NOTES AND COMMENTS

CONSTITUTIONAL LAW

THE PRIVILEGE OF A NEGRO CITIZEN TO VOTE IN A PRIMARY

The petitioner, a Negro citizen of Texas, having been denied the privilege to vote[1] in the Texas Democratic primary[2] for federal and state officers, brought an action for damages against the respondents on the ground that such denial was based solely on the race and color of the petitioner. The United States District Court refused the relief requested and the Circuit Court of Appeals affirmed this judgment[3] on the authority of the Supreme Court's decision in the case of Grovey v. Townsend.[4] Certiorari was granted to dispel an alleged inconsistency between the Grovey case and that of United States v. Classic.[5] Held, reversed; the decision in Grovey v. Townsend was expressly overruled. Smith v. Allwright, Election Judge, et al., 321 U. S. 649 (1944). (Justice Roberts dissenting).[6]

The instant case is seemingly one of a series arising from the

1. U. S. Const. Amend. XIV, § 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const. Amend. XV, § 1: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, conor, or previous condition of servitude." 16 Stat. 140 (1870), 8 U. S. C. A. § 31 (1942): "All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the controversy notwithstanding."
2. Held on July 27, 1940.
3. Smith v. Allwright et al., 131 F.(2d) 593 (C.C.A. 5th, 1942).
4. 295 U. S. 45 (1935).
5. 313 U. S. 299 (1941).
6. In a dissenting opinion Mr. Justice Roberts criticized the Court's present practice of overruling prior decisions. Such action, he said, " . . . tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only." (p. 669). "It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this court, which has been looked to as exhibiting consistency in adjudication, and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinion, should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions." (p. 670).

efforts of the southern state of Texas to prevent the Negroes from voting. Whether such "series" is terminated by this decision remains to be seen; to some extent the answer is dependent upon the ability of the southern state to "dodge"[7] the requirements of the federal constitution and the present decision, and this in turn depends on whether the "means" used to exclude the Negro is considered to be "state action."[8] State action is clearly prohobited by the United States Constitution.[9]

A review of prior cases indicates that what was and what was not action by the state was conjectural at most and not factual. In Nixon v. Herndon,[10] the court found state action where the Texas statute of 1923 provided that "in no event shall a negro be eligible to participate in a Democratic primary election held in the state of Texas," with the obvious result that a stautute per se is state action.

By 1932 Texas had amended this statute so that the state executive committee of the Democratic party was empowered to prescribe the qualifications of its members. Pursuant to that authority the committee passed a resolution barring Negroes from voting in the primary; such action was held unconstitutional in Nixon v. Condon[11] because it was carried out by an organ of the state and thus "state action."

Later the Democratic State Convention[12] adopted a resolution which in substance prohibited Negroes from voting at primaries; this method was held valid[13] as it was not state action. This result was reached by the Supreme Court when it followed the reasoning of the Texas Supreme Court in Bell v. Hill, which held that a Texas political party was but a "voluntary association" for political action and not an organ of the state.[14] Thus up to the time of the principal case determination of party membership by the state executive committee was invalid, while determination by the state convention was valid: query, what is the mark of distinction? Apparently only that the former acted under statutory authorization while the latter did not.[15]

7. See Willoughby, "Principles of the Constitutional Law of the United States" (2d ed. 1935) § 234.
8. "The cases in which the equal protection clause has been definitely held to prevent unreasonable discriminations in defining the right to vote involved the exclusion of negroes from participation in the primary elections of the Democratic party in some of the southern states. The issue principally discussed in most of these cases was whether the action of the party constituted action by the state since the equal protection clause would apply only if it were such." Rottschaefer, "Handbook of American Constitutional Law" (1939) 753.
9. See note 1 supra.
10. 273 U. S. 536 (1927).
11. 286 U. S. 73 (1932).
12. Note that this is not the state executive committee as provided in the stautute mentioned in the preceding paragraph.
13. Grovey v. Townsend, 295 U. S. 45 (1935), cited supra note 4.
14. Bell et al. v. Hill, County Clerk, et al., 125 Tex. 531, 534, 74 S. W. (2d) 113, 114 (1934).
15. See note 17 infra.

Mr. Justice Reed, speaking for the majority, concluded that the case of United States v. Classic[16] was relevant since it held that Congress was authorized to regulate primary elections ". . . where the primary is by law made an integral part of the election machinery. . . ."[17]

The Court found state action present when the party, under statutory authority, conducted the primary election.[18] That the Court thought a state should not encourage any discriminatory activity was quite evident.[19]

The majority opinion conceded that the instant case presented a ". . . substantially similar factual situation. . ." as that found in the Grovey case.[20] Yet it maintained that " . . . when convinced of former error, this Court has never felt constrained to follow precedent."[21] It seems reasonable to say that the Court was quite aware of its action, and that it forcefully meant what it was deciding.

It is submitted that the decision in the principal case is sound. The plain words of the United States Constitution and their literal and unmistakable meaning,[22] could not easily dictate any other result.

