CHAPTER 3

Torts

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A. COURT DECISIONS

§3.1. Negligence: Liability of suppliers and contractors. Twelve years ago in the leading case of Carter v. Yardley & Co.¹ the Supreme Judicial Court abandoned older notions requiring privity and held a manufacturer of perfume liable in tort to a remote vendee for negligence in putting out a product that burned the plaintiff's skin. Commendation is due the Court for preserving, during the 1958 Survey year, the potential value which Yardley may have in related situations.

In Flaherty v. New York, New Haven & Hartford R.R.,² the plaintiff complained of injuries received when bags of asbestos fell on him, the pile of bags coming unbalanced as he reached to remove one from the top for loading on a freighter. The plaintiff was working for a stevedoring company; four days earlier the bags had been unloaded from railroad cars by the defendant railroad, and placed in a shed owned by a terminal company and occupied by a steamship line. The pre-Yardley rule that a manufacturer or supplier was not liable to a remote vendee or other person with whom it had no contractual relation was subject to exceptions, one of which allowed liability for injury from an unsafe condition created incident to a delivery of materials by a seller, even though injury occurred after the seller had left the premises. Relying on both Yardley and cases establishing this exception to the pre-Yardley rule, the Supreme Judicial Court held the defendant liable, although it was a carrier rather than a seller. The possibility of intervening negligence of the steamship line, which was in control of the asbestos and had allowed it to remain in unsafe condition, was held not sufficient to relieve the defendant.

Messina v. Richard Baird Co.³ was another sequel to Yardley, but

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The minor plaintiff, seven or eight years of age, in passing through the rear doorway of the house owned by her parents tripped on a two-by-four nailed to the threshold by a workman who was installing an aluminum door pursuant to a contract between the owners and the defendant. Holding that the installation could have been found to be negligent, and that the work had not been accepted by the owners, complaints having been made by them, the Court observed that it need not determine whether the principle of *Yardley* affects older decisions which indicated that the owner's acceptance of the premises ended the contractor's responsibility. This express reservation suggests that the Court may, when the occasion arises, hold that a requirement of "privity" is as inappropriate in negligence claims against contractors as in those against manufacturers and suppliers; by doing so it would add another sound ruling in an area in which the Court's decisions have excelled.

**§3.2. Negligence: Insurance: Damage to mortgaged automobiles.** In *Bell Finance Co. v. Gefter*,\(^1\) the plaintiff finance company held an assignment from the conditional vendor of a vehicle which, while driven by the conditional vendee, was damaged in a collision caused by the defendant's negligence. The conditional vendee was not in default at the time of the accident, and it did not appear whether the amount of the debt was greater or less than the damage; in these respects the case differed from *Morris Plan Co. v. Hillcrest Farms Dairy, Inc.*,\(^2\) in which the Supreme Judicial Court had allowed a conditional vendor to recover from a third person who negligently damaged the automobile. These differences were held to be immaterial, and the plaintiff was awarded the full amount of the damage, with the understanding that any surplus above the debt would be held for the conditional vendee. The opinion indicates that mortgages and conditional sales are to be treated alike in regard to the present problem.

*Gefter* did not involve contributory negligence, and left open the question whether recovery in excess of the debt would be allowed in a case in which the conditional vendee or mortgagor was contributorily negligent. Answering this question in *Harvard Trust Co. v. Racheotes*,\(^3\) the Supreme Judicial Court limited the recovery to the amount of the debt, since if "Harvard can recover anything in excess of the debt we would be permitting [the mortgagor] to accomplish indirectly what he could not accomplish directly" because of his contributory negligence.

More debatable is the question as to whether there should have been any recovery in *Racheotes*. The suit was being pressed in Harvard's name but for the interest of its subrogee, the collision insurer, from whom the mortgagor had obtained a collision policy for the benefit of

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\(^2\) 323 Mass. 452, 82 N.E.2d 889 (1948).

both the mortgagor and the mortgagee. The balance outstanding on the debt was $318; the cost of repairing the car was $506.11; the insurer issued a check in the amount of $456.11 payable to Harvard and the mortgagor, and it was endorsed over to the repairman. The Court reasoned that the insurer should recover $318 as subrogee to the mortgagee’s claim. But what was the nature of the mortgagee’s claim? That is, what would have been the rights of the various parties, incident to the mortgagee’s claim, in the absence of insurance?

