

Missouri Law Review

Volume 26
Issue 3 *June 1961*

Article 10

1961

Recent Cases

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Recent Cases, 26 Mo. L. REV. (1961)

Available at: <https://scholarship.law.missouri.edu/mlr/vol26/iss3/10>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Recent Cases

PROMISSORY ESTOPPEL—RELIANCE ON MISTAKEN BID OF SUBCONTRACTOR

*Drennan v. Star Paving Co.*¹

Defendant-subcontractor submitted his paving bid to plaintiff-general contractor the afternoon before plaintiff was to submit his bid on a school construction contract, as was the custom of the trade. Plaintiff did not immediately accept the defendant's bid, but as it was the lowest he relied upon it in computing his total bid. Plaintiff submitted this bid with the required ten per cent bid bond, and was awarded the contract. When Drennan visited the defendant's office the next morning with intent to formally accept its offer, defendant's employee informed him that a mistake had been made in figuring the bid and it would not perform at the bid price. Plaintiff thereafter secured another to do the paving at a higher price, the excess being the damages he sought in this action. Judgment for plaintiff in the trial court was affirmed by the Supreme Court of California. The court held that since the defendant could reasonably foresee that the plaintiff would rely on defendant's bid in submitting his own, it would imply a subsidiary promise not to revoke that bid. The court also held that under the theory of promissory estoppel lack of consideration was no defense.

Most courts discussing the doctrine of promissory estoppel begin with the rule adopted by the Restatement of Contracts:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee, and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.²

The requisite elements of promissory estoppel under the Restatement rule are three: (1) a reasonable expectation of substantial reliance by the promisor; (2) substantial reliance by the promisee; and (3) that injustice can only be avoided by an application of the doctrine.

The promise must be of such a nature that the promisor could reasonably expect the promisee to rely upon it, and hence a mere prophecy, opinion, or pep

1. 51 Cal. 2d 409, 333 P.2d 757 (1958).

2. RESTATEMENT, CONTRACTS § 90 (1932).

talk will not be enough.³ Some courts have looked to the general custom of the trade or community to determine whether it is reasonable for the promisee to rely upon the promise before acceptance.⁴ Other promises are incapable of being substantially relied upon because of their very nature.⁵ There is no requirement that the specific action taken in reliance must be foreseen.⁶

"Material alteration in position"⁷ or "irreparable detriment"⁸ are terms sometimes used to describe what constitutes substantial reliance. This element furnishes the greatest hurdle for enforcement of charitable subscriptions.⁹ Actually, the reliance required in charitable subscription cases is often quite insubstantial, such as the continuation of an operation that would no doubt have been continued notwithstanding the charitable subscription.¹⁰

The limitation that the doctrine will be applied only to avoid an injustice is a concept as elusive as justice itself, impossible of reduction to anything more specific. If the previous two requirements are met, in most instances this one will also be present. However, in some cases it may be that more conventional remedies will afford as just a result as promissory estoppel. One Iowa case has laid down a very strict test for the application of the doctrine. In *Swift v. Petersen*¹¹ it was said actual fraud in the making of the promise must appear before promissory estoppel would be applicable. It is believed that this decision goes farther than what is meant by injustice.

Promissory estoppel is a relative newcomer to the law. In 1927 Mr. Chief Justice Cardozo, relying on Williston's text on contracts,¹² brought the term into repute in *Allegheny College v. National Chautauqua County Bank*.¹³ However, it is the view of one writer that Cardozo tagged a name on a theory that had appeared intermittently for centuries before.¹⁴

Although a few jurisdictions may still refuse to apply promissory estoppel,¹⁵

3. *General Elec. Co. v. N. K. Ovalle, Inc.*, 335 Pa. 439, 6 A.2d 835 (1939) (statements made to discouraged dealers by sales manager during depression that by sticking with the business they would recoup their losses); *Hanna v. Nowell*, 330 S.W.2d 595 (Spr. Ct. App. 1959) (opinion).

4. *Hill v. Corbett*, 33 Wash. 2d 219, 204 P.2d 845 (1949) (option to extend a lease).

5. *Clement v. Clement*, 230 N.C. 636, 55 S.E.2d 459 (1949) (promise to maker of note not to charge interest when maker could not pay note anyway).

6. This is the view of Professor Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459 (1950). This article contains a thorough discussion of the requirements for the application of promissory estoppel.

7. *Rennie & Laughlin, Inc. v. Chrysler Corp.*, 242 F.2d 208 (9th Cir. 1957).

8. *Robert Gordon, Inc. v. Ingersoll-Rand Co.*, 117 F.2d 654 (7th Cir. 1941).

9. *Floyd v. Christian Church Widows & Orphans Home*, 296 Ky. 196, 176 S.W.2d 125 (1943).

10. *In re Estate of Griswold*, 113 Neb. 256, 202 N.W. 609 (1925).

11. 240 Iowa 715, 37 N.W.2d 258 (1949).

12. WILLISTON, *CONTRACTS* § 139 (1920).

13. 246 N.Y. 369, 159 N.E. 173 (1927); see Annot., 57 A.L.R. 980 (1928).

14. 1 CORBIN, *CONTRACTS* § 195 (1950).

15. E.g., *Ducote v. Oden*, 221 La. 228, 59 So.2d 130 (1952); *Crowley v. Whittemore*, 255 Mass. 99, 150 N.E. 880 (1926).

it is believed the problem that troubles most courts today is, what are the limits of the doctrine? Courts frequently purport to apply promissory estoppel to charitable subscription promises,¹⁶ and a New York case has attempted to limit the doctrine to this situation.¹⁷ Promissory estoppel is also often applied in situations where the promisor indicates an intention to abandon an existing legal right.¹⁸ Two recent cases have indicated that the courts will extend the doctrine of promissory estoppel no further than this area.¹⁹ In general, however, the theory of promissory estoppel is liberally applied to promises which are of a donative character.²⁰

Some courts refuse to extend promissory estoppel beyond those situations referred to above and into the area of business bargaining, believing that the traditional concept of consideration will provide adequate protection for the business world.²¹ This belief is partly induced by the fact that the early landmark cases in this field were those involving charitable subscriptions.²² Indeed, there are few situations in commercial bargaining in which the promisor can reasonably expect reliance on his offer. However, some courts have been presented with promises of a commercial character to which they thought it appropriate to apply the doctrine of promissory estoppel. In one such case the promisor promised a dealer franchise, and the promisee made expenditures in preparation for the exercise of the expected franchise.²³ In another case a bank made loans to a subcontractor in reliance on a contractor's promise that so much would be due the subcontractor at a future date.²⁴

On facts similar to the *Drennan* case, Judge Learned Hand in *James Baird Co. v. Gimbel Bros., Inc.*,²⁵ rejected promissory estoppel even though the bidder "guaranteed" his bid. The court held that when offers are made in return for consideration, promissory estoppel does not apply. The decision in the *Baird* case

16. *E.g.*, *Missouri Wesleyan College v. Shulte*, 346 Mo. 628, 142 S.W.2d 644 (1940).

17. *Comfort v. McCorkle*, 149 Misc. 826, 268 N.Y. Supp. 192 (Sup. Ct. 1933).

18. Illustrative cases are *Edwards v. Smith*, 332 S.W.2d 770 (Mo. 1959) (not to enforce acceleration clause); *Miller v. Lawlor*, 245 Iowa 1144, 66 N.W.2d 267 (1954) (not to plead Statute of Frauds); *Waugh v. Lennard*, 69 Ariz. 214, 211 P.2d 806 (1949) (not to plead statute of limitations); *Wade v. Markwell & Co.*, 118 Cal. App. 2d 410, 258 P.2d 497 (Dist. Ct. App. 1953); see also Annot., 48 A.L.R.2d 1058 (1956).

19. *Ravarino v. Price*, 123 Utah 559, 260 P.2d 570 (1953); *Friedman v. Tappan Dev. Corp.*, 22 N.J. 523, 126 A.2d 646 (Sup. Ct. 1956).

20. Illustrative cases are *Schafer v. Fraser*, 206 Ore. 446, 290 P.2d 190 (1955) (promise to contribute toward costs of a test lawsuit); *Miller v. Lawlor*, *supra* note 18 (promise of an easement); *In re Jamison's Estate*, 202 S.W.2d 879 (Mo. 1947) (promise to make good any losses sustained in the purchase of stocks); *Lusk-Harison-Jones, Inc. v. Universal Credit Co.*, 164 Miss. 693, 145 So. 623 (1933) (promise to provide insurance); *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (St. L. Ct. App. 1959) (promise to pay a pension to an employee).

21. *E.g.*, *James Baird Co. v. Gimbel Bros., Inc.*, 64 F.2d 344 (2d Cir. 1933).

22. See *Missouri Wesleyan College v. Shulte*, *supra* note 16.

23. *Goodman v. Dicker*, 169 F.2d 684 (D.C. Cir. 1948). See also *Chrysler Corp. v. Quimby*, 144 A.2d 123 (Del. 1958).

24. *Peoples Nat'l Bank v. Linebarger Constr. Co.*, 219 Ark. 11, 240 S.W.2d 12 (1951).

25. *Supra* note 21.

was cited favorably in a recent Utah decision,²⁶ the court there concluding that the reliance doctrine may be applicable when there has been a promise and acceptance without consideration, but not when there has been only a promise, with subsequent detrimental reliance. However, when the promise is of such a nature that the promisor can reasonably foresee that the promisee will rely on it to his detriment before making any acceptance, it is believed that he should be liable. The medium that the court in the *Drennan* case used to meet the objection of the Utah court, where there is no acceptance, was an implied subsidiary promise not to revoke. The Utah decision is, perhaps, distinguishable because the court relied heavily on what they deemed to have been a counter-offer by the contractor.