CRIMINAL LAW

PRESENCE OF ACCUSED DURING REREADING OF THE INSTRUCTIONS

After the jury had deliberated five or six hours over its verdict on a rape charge, the judge, proposing to reread the instructions, called

16. 313 U. S. 299 (1941), cited supra note 5.
17. Id. at 318. The Classic decision was considered pertinent only ". . . because the recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State." Instant case at 660.
18. Instant case at 663. It was found that certain committees of the party or its state convention would certify the party's candidates to be included on the official ballot for the ensuing general election. A name not so certified could not appear on that ballot. This statutory method of selection of party nominees required the party which adhered to these directions to be ". . . an agency of the State in so far as it determines the participants in a primary election." Ibid. The Court said further that "the party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party." Ibid.
19. "If the State requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state officers, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment." Id. at 664.
20. Instant case at 661.
21. Id. at 665.
22. See note 1 supra.

the appellant's attorney to the courtroom and asked if he desired that appellant be brought from the jail to the courtroom so as to be present when the instructions were again read. The attorney expressly waived appellant's presence, whereupon the judge read to the jury for the second time all the written instructions; then he once more directed the jury to retire and attempt to agree upon a verdict. Held, reversed and motion for new trial sustained. There was no showing that appellant authorized such waiver by his attorney. In overruling the case of Ray v. State,[1] the court stated, in regard to the statute requiring the presence of accused during trial,[2] that the appellant's presence could be waived but only by his express authorization. Miles v. State—Ind. —, 53 N.E. (2d) 779 (1944).

The state statutes requiring the presence of the accused during trial of a felony are mere declarations of the common law.[3]

It is generally recognized that a prisoner has the "right"[4] to be present during all stages of his trial for a felony.[5] There is direct conflict among the authorities as to whether one accused of a felony can waive his "right" to be present at the trial or at any part of the trial.[6] The majority view seems to be that one accused of a felony can waive his "right" to be present at any stage of the trial.[7]

In Indiana, the question arises as to whether the statute,[8] which requires the presence of the accused at the trial, is mandatory at every step of the trial or whether it can be waived, and if so, in what manner. In Hopt v. United States,[9] the United States Supreme Court interpreted

1. 207 Ind. 370, 192 N.E. 751 (1934).
2. Acts 1905, c. 169, Sec. 222, Ind. Stat. Ann. (Burns, 1942 Replacement) Sec. 9-1801. "No person prosecuted for any offense punishable by death or confinement in the state prison or county jail shall be tried unless personally present during trial."
3. Frank v. Mangrum, 237 U.S. 309 (1914); Lewis v. United States, 216 U.S. 611 (1914); Am. Jur., Criminal Law, Sec. 189; Ewbank, "Criminal Law" (2d ed. 1929) Sec. 445.
4. We must realize that this is not referring to a "right" in the strict contract sense, as it is commonly held that one can not waive such a "right." Willis, "Promissory and Non-Promissory Conditions" (1941) 16 Ind. L. J. 349, 366. Using the word "right" in this sense carries the interpretation of being a privilege; otherwise, it could not be waived. Several states have allowed waivers of such a "right." See, Lowman v. State, 80 Fla. 18, 85 So. 166 (1920); Frank v. State, 142 Ga. 741, 83 S.E. 645 (1914); State v. Bragdon, 136 Minn. 348, 162 N.W. 465 (1917); State v. O'Neal, 197 N.C. 548, 149 S.E. (2d) 968 (1934); People v. La Barbera, 274 N.Y. 339, 8 N.E. (2d) 884 (1937).
5. State v. Wilson, 50 Ind. 487 (1875). In Indiana this is a statutory right: See note 2 Supra.
6. 8 R. C. L., Criminal Law, Sec. 53; 14 Am. Jur., Criminal Law, Sec. 199.
7. Diaz v. United States, 223 U.S. 442 (1912); State v. Way, 76 Kan. 928, 93 Pac. 159 (1907); Thomas v. State, 117 Miss. 532, 78 So. 147 (1918).
8. See note 2 supra.
9. 110 U.S. 574 (1884).

a statute[10] similar to the one in question to mean in substance that it was essential to the protection of one whose life or liberty was involved in a prosecution for a felony that he should be personally present at the trial, that is, at every stage of the trial when his substantial rights might be affected by the proceedings against him.[11] It is questionable whether rereading the same instructions is such a substantial right.[12] In the case of Ray v. State,[13] the Supreme Court of Indiana held that the statute concerned is mandatory in favor of the prisoner when it appears that any substantial part of the trial is had in his absence and without his consent. However, the principal case expressly overrules this case thereby leaving it possible for a defendant to waive his presence at a substantial part of his trial.

It seems that the principal purpose of requiring the accused to be present at the trial of a felony was to protect his "right" of due process of law.[14] If this be so, then it would seem justifiable that the accused should be allowed to expressly waive such a "right." "He can waive a trial altogether, and plead guilty. He can waive the constitutional and legal privilege of trial by jury. He can waive the . . . privilege of being a second time put in jeopardy."[15] Then logically why should he not be permitted to waive his privilege of being present at a substantial part of the trial?

Next there arises the question as to the manner of waiving the presence of the accused. The voluntary absence of accused during a trial waives his "right" of being present.[16] This certainly is not an express waiver but an implied one. If we can imply a waiver from the voluntary absence of accused, then can we also imply that his attorney can waive his presence during the rereading of instructions to the

10. This statute (Code of Criminal Procedure of Utah, Sec. 218) provided that, "If the indictment is for a felony, the defendant must be personally present at the trial. . . ." Id. at 576.

11. The court went on to say that if he had been deprived of his life or liberty without being so present, such deprivation would be without the due process of law required by the constiution. Id. at 579.

12. The settlement of instructions is not a part of the trial necessitating the presence of accused at the trial of a felony. State v. Hall, 55 Mont. 182, 175 Pac. 267 (1918). It was not error for the judge in the absence of the defendant to urge the jury to agree after it had deliberated for twenty hours. Sevilla v. People, 65 Colo. 437, 177 Pac. 135 (1918).

13. 207 Ind. 370, 192 N.E. 751 (1934), cited supra note 1.