1. Rights of the parties in the absence of insurance. Before Racheotes it had been decided that the mortgagee or conditional vendor can recover against the negligent third party despite contributory negligence of the mortgagor or conditional vendee. After such a recovery, what is the status of the debt? Only three possibilities can be suggested: (1) the mortgagee still retains the debt, thus enabling him to obtain double payment if the debtor is solvent; or (2) the negligent third party's payment to the mortgagee has discharged the debt pro tanto, thus enabling the debtor to obtain indirectly a benefit he could not obtain directly because of his contributory negligence; or (3) the negligent third party is entitled to receive any sum which can be collected on the debt. The first choice unjustly enriches the mortgagee, by giving him double payment. The second unjustly enriches the mortgagor. The third is the best choice. As between the two negligent drivers, it places the ultimate legal responsibility in the same place, irrespective of mortgages and conditional sales; yet it gives the non-negligent mortgagee or conditional vendor a claim against the negligent third party to protect itself against the risk of nonpayment by the debtor. Thus the mortgagee's claim against the third party is good only for shifting to the latter the risk of financial irresponsibility of the mortgagor, and is not good for an added benefit to either the mortgagee or the mortgagor.

Whatever we may call it — a security interest, an interest in property, or a chose in action — the mortgagee's interest which is harmed by the third party's negligence is an interest intended only as security for payment of a debt. The amount remaining due on the debt is a measure of the maximum possible harm done to the mortgagee's interest. The actual harm will be less if subsequently the debtor makes some payment or if something is realized from the remaining value of the damaged chattel. Nevertheless, if there is uncertainty about the debtor's payment or the damaged chattel's value, it would be unfair to the mortgagee to make his award against the negligent third party less than the sum remaining due on the debt, since it may finally turn out that he loses the entire amount still owed him. To insure that the mortgagee is not undercompensated for the loss caused by the negli-

4 Morris Plan Co. v. Hillcrest Farms Dairy, Inc., 323 Mass. 452, 82 N.E.2d 889 (1948) (involving conditional sale). That a mortgage is to be similarly treated is indicated in the Gefter case, discussed in text supported by note 1 supra.

5 Note that a reason given by the Court in Racheotes for disallowing any recovery in excess of the debt was that the mortgagor would then obtain indirectly a recovery he could not obtain directly.
gent third party, it is sound to measure the amount of the mortgagee's recovery by the sum outstanding on the debt. But, to insure that the negligent third party is not required to pay more than compensation, it is a necessary corollary that when he pays the full sum to the mortgagee, he becomes the beneficial owner of whatever value remains in the mortgagee's security interest. This legal relation may be described as an instance of subrogation, in which the third party's payment to the mortgagee entitles him to sue on the mortgagee's claim in debt against the mortgagor. Or it may be said that any further recovery by the mortgagee against the mortgagor is held in trust for the third party, who has fully compensated the mortgagee. Also, the legal relation may be thought of as one of forced purchase, analogous to that which the action of trover imposes upon one whose tortious damage to a chattel is so severe as to amount to conversion; the tort-feasor must pay a sum equal to the full value of the interest in an undamaged condition, but in return the judgment vests in him the title to the interest in its damaged condition. Thus, if the mortgagor is financially responsible, the third party will recover on the debt and the mortgagor will be left with his damaged chattel; the ultimate loss will fall on the mortgagor as would have been true if there had been no mortgage.

Parenthetically, it may be noted that prior to Racheotes the Court had not been required to choose among these three possibilities as to what effect the mortgagee's recovery against the third party has upon the debt. It is easy to imagine why the point had not been presented for decision. A mortgagee would ordinarily sue on the claim more easily established — the debt — except when the debtor is not financially responsible, and in that case the negligent third party would not ordinarily bother to preserve and press a potential claim as the mortgagee's subrogee.

