the entire taxable year. Whether or not he was a bona fide resident is to be determined by application of Treasury Regulation 111, §§ 29.211-1 – 29.211-5 relating to what constitutes residence in the United States on

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the following instructions to the jury: "If however, you find beyond a reasonable doubt that at the time of said collision and injuries the defendant was subject to *frequent* attacks of vertigo or similar afflictions . . . and that with full knowledge that he was subject to such attacks and the effect of such attacks, defendant was intentionally running said automobile . . . and while thus running said car defendant suffered a *customary* attack . . . which rendered him powerless . . . defendant would be guilty of the offense of an assault and battery." *Id.* at 665, 88 S. E. at 41 (italics supplied). See also People v. Freeman, 61 Cal. App. 2d 110, 142 P. 2d 435 (1943), where the appellate court reversed a conviction for negligent homicide of the defendant who had frequently suffered epileptic attacks since he was nine years of age. He felt ill at a friend's home prior to the accident and having been given two drinks of whiskey said: "I think I can make it home, there is where I belong." The appellate court reversed because the trial court failed to submit to the jury the question of whether at the time he was under such attack and not capable of reasoning.

20. The defendant's conduct in the instant case does not apparently involve any violation of the provisions of the Motor Vehicle Law and any other regulatory statute. *Cf.* 39 N. J. STAT. ANN. (1940).

the part of an alien.[1] Treasury Regulation 111, § 29.211-2[2] describes an alien actually present in the United States, who is not a mere transient or sojourner, as a resident of the United States for income tax purposes. A person who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient. A mere floating intention to return to another country indefinite as to time is not sufficient to constitute a person a transient. Further a person who comes to the United States for a purpose of such a nature that an extended stay may be necessary to accomplish it and makes his home temporarily in the United States to that end becomes a resident even though he may at all times have an intention to return to his domicile abroad when the purpose for which he came has been accomplished.

Section 116 (a)(1) of the Internal Revenue Code differs in its requirements of bona fide residence for an entire taxable year from the requirements set out when the exemption was first enacted as Section 213 (b) (14) of the Revenue Act of 1926.[3] The latter statute was satisfied by a showing of bona fide nonresidence without the United States for more than six months of the taxable year and was interpreted by the courts to mean that proof of mere absence from the United States for the required time was all that was necessary to establish nonresidence.[4]

The Tax Court decisions point out that whether the taxpayer was a bona fide resident of a foreign country is a question of fact depending on the circumstances of each case.[5] In the so called "war contract" cases where the taxpayers were hired by corporations having contracts with the United States Government to construct air and defense bases in foreign countries and in pursuance of such employment proceeded to a foreign country it has generally been held that they were not bona fide residents of the foreign countries even though they remained abroad for a year or more.[6]

These decisions were based on the facts that the taxpayers while abroad were subject to military control, lived in barracks or huts provided by their employer, and their families were not allowed to accompany them; they paid no taxes to the foreign government and their intention was not to remain permanently but to return to their homes in the United States as soon as their jobs were finished. The result of these cases seems clearly correct since for all practical purposes there was merely an extension of the United States to the localities where the taxpayers were working and they were not in any real sense bona fide residents of a foreign country. That such persons were not intended to be entitled to exemptions within the meaning of the amendment was pointed out by Senator George at the hearing before the Senate Finance Committee at the time the statute was amended. He explained that the

1. See Sen. Rep. No. 1631, 77th Cong., 2d Sess. 116 (1943); U. S. Treas. Reg. 103, § 19.116-1 (1943), T. D. 5230, 1943 CUM. BULL. 299.

2. U. S. Treas. Reg. 111, § 29.211-2 (1949).

3. 44 STAT. 9 (1926).

4. See *e.g.*, Downs v. Commissioner, 166 F. 2d 504 (9th Cir.), *cert. denied*, 334 U. S. 832 (1948); Commissioner v. Swent *et ux.*, 155 F. 2d 513 (4th Cir. 1946), *cert. denied*, 329 U. S. 801 (1947); Paul J. Fichter, 9 T. C. 1126 (1947).