In the *Drennan* decision the court found support in *Northwestern Eng'r Co. v. Ellerman*²⁷ and *Robert Gordon, Inc. v. Ingersoll-Rand Co.*²⁸ In the *Ellerman* case the defendant promised to perform certain work for the plaintiff if the plaintiff's bid on a project should be accepted. The court found no consideration for this promise, but because of the general contractor's reliance on it, the court held that promissory estoppel applied. In the *Gordon* case the *Baird* decision was expressly rejected. The court stated: "The mere fact the transaction is commercial in nature should not preclude the use of the promissory estoppel."²⁹

The contractor's whole problem might be solved if he would enter into an agreement with the subcontractor, conditional upon the contractor's bid being accepted. If this type of contract is not carefully drawn, however, it may fail for lack of consideration.³⁰ An option or a bid bond are other devices that the contractor might use to prevent the subcontractor from withdrawing his bid. However, a study made in Indiana³¹ revealed that over fifty per cent of the contractors questioned had never considered use of any of these devices. A formal agreement is often impractical, for subcontractors often wait until the very last day to submit their bids, as in the *Drennan* case, so that they may have the advantage of using the latest market prices. This leaves the contractor little time to bind formally the subcontractor before he submits his own bid.

Another problem is whether there is the required substantial reliance by the contractor if he is in a jurisdiction where a court of equity would allow him to rescind the contract with the owner because of the innocent mistake of the subcontractor in computing his bid. Some jurisdictions refuse to allow the contractor to withdraw his bid because of his own errors,³² but others will allow him to do

26. *R. J. Daum Constr. Co. v. Child*, 122 Utah 194, 247 P.2d 817 (1952).

27. 69 S.D. 397, 10 N.W.2d 879 (1943).

28. *Supra* note 8.

29. *Id.* at 661 (dictum).

30. See *Northwestern Eng'r Co. v. Ellerman*, *supra* note 27.

31. Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. CHI. L. REV. 237, 262 (1952).

32. See, e.g., *Heifetz Metal Crafts, Inc. v. Peter Kiewit Sons' Co.*, 264 F.2d 435 (8th Cir. 1959).

so even if there is a bid bond involved.³³ Presumably, the same principles could be applied if the error was that of the subcontractor. But even if equity would grant rescission, it is still believed that there is the required reliance. Aside from the interest of the owner, the contractor and subcontractor each have an expectation interest in the profits to be derived from performance of the contract. Additional legal complications would result if the contractor had already accepted the bids of other subcontractors. Also the contractor's withdrawal of his bid would be a breach of business ethics, and would undoubtedly injure his business reputation.³⁴ A contractor might also be put to the expense of attorney's fees if the owner contested the rescission.

But the doctrine of promissory estoppel should be applied with caution where the contractor has been slow in accepting the subcontractor's bid. The less reputable contractors often do not accept the bid of the subcontractor whose bid they used, but rather shop around for a lower bid.³⁵ In light of this practice, the subcontractor should not be required to hold his bid open longer than what would be considered a reasonable time for acceptance in the industry. It is submitted the *Drennan* case is correct on its own facts, where prompt acceptance is attempted, for it is elementary that the party who makes the mistake must bear the loss.

Missouri has no decision that has either accepted or rejected promissory estoppel on facts similar to those in the principal case, but the acceptance of promissory estoppel in Missouri has, to this date, followed much the same pattern as in the United States as a whole. It was held in 1898 that a representation as to a future event will not form the basis of an estoppel.³⁶ However, in *School Dist. of Kansas City v. Sheidley*,³⁷ where a board of education relied on a pledged donation in purchasing land to build a new library, the court held that the pledgor's personal representative was estopped to plead want of consideration.

In *Underwood Typewriter Co. v. Century Realty Co.*³⁸ the plaintiff lessee, who had no power under the lease to assign, obtained gratuitous consent from the defendant lessor to accept an assignment to an acceptable tenant. Plaintiff, relying on the promise, spent time and money securing a tenant, but defendant refused to accept the assignment. In its petition plaintiff alleged the tenant found was acceptable. Defendant's demurrer was sustained by the trial court. The St. Louis Court of Appeals³⁹ held that when the plaintiff spent time and money se-

33. *M. F. Kemper Constr. Co. v. City of Los Angeles*, 37 Cal. 2d 696, 235 P.2d 7 (1951); *Peerless Cas. Co. v. Housing Authority of Hazelhurst*, 228 F.2d 376 (5th Cir. 1955). Of course, the problem in these cases is closely related to that in the noted case.

34. See *Frederick Raff Co. v. Murphy*, 110 Conn. 234, 147 Atl. 709 (1929) (The court relied on this factor in holding that the contractor had no duty to minimize damages by forfeiture of a one per cent bid bond.)

35. *Schultz*, *supra* note 31, at 260. In the survey made by Schultz over 15% of the contractors responding admitted this practice.

36. *Morris v. McMahan*, 75 Mo. App. 494 (K.C. Ct. App. 1898).

37. 138 Mo. 672, 40 S.W. 656 (1897) (en banc).

38. 220 Mo. 522, 119 S.W. 400 (1909) (en banc).

39. *Underwood Typewriter Co. v. Century Realty Co.*, 118 Mo. App. 197, 94 S.W. 787 (St. L. Ct. App. 1906).

curing a new tenant in reliance on the promise, this imported consideration and mutuality which related back to the time the promise was made. Presiding Justice Bland dissented, and certified the case to the Supreme Court. By a four to three decision the Supreme Court adopted the majority opinion by the St. Louis Court of Appeals and then added an opinion of its own. The Supreme Court majority opinion looks to the theory of unilateral contract, but under the facts this theory cannot be supported, for as was acknowledged in the majority opinion of the St. Louis Court of Appeals, the promise was purely a matter of accommodation to the plaintiff.

In *Swinney v. Modern Woodmen of America*⁴⁰ the Kansas City Court of Appeals limited promissory estoppel to representations regarding future events which result in forfeiture of an existing right.⁴¹ The court did not, indeed could not have, relied upon any Missouri decisions in reaching this conclusion, and as will be seen, subsequent decisions have not adhered to this view.

Promissory estoppel was first applied in Missouri by that name in *In re Jamison's Estate*.⁴² Jamison bought stock of a corporation on account of defendant under defendant's trading authorization and by letter at the same time promised defendant that if the stock went up she would get any gains, but if it went down he would pay any losses. The stock went consistently down, and defendant several times urged Jamison to sell, but he still held the stock at his death. Jamison's executor made up the deficit to the stock broker, and thereafter brought suit against defendant for the amount paid. The court held for the defendant on the alternative grounds of promissory estoppel and estoppel in pais.

In *Feinberg v. Pfeiffer Co.*⁴³ the directors of defendant corporation, in consideration of plaintiff's long service, resolved that when plaintiff retired she would have a pension of \$200 a month. Relying on this promise, plaintiff voluntarily retired two years later. The monthly pension was paid plaintiff for several years, but a new president refused to continue the pension. The court held that plaintiff had quit her job in reliance on the promised pension, and that promissory estoppel precluded the defense of lack of consideration.

With promissory estoppel now firmly established in Missouri law, there is no reason why a Missouri court would not apply it in a factual situation similar to that in the *Drennan* case.

FRED D. BOLLOW

40. 231 Mo. App. 83, 95 S.W.2d 655 (K.C. Ct. App. 1936).

41. The court relied upon 21 C.J. *Estoppel* § 145 (1920) as authority for their limitation.

42. *Supra* note 20.

43. *Supra* note 20.

APPLICABILITY OF NORRIS LAGUARDIA ACT TO UNION ACTIVITIES
ENGAGED IN FOR THE PURPOSE OF PROTECTING
EMPLOYMENT SECURITY

In two important recent cases the United States Supreme Court interpreted the Norris LaGuardia Act so as to extend its application to situations where the lower courts had refused to find coverage. Both cases involved activities engaged in by unions for the purpose of protecting employment security. Due to the diversity in the fact situations, the cases will be discussed separately along with the authorities peculiar to each case.

In *Marine Cooks & Stewards v. Panama S.S. Co.*¹ respondents brought an action in a United States district court against petitioner union and its members, praying for temporary and permanent injunctions to restrain, and for damages allegedly suffered from, the Union's peaceful picketing of a foreign ship, manned by a foreign crew, in American waters, and union threats to further picket consignees of the ship's cargo should they accept delivery. The union by its picketing was protesting the shipowner's part in allegedly creating substandard wages and working conditions in the industry, and causing the loss of union members' jobs. The union's sole contention was that the district court was without jurisdiction since its activities came within the Norris LaGuardia Act.² But in spite of a finding that the union and its members had not been guilty of fraud, or threatened or committed any acts of violence, so as to bring it under section 4 of the Norris LaGuardia Act,³ the district court issued a temporary injunction to restrain the picketing. The district court first found that the case did not involve or grow out of any labor dispute within the meaning of the Norris LaGuardia Act and then said such picketing interfered with the internal economy of a friendly foreign power. Upon appeal from the order granting a temporary injunction the court of appeals affirmed.⁴ The Supreme Court granted certiorari to consider the question of the applicability of the Norris LaGuardia Act and reversed the decision.

The court of appeal's decision was based largely upon *Benz v. Compania Naviera Hidalgo*⁵ in which the United States Supreme Court held that the Labor Management Relations Act of 1947 did not pre-empt the field so as to protect certain union activities under somewhat similar facts. But in the instant case the Supreme Court pointed out that the dispute in the *Benz* case arose on a foreign ship, between a foreign employer and foreign crew, operating under an agreement made abroad under the laws of another nation. The only American connection in

1. 362 U.S. 365 (1960).

2. 47 Stat. 70 (1932), 29 U.S.C. § 101 (1958): "... no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act."

3. 47 Stat. 70, 71 (1932), 29 U.S.C. § 104 (1958).

4. *Marine Cooks & Stewards v. Panama S.S. Co.*, 265 F.2d 780 (9th Cir. 1959).

5. 353 U.S. 138 (1957).

Benz was that the controversy between the foreign employer and the foreign crew members erupted in the United States, and that an American labor union had participated in the picketing. It is one thing to determine the question of federal pre-emption under the National Labor Relations Act, but it is quite a different matter to determine the jurisdiction of the federal courts under the provisions of the Norris LaGuardia Act.