14. Hopt. v. People of Utah, 110 U.S. 574 (1884); People v. McGrane, 336 Ill. 404, 168 N.E. 321 (1929); State v. Blackwelder, 61 N.C. 51 (1886); Andrews v. State, 34 Tenn. 550 (1885). The Indiana Supreme Court has said, "The constitution and laws provide that a defendant in a criminal case shall be present at his trial. This is for a two-fold object—1. That the defendant may have the opportunity of meeting the witnesses and jury face to face, and of directing the course of his trial. 2. That the state may be in possession of his person so that judgment may be executed thereon." McCorkle v. State, 14 Ind. 39, 44, 45 (1859).

15. McCorkle v. State, 14 Ind. 39, 45 (1859).

16. Southerland v. State, 176 Ind. 493, 96 N.E. 583 (1911); State v. Smith, 183 Wash. 136, 48 P. (2d) 581 (1935); McCorkle v. State, 14 Ind. 39 (1859); State v. Wamire, 16 Ind. 357 (1816).

jury? The majority of states hold that in the physical absence of the defendant, his counsel cannot waive his "right" to be present.[17] One state has clear-cut decisions holding the exact opposite: that is, an attorney may waive a defendant's presence.[18] However, the prevailing view seems to be that the defendant must expressly relinquish a "right" before he can be understood to waive it and no presumption will be made in favor of a waiver.[19] Indiana follows this latter rule in the case at hand by refusing to accept a waiver of the accused's presence without his express consent.

CONSTITUTIONAL LAW

INSURANCE DECLARED INTERSTATE COMMERCE

Nearly 200 private stock fire insurance companies formed a combination, operating in six southern states, to fix agents' commissions and to fix non-competitive premium rates, to be effected by boycotts against persons purchasing insurance from non-members, by refusing to allow agents representing non-member insurance companies to represent them, and refusing the opportunity of re-insurance to non-member companies. Members of the association were indicted for alleged violation of the Sherman Anti-Trust Act.[1] The District Court dismissed the indictment.[2] The Supreme Court, in reversing this action held that "fire insurance transactions which stretch across state lines constitute 'commerce among the several state'." United States v. South Eastern Underwriters Association, 322 U.S. 533 (1944).

In Paul v. Virginia,[3] the Supreme Court announced that "the business of insurance is not commerce,"[4] and in the intervening years

17. Waller v. State, 40 Ala. 325 (1865); Stroope v. State, 72 Ark. 379, 80 S.W. 749 (1904); Bonner v. State, 67 Ga. 510 (1881); State v. Wilcoxen, 200 Iowa 1250, 206 N.W. 260 (1925); State v. Myrick, 38 Kan. 238, 16 Pac. 330 (1888); State v. Grisafulli, 135 Ohio St. 87, 19 N.E. (2d) 645 (1939); Schafer v. State, 118 Texas Cr. R. 500, 40 S.W. (2d) 147 (1931).

18. In Davidson v. State, 108 Ark. 191, 195, 158 S.W. 1103, 1107 (1913) the court said, "It is not essential to a valid waiver that defendant should make the agreement in his own person. He may do so through his own counsel, and, as before stated, in the absence of a showing to the contrary, authority to perform an act in the progress of the trial, which counsel assume to do, will be presumed." Accord, Nelson v. State, 190 Ark. 1027, 82 S.W. (2d) 619 (1935); Durham v. State, 179 Ark. 507, 16 S.W. (2d) 991 (1929); Schruggs v. State, 131 Ark. 320, 198 S.W. 694 (1917).

19. Biggs v. Lloyd, 70 Cal. 447 (1886); Commonwealth v. Andrews, 3 Mass. 126 (1807); French v. State, 85 Wis. 400, 55 N.W. 566 (1893).

1. 26 Stat. 209 (1890), 15 U. S. C. A. §§ 1-2.

2. 51 F. Supp. 712 (194) See Legis. Note (1943) 32 Geo. L. J. 66.

3. 8 Wall. (U.S.) 168 (1869).

4. See also, Liverpool and L. Life and F. Ins. Co. v. Massachusetts, 10 Wall. (U.S.) 566, (1870); Hooper v. California, 155 U.S. 648, (1894). Northwestern Mutual Life Ins. Co. v. Wisconsin, 247 U.S. 132 (1918); Colgate v. Harvey, 296 U.S. 404 (1935). For a general collection of cases, see Gavit, The Commerce Clause

the states have set up their own systems for the regulation of insurance companies operating within their borders.[5] With the instant decision, the Supreme Court has cleared the way for federal control. Already, a state law has been held invalid under this decision.[6]

The dissenting opinion in the instant case is based on the theory that merely entering into a contract cannot constitute an act of interstate commerce;[7] that neither the incidental use of the mails or other instrumentalities of interstate commerce, nor the insurance of goods moving in interstate commerce could bring the business of insurance within federal control.

However, Mr. Justice Jackson, who wrote a separate opinion, dissenting in part, takes notice of the fact that there does not seem to be "any satisfactory distinction between insurance business as now conducted and other transactions that are held to constitute interstate commerce.[8] "Were we considering the question for the first time and writing upon a clean slate, I would have no misgivings about holding that insurance business is commerce and where conducted across state lines is interstate commerce."

He bases his opinion on six principles:

1. Modern insurance business, as usually conducted, is commerce.[9]
2. "For constitutional purposes a fiction has been established,

(1932) 134-139; Powell, Insurance as Commerce in Constitution and Statute, 57 Harv. L. Rev. 937 (1944); Recent Decision (1944) 44 Col. L. Rev. 772.