5. Herman F. Baehre, 15 T. C. 236 (1950); Audio G. Harvey, 10 T. C. 183 (1948); Charles F. Bouldin, 8 T. C. 959 (1947).

6. J. Kenneth Hull, P-H 1948 TC MEM. DEC. ¶ 48,121 (1948); Dudley A. Chapin, 9 T. C. 142 (1947); Louis C. Beauchamp, P-H 1947 TC MEM. DEC. ¶ 47,088 (1947); Arthur J. H. Johnson, 7 T. C. 1040 (1946). *But see* Charles F. Bouldin, 8 T. C. 959 (1947).

purpose of the amendment was "that a nonresident American citizen who establishes a home, maintains his establishment and is taking on corresponding obligations of the home in any foreign country may enjoy the exemptions. And so that technicians, American citizens who are merely temporarily away from home, could be reached for taxation purposes."[7]

In *William B. Cruise*[8] and *Carl H. Thorsell*[9] the Tax Court extended the strict war worker test to cases where the taxpayers were only indirectly connected with war work and were subject to conditions entirely unlike those of the employees mentioned in the cases above. Cruise was hired as a Red Cross club director in London and Thorsell as an insurance agent in the British West Indies. Neither of the taxpayers was at any time subject to military control nor did they live with other employees in barracks or huts. But in each case it was determined by the court that they were not bona fide residents of the foreign countries since in the *Cruise* case, although the taxpayer testified that he intended to stay in England after the term of his employment was over, there was nothing in the record to show that he ever took any action indicative of an intention to remain; and in the *Thorsell* case since the taxpayer kept all family and business connections in the United States and intended to return as soon as his job abroad was over it was said that he was a sojourner rather than a bona fide resident.

In other cases where the Tax Court has considered the problem it is difficult to find the exact criteria required to be met to bring the taxpayer within the exemption. If the taxpayer is a married man then one of the most important points considered is whether he left his family in the United States or had them come to the foreign country with him.[10] In one case the court dated the taxpayer's bona fide residence from the time when he moved from a hotel in the foreign country into an apartment and arranged for his family to come there and live.[11] Of the other tests to be applied, one is whether taxes were paid to the foreign government. The payment or non-payment of taxes is not in itself considered to be conclusive as to residence but is an evidentiary fact to be weighed along with everything else.[12] If the preponderance of the evidence shows residence then a failure to pay taxes will not deprive the taxpayer of his exemption, but if he has paid taxes the act is considered to be that of a resident rather than of a mere transient or sojourner.[13] The taxpayer's intention both before he goes to the foreign country and during his stay there as to the permanency of his stay is another point relied on by the court to show residence.[14] Although the court has said that it is not necessary to determine where the taxpayer

7. H. R. Rep. No. 7378, 77th Cong., 2d Sess. 743 (1943).

8. 12 T. C. 1059 (1949).

9. 13 T. C. 909 (1949).

10. David E. Rose, 16 T. C. 232 (1951) (petitioner took his family, personal effects and furniture and leased an apartment for five years); Charles F. Bouldin, 8 T. C. 959 (1947) (petitioner although unmarried when he went to Canada married while there. His wife was an American citizen but agreed to live in Canada).

11. See Herman F. Baehre, 15 T. C. 236 (1950).

12. Robert W. Seeley, 14 T. C. 175 (1950), *rev'd*, 186 F. 2d 541 (2d Cir. 1951); William B. Cruise, 12 T. C. 1059 (1949).

13. See Audio G. Harvey, 10 T. C. 183 (1948).

14. In C. Francis Weeks, 16 T. C. 248 (1951), the court said that petitioner had no intention of becoming a permanent resident of Iran but that at all time his intention to return to the United States was fixed and definite except as to time. See also Arthur J. H. Johnson, 7 T. C. 1049 (1946).

was domiciled but only where his bona fide residence was, the cases in which bona fide residence has been found tend to show facts more consistent with domicile than with mere residence.[15] This would seem to indicate the Tax Court treats bona fide residence in a foreign country as the equivalent of domicile.