The Court took the view that this controversy was one "concerning terms or conditions of employment," and therefore a labor dispute within the meaning of the Norris LaGuardia Act.⁶ The fact that the persons involved in the dispute were not in an employee-employer relation is mentioned but not considered of any significance, it having long been decided that such a relation is not necessary for the act to be applicable.⁷

In the Court's statement of facts the nature of the dispute, that is, that the owners of the ship were depriving American workmen of their livelihood, is established. However, in order to fully understand the seriousness of the loss to American workmen, one need only examine *Afran Transport Co. v. National Maritime Union*,⁸ a district court decision. It is there stated that in the five-year period from 1953 to 1958, American shipping interests had transferred over 500 vessels to Liberian registry, making its merchant fleet the second largest in the world, to avoid paying American wages. The owners contended that such action was necessary to compete with foreign shipping interests since American wages were the highest in the world. The fact remained, however, that the transfers to Liberia had cost American seamen 16,000 jobs. The foreign shipowner being picketed in the instant case was one of the persons directly involved in creating the substandard condition against which the petitioners were protesting. Picketing in the *Afran* case, which was for the same purpose as in the instant case, was held to be protected by the Norris LaGuardia Act.

Shortly after the decision in the *Afran* case was handed down, a contrary result was reached in another district court in *Fianza Cia Nav. S.A. v. Benz*.⁹ The court there attempted to distinguish the *Afran* case in that the vessels there involved were "runaway flags,"¹⁰ while in the *Fianza* case there was no showing that the vessels were either owned, controlled, or operated by American interests. The court avoided considering the effect of foreign labor upon the job opportunities of American seamen.

6. 47 Stat. 73 (1932), 29 U.S.C. § 113(c) (1958), defines a labor dispute for purposes of that Act as follows: "The term 'labor dispute' includes any controversy concerning terms or conditions or employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

7. *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938).

8. 169 F. Supp. 416 (D.C.S.D.N.Y. 1958).

9. 178 F. Supp. 243 (D.C.D. Ore. 1958).

10. "Runaway Flag" is a descriptive term applied to "flags of convenience" or "flags of necessity" which certain ships fly when American interests are seeking to avoid the necessity of entering into American collective bargaining agreements with the crews of such vessels or the payment of American seamen's wages.

In *Marine Cooks* there is no showing of circumstances that would make the ship a "runaway flag," and evidently the Supreme Court did not consider that distinction controlling. The important factor seemed to be that the union in this case was not registering concern for the internal economy of the ship, or sympathy with foreign seamen aboard, but concern only for the preservation of American seamen's jobs in this country. The picketing not being for the purpose of securing rights for others, but to benefit the union members' own domestic interest, it was directed to the person responsible for the substandard conditions.

On the same day the *Marine Cooks* case was decided, the Court handed down its decision in *Order of Railroad Telegraphers v. Chicago & Northwestern Ry. Co.*¹¹ Here the employer was attempting to institute a "Central Agency Plan" which would result in the abolition of a number of existing positions. The union notified¹² the employer that it wanted to negotiate to amend the current bargaining agreement by adding the following clause: "No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization." The employer refused to negotiate on this matter, contending it was an improper attempt to usurp a legitimate managerial prerogative, and did not raise a bargainable issue. The company then brought this action to restrain the employees' threatened strike. The district court found that the proposed contract change related to "rates of pay, rules and working conditions," and was therefore a bargainable issue under the Railway Labor Act.¹³ The district court did grant temporary relief but declined to grant a permanent injunction. On appeal the court of appeals held that the finding of the district court as to the existence of a bargainable issue was erroneous, and granted a permanent injunction.¹⁴ Here again the United States Supreme Court granted certiorari to determine the applicability of the Norris LaGuardia Act, and reversed the decision of the court of appeals.

The Supreme Court found that the proposed contract provision was not an attempt to usurp legitimate managerial prerogatives, but rather an attempt to stabilize the position of the workmen whose jobs were threatened with abandonment.¹⁵ The Court then cited *United States v. Lowden*,¹⁶ and referred to the brief for the railroad association in that case to show that as early as 1936 railroads representing 85 per cent of the track mileage in the United States had included some form of benefits for workers displaced or adversely affected by con-

11. 362 U.S. 330 (1960).

12. As required by 44 Stat. 582 (1934), 45 U.S.C. § 156 (1958).

13. 44 Stat. 577 (1934), 45 U.S.C. § 152 (1958).

14. *Chicago & Northwestern Ry. v. Order of Railroad Telegraphers*, 264 F.2d 254, 260 (7th Cir. 1959).

15. See 54 Stat. 905 (1940), 49 U.S.C. § 5(2)(f) (1958): Congress has expressly required as a condition precedent to approval of such consolidations that the Interstate Commerce Commission "shall require a fair and equitable arrangement to protect the interest of the railroad employees affected." The Interstate Commerce Act requires that for a term of years after consolidation the employees not be "in a worse position with respect to their employment" than they would have been.

16. 308 U.S. 225 (1939).

solidations or mergers. Undoubtedly the Court was impressed by the vast number of past collective bargaining agreements that had recognized this subject as one proper for bargaining. The court may have felt that to allow the railroad to contend that the employees could take no collective action to preserve their own interest in matters of this kind at this late date would in effect allow it to ignore the position other railroads had taken in virtually every collective bargaining agreement made in the past 25 years. Further, the Court found that the objects desired by the union were closely related to those espoused in the Interstate Commerce Act,¹⁷ insofar as protecting the interest of the workers is concerned.

There was a vigorous dissent in this case by Mr. Justice Whittaker, joined in by three other judges, which in the main rested upon the unlawfulness of the objectives of the union. It was the contention of the dissenters that the union's objective, rather than being related to the objectives of the Interstate Commerce Act, was directly opposed to the declared intention of Congress in passing it.¹⁸

The *Telegraphers* case, so far as it concerns the argument of attempted usurpation of management prerogatives, comes very close to the facts in *Brotherhood of Railroad Trainmen v. New York Central R.R.*¹⁹ In that case the union threatened to strike if the New York Central closed its Toledo, Ohio, yards. The court in that case held that no labor dispute existed within the meaning of the Norris LaGuardia Act, and that unilateral action by the employer was permissible. The only distinction seems to be that in the *New York Central* case the union did not file a Section 6 Notice as required in the Railway Labor Act,²⁰ though this should not affect the rationale of the case.

Certainly the Court's decision in the *Telegraphers* case that the proposed contract provision was included in the "terms or conditions of employment" within the meaning of the Norris LaGuardia Act encroached upon many preconceived concepts of "management prerogatives."

The decisions discussed clearly show a willingness to follow the intention of Congress in passing the Norris LaGuardia Act, that intention being to take the federal judiciary out of the labor injunction business.²¹ Norris LaGuardia was a legislative interpretation of the Clayton Act, withdrawing from the courts jurisdiction to enjoin union activities involving or growing out of a "labor dispute."²² The difficulty arises in attempting to define the term "labor dispute." It is generally conceded that the term as used in the Act is extremely broad,²³ and most courts so construe it, yet it does not include any and all circumstances concerning the employment relation.²⁴ The courts have not put any definite limitations upon

17. See note 15 *supra*.

18. The dissenting opinion referred to 54 Stat. 899 (1940), 49 U.S.C. § 1 (1958). See note preceding § 1—titled "National Transportation Policy."

19. 246 F.2d 114 (6th Cir. 1957).

20. See note 12 *supra*.

21. See *Milk Wagon Drivers v. Lake Valley Farm Products*, 311 U.S. 91 (1940); *United States v. Hutcheson*, 312 U.S. 219 (1940).

22. See note 2 *supra*.

23. *United Elec. Coal Co. v. Rice*, 80 F.2d 1 (7th Cir. 1935).

24. *Brotherhood of Locomotive Firemen & Enginemen v. Chicago North Shore & Milwaukee R.R.*, 147 F.2d 723 (7th Cir. 1945).

the various matters that may be declared a "labor dispute," generally holding that each case must depend upon its own facts.²⁵ The courts often draw an analogy between the term "labor dispute" as used in the Norris LaGuardia Act, and as used in the National Labor Relations Act, or "dispute" as used in the Railway Labor Act. Once the court finds a particular subject is bargainable, and a refusal to bargain on this matter causes a "labor dispute" to arise, the jurisdiction of the federal court to enjoin is then withdrawn. This in fact was the course the district court pursued in the *Telegraphers* case.

The position of the National Labor Relations Board and the courts has been to hold an ever increasing number of subjects to be within the "terms or conditions of employment" clause. Such subjects as personnel transfers,²⁶ plant rules,²⁷ seniority,²⁸ removal of work to other areas,²⁹ the company's system of subcontracting,³⁰ work schedules,³¹ grievance procedures,³² tenure of employment,³³ holiday provisions,³⁴ coffee breaks,³⁵ and the reduction of the work week,³⁶ have been found to be within the clause either expressly or impliedly.

Management, on the other hand, is constantly attempting to keep certain areas open to unilateral action. It is generally recognized that an employer is not under a duty to bargain with respect to discontinuance of a department,³⁷ going out of business,³⁸ or the transfer of operations to a non-union plant when done solely for business purposes.³⁹

The decisions of the Court in *Marine Cooks* and the *Telegraphers* case are not surprising considering the broad meaning of the term "labor dispute" as used in the Norris LaGuardia Act. In *Marine Cooks* the only real problem was finding a sufficient interest on the part of the picketing seamen without the existence of a "runaway flag." The opinion of the *Afran* case certainly proves the existence of a direct interest on the part of the seamen in the conditions created by foreign shipowners. In the *Telegraphers* case the question of whether or not a labor dispute existed was somewhat closer, as the 5-4 decision of the Court tended to show. The very heart of this case was whether the Court would associate the objectives of the union with tenure of employment, long recognized by the railroad companies and the unions as a proper subject for bargaining, or with a

25. *Petrucchi v. Hogan*, 27 N.Y.S.2d 718 (Sup. Ct. 1941).

26. *U.S. Automatic Corp.*, 57 N.L.R.B. 124 (1944).

27. *Timkin Roller Bearing Co.*, 70 N.L.R.B. 411 (1939).

28. *Dallas Cartage Co.*, 14 N.L.R.B. 411 (1939).