5. Thirty-nine states joined as amicus curiae in a petition for a rehearing. See 30, A. B. A. J. 580 (1944).
6. Ware v. Travelers Insurance Co., (U.S.D.C. Idaho, No. Dist., July 28, 1944), held a resident-agent law was an undue burden on interstate commerce. Pensacola Telegraph Co. v. Western U. Telegraph Co., 96 U.S. 1, (1877), "The power of Congress to regulate interstate commerce is exclusive in all cases where the subject over which the power is exercised is in nature national, or admits of one uniform system or plan of regulation. The inaction of Congress upon such a subject is equivalent to a declaration that it shall be free from all state regulation or interference." Baldwin v. Seelig, 294 U.S. 511 (1934).
7. See majority opinion, n. 50. "Whether reliance on earlier statements of this Court in the Paul v. Virginia line of cases that insurance is not 'commerce' could ever be pleaded as a defense to a criminal prosecution under the Sherman Act is a question which has been suggested but it is not necessary to discuss at this time." The impact of monopoly upon the public consciousness as disclosed in pamphlet, party platforms, and congressional debate is effectively, set forth in the majority opinion, nn. 39-48. Burke, Is the Business of Insurance Commerce? 42 Mich. L. Rev. 409 (1943).
8. International Textbook v. Pigg, 217 U.S. 91, (1909), where it was held that sending a correspondence course through the mails from one state to another constituted interstate commerce; United States v. General Motors Corporation, 121 F. (2nd) 376 (1941), and for a discussion of same see, Note (1942) 17 Ind. L. J. 255.
9. Gibbons v. Ogden, 9 Wheat. (U.S.) 1, (1824), "Commerce undoubtedly is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches."

and long acted upon by the Court, the states, and the Congress, that insurance is not commerce."[10]

3. So long as Congress acquiesces, this Court should adhere to the rule which sustains the regulation of insurance companies by the states.

4. Congressional enactment on the subject is of presumptive constitutional validity.

5. Congress may, without exerting its full powers, prohibit acts involving the insurance business "which substantially affect or unduly burden or restrain interstate commerce."

6. "The antitrust laws should be construed to reach the business of insurance and those who are engaged in it only under the latter congressional power."

Under this construction all combinations could be prosecuted if they unreasonably restrain interstate commerce.[11] It would leave state regulations intact. The lone act of conspiring to fix rates in several states would be sufficient to sustain the indictment.[12]

This decision has been called a four to three decision, but on the principle that insurance is in fact interstate commerce, Mr. Justice Jackson can be included with the majority of the court.[13] He refused merely to do violence to existing controls over insurance, when in fact Congress has taken no steps to establish federal regulation. The conspiracy alleged could have been found to be a violation of the antitrust act because of its effect on interstate commerce without directly deciding whether or not insurance is interstate commerce.[14]

10. The Paul v. Virginia line of cases held that the mere issuing of a policy of insurance takes place in one state and the mere incidental use of the mails is not enough to constitute interstate commerce; that the contracts are not subjects of trade and barter offered in the market as something having an existence and value of the parties to them. It is suggested that with the growth of common carriers, expansion of the insurance business, and change in methods of handling insurance sales and promotion, insurance is in fact a necessary part of interstate commerce.

11. Fashion Originators Guild of America Inc. et al. v. Federal Trade Commission, 312 U.S. 457, (1940); National Cotton Oil Co. v. Texas, 197 U.S. 115, (1904).

12. Conspiracies under the Sherman Act are not dependent on the "doing of any act other than the act of conspiring" as a condition of liability, Nash v. United States, 229 U.S. 373, (1912). Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, (1939).

13. The Paul v. Virginia line of cases were all in relation to attempts to sustain state regulatory laws. Davis v. Department of Labor and Industries, 317 U.S. 249, 255 (1942) recognized that certain former decisions as to the dividing line between state and federal power were illogical and theoretically wrong, but at the same time, it announced that it would adhere to them because both governments had accommodated the structure of their laws to the error.

14. This decision of the Court should be read and considered along with the decision handed down the same day in Polish National Alliance of U.S. v. N.L.R.B. 322 U.S. 1196 (1944), in which the

MASTER AND SERVANT

EMPLOYER'S LIABILITY FOR SERVANT'S NEGLIGENT PEDESTRIANISM

A messenger boy, engaged in behalf of the Postal Telegraph Company, appellee, in the delivery of a telegram, negligently collided with the appellant on a public sidewalk. Both parties to the accident were pedestrians. In the appellant's action for personal injuries the trial court sustained the appellee's demurer on the grounds that the messenger boy used his legs and the public sidewalk in his own right, which right was not and could not be delegated to him by the appellee, and that the doctrine of "respondeat superior" had no application to such a state of facts. Held, reversed. The applicability of "respondeat superior" is tested by a determination of whether, at the time of the injury, the employee is performing some duty within the scope of his authority.[1]

By the doctrine of "respondeat superior"[2] a master is liable for negligent acts[3] committed by his agents or servants acting in the course of employment[4] or the line of duty.[5] Realizing that the great

---

three dissenting judges in this case and Justice Rutledge (who was of the opinion of the Court in this case), and Justice Reed (who did not consider this case) held that labor disputes among insurance workers are subject to regulation by the National Labor Relations Board because of the affect on interestate commerce. Three judges concurring in the Polish Alliance case did so because they believed insurance to be interstate commerce, and that the regulation was justifiable because of this. However, the harm to existing regulation had already been done in the South-Eastern Underwriters case.