This apparent confusion of residence and domicile was clearly revealed in the case of *Myers v. Commissioner*.[16] There the Tax Court refused to find that the taxpayer was a bona fide resident of Nassau even though, after his original contract of employment as chief engineer on a construction project in Nassau from May 1942 until December 1943 expired, he accepted a position with a Nassau engineering company and remained so employed until war conditions terminated the connection in March 1944. Petitioner early in 1943 had moved his wife to Nassau and they had lived there together until their return to the United States. However on appeal this decision was reversed by the Circuit Court, the court saying that the fact that petitioner moved his wife to Nassau would indicate that he acquired domicile there as early as 1943; that the idea of domicile is not inconsistent with that of residence and that in the tax statute residence is used in the limited sense as contrasted with domicile. Citing *Commissioner v. Swent*[17] the court said, "*'Residence' simply requires bodily presence as an inhabitant in a given place,* while 'domicile' requires bodily presence in that place and also an intention to make it one's domicile."[18]

A Circuit Court decided *Downs v. Commissioner*,[19] a war contract case, in accord with the reasoning and decisions of the Tax Court and held that the taxpayer was not a bona fide resident of a foreign country for the purpose of exemption from taxation. In general, however, the federal courts have been more liberal in construing the requirements of bona fide residence. In *Seeley v. Commissioner*[20] the Circuit Court, reversing the Tax Court which held that the taxpayer was not a resident of London but was a mere sojourner, adhered closely to the requirements set out in Treasury Regulation 111. On the basis that the taxpayer's purpose, which was to obtain certain reports for his employer, was not one which was sure to be accomplished promptly, that he had no definite intention as to the length of his stay and that an extended stay might be necessary to accomplish his purpose, the court held him to be a bona fide resident even though his family did not accompany him and he did not pay taxes to the foreign government. The court noted that if the taxpayer's wife had accompanied him there could have been no fair question that London would have been their temporary home, but because of travel restrictions she could not go. The court said, "Such husbands were *pro tanto* in the same position as single men."[21]

In other cases the federal courts have pointed out that although a failure to pay taxes to the foreign government is relevant to the question of residence it is not conclusive and is not a condition precedent to exemption under the statute;[22] that residence simply requires bodily presence in the foreign country for the required

15. See *e.g.*, Audio G. Harvey, 10 T. C. 183 (1948); David E. Rose, 16 T. C. 232 (1951); Charles F. Bouldin, 8 T. C. 959 (1947); Herman F. Baehre, 15 T. C. 235 (1950).

16. 180 F. 2d 969 (4th Cir. 1950), *reversing*, O'Kelly v. Myers, P-H 1949 TC MEM. DEC. ¶ 49,099 (1949).

17. 155 F. 2d 513 (4th Cir. 1946), *cert. denied*, 329 U. S. 801 (1947).

18. 180 F. 2d 969, 971 (4th Cir. 1950).

19. 166 F. 2d 504 (9th Cir.), *cert. denied*, 334 U. S. 832 (1948).

20. 186 F. 2d 541 (2d Cir. 1951).

21. *Id.* at 544.

22. See Chidester v. United States, 82 F. Supp. 322 (Ct. Cl. 1949); White v. Hoffer-bart, 88 F. Supp. 457 (D. Md. 1950).

length of time;[23] that the phrase "making his home temporarily in a place" does not mean necessarily buying a house or changing domicile but means no more than living there temporarily[24] and that temporary absence from the foreign country on business or vacation trips does not defeat the exemption.[25]

In the instant case, however, the Court of Appeals in reversing the decision of the District Court that the taxpayer was a resident of Saudi Arabia has apparently adopted the criteria of the Tax Court. The facts indicate that petitioner complied with Treasury Regulation 111. True his family remained in the United States while he was abroad and he paid no taxes to the foreign government but his contract of employment was for eighteen months and it was understood that he could afterwards obtain other work in the area. He did not intend to leave until he had saved enough money to buy a farm, and he thought it would take about three years to accomplish that purpose. He therefore intended to stay in Saudi Arabia for the eighteen months and for a further indefinite period. At the time his contract expired he was offered other employment and the only reason he did not accept was his dissatisfaction with certain personnel changes. Thus the purpose in going to the foreign country was of such a nature that an extended stay would be necessary for its accomplishment and the period of that stay beyond eighteen months was indefinite as to time.