29. *California Portland Cement Co.*, 101 N.L.R.B. 1436 (1953).

30. *Timkin Roller Bearing Co.*, *supra* note 27.

31. *Inter City Advertising Co.*, 61 N.L.R.B. 1377 (1945).

32. *Hughes Tool Co. v. NLRB*, 147 F.2d 69 (5th Cir. 1945).

33. *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948).

34. *Singer Mfg. Co. v. NLRB*, 119 F.2d 131 (7th Cir. 1941).

35. *Fleming Mfg. Co.*, 119 N.L.R.B. 452 (1956).

36. *Lehman v. Quill*, 192 F.2d 971 (2d Cir. 1951).

37. *National Gas Co.*, 99 N.L.R.B. 273 (1952).

38. *Walter Holm & Co.*, 87 N.L.R.B. 1169 (1949).

39. Administrative Decision of NLRB General Counsel, Case No. F-1256, 2 CCH LAB L. REP. ¶ 3025.605 (1960).

shutdown of operations caused by economic conditions, which is generally conceded to be a proper matter for unilateral action on the part of management. The Court of course took the view that this was simply a matter relating to tenure of employment.

The significance of these two important cases will undoubtedly increase in the near future as unions meet head-on the triple threat of foreign competition, industrial mergers, and automation.

JACK O. EDWARDS

EMINENT DOMAIN—COMPENSATION FOR CONDEMNATION OF AN EASEMENT

*Kamo Elec. Coop. v. Brooks*¹

Plaintiff brought this action to condemn an easement across defendant's farm for the purpose of constructing, operating, and maintaining an electrical power line. Both parties excepted to the commissioners' findings on the amount of damages and the issue was tried before a jury. The trial court instructed the jury that in estimating the amount of compensation they should not take into consideration damage which might arise because the existing easement would be a "drawback" in case of a sale of the lot, nor should they take into consideration damage which might arise because the "looks" of the transmission line would be detrimental to the lot's value. On appeal, the court of appeals held the instruction that the jury may not consider the possibility of the easement's constituting a "drawback" prejudicial error because it not only excluded damages which might arise in the future by reason of the existing easement, but also improperly precluded consideration of depreciation arising out of the actual taking of the easement. The instruction to the effect that the jury may not consider the detriment to the "looks" of the lot was sustained because this was too uncertain, speculative, and conjectural to be considered an element of damage.

Eminent domain is the right or power to take private property for public use.² The constitution provides that just compensation shall be made to the landowner for the taking and for the resultant damage.³ The procedure by which damages shall be determined is provided for by statute.⁴

Just compensation means full indemnity for the loss or damage sustained

1. 337 S.W.2d 444 (Spr. Ct. App. 1960).

2. State *ex rel.* N.W. Elec. Power Coop. v. Waggoner, 319 S.W.2d 930, 934 (K.C. Ct. App. 1959).

3. Mo. Const. art. I, § 26.

4. §§ 523.010-.100, RSMo 1959. Section 523.010 provides that where private property is sought to be appropriated for public use and the corporation and the landowner cannot agree on the proper compensation to be paid, application for a petition is to be made to the circuit court of the county wherein the land lies for the appointment of three commissioners to assess damages. Section 523.050 provides that if the report of the commissioners is unsatisfactory to either party, a new appraisal may be made by a jury. See also Mo. R. Civ. P. 86.

by the owner of the property taken or injured,⁵ and the general rule is that just compensation is the difference between the fair and reasonable market value of the tract of land before and after appropriation of the part.⁶ This rule applies to condemnation for all purposes, though it has been held the general rule for assessing damages for the taking of lands for a public highway or railroad is the value of the land taken and the damage, if any, to the remainder of the tract of which it is a part, from which must be deducted the value of any benefits peculiar to such tract arising from establishing the road.⁷ Apparently the above rules can be used interchangeably, for, as a practical matter, the same result may be and usually is reached under either instruction. However, the latter instruction may be preferable when special benefits become a matter of prime importance.⁸

Just compensation does not demand the payment of money. If the land has been specially benefited and the value of the benefits outweigh the damage, then no compensation need be paid.⁹ The benefits taken into consideration must be special to the land and not common to and enjoyed by other tracts in the same neighborhood, no part of which is taken. Special benefits must be reflected in an increase in the market value of the land.¹⁰ The burden of proving special benefits rests on the condemnor,¹¹ but the improvement of a highway is presumptively beneficial to adjacent land.¹²

The landowner has the burden of going forward and proving his damage.¹³ The extent of damage must be established by expert testimony,¹⁴ and must be direct and certain, and such as may reasonably be expected to follow from the invasion of the premises.¹⁵

5. *State ex rel. N.W. Elec. Power Coop. v. Waggoner*, *supra* note 2, at 934.

6. *Kamo Elec. Coop. v. Baker*, 365 Mo. 814, 817, 287 S.W.2d 858, 861 (1956). For an appraisal of the market value rule and a discussion of eminent domain damages generally see leading article by Steiner, *Eminent Domain Damages*, 6 Mo. L. Rev. 166 (1941).

7. *Howell v. Jackson County*, 262 Mo. 403, 417, 171 S.W. 342, 346 (1914).

8. *State ex rel. State Highway Comm'n v. Craighead*, 65 S.W.2d 145, 148 (St. L. Ct. App. 1933).

9. *State ex rel. State Highway Comm'n v. Kiefer*, 110 S.W.2d 883, 884 (Spr. Ct. App. 1937).

10. *State ex rel. State Highway Comm'n v. McCann*, 248 S.W.2d 17, 22 (Spr. Ct. App. 1952).

11. *State ex rel. State Highway Comm'n v. McMurtrey*, 300 S.W.2d 521, 526 (Mo. 1957).

12. *State ex rel. State Highway Comm'n v. Powell*, 226 S.W.2d 106, 108 (Spr. Ct. App. 1950).

13. *State ex rel. Kansas City Power & Light Co. v. Cave*, 360 Mo. 795, 803, 230 S.W.2d 850, 854 (1950) (en banc).

14. *Id.* at 800, 230 S.W.2d at 852; *Missouri Power & Light Co. v. Creed*, 32 S.W.2d 783, 787 (St. L. Ct. App. 1930), where it was stated that witnesses giving opinions must show themselves to be acquainted both with the property condemned and the effect of the construction and operation of the public utility upon it.

15. *Kamo Elec. Coop. v. Baker*, *supra* note 6, at 818, 287 S.W.2d at 862; *Missouri Power & Light Co. v. Creed*, *supra* note 14, at 787.

The jury may take into consideration all uses for which the condemnee's property is suitable and adaptable, having regard to existing business or wants in the community, or such as may reasonably be expected in the near future. Thus where land capable of subdivision was rendered suitable only for farming by reason of a pipeline easement, the jury was allowed to take suitability for homesites into consideration in arriving at market value.¹⁶ However, it is error to permit a landowner to testify as to the specific use he may have intended to make of his property in order to show enhanced loss when he is prohibited from carrying out that particular improvement.¹⁷

In assessing damages, the jury may consider risks and hazards special and peculiar to the land. Evidence of this is competent on the theory that such matters are in the nature of special damages and affect the present market value of the land in the light of the uses to which it may be put. Compensation is not allowed, however, for damages that are incidental to all land over which the easement might pass.¹⁸ Damages are not allowed for speculative risks and contingencies which could only be based upon uncertainty and conjecture.¹⁹

The admissibility of evidence falling within the conjecture rule has been the subject of much litigation. Among items that have been held to be speculative are the possibility that: the electric line might break and kill or injure persons or livestock;²⁰ hunters might shoot at and break insulators;²¹ towers might blow over, and the power company's employees might at some future date commit torts in connection with the use of the right of way.²² However, in *Missouri Power & Light Co. v. Creed*,²³ where expert witnesses testified that the presence of strangers on the right of way situated in a large feeding lot might frighten cattle and cause them to stampede and lose weight, the jury was permitted to consider this as an element of damage, special and peculiar to the tract.

The controversy in the principal case involves the general rule that the jury may not consider matters that are remote or speculative. The landowner's witnesses had testified that the easement constituted a "cloud" or "slur" on the title and would influence a possible buyer. The plaintiff power company contended

16. *Shell Pipe Line Corp. v. Bruns*, 239 S.W.2d 546, 550 (St. L. Ct. App. 1951).

17. *Empire Dist. Elec. Co. v. Johnston*, 241 Mo. App. 759, 766, 268 S.W.2d 78, 82 (Spr. Ct. App. 1954). (Landowner testified that he purchased tract for purpose of building a motel.)

18. *State ex rel. State Highway Comm'n v. Hoffman*, 132 S.W.2d 27, 30 (St. L. Ct. App. 1939) (noise and speed of traffic on highway); *State ex rel. State Highway Comm'n v. Sharp*, 62 S.W.2d 928, 930 (Spr. Ct. App. 1933) (inconvenience and damage from dirt, dust and noise).

19. *Missouri Power & Light Co. v. Creed*, *supra* note 14, at 787.

20. *State ex rel. Kansas City Power & Light Co. v. Cave*, *supra* note 13.

21. *State ex rel. N.W. Elec. Power Coop. v. Waggoner*, *supra* note 2, at 935.

22. *Missouri Power & Light Co. v. John Hancock Mut. Life Ins. Co.*, 58 S.W.2d 321, 322 (St. L. Ct. App. 1931). (Fourteen different elements claimed as damages were held to be speculative.)

23. *Supra* note 14, at 788. (However, other elements of damage were held speculative.) *But see* *Kamo Elec. Coop. v. Dicke*, 296 S.W.2d 905 (K.C. Ct. App. 1956) (Landowner contended construction of power line over lakes created risk to fly fishermen.)

this was speculative and was granted an instruction that the jury should not take into consideration damage that may arise because the existing easement would be a "drawback" to the sale of the tract.²⁴ In declaring the instruction bad, the court of appeals seems to have assumed that the so-called "cloud on the title" was speculative, but held the instruction error as excluding from the jury's consideration physical factors presently affecting the ready sale of the farm.²⁵ As for the easement's being a "cloud on title," some prospective buyer might be inclined to give less for the land, perhaps feeling that since the existing easement is a perpetual one it represents a diminution in the landowner's property rights. This is, however, a future contingency depending upon the viewpoint of a particular buyer. It would never occur to many that the easement constitutes a "cloud on title." Thus, had the power company's instruction been worded in terms of "cloud on title" rather than "drawback" it most likely would have been upheld as properly excluding an element of damages speculative in nature.