1. Anna L. Annis v. Postal Telegraph Co., —— Ind. App. ——, 52 N.E. (2d) 373 (1944).
2. Literally translated, "Let the principal answer."
3. It is often said that the master is liable whether the act of the servant be negligent or willful and wanton. See Alabama Power Co. v. Bodine, 213 Ala. 627, 105 So. 869, 870 (1925).
4. See Restatement, "Agency" (1933) § 228, where it is said that the conduct of a servant is within the scope of employment, if (a) it is the kind he is employed to perform, (b) it occurs substantially within the authorized time and space limits and (c) it is actuated, at least in part, by a purpose to serve the master. See also Note (1943) 4 Ga. B. J. 45. However, it should be noted that the exact meaning of an "act within tbe scope of employment" has always been a mooted question.
5. This is the usual statement of the rule of "respondeat superior." See Illinois Central R.R. et al. v. Hawkins, Administratrix, 66 Ind. App. 312, 317, 318, 115 N.E. 613, 614 (1917). The Kentucky Supreme Court aptly states the reason for the doctrine as one of public policy and necessity for holding a responsible person liable for acts done by others in the prosecution of his business, as well as for placing on employers an incentive to hire only careful employees. Johnson et al. v. Brewer, 266 Ky. 314, 317, 98 S.W. (2d) 889, 891 (1936). See William F. Barker v. Chicago, Peoria, & St. Louis Ry., 243 Ill. 482, 488, 90 N.E. 1057, 1059, 26 L.R.A. (N.S.) 1058 (1909); Hantke v. Harris Ice Mach. Works, 152 Ore. 564, 54 P. (2d) 293, 295 (1936). See also Note (1942) 6 Md. L. Rev. 248, 249.

bulk of modern business is transacted through agency channels, it is immediately obvious that innumerable fact situations fall within the ambit of this general rule.[6] The breadth of the rule is such that many limitations and variations in its application are unavoidable.[7] In the principal case the appellees seek to impose another limitaion: i.e., tbat the cause of action must be predicated upon the agent's negligent management of some instrumentality and that no liability adheres to the principal as a result of its agent's pedestrious negligence.[8]

Two American decisions, both Missouri cases, directly support the appellee's contention.[9] The Pennsylvania Supreme Court, by certain dicta, has indicated that it would approve of the Missouri opinions.[10] The first of the Missouri decisions, Phillips v. Western Union Telegraph Company,[11] was decided upon facts substantially identical with those of the principal case.[12] The Missouri Supreme Court[13] concluded that a master was liable only for those acts of its agents that could be performed by the use of its powers and under its direction; that the messenger was traveling upon a public street in the exercise of a public right which was not subject to control by the defendant, and being under no duty to regulate the gait of its messengers the defendant was not liable.[14] In the second of the Missouri cases,[15] decided fourteen years later, the Kansas City Court of Appeals, although implying

6. See Mechem, "Outlines of Agency" (3d ed. 1923) § 529.
7. See Neuner, "Respondeat Superior In The Light Of Comparative Law" (1941) 4 La. L. Rev. 1, 36, 37, who, for example, proclaims that the "scope of employment" limitation is unreasonable and that the test should be whether or not the tort was connected with the work. See also (1938) 32 Ill. L. Rev. 1001.
8. Anna L. Annis v. Postal Telegraph Co., —— Ind. App. ——, 52 N.E. (2d) 373, 374 (1944), cited supra note 1.
9. Ritchey v. Western Union Telegraph Co., 227 Mo. App. 754, 41 S. W. (2d) 628 (1931), and Phillips v. Western Union Telegraph Co. et al., 270 Mo. 676, 195 S. W. 711 (1917).
10. John Wesolowski et al v. Hancock Mutual Life Insurance Co., 308 Pa. 117, 162 Atl. 166, 87 A.L.R. 783 (1932).
11. Phillips v. Western Union Telegraph Co. et al., 270 Mo. 676, 195 S.W. 711 (1917), cited supra note 9.
12. The facts of the Phillips Case were that the plaintiff was standing on a street corner waiting for an auto to pass; one of the defendants messengers snatched a newspaper from a news vendor and while fleeing from the newsboy negligently collided with the plaintiff, knocking her into the street and seriously injuring her; at the time of the accident the messenger was delivering a telegram for the defendant.
13. The court sat in banc with Justice Woodson dissenting upon the grounds that at the time of the accident the niessenger was pursuing the business of the master and therefore, ". . . the negligence in the one is identical with that in the other. . . ." Phillips v. Western Union Telegraph Co., et al., 270 Mo. 676, 684, 195 S.W. 711, 714 (1917), cited supra note 11.
14. Id. at 680, 195 S.W. at 712, 713.
15. Ritchey v. Western Union Telegraph Co., 227 Mo. App. 754, 41 S.W. (2d) 628 (1931), cited supra note 9.

doubt as to the logic of the Phillips case,[16] cited it as controlling in Missouri. The Pennsylvania decision[17] held the defendant insurance company not liable for injuries resulting from the negligent operation of an automobile by one of the defendant's collection agents upon the grounds that responsibility was commensurate with actual or inferable control of the instrumentality causing the injury.[18] As illustrative of their reasoning the court said, "If Adams [the collection agent] had chosen to walk from person to person with whom he had his employer's business to transact, and in walking he had negligently knocked over and injured another pedestrian, it could not reasonably be contended that his employer should respond in damages. . . . So to hold would be to construe the phrase 'respondeat superior' beyond its fundamental meaning and to carry its principle to absurd lengths and to consequences forbidden by every sound consideration of public policy."[19] These three cases stand alone as a minority rule.[20]

The decision in the principal case aligns Indiana with the majority doctrine but again there is a noted paucity of authority.[21] Two California opinions[22] and a recent Washington decision[23] give apt expres-