The mentioned inconsistencies and lack of definiteness relative to the requirements of residence have made it difficult, if not impossible, for a taxpayer to know whether he is within the exemption, and have indicated the need for further congressional action.

Since the principal case was decided, Section 116 (a) (2) of the Internal Revenue Code has been amended to provide for exemption in the case of an individual citizen of the United States who during any period of eighteen consecutive months is present in a foreign country or countries during at least five hundred and ten full days in such period.[26]

Under the latter section there will be no necessity for a determination by the court as to whether there was a bona fide residence. A taxpayer will be entitled to the exemption merely upon showing that he was present in the foreign country for the specified number of days in eighteen consecutive months. An application of the Section to the principal case illustrates its importance. The taxpayer's employment in Saudi Arabia commenced October 6, 1944, and he returned to the United States on May 25, 1946. He was present for more than five hundred and ten days out of eighteen consecutive months and therefore would be entitled to the exemption. The same would undoubtedly be true of many of the decided cases where the exemption was denied because bona fide residence as interpreted by the courts had not been shown.

TORTS—RIGHT OF PRIVACY—UNAUTHORIZED TELEVISING OF ENTERTAINMENT DURING INTERMISSION OF BALLGAME.—Plaintiff, a well-known producer of animal acts, performed between the halves of a professional football game in Washington, D. C., pursuant to a contract with the defendant Pro-Football, Inc. The plaintiff's act was televised at that time by the defendant American Broadcasting Company

23. See Myers v. Commissioner, 180 F. 2d 969 (4th Cir. 1950).

24. See Swenson v. Thomas, 164 F. 2d 783 (5th Cir. 1947).

25. See Yaross v. Kraemer, 83 F. Supp. 411 (D. Conn. 1949); White v. Hofferbart, 88 F. Supp. 457 (D. Md. 1950).

26. Revenue Act of 1951, § 321 (a) (2), 65 STAT. 452 (1951).

and was seen on an estimated 17,000 television sets in the New York area. Commercial announcements were made both prior and subsequent to the telecast of the plaintiff's act. Plaintiff sued, alleging that the defendants, without authorization, used his name and picture for advertising purposes and for the purposes of trade in violation of Section 51 of the New York Civil Rights Law. On appeal from a verdict in favor of the plaintiff, *held,* one justice dissenting, judgment reversed on the ground that the name and picture of the plaintiff were not used for advertising or trade purposes since the telecast was a factual presentation of a matter of public interest. Moreover the court held that in the light of the history of Section 51 and its judicial interpretation, the statute was never intended to apply where a plaintiff seeks recovery for injury to his property or business and not to his personality. *Gautier v. Pro-Football, Inc.* et al., 278 App. Div. 431, 106 N. Y. S. 2d 553 (1st Dep't 1951).

This is the first case in a state court of New York involving the invasion of privacy by television.[1] Since television is so new a medium there is a paucity of decided cases pertaining to it in conjunction with the right of privacy. One of the most recent is *Peterson v. KMTR Radio Corp.*[2] which was decided in California, a state which recognizes a common law right of privacy.[3] There, plaintiffs, acquatic stars, performed their act for the benefit of charity and were televised without their consent. The court denied plaintiffs' recovery holding that a performer or participant in a public, semi-public or private show or event where other persons attend thereby waives his right of privacy so far as that performance or event is concerned.[4] Since New York has specifically denied the existence of a common law right of privacy,[5] the only recourse to a person claiming an invasion of privacy is by statute. Section 50 of the New York Civil Rights Law provides: "A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without first having obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor." Section 51 provides for the recovery of damages.