The court of appeals upheld the trial court's ruling that injury to "looks" is not an element of damage on the basis that this also comes within the rule as to speculative damages. This is apparently the first time a Missouri appellate court has expressly ruled on the question. The only other time the question arose, it was disposed of without separate consideration.²⁶ There is, however, a split of authority in other states as to whether aesthetic considerations may be an element of damage in condemnation proceedings.²⁷ The court here does seem to leave the door open to consideration of the unsightliness of poles, wires, and the like, as an element of damage in the case of non-farm property.²⁸ Thus, where the tract has been specially beautified, or is used for recreational purposes, the court strongly infers that aesthetic considerations may be allowed to increase damages. This is as it should be, for in cases where the landowner has devoted much time and expense in order to beautify his property, damages would be more direct and certain and more capable of being ascertained. It cannot reasonably be contended a prospective buyer of property which is particularly attractive would not be influenced by the diminution of the beauty of the property.

FLOYD E. LAWSON, JR.

24. 337 S.W.2d at 448.

25. *Id.* at 449. Among those factors listed by the court were the number of poles and wires, their locations and the nature of their use, the entry privileges granted, and the perpetual nature of the easement.

26. *Missouri Power & Light Co. v. John Hancock Mut. Life Ins. Co.*, *supra* note 22, at 322 (landowner's contention that towers injured appearance of farm held speculative).

27. For cases where unsightliness of poles, etc., have been held not an element of damage see *United Power & Light Corp. v. Murphy* 135 Kan. 100, 9 P.2d 658 (1932); *Illinois Power & Light Corp. v. Barnett*, 338 Ill. 499, 170 N.E. 717 (1930). *Contra*, *Texas Elec. Serv. Co. v. Etheredge*, 324 S.W.2d 322, 324 (Tex. Civ. App. 1959); *Ohio Pub. Serv. Co. v. Dehring*, 34 Ohio App. 532, 172 N.E. 448 (1929). See also *Hicks v. United States*, 266 F.2d 515, 521 (6th Cir. 1959).

28. 337 S.W.2d at 451. See Annot., 124 A.L.R. 407, at 413 (1940), and 5 NICHOLS, *EMINENT DOMAIN* § 16.103(1), at 42-43 (3rd ed. 1952), both noting a possible distinction in the rule applying to ordinary farm land and land having other special uses or value where aesthetic considerations may be important.

ZONING—USE RESTRICTIONS—ACCESSORY USE

*Building Inspector of Falmouth v. Gingrass*¹

Pursuant to a permit to construct a dwelling house and "garage and storage 41' x 31'" issued by the building commissioner of the city of Falmouth, Massachusetts, defendant had built a house and "garage and storage" building in a district zoned for single family residences. Section 17(b) of the city zoning by-law (hereinafter by-laws are referred to as ordinances) provided: "Garage space for not more than two cars shall be permitted as an accessory use in residence districts, provided that the Selectmen may permit space for an additional car for each 2000 square feet by which the area of the lot exceeds the minimum requirements, but not for over four cars." The ordinance defined "accessory use" as follows: "A use of land or a building customarily incident to and located on the same lot with another use of land or a building."² The defendant had been authorized by the Massachusetts aeronautics commission to base his private seaplane on Oyster Pond (a lake) which abutted the rear of the property. Marine tracks and a dolly had been installed to pull the plane from the water into the "garage and storage" building.

In a suit to enjoin storage of the seaplane, the trial court found that the defendant intended to use the building to house two automobiles and the plane and granted an injunction, holding that the use of the property for storing a seaplane was not permitted by the zoning ordinance. On appeal, *held*, affirmed.

The first problem the Supreme Judicial Court of Massachusetts faced in affirming the lower court was construction of section 17(b):

Garage space for not more than two cars shall not be permitted as an accessory use (emphasis added).

The court was probably justified in concluding that the use of the words "cars" and "garage" in the ordinance manifested the intent of its drafters to restrict the use of a garage to the housing of automobiles and to exclude other vehicles sometimes found in garages, e.g., commercial trucks, airplanes, and the like.

Independent of the actual intent of the drafters of 17(b), the court probably reached a correct conclusion in the principal case on the basis of the usual present-day definition of "garage" and application of the ordinary rules relating to construction of ordinances. Although the word "garage" was at one time also used to designate an airplane hangar,³ modern usage limits it to a place where motor vehicles are housed.⁴ One court has defined a private garage as a "building or structure appurtenant to a private residence or apartment house, designed for the housing or storing of a motor vehicle by the owner or person."⁵ Section 17(b) of

1. 338 Mass. 274, 154 N.E.2d 896 (1959).

2. Although the opinion does not indicate, it is probable that accessory uses were expressly authorized in this single family residence district.

3. THE OXFORD ENGLISH DICTIONARY 406 (Supp. 1933): In 1909 "garage" was said to refer to an airplane hangar.

4. 24 AM. JUR. *Garages, Parking Stations, and Liveries* § 2 (1939).

5. *Dumais v. Somersworth*, 101 N.H. 111, 134 A.2d 700 (1957).

the ordinance, like any ordinance of its kind and like the zoning enabling act, should be construed and applied as intended by the ordinary person who sits in the legislative body and enacts law for the welfare of the general public.⁶ In ascertaining this intent, the language used in the ordinance and the purpose sought to be achieved must be considered, without employing any artificial or forced construction to defeat the legislative purpose.⁷ Particular provisions within the zoning measure should be interpreted in the light of surrounding circumstances and the language used should be given its common sense, ordinary and natural meanings.⁸ Likewise, an unusual and strained definition should not be utilized to work a denial of a use permitted within the familiar and popular understanding of the words used.⁹

Having concluded the authorized use under section 17(b) of "garage space" did not include the housing of a seaplane, the court further held that the storage of a plane was not permitted as an "accessory use." As noted above the ordinance defined "accessory use" as "a use of land or a building customarily incident to and located on the same lot with another use of land or a building." Although the opinion does not so indicate, the ordinance probably had an express general provision that "accessory uses" are permitted in a single family residence district. Or if provision was not made in the ordinance for uses incidental to a single family dwelling, such uses would have been implied where they were customary, if the implication did no violence to the plain intent of the statute or ordinance.¹⁰ According to this court, and some other authorities, a use is "accessory" when it is so necessary or commonly to be expected in connection with the main use that it cannot be supposed that the ordinance was intended to prevent it.¹¹ Another test, less restrictive in its nature, is that an "accessory" use is one that is dependent upon or pertains to the principal or main use.¹² As a practical matter the courts determine whether to permit or exclude an accessory use on the basis of the type of use involved and then apply the test most nearly suited to the result reached. Such permissible use of the building, customary and incident to the residence, might include storing a lawnmower, garden tools, lawn furniture, fishing equipment, fertilizer and other items commonly found in this type neighborhood. Probably no question would be raised about keeping a motorboat, canoe, or motor scooter. Particularly in the present case, because many of the surrounding resi-

6. 1 YOKLEY, ZONING LAW & PRACTICES § 184 (2d ed. 1953).

7. *Hutchinson v. Board of Zoning Appeals*, 140 Conn. 381, 100 A.2d 839 (1953); *Jones v. Board of Adjustment*, 119 Colo. 420, 204 P.2d 560 (1949); *City of New Rochelle v. Lore*, 94 N.Y.S.2d 537, 540 (New Rochelle City Ct. 1950).

8. *City of New Rochelle v. Lore*, *supra* note 7; *Kaufman v. City of Glen Cove*, 180 Misc. 349, 45 N.Y.S.2d 53, 56 (Sup. Ct. 1950).

9. *Jones v. Board of Adjustment*, *supra* note 7.

10. *Dumais v. Somersworth*, *supra* note 5; 1 YOKLEY, *op. cit. supra* note 6, § 64.

11. *Lord's Appeal*, 368 Pa. 121, 81 A.2d 533, 536 (1951); *Presnell v. Leslie*, 3 N.Y.2d 384, 144 N.E.2d 381 (1957).

12. *Borough of Mountain Lakes v. Mola*, 60 N.J. Super. 419, 159 A.2d 468 (Morris County Ct. 1960); *Pratt v. Building Inspector of Gloucester*, 330 Mass. 344, 113 N.E.2d 816 (1953).

dences were also located on Oyster Pond, a motorboat might be considered customarily incident to the residential use of the property. But, as the court pointed out, the ownership of private planes is not yet so common that their use is "customary and incident" to a private residence. Perhaps, with the advent of helicopters and their use as short distance commuting vehicles in some of the more privileged communities today, and in many suburban areas, some time in the future housing a helicopter or other aircraft will be a customary and incidental use of a private residence.

Assuming the ordinance did not permit use of defendant's premises as a hangar, was it unreasonable zoning classification to permit car storage but prohibit airplane storage? This writer, as did the court, thinks it was not. Cases discussing the problem of reasonable classification generally treat it as a question of whether the particular use is a use of the same general character as and no more objectionable than uses expressly authorized. The cases have stated that residential areas are not confined exclusively to the principal use authorized and that accessory uses are valid where they are customary.¹³ In general, commercial and business uses are forbidden in residential districts unless conducted in such a manner that their nature is not evident from the exterior and do not involve numerous people visiting the residence, e.g., offices of doctors, artists or dentists, or come under specific provisions in an ordinance permitting certain home occupations.¹⁴ On the other hand, uses for personal enjoyment or private convenience are usually permitted so long as the quality or safety of the neighborhood is not impaired or the personal enjoyment of the residents invaded.