16. Id. at 629, where the court said, "Whether the doctrine of the Phillips Case is sound or unsound is not for this court; it is controlling, notwithstanding holdings in other jurisdictions to the contrary." Contra: Phillips v. Western Union Telegraph Co., 194 Mo. App. 458, 184 S.W. 958 (1916), where, upon the facts of the Phillips case cited in note 11 supra, the husband recovered for the loss of his wife's services. See Salmons v. Dunn & Bradstreet, 349 Mo. 498, 508, 162 S. W. (2d) 245, 250 (1942).
17. John Wesolowski et al. v. Hancock Mutual Life Insurance Co., 308 Pa. 117, 162 Atl. 166 (1932), cited supra note 10.
18. Id. at 168.
19. Id at 167.
20. See Salmons v. Dunn & Bradstreet, 349 Mo. 498, 508, 162 S.W. (2d) 245, 250 (1942), where the Missouri Supreme Court said, "Our research does not support the notion that the Phillips case had been overruled by implication, but it does reveal that the case stands alone, except for Ritchey v. Western Union." In the principal case counsel for the appellee's have cited Railway Express Agency, Inc. v. Bonnell, 218 Ind. 607, 611, 33 N.E. (2d) 980, 981 (1941), for the proposition that an employer is not liable for the injurious consequences of the acts of the servant if by reasonable prudence the employer could not have forseen or prevented the act causing the injury. However, in the Bonnell case, the court said that there was no evidence to support an inference that the employee was acting within the scope of his employment, while in the principal case it was not contended that the messenger was acting outside the scope of his employment. Upon these facts the cases seem clearly distinguishable.
21. See 47 L. R. A. (N.S.) 143 (1914), where it is suggested that a probable reason for the sparsity of this type of case is that the injury is usually so slight that there is no effort to recover, or the contact is of such a character that the third person bases his action upon an assault wilful in its character rather than upon negligence.
22. Schediwy v. McDermott et al., 113 Cal. App. 218, 298 Pac. 107 (1931); Tighe v. Ad Chong et al, 44 Cal. App. (2d) 164, 112 P. (2d) 20 (1941).
23. Hobba et ux. v. Postal Telegraph Co., —— Wash. ——, 141 P. (2d) 648 (1943).

sion to this view.[24] Five other cases give support to the majority.[25]

"Respondeat superior" is commonly said to be founded upon the policy, ". . . that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it."[26] It is submitted that it is difficult to see why the absence of an instrumentality should delimit this policy.[27] The logic of the case seems undisputable.

MASTER AND SERVANT

"PORTAL TO PORTAL" TIME CONSTITUTES WORK UNDER THE FAIR LABOR STANDARDS ACT.

Plaintiff iron ore company brought action against the defendant miners' union for a declaratory judgment that miners' travel time, (a) in the shafts, (b) getting to and from the actual face of the iron ore, and (c) time spent at the surface in obtaining and returning tools, checking in and out etc., should not be counted in the work week as

24. In Tighe v. Ad Chong et al., 44 Cal. App. (2d) 164, 112 P. (2d) 20 (1941), cited supra note 22, where a delivery boy negligently bumped into and injured the plaintiff, the California Supreme Court, in disavowing the principle of the Missouri cases and following the Schediwy case, held that the negligent operation of some instrumentality was not essential in invoking "respondeat superior." "Quite to the contrary, the law is well settled that in determining the question of respondeat superior the real test to be applied is whether at the time the employee commits the negligent act resulting in the injuries to the third person, he is engaged in performing some duty within the scope of his employment." Id. at 22. However, it should be noted that the court attempts to distinguish the Missouri cases upon the grounds that in those cases the injury was the result of "rollicking" by the servant. In Hobba et ux. v. Postal Telegraph Co., —— Wash. ——, 141 P. (2d) 648 (1943), cited supra note 23, where the facts were very similar to those of the Phillips case, the Washington Supreme Court said that you would probably feel that you should make some distinction between those cases where the employee uses some instrumentality and where the employee travels on foot. However, the court continued by saying, "If the employer chooses to have the work done by another, he must be held responsible to others for the negligent conduct of his employee while doing the work, or else he should do the work himself. We think that if we try to draw a distinction between the different methods of locomotion that might result in injury to others, we not only misapply the doctrine of respondeat superior, but also forsake it entirely." Id. at 651.

25. See Cook v. Sanger, 110 Cal. App. 293, 293 Pac. 794, 800 (1930); Phillip Ryan v. Patrick F. Keane, 211 Mass. 543, 98 N. E. 590 (1912); Phillips v. Western Union Telegraph Co., 194 Mo. App. 458, 184 S. W. 958 (1916); Price v. Simon, 62 N.J.L. 151, 40 Atl. 689 (1898); Missouri, K. & T. Ry. v. Edwards, 22 Tex. Civ. App. 184, 67 S. W. 891 (1902). See also (1944) 32 Geo. L. J. 308.

26. Nicholas Farwell v. Boston & Worcester R. R., 4 Metc. 49, 55, 56 (Mass. 1842).

27. See (1944) 32 Geo. L. J. 308.

defined for overtime purposes under the Fair Labor Standards Act.[1] A judgment of the district court[2] in favor of the defendants was modified[3] as to the time spent checking in and out and affirmed as to time spent from "portal to portal."[4] Rehearing was denied[5] and plaintiffs brought certiorari. Held, affirmed. Time spent in traveling underground to and from the working face constituted work or employment for which compensation must be paid under the Fair Labor Standards Act. Tennessee Coal, Iron and Railroad Co. v. Muscoda Local Number 123, etc. et al., 64 Sup. Ct. 698 (1944). (Chief Justice Stone and Justice Roberts dissenting.)