The courts of this state have held as actionable the unauthorized use of a person's name or picture in direct connection with and as part of advertising.[6] For example, liability has been found where a plaintiff's name or photograph appeared within the boundaries of a newspaper advertisement.[7] The only exception to this rule occurs in the incidental mention of a person's name or picture within the boundaries of a paid advertisement but unrelated to the advertised business or product.[8] The court

1. See Gautier v. Pro-Football, Inc. *et al.,* 198 Misc. 850, 851, 99 N. Y. S. 2d 812, 813 (N. Y. City Ct. 1951). See also Sharkey v. The National Broadcasting Co., 93 F. Supp. 986 (S. D. N. Y. 1950), where the defendant showed newsreel pictures of the plaintiff, a famous boxer, in some of his past fights. The program televised was "Famous Fights of the Century." The court held that the complaint stated a cause of action under N. Y. CIV. RIGHTS LAW §§ 50, 51.

2. Case No. 557,555 (L. A. Super. Ct. 1949) (not officially reported).

3. See Melvin v. Reed *et al.,* 112 Cal. App. 285, 297 Pac. 91 (1931).

4. The court also denied recovery on the basis of quantum meruit and on the basis of unfair competition.

5. Roberson v. Rochester Folding Box Co. *et al.,* 171 N. Y. 538, 64 N. E. 442 (1902).

6. See *e.g.,* Lane v. Woolworth Co., 171 Misc. 66, 11 N. Y. S. 2d 199 (Sup. Ct.), *aff'd mem.,* 256 App. Div. 1065, 12 N. Y. S. 2d 352 (1st Dep't 1939).

7. Lahiri v. Daily Mirror, Inc., 162 Misc. 776, 295 N. Y. Supp. 382 (Sup. Ct. 1937).

8. Wallach v. Bacharach *et al.,* 192 Misc. 979, 80 N. Y. S. 2d 37 (Sup. Ct.), *aff'd,* 274 App. Div. 919, 84 N. Y. S. 2d 897 (1st Dep't 1948). See also 49 COL. L. REV. 282 (1949).

held in the instant case that in the absence of exploitation of a name or picture in the commercial announcement or in direct connection with the product itself, there was no use for advertising purposes. An analogy may be drawn between newspapers and television in that a sustaining program, like the one in the instant case, contains matters of public interest and of advertisement. However in newspapers, matters of advertisement are clearly set off from matters of news and visual inspection will suffice to determine whether the name or picture is used in connection with advertising[9] while there is no such lucid delineation in televised advertisements. Many television commercials do not appear solely in the beginning, middle and conclusion of a program. Rather, they are injected throughout the program at varied intervals. In addition, it is not uncommon to see a sponsor's product superimposed upon the picture of the program. At times it is not possible to discern wherein an advertisement commences and where it concludes. Therefore the rules established for determining whether the use of a name, portrait or picture in a newspaper or periodical is for advertising purposes may prove inadequate in the television cases.

For the purpose of determining whether the trade purposes section of the statute should be invoked, the material question is whether the ever-present commercial factor is outweighed by the educational or informative content of the subject.[10] Though a publisher's primary motive in sponsoring a telecast is to increase the sale of his commodity, he is immune from the interdict of the statute so long as he presents matters of public import.[11] If a meeting of the United Nations were sponsored via television, there would undoubtedly be no question but that the newsworthiness of the program would overbalance the fact that it was sponsored. By the same token, an opposite result would be reached if a telecast of pure entertainment were sponsored. Though the court in this case found that the plaintiff's act was entertainment but televised in connection with a matter of public interest,[12] it is submitted that the privilege accorded to news and matters of public import should not be extended to cover the facts in the instant case. The plaintiff's act was not an integral part of the football game. It could well have been omitted from the telecast. Had the defendants taken "still pictures" of the plaintiff in conjunction with his animals and used them for purposes of trade, the court would undoubtedly invoke the protection of the statute.[13] Certainly the defendants should not find shelter from liability because they used a more potent instrument for the invasion of privacy: the television camera. There is no language in our statute nor in the judicial interpretation of it that differentiates a "still picture" from a "moving picture."[14] The fact that the act was presented factually should not preclude the