With respect to the defendant's seaplane, it may be conceded that a seaplane and an automobile have many common characteristics, but the noise and danger created by the seaplane sufficiently distinguish it from an automobile to make valid the classification of uses by the ordinance. Query however, if such a distinction exists between a seaplane and a motorboat. But, in the absence of a showing by the plaintiff that it was customary to keep seaplanes in this type of residential area, the court could not say that such a use was a customarily incidental use of residential property, or one which might commonly be expected by neighboring property owners.

It is well settled that a zoning law may limit the use of land as well as the use of buildings,¹⁵ but power to so regulate is limited and must be exercised within the scope and limitations imposed by the applicable enabling statute and constitutional provision.¹⁶ The purpose of zoning as set out in the Commerce Depart-

13. *Pratt v. Building Inspector of Gloucester*, *supra* note 12. In *Thomas v. Zoning Board of Adjustment*, 241 S.W.2d 955 (Tex. Civ. App. 1951), the court held a private swimming pool a permissible accessory use even though not provided for in the ordinance; the case contains an excellent collection of cases and discussion on the reasonableness of different classifications.

14. *State ex rel. Kabel v. Holekamp*, 151 S.W.2d 685, 689 (St. L. Ct. App. 1941); 8 McQUILLEN, *MUNICIPAL CORPORATIONS* § 25.126 (3rd ed. 1957).

15. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Town of Brookline v. Co-Ray Realty Co.*, 326 Mass. 206, 93 N.E.2d 581 (1950).

16. *City of Washington v. Mueller*, 218 S.W.2d 801, 803 (St. L. Ct. App. 1949).

ment's *A Standard State Zoning Act*,¹⁷ is stated generally as that of "promoting health, safety, morals, or the general welfare of the community"¹⁸ and more specifically "to lessen congestion in the streets, to secure safety from fire, panic and other dangers; and to promote health and the general welfare."¹⁹ Zoning power is police power and as such must be reasonably related to the protection of public health, safety, morals or welfare.²⁰ Recently some courts have extended the application of this power so that zoning regulations may be designed merely to promote the public convenience and general prosperity.²¹ If reasonable in its application, the zoning of a residential area promotes the public health, morals and welfare in numerous ways, e.g., the promotion of better living conditions, the securing of better light for homes, improvement of the atmosphere, removal and prevention of accumulations of trash, garbage and waste products, and the securing of play areas.²² More broadly, zoning stabilizes the use and value of property, prevents the overcrowding of land, avoids undue concentrations of population, reduces traffic congestion on streets and prevents fire hazards.²³ But these regulations must be reasonably related to the purpose and intent of the ordinance and may not be applied so the effect is arbitrary, confiscatory, or discriminatory.²⁴ This is not to say, however, that a zoning ordinance is unreasonable because it excludes from certain areas uses that are neither offensive nor dangerous, since the very essence of comprehensive zoning is regulation of innocent and safe uses as well as offensive or dangerous uses according to districts.²⁵

JAMES H. McLARNEY

17. Department of Commerce, *A Standard State Zoning Enabling Act* 6 (rev. ed. 1926).

18. *Id.* at 4.

19. *Id.* at 6.

20. Village of Euclid v. Ambler Realty Co., *supra* note 15; Alexander Co. v. City of Owatonna, 222 Minn. 312, 24 N.W.2d 244, 251 (1946); Property Owners Ass'n v. Board of Zoning Appeals, 2 Misc. 2d 309, 123 N.Y.S.2d 716 (Sup. Ct. 1953).

21. Women's Kansas City St. Andrew Soc'y v. Kansas City, 58 F.2d 593, 599 (8th Cir. 1932); Dennis v. Village of Tonka Bay, 64 F. Supp. 214, 218 (D.C.D. Minn. 1946), *aff'd* 156 F.2d 672 (8th Cir. 1946).

22. 8 McQUILLEN, *op. cit. supra* note 14, § 25.02.

23. Village of Upper Brookville v. Torr, 7 Misc. 2d 725, 158 N.Y.S.2d 899, 905 (Sup. Ct. 1956).

24. Village of Euclid v. Amber Realty Co., *supra* note 15; Women's Kansas City St. Andrew Soc'y v. Kansas City, *supra* note 21.

25. People v. Calvar Corp., 286 N.Y. 419 (1941); State *ex rel.* Kabel v. Holkamp, *supra* note 14, at 689.

CRIMINAL LAW—ARREST—UNREASONABLE SEARCH AND SEIZURE

*Benge v. Commonwealth*¹

Grand jury indictments were returned against the defendant, his wife, and a boarder, charging them with *selling intoxicants* in a local option territory. Bench warrants were issued and local peace officers proceeded to the defendant's home to make the arrests. Finding only the wife there, the officers arrested her and, without her consent, made a search of the entire dwelling. They discovered therein quantities of beer and gin, which they seized. The defendant was later arrested, tried and convicted of the offense of *possessing intoxicants* for the purpose of sale in a local option territory. The defendant's appeal was grounded upon the trial court's refusal to suppress the evidence of the confiscated liquor as unlawfully obtained. Upon appeal to the Supreme Court of Kentucky, *held*, reversed. The bare fact of lawful arrest within one room of a dwelling is not sufficient justification for an unlimited search of the entire house.

The Kentucky court's decision was based strongly upon the dissenting opinions in two United States Supreme Court decisions—*Harris v. United States*² and *United State v. Rabinowitz*.³ In those cases, the majority holdings established a doctrine allowing police officials relatively broad powers of search and seizure incident to a lawful arrest. This doctrine, now widely followed in the state and federal courts,⁴ is that if the arrest is lawful, a search made incident thereto may extend beyond the person of the arrested party to the premises under his immediate control. If the place of arrest is the residence of the person arrested, the search may, if "reasonable," extend even beyond the room in which the arrest is made into the entire dwelling. Thus, "immediate control" could include the entire possessory interest of the arrested party in the dwelling where the arrest was made.

According to the *Harris* and *Rabinowitz* cases the reasonableness of a search beyond the room of arrest depends generally upon all the facts and circumstances of the individual case. Yet the Court did mention therein some specific determinative factors. One consideration mentioned is that of the arrested party's actual control over the area searched;⁵ another was stated as a prohibition of purely exploratory searches.⁶ The latter involves an inquiry into the subjective intent with

1. 321 S.W.2d 247 (Ky. Ct. App. 1959).

2. 331 U.S. 145 (1947).

3. 339 U.S. 56 (1950).

4. See the following federal decisions: *Leahy v. United States*, 363 U.S. 810 (1960); *Smith v. United States*, 363 U.S. 846 (1960); *Davis v. United States*, 328 U.S. 582 (1946); *Honig v. United States*, 208 F.2d 916 (8th Cir. 1953); *McKnight v. United States*, 183 F.2d 977 (D.C. Cir. 1950); *United States v. Alberti*, 120 F. Supp. 171 (S.D.N.Y. 1954). See also the following state cases: *People v. Jackson*, 6 Cal. Rptr. 884 (Dist. Ct. App. 1960); *People v. Gonzales*, 356 Mich. 247, 97 N.W.2d 16 (1959); *Commonwealth ex rel. Weyant v. Keenan*, 7 Cumb. 125 (1956); *State v. Mehlhaff*, 72 S.D. 17, 29 N.W.2d 78 (1947).

5. *Harris v. United States*, *supra* note 2, at 152: "... the nature and size of the object sought or the lack of effective control over the premises on the part of the persons arrested may require that the searches be less extensive."

6. *Id.* at 152.

which the search is initiated. It must be made for the purpose of finding the fruits, tools and other instrumentalities directly related to the crime for which the arrest was made. The only objective test offered to determine this intent was whether the tools or fruits of the crime for which the arrest was made were of such size and nature that a search as intensive and extensive as the one made was appropriate to their discovery.⁷ If, for example, the arrest is made for cattle theft, intensive incidental search of the arrested party's home would not be reasonable.

The doctrine of these two Supreme Court cases also permits a seizure of any article the possession of which is by itself an offense if the arrest is lawful and the search of the dwelling is reasonable in its purpose and scope.⁸

The Kentucky court chose not to follow the Supreme Court's majority holdings but instead joined the dissenting opinions to advocate a narrower rule. This rule would allow a search of private property only upon the procurement of a search warrant, with but two highly confined exceptions. The first exception permits a search incident to an arrest, but limits it to the person of the arrested party and those articles under his immediate physical control.⁹ This means actual physical control in the sense of manucaption of projections from the body, and not control in the legal sense as in the broad federal doctrine. The second exception allows a search without written authority where circumstances prevent the procurement of a search warrant¹⁰—limited generally to vehicles and property likely to be removed before a warrant can be procured.

The condemnation of the majority decisions in the *Harris* and *Rabinowitz* cases lay basically upon the belief of the Supreme Court of Kentucky that to authorize the search of a man's entire house solely upon the basis of his arrest therein is not "reasonable" under the fourth amendment of the federal constitution and the Kentucky constitutional provision patterned thereafter.¹¹ It was pointed out that the right of privacy, defined in a prior Supreme Court decision as the underlying principle of the fourth amendment,¹² would be violated by allowing the home of any individual to be ransacked provided only that an arrest was made therein. Particular stress was laid upon the fact that the power to search incident to arrest enables the circumvention of the statutory protections, phrased as requirements for a valid search warrant,¹³ of description, judicial authorization, and probable cause supported by oath and affirmation. Also, they predicted the broad federal doctrine will tend to encourage over-zealous police officials to make arrests solely as a ruse to gain entry and make searches of private homes in hope of

7. *Harris v. United States*, *supra* note 2, at 152-53.

8. *Id.* at 155.

9. 321 S.W.2d at 250.

10. The court did not expressly set forth this exception, but it did summarily adopt the dissenting opinion in *United States v. Rabinowitz*, wherein the exception is set out. See *United States v. Rabinowitz*, *supra* note 3, at 84 (dissent).

11. U.S. CONST. amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." KY. CONST. § 10: "The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure."

12. *Weeks v. United States*, 232 U.S. 383 (1914).

13. See KY. CONST. § 10; U.S. CONST. amend. IV.

turning up some evidence which could tie some member of the household to some crime.