This is a problem of construction of the Fair Labor Standards Act of 1938,[6] and the common law rules governing the master-servant relationship are not applicable to situations which fall within the ambit of this legislation.[7] The primary goal of Congress was that persons should not be permitted to take part in interstate commerce while working under sub-standard labor conditions.[8] If overtime pay might have the effect of protecting commerce from the injurious results of goods produced under sub-standard conditions, labor contracts made before or after such legislation cannot take these overtime transactions from the jurisdiction of the statute.[9]

Upon facts very similar to the instant case, the Sunshine case[10] held that minors of silver ore were entitled to "portal to portal" pay, although the time spent in travel was in cages which were readily lowered and hoisted, and not in uncomfortable and dangerous ore skips[11] as in the principal case. However, it is to be noted that the court in the Sunshine case appeared to be greatly influenced by the fact that the miners were "within the scope of employment" in de-

1. Fair Labor Standards Act, 52 Stat. 1060, 1063, 29 U.S.C.A. §§203 (g,j,), 207 (a,3), (1938).
2. Tennessee Coal, Iron & Railroad Company v. Muscoda Local No. 123, 40 F. Supp. 4 (N.D. Ala. 1941).
3. Tennessee Coal, Iron & Railroad Company v. Muscoda Local No. 123, 135 F. (2d) 320 (C.C.A. 5th, 1943).
4. The "portal to portal" basis of pay, proposed by the respondents, includes time spent in traveling between the entrance or portal to the mine and the working face and the reutrn trip, as well as the time spent at the actual working face of the ore
5. Tennessee Coal, Iron & Railroad Company v. Muscoda Local No. 123, 137 F. (2d) 176 (C.C.A. 5th, 1943).
6. The Fair Labor Standards Act is a regulatory statute designed to implement a public, social, or economic policy through remedies often in derogation of the common law. Walling v. American Needlecraft, 139 F. (2d) 60 (C.C.A. 6th, 1943).
7. Walling v. American Needlecraft, 139 F. (2d) 60, 63 (C.C.A. 6th, 1943), sited supra note 6.
8. United States v. Darby, 312 U. S. 100, 115 (1941).
9. Overnight Motor Transport Company v. Missel, 316 U. S. 572, 577 (1942).
10. Sunshine Mining Company v. Carver, 41 F. Supp. 60 (Idaho 1941).
11. An ore skip is an ordinary four-wheeled ore box car. It is normally used in transporting ore and its floor is often covered with muck from such use. When men ride in it, it is called a "man skip trip."

ciding that travel time was hours worked.[12] It appears that there is a difference between actually working and being in the scope of employment. This court, in fact, decided that the miners' lunchtime was not hours worked, yet it has been almost uniformily held that a workman in a like situation was "within the scope of employment."[13]

Since many borderline cases have purportedly turned on the very few words appearing in the Fair Labor Standards Act, §207 (a) (3),[14] it is not surprising that opposite results have been reached. In the case of auxiliary firemen, time spent at the fire hall in recreation while subject to call has been held not to be "work."[15] In a similar situation another court held that such time was "work,"[16] distinguishing the cases on the ground that in the first-mentioned case the parties agreed to special separate pay in case of a fire call.[17]

---

12. The court at 66 cited Bountiful Brick Co. v. Giles, 275 U.S. 154 (1928) and quoted from it: "The employment may begin in point of time before the work is entered upon and in point of space before the place where the work is to be done is reached. Probably, as a general rule, employment may be said to begin when the employee reaches the entrance of the employer's premises where the work is to be done; but it is clear that in some cases the rule extends to include adjacent premises used by the employee as a means of ingress and egress with the express or implied consent of the employer."

13. Employer's Mutual Insurance Co. v. Industrial Commission of Colorado, 76 Colo. 84, 230 P. 394 (1924); Bollard v. Engel, 4 N.Y.S. (2d) 363, 254 App. Div. 162 (1938); White v. E. L. Slattery Co., 236 Mass. 28, 127 N.E. 597 (1920); Thomas v. Proctor and Gamble Mfg. Co., 104 Kan. 432, 179 P. 372 (1919).

14. What did Congress mean when it said in the Fair Labor Standards Act, "No employer shall . . . employe any of his employees . . . for a workweek longer than forty hours . . . unless such employee receives compensation" for overtime at a specific rate?

15. Skidmore et al. v. Swift and Co., 136 F. (2d) 112 (C.C.A. 5th, 1943).

16. Wantock at al. v. Armour and Co., 140 F. (2d) 356 (C.C.A. 7th, 1944).

17. The court at 357 expressed its uncertainty as to whether or not the distinction between the two cases was material by saying: "It seems to us that the question is one which only the court of last resort can answer finally, and our conclusion affords but a resting place, as it were, for the passage of this question on its flight from the court of original jurisdiction to the Supreme Court." The fact that the employer furnished the means of transportation would not appear to make the time spent in travel "time worked" since, when the employer furnished a motor boat to ride employees to and from that place of work, it was not "time worked." Bulot et al. v. Freeport Sulphur Co., 45 F. Supp. 380 (E.D. Louisiana 1942). Opposite results have been reached in the case of oil pumpers as to whether time spent when subject to call is time worked. In the case holding that it was time worked, the decision was based on the pumper's obligation to carry out his responsibility. Fleming v. Rex Oil and Gas Co., 43 F. Supp. 951 (W.D. Michigan 1941). In the other case he was entitled to pay only for time actually worked. Thompson v. Loring Oil Co., 50 F. Supp. 213 (W.D. Louisiana 1943). A porter who was required to sleep on the premises was held not entitled to overtime compensation when, in the course of ordinary events, he was indulging in relaxation and entirely private pursuits. Muldowney v. Seaberg

In the case of coal miners a different holding than that of the instant case is to be noted. Bituminous coal miners' travel-time has been held not to be work-time under the statute.[18] The coal miners ride in "man-trips" which are slightly larger than those used by ore-miners.[19] The supervision during the trip would appear to be about the same. Both groups find it necessary to bend over where the roof is low. It does not appear reasonable that the difference in difficulty of travel should lead to the distinction between hours worked and non-hours worked. As a practical matter the decision in the instant case will operate by way of sudden penalty in that the employer will not only be forced to pay for all back time in travel, but also to pay at the rate of time and one-half.[20] Older mines, whose travel time amounts to one and one-half hours daily, can hardly meet the competitive situation.[21] Due to the peculiar travel situation and labor shortage a reduction in hours and a spread of employment would appear impractical, and thus two of the intended ends of the Fair Labor Standards Act[22] are thwarted.