9. Gautier v. Pro-Football, Inc. *et al.*, 278 App. Div. 431, 434, 106 N. Y. S. 2d 553, 556 (1st Dep't 1951).

10. See Nizer, *The Right of Privacy*, 39 MICH. L. REV. 526, 549 (1941).

11. See Sidis v. F-R Publishing Corp., 113 F.2d 806, 810 (2d Cir. 1940).

12. See Humiston v. Universal Film Manufacturing Co. *et al.*, 189 App. Div. 467, 178 N.Y. Supp. 752 (1st Dep't 1919).

13. In Miller v. Madison Square Garden Corp., 176 Misc. 714, 28 N.Y.S.2d 811 (Sup. Ct. 1941), defendants placed a picture of the plaintiff, public performer, on the programs of the event in which plaintiff performed. Plaintiff sued for the breach of his right of privacy and recovered six cents.

14. Humiston v. Universal Film Manuacturing Co. *et al.*, 189 App. Div. 467, 178 N.Y. Supp. 752 (1st Dep't 1919). "I am unable to see any practical difference between the presentation . . . in a motion picture film and in a newspaper. . . ." *Id.* at 474, 178 N.Y. Supp. at 757.

plaintiff from establishing a cause of action based on the violation of his right of privacy since the truth or falsity of the publication does not of itself determine whether said publication comes within the ban of the statute.[15] The "fact or fiction test" is applicable only after it has been determined that the publication is one of a matter of news interest to the general public.[16] The court finally pointed out that the statute was not intended to apply to a case where the plaintiff sues for the unlawful intrusion upon his business rather than upon his personality.

It is not necessary for a plaintiff who bases his cause of action on the breach of his right of privacy to plead or prove actual damages.[17] Although the infringement of the plaintiff's privacy in the instant case be minimal,[18] and although the damage to his property interest "inherent and inextricably interwoven in the individual's personality"[19] might far outweigh the damage to his privacy, nevertheless it would seem that the existence of additional remedies does not militate against the action for invasion to privacy.

Television is the most revealing medium yet invented for the dissemination of news and entertainment. While newspapers can report occurrences without the use of names or pictures,[20] television brings to its audience, in life-like portrayal, the name, picture and voice of the person in question.[21] Its potentiality for the invasion of an individual's privacy far surpasses that of any other medium. Therefore it is submitted that a more rigid interpretation be given the statute in cases involving alleged breaches of privacy by the new medium than in cases involving other media. A reporter's account of the misfortunes of a former boy genius have been held to be outside the statute.[22] However a candid television portrayal of the same incidents without the knowledge or consent of the subject would certainly seem to require some relief.

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15. See Koussevitsky v. Allen, Towne & Heath, Inc. *et al.*, 188 Misc. 479, 484, 68 N.Y.S.2d 779, 783 (Sup. Ct.), *aff'd mem.*, 272 App. Div. 759, 69 N.Y.S.2d 432 (1st Dep't 1947). See also Warren and Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 218 (1890).

16. See 20 FORD. L. REV. 100, 102 (1951).

17. *See* Miller v. Madison Square Garden Corp., 176 Misc. 714, 28 N.Y.S.2d 811 (Sup. Ct. 1941).

18. Gautier v. Pro-Football, Inc. *et al.*, 278 App. Div. 431, 438, 106 N.Y.S.2d 553, 560 (1st Dep't 1951).

19. *Ibid.* See also Redmond v. Columbia Pictures Corp., 277 N.Y. 707, 14 N.E.2d 636 (1938).

20. See Nizer, *The Right of Privacy*, 39 MICH. L. REV. 526, 544 (1941).

21. The court in the principal case held that New York had jurisdiction and applied New York law. No reasons were given. The law to be applied is the *lex loci delictus*. RESTATEMENT, CONFLICT OF LAWS § 378 (1934). The place of the wrong is that place where the last event necessary to make the actor liable occurs. *Id.* § 377. An interesting question is raised with respect to a telecast and that is, where is the "last event"? By inference, the instant court held that the last event does not occur at the situs where the event takes place. Whether the situs is where the telecast is viewed or where the master control board of the television station is situated is still an open question. See Note, 60 HARV. L. REV. 941 (1947).

22. Sidis v. F-R Publishing Corp., 113 F. 2d 806 (2d Cir. 1940).