The issues raised and the rules advocated in the *Benge*, *Harris*, and *Rabinowitz* opinions are particularly significant when compared with Missouri case law in point. The rule generally cited in Missouri is that a search incident to a lawful arrest may extend beyond the person of the party arrested to the "premises"¹⁴ or to the "place of arrest."¹⁵ In those cases in which the arrest was made in the defendant's home, "premises" has been held to include: the room in which the arrest was made;¹⁶ the entire house;¹⁷ the house and basement;¹⁸ the house and smokehouse;¹⁹ and the house and all the out-buildings including a well which was pumped dry.²⁰ In at least one case an arrest made outside the house was held to authorize a search of the defendant's dwelling.²¹ Whenever the question of reasonableness of the scope of the search was raised in these cases, the courts handled it by merely reciting the "premises" rule and then dropping the issue. Although never expressly stated therein, these cases indicate that Missouri has adopted an extremely liberal rule regarding the permissible extent or scope of a search incident to an arrest.

Two Missouri Supreme Court cases have indicated that the arresting officer has the right to search the entire house, incident to an arrest therein, "for the purpose of discovering any violation of the law."²² Taken literally, these statements indicate that in Missouri there is no limitation upon the crime or crimes for which an incidental evidentiary search may be initiated, i.e., that the crime for which the arrest is made need not be identical to the crime of which evidence is sought. Although this was and is still dictum to the extent that it has never been applied to a case wherein the evidence offered concerned a crime other than that for which the arrest was made, nevertheless it remains upon the Supreme Court reports unchallenged by any subsequent Missouri decision.²³

14. *State v. Carenza*, 357 Mo. 1172, 212 S.W.2d 743 (1948); *State v. Hadlock*, 316 Mo. 1, 289 S.W. 945 (1926); *State v. Pinto*, 312 Mo. 99, 279 S.W. 144 (1925); *State v. Turner*, 302 Mo. 660, 259 S.W. 427 (1924).

15. *State v. Raines*, 339 Mo. 884, 98 S.W.2d 580 (1936); *State v. Long*, 336 Mo. 630, 80 S.W.2d 154 (1935); *State v. Williams*, 328 Mo. 627, 14 S.W.2d 434 (1929).

16. *State v. Hands*, 260 S.W.2d 14 (Mo. 1953); *State v. Raines*, *supra* note 15; *State v. Rebasti*, 306 Mo. 337, 267 S.W. 858 (1924) (en banc).

17. *State v. Carenza*, *supra* note 14.

18. *State v. Rhodes*, 316 Mo. 571, 292 S.W. 78 (1927).

19. *State v. Hadlock*, *supra* note 14.

20. *State v. Long*, *supra* note 15.

21. *State v. Pinto*, *supra* note 14.

22. *State v. Hadlock*, *supra* note 14, at 17, 289 S.W. at 947: "After arresting the defendant, the sheriff had the legal right to search the premises where the arrest was made to discover any violation of law." *State v. Pinto*, *supra* note 14, at 107, 279 S.W. at 146: "After having arrested the defendant the sheriff had a right to search the premises where the arrest was made for the purpose of discovering any violation of the law."

23. In *State v. Raines*, *supra* note 15, it was stated that the evidence sought in a search incident to an arrest is limited to that evidence tending to convict the person arrested of the crime for which the arrest was made. In this case, as in the *Pinto* and *Hadlock* cases, the assertion was also dictum. No case has arisen

Thus it appears that there is authority for an assumption by Missouri courts and police officials that so long as there is a lawful arrest a search made incident thereto is limited neither in its scope nor its purpose nor in the kind of evidence which may be searched for and seized. All of the criticisms made in the *Benge* opinion and the supporting Supreme Court dissents are even more applicable to Missouri case law than to the Supreme Court doctrine which they attacked. The courts of this state not only disregard the tests for reasonableness of a search for evidence of the same crime for which defendant is arrested applied by the federal Supreme Court, but also the dictum in the Missouri Supreme Court decisions previously referred to would indicate there is no restrictive criteria whatever upon a search incident to a lawful arrest.

In *Wolff v. Colorado*,²⁴ the Supreme Court of the United States ruled that the admissibility in state courts of evidence illegally obtained did not violate the provisions of the United States Constitution. That decision has now been overruled,²⁵ the Court saying, through Mr. Justice Clark, that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority inadmissible in a state court." The question now becomes whether the standard in determining if there has been an unreasonable state intrusion will be based on a uniform test now applied by federal courts or, on the other hand, if the states will be free to apply some other standard.²⁶ This will depend, of course, on whether the Court determines that the protection against unreasonable state action as prohibited by the 14th amendment is something different than the traditional prohibition against federal action as found in the 4th amendment.²⁷

in Missouri where the evidence sought to be introduced was obtained in a search incident to an arrest for a crime other than that for which the defendant was on trial.

24. 338 U.S. 25 (1949).

25. *Mapp v. Ohio*, No. 236, U.S., June 19, 1961. Of course the *Mapp* decision will have no effect on that portion of the *Wolff* case which determined that the protection against unreasonable searches and seizures as found in the 4th amendment was so fundamental as to also be granted the individual from state action by virtue of the due process clause of the 14th amendment. The portion of the *Wolff* case which is overruled is that which determined that admissibility of evidence illegally obtained by state officers was to be determined by the states' own evidentiary rules.

26. The immediate decision in the *Mapp* case should have no effect on Missouri decisions in that Missouri follows the exclusionary or federal rule as announced in *Weeks v. United States*, 232 U.S. 383 (1914), as to illegally obtained evidence. See *State v. Owens*, 302 Mo. 348, 259 S.W. 100, 32 A.L.R. 383 (1924); *State v. Wilkerson*, 349 Mo. 205, 159 S.W.2d 794 (1942); *State v. Clark*, 259 S.W.2d 813 (Mo. 1953); *State v. Hunt*, 280 S.W.2d 37 (Mo. 1955). It appears certain, however, that even though the Court does not determine the federal standard to be uniformly applicable, some uniformity among the states must result. The *Mapp* case holds that the admission of illegally obtained evidence in state courts is violative of the constitutional protection granted by the 14th amendment; thus, that amendment must itself set some standard in order to determine the legality of the search. Even without a uniform standard it seems that there is a line beyond which a state cannot go in finding a reasonable search and thus admissible evidence.

27. The problem is not touched upon in the majority opinion. However, Mr. Justice Harlan in his dissenting opinion bases his criticism of the majority holding

In any event the constitutional test is the reasonableness of the search by which the evidence is obtained. The method used to gain that evidence must then, in fact, be reasonable.²⁸ A power which may be exercised only if it is exercised reasonably is not a power which is absolute and boundless. It might be said that the courts of Missouri have in effect declared that all searches made either in compliance with a search warrant or as an incident to a lawful arrest are reasonable. But this argument would confuse the requirement of reasonableness with that of authorization. The constitution of Missouri does not refer to "unauthorized" searches and seizures. It requires that the power be exercised within the limits of reasonableness.²⁹ That same constitution, by setting out detailed requirements for written authorization to search, would seem to indicate that more is required than a mere arrest made upon the property searched.³⁰ The requirement of description indicates that the scope of the search and the nature of the thing to be searched for must also be limited in order that the search be reasonable. Thus, where a warrant is the authority for a search, the search is limited to those items and that area described in the warrant. Where an arrest is the authority for a search then it would logically follow that the search should at least be related in some manner to the nature and the circumstances of the arrest.

It is not within the purpose or scope of this note to ascertain which doctrine, as between the majority holdings of the *Harris* and *Rabinowitz* cases and their minority opinions and the *Benge* decision, best satisfies the constitutional requirement of reasonableness of a search incident to an arrest. It has rather been its purpose to point out how other courts, state and federal, have dealt with the question and to compare their treatment of the reasonableness requirement with the decisions of Missouri courts acting under similar constitutional restrictions. Such a comparison has revealed that where the courts of other jurisdictions have applied

on this point as well as others. Mr. Justice Harlan points out that since the *Wolf* case the standard of reasonableness to be applied has been discretionary with the states as well as the actual admissibility of the evidence, illegally obtained notwithstanding. He contends that a logical result of the *Mapp* decision will be that long lines of state cases must now be overturned and that states must follow the same standard of reasonableness as that applied by federal courts in determining the constitutionality of the search under the fourth amendment. The implication of this reasoning is that the 4th and 14th amendments contain the same prohibition. It would be difficult to criticize Mr. Justice Harlan's reasoning except to the extent that he feels this weakens the majority ruling. The question remains open and is one which the Court will, in all probability, soon be forced to answer.

28. Whether or not there may be more than one test in determining whether the constitutional protection has been invaded is a question already raised. *Supra* notes 26 and 27. This does not change the fact that the constitutional requirement is, no matter how tested, the reasonableness of the search.

29. Mo. CONST. art 1, § 15: "... the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures"

30. Mo. CONST. art. 1, § 15: "... and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by written oath or affirmation."

limitations of varying stringency upon the purpose and scope of a search incident to an arrest, the courts of this state have seemingly indicated in effect that the sole fact that a search is made incident to a lawful arrest removes all other requirements for reasonableness.

Reasonableness, by definition, is somewhere in the middleground between two extremes of action or attitude. In the case of search and seizure, this middle-ground should be determined by balancing the state's power or duty to prosecute criminals against the individual's right of privacy. The enforcement of a statute or rule of law in such a way as to subordinate completely such right in favor of the power cannot be said to be reasonable and is therefore contrary to the expressed terms of the state constitution.

DAVID R. ODEGARD

CONSTITUTIONAL LAW—EXTENSION OF THE GENERAL TRADING COMPANY DOCTRINE TO INCLUDE INDEPENDENT CONTRACTORS

*Scripto, Inc. v. Carson*¹

The plaintiff brought this suit to test the constitutionality of a Florida statute² which imposed on the plaintiff the obligation to collect and remit the Florida use tax on products it shipped into Florida. The plaintiff was a Georgia corporation which had no office, warehouse or place of business in Florida, nor did it have any property, bank account, regular employee or agent there. The plaintiff's orders were solicited in Florida by resident wholesalers, or "jobbers," who solicited for other companies as well. The plaintiff and the "jobbers" had entered into detailed contracts creating the employer-independent contractor relationship. All compensation was on a commission basis and Scripto had the right to reject or approve the orders when they were received in Scripto's office in Georgia. In spite of the absence of the traditional bases of jurisdiction, the Florida Supreme Court³ had held that Scripto was obligated to collect and remit the Florida tax on products which it shipped from Atlanta to residents of Florida. Upon appeal to the United States Supreme Court, *held*, affirmed. The Court agreed that the plaintiff's activities in Florida satisfied the jurisdictional requirements for the imposition of the obligation to collect and remit the Florida tax.