In the face of these disadvantageous reactions and the opposing prior decisions, it is submitted that the court found a matter of public policy to be controlling. An excerpt from the brief of counsel for the ore miners might reveal this policy: "In coal mining we find a union which has been strong and powerful and which as a union has been engaged in collective bargaining with the coal operators over a long period of years. In our case we find the efforts of the men to organize their union presents a pitiable picture of helplessness against the domination of the mining companies."[23] Noting that the court said, "But these provisions, like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose,"[24] might strengthen this conclusion. In perfect harmony with this reasoning is the fact that the coal miners, through collective bargaining agreements, are now receiving "portal to portal" pay.

Elevator Co., 39 F. Supp. 275 (E.D. New York 1941). Radio engineers are entitled to compensation for periods on duty between half-hourly readings of meters while they are responsible for the operation of the equipment in their charge. Walling v. Sun Publishing Co., 47 F. Supp. 180 (W.D. Tennessee 1942).

18. Jewell Ridge Coal Corporation v. Local No. 6167, United Mine Workers of America, 53 F. Supp. 935 (Virginia 1944).

19. Man-trips used by the coal miners are about twelve feet long and seven feet wide. Not more than eight men riding in these cars ordinarily sit on a bench furnished for that purpose or, where the ceiling of the shaft is low, in the bottom of the car. Man-trips used by ore miners are about eight feet long and ten men ride on each one.

20. See Mr. Justice Sibley dissenting in Tennessee Coal Iron and Railroad Company v. Muscoda Local No. 123, 135 F. (2d) 320, 323.

21. Ibid.

22. Overnight Motor Transport Co. v. Missel, 316 U. S. 573, 576 (1942).

23. Judge Barksdale was quoting from the brief of counsel for the ore miners in the principal case in Jewell Ridge Coal Corporation v. Local No. 6167, United Mine Workers of America, 53 F. Supp. 935, 948 (Virginia 1944).

24. Instant case at 703.

PROPERTY

INTERESTS CONVEYED BY TAX SALE DEED

Real estate was devised to the father of appellants for life and at his death to his surviving children. On life tenant's failure to pay taxes, land was sold at a tax sale to appellee. At expiration of statutory time of two years,[1] the county auditor issued a tax deed to appellee which was recorded and described said real estate. Held: Tax deed issued pursuant to sale for delinquent taxes conveyed fee simple and cut off interest of contingent remainderman. Schofield et al. v. Green, —— Ind. App. ——, 56 N.E. (2d) 506 (1944).

There are two theories for real property taxes; one, that they are taxes upon the land;[2] the other, that they are taxes upon the owner of the land.[3] In the instant case, the court held that although taxes constitute a personal liability against the owner or occupant of the property,[4] the tax is an in rem obligation on the land. If this were not true, the tax sale in the instant case would only be a sale of the life tenant's interest. The court held that the contingent remaindermen were cut off by the tax sale, the tax deed carrying with it the interest of both the life tenant and the remaindermen.

The sale and redemption of lands sold for taxes is governed by statute and must be exercised in strict compliance with such statute.[5] The Indiana statutes provide that a tax sale deed shall vest in the grantee an absolute estate in fee simple[6] and that a lien for unpaid taxes shall attach on all real estate.[7] A lien on the real estate imports that the land itself can be sold to pay delinquent taxes.[8] The statute accepts the theory that taxes are a lien on the land as well as a personal liability.[9] The result in the instant case is in accord with the statutory theory when it allows a tax sale deed to convey the interest of the remaindermen.[10]

---

1. Ind. Stat. Ann. (Burns, 1943 Replacement) Sec. 64-2401.
2. "The purpose of designating the person in whose name the property is addressed is merely, secondary, being inserted only for the purposes of identification. The burden of the tax is upon the real property itself, and not upon the owner thereof." Eisenhut v. Marion De Vires Inc., 150 Misc. 804, 806, 269 N.Y.S. 483, 485 (1934); McIlroy v. Fugitt, 182 Ark, 1017, 335 S.W. (2d) 719 (1931); McPike v. Heaton, 131 Cal. 109, 63 Pac. 179 (1900); Jones, "Cyclopedia of Real Property Law" (1939) Sec. 495.
3. Mercier's Succession, 42 La. Ann. 1135, 8 So. 732 (1890); Green v. Craft, 28 Miss. 70, 73 (1854).
4. Prudential Casualty Co. v. State, 194 Ind. 542, 550, 143 N.E. 631, 634 (1923).
5. Milwaukee County v. M. E. White Co., 296 U.S. 268, 271 (1935); Brasch v. Mumey, 99 Ark. 324, 326, 138 S.W. 458, 459 (1911); 4 Cooley, "Taxation" (4th ed., 1924) Sec. 1559.
6. Ind. Stat. Ann. (Burns, 1943 Replacement) § 64-2401.
7. Ind. Stat. Ann. (Burns, 1943 Replacement) § 64-2825.
8. Ind. Stat. Ann. (Burns, 1943 Replacement) § 64-1518.
9. Ind. Stat. Ann. (Burns, 1943 Replacement) § 64-1519 specifies how the proceeds of the real estate sold for tax liens shall be applied.
10. Figgins v. Figgins, 53 Ind. App. 43, 101 N.E. 110 (1913); Clark et al. v. Middleworth et al., 82 Ind. 240 (1882).