The tax which Florida had imposed was a general use tax. The use tax is a tax which is levied on the privilege of using, storing or consuming personal property within the boundaries of the taxing state.⁴ It is complementary to the sales tax in that it prevents economic advantage from arising by purchase out of state where the sales tax is lower or non-existent. The constitutionality of a gen-

1. 362 U.S. 207 (1960).

2. FLA. STAT. § 212.06 (1959).

3. *Scripto, Inc. v. Carson*, 105 So.2d 775 (Fla. 1958).

4. Criz, *The Use Tax: Its History, Administration and Economic Effects*, (Public Administration Service #78, 1941).

eral use tax was first upheld in *Henneford v. Silas Mason Co.*,⁵ where the court said that a use tax imposed "when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate."⁶

The plaintiff contended before the United States Supreme Court that the statute placed a burden on interstate commerce and that it violated the due process clause of the fourteenth amendment. The Court, Justice Clark writing for the majority, did not seem to give serious consideration to the argument that the statute unduly burdened interstate commerce but rather considered the due process issue almost exclusively.

The court in meeting the due process question considered two problems: (1) whether or not the taxing state can impose a burden of collection on a vendor and (2) whether the vendor has submitted himself to the state's jurisdiction.

The first question seemingly has never caused any serious difficulty to the Court, as it usually has dismissed the question with the statement that to make the vendor a tax collector is a "familiar and sanctioned device."⁷ This casual handling of the problem prompted Professor Howard of the University of Missouri Law School to state that the "propriety of the arrangement whereby the out-of-state seller is required to act as collector of the use tax on goods sold in interstate commerce and shipped into the taxing state . . . [is a matter] that must be taken on faith."⁸

The second question, that of jurisdiction, has been more vexing to the court. It has been stated that a state may properly make the distributor a tax collector if he comes into the state and does business for he thereby submits himself to its power.⁹ The problem therefore is determining *when* the vendor is doing business within the state for taxing purposes.

Mr. Justice Clark, in meeting the question of whether Scripto was doing business in Florida, said that the instant case was controlled by *General Trading Co. v. State Tax Comm'n.*¹⁰ General Trading Company was a foreign corporation which had never qualified to do business in Iowa nor did it maintain any office or warehouse within the state. The company's only connection with Iowa was the regular sending of traveling salesmen from Minnesota into Iowa, where they solicited orders subject to acceptance in Minnesota. The court held the company was maintaining a place of business in Iowa for taxing purposes.

In *Miller Bros. v. Maryland*,¹¹ the issue was also whether the out-of-state merchant was doing business in the taxing state. Miller Brothers operated a store, doing an over-the-counter business, in Delaware just across the Maryland-

5. 300 U.S. 577 (1937).

6. *Id.* at 583.

7. *General Trading Co. v. State Tax Comm'n.*, 322 U.S. 335, 338-339 (1944). The Court usually cites *Monamotor Oil Co. v. Johnson*, 292 U.S. 86, 93-94 (1934), for this proposition.

8. Howard, *Constitutional Law Cases in the United States Supreme Court: 1941-1946*, 11 Mo. L. Rev. 197, 253 (1946).

9. *General Trading Co. v. State Tax Comm'n.*, *supra* note 7 (dissent).

10. *Supra* note 6.

11. 347 U.S. 340 (1954).

Delaware state line. Miller Brothers' advertising reached into Maryland through a Delaware radio station and through circulars mailed to individual customers. The business's only activity in Maryland was an occasional delivery, and it carried on no solicitation by agents in Maryland. The Supreme Court held in that case that Miller Brothers was not doing business in Maryland and therefore not obligated to collect and remit the Maryland use tax. Mr. Justice Clark distinguished the *Miller Bros.* case from the instant one by pointing out that Miller Brothers had no solicitors in Maryland; that there was no exploitation of the consumer market; that there was no systematic displaying of catalogs; and further, that Miller Brothers, on a cash sale, had no way of knowing if a customer was a resident of Maryland and consequently they would not know whether to collect the use tax or not. In distinguishing the two cases, Justice Clark quoted Justice Jackson in the *Miller Bros.* decision that there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."¹² The activity—the "minimum connection"—was found not to be present in the *Miller Bros.* case.

Scripto attempted to distinguish the *General Trading Co.* case by pointing out that the wholesalers in Florida were independent contractors and not salesmen. If this distinction in the business relationships had been permitted, the necessary activity to constitute "doing business" would not have been present. The Court rejected Scripto's contention and treated the wholesalers as salesmen, saying "to permit such formal 'contractual shifts' to make a constitutional difference would open the gates to a stampede of tax avoidance."¹³

The Court, in finding that Scripto was doing business in Florida, did not attach any constitutional significance to the fact that the agents worked for more than one principal. In dismissing this contention, the court cited *Bomze v. Nardis Sportswear, Inc.*,¹⁴ in which the question was whether the state could subject a foreign corporation to suit by service of process on its agents in the state. It was not unusual for the Court to rely on such a "state judicial power" case, for it has been pointed out in other cases that, "while the due process test applied to the problem of state jurisdiction over non-residents for taxing purposes is not identical with the due process test for the exercise over them of state judicial power, the two present a close parallel."¹⁵ But, the Court did not rely on the *Bomze* case exclusively, for the opinion then says: "The test is simply the nature and extent of the activities of the appellant in Florida."¹⁶ A test that looks to the "nature and extent of activities" is one of jurisdiction for taxing purposes whereas in the "state judicial power" cases, presence of the company is "determined by balancing the opposed interests . . ."¹⁷

The problem of determining when a company is "doing business" in a state,

12. 362 U.S. at 210-211.

13. *Id.* at 211.

14. 165 F.2d 33 (2d Cir. 1948).

15. *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502, 506 (4th Cir. 1956).

16. 362 U.S. at 211.

17. *Momze v. Nardis Sportswear, Inc.*, *supra* note 14, at 35.

measured by the extent of its activities, arises in other related areas. Such a related area is the imposition of a state net income tax on a foreign corporation's local business. In the *Northwestern States Portland Cement Co.* case,¹⁸ the company on a regular and systematic basis had solicited orders in Minnesota, where it maintained a leased sales office with a sales manager, two salesmen and a secretary. The court held that the net income tax could be imposed if properly apportioned, as there was sufficient "connection" to constitute doing business.

The decisions of the United States Supreme Court on whether there was sufficient connection for jurisdiction in both the net income and use tax cases caused a great deal of uncertainty on the part of businessmen as to their tax liability and a fear of assessment years later. It led many businessmen to keep additional records which, of course, meant higher bookkeeping costs. The court's decision in the *Northwestern States Portland Cement Co.* case "produced a strong, concerted effort . . . to obtain clarification and relief."¹⁹ The "Interstate Income Law"²⁰ was passed to alleviate the existing situation with regard to the state net income tax. This law prohibits a state from taxing net income where its only connection with the out-of-state vendor is the solicitation of orders by traveling salesmen, the orders being sent out of state for approval or rejection.²¹ It gives similar immunity to vendors who solicit through "independent contractors" without regard to whether the orders are accepted in the taxing state or whether the "independent contractor" has an office in the taxing state.²² The statute further provides that the term "independent contractor" includes commission agents, brokers and other kinds of independent contractors who solicit for more than one principal.²³

18. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

19. Del Duca, *Jurisdiction Over Out-of-State Vendors Operating Through Solicitors*, 64 DICK. L. REV. 7, 19 (1959).

20. 73 Stat. 555, 15 U.S.C. § 381-384 (1959).

21. 15 U.S.C. § 381(a): No state, or political sub-division thereof, shall have power to impose, for any taxable year ending after the date of the enactment of this act, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such state by or on behalf of such person during such taxable year are either, or both, of the following:

(1) The solicitation of orders by such person, or representative, in such state for sales of tangible personal property, which orders are sent outside of the State for approval or rejection and if approved, are filled by shipment or delivery from a point outside the state; and

(2) The solicitation of orders by such person, or his representative, in such state in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

22. 15 U.S.C. § 381(c): For purposes of subsection (a), a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

23. 15 U.S.C. § 381(d): For purposes of this section— (1) The term "independent contractor" means a commission agent, broker, or other independent con-

The Interstate Income Law is an important consideration in this case because probably the most important reaction to the *Scripto* decision was the introduction of two bills²⁴ in Congress to amend the Interstate Income Law so as to immunize the out-of-state vendor from the duty of collecting and remitting a use tax. The two bills that were introduced are worded exactly the same as the Interstate Income Law "except that the words 'use tax' are substituted for 'income tax.'"²⁵ The bills, if subsequently enacted into law, would completely remove any obligation to collect the use tax in a situation like that present in this case.

That the decisions of the Court have not marked out a clear boundary for the businessman and the lawyer is abundantly clear; that the states need increased revenue is also clear, especially with the decreased reliance on the property tax. It would seem to be an area where thoughtful Congressional action would be appropriate to give clarification and stability. It can be predicted with some confidence that, in the absence of the passage of an Interstate Income Law amendment, the *Scripto* case will inspire the various states with a use tax to "tailor" their tax to take advantage of the decision. The *Scripto* case is a marked and significant extension of the *General Trading Co.* doctrine, presenting the states with the authority to reach the out-of-state vendor through his dealings with wholesalers.

RICHARD K. WILSON

tractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal. . . .

(2) The term "representative" does not include an independent contractor.

24. S. 3549, H.R. 12235, 86th Cong., 2nd Sess. (1960).

25. 21 STATE TAX REV. 21 (May 23, 1960).