2. Rights of the parties when the mortgagee and mortgagor have joint collision insurance. It is conceded in Racheotes that the insurer can recover only as subrogee of the mortgagee, and if the foregoing analysis is correct, the mortgagee's claim is not one by which the result of placing the ultimate loss on the negligent third party can be reached. Yet that is the result reached in Racheotes, unless after the judgment for the insurer against Racheotes, the latter still has a subrogation claim on the debt against the mortgagor. This possibility surely would not be conceded, since it would result in loss by the mortgagor, who would then have received no net benefit from his own collision insurance, unless in turn he were allowed to complete the circle by recovering again from the insurance company.

There is a second ground for criticism of Racheotes, entirely independent of the foregoing analysis. The mortgage included an assignment by the mortgagor of the insurance proceeds not exceeding the unpaid balance of the debt, and an agreement that the insurance proceeds would be paid to the mortgagee to be "applied" to the unpaid balance of the debt.6 Neither the opinion nor the record contains a

copy of the insurance policy; stipulations make it apparent, however, that the insurer was aware of the mortgagee’s interest, and perhaps also inserted in the policy a loss payable clause providing for payment to the mortgagee “as its interest may appear.” Thus it would be inconsistent with the policy obligations as well as the mortgage to make payment otherwise than to the mortgagee to be “applied” to the unpaid balance of the debt. Of course the insurer, mortgagor and mortgagee are free to, and often do, agree on another form of payment, as they did in this case by using a check payable jointly to mortgagee and mortgagor, which was then applied toward the repair bill. But such an arrangement as to manner of payment, agreed upon after loss, should not give rise to a claim against the negligent third party which would not have been available if the manner of payment had been that provided in the combined terms of the mortgage and the insurance policy. If the proceeds had been paid as those documents provided, then the debt would have been fully discharged; the insurance proceeds exceeded the unpaid balance, and “applied” surely means “applied toward discharge” since any other meaning would leave the mortgagor owing further payment even if the proceeds were “applied” to the debt rather than being used to pay the repair bill. Thus, because of the discharge of the debt, the mortgagee would be fully compensated and would have no further claim for harm to his security, and there would then be no basis for the insurer’s subrogation claim.

It is not an adequate answer to argue that we should allow the insurer-subrogee to assert the claim that existed just before it made payment. That would be giving the payment the effect of purchasing an assignment of the claim, rather than the declared effect of being applied to the unpaid balance of the debt. It would leave the debt outstanding; the mortgagor would still owe the full balance to the mortgagee (or its subrogee), and would be holding a damaged car with no fund to repair it, since we are now assuming that payment has been made to the mortgagee as provided in the documents, and not to the repairman. The effect of allowing the insurer its alleged subrogation claim would thus be to cause the mortgagor to receive no net benefit from the insurance. It would be treating him as if he were not an insured — as if the policy had been insurance of the mortgagee’s interest only. If the negligent third party had been named as an additional insured, it would never have been argued that the insurer should have a subrogation claim against him. In a sense, that is the effect of the agreement that proceeds will be applied to the unpaid balance of the debt; the agreement is one for the discharge pro tanto of the debt and all other claims dependent upon the debt.

The foregoing criticisms of Racheotes may be regarded as essentially doctrinal in character. If that be a detraction, however, they are fully supported on grounds of public policy as well, even without resort to the view sometimes urged that subrogation is generally undesirable.

7 See, e.g., James, Indemnity, Subrogation and Contribution and the Efficient Distribution of Accident Losses, 21 NACCA L.J. 360 (1958).
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If subrogation is to be justified, it is upon the bases that it reduces insurance costs by reducing insurance losses, and that it carries out the theme that insurance should effect indemnity only, by allowing the insurer to capitalize on other rights for indemnification of the insured loss rather than leaving an insured to profit by recovering twice. In this instance, it is plain both that denial of subrogation will not cause anyone to recover more than he lost, and that any saving on collision insurance rates which results from allowing subrogation will be exceeded by an increase of liability insurance rates because of administrative costs incurred and losses paid by the liability insurers of persons occupying the position of the negligent third party.

It is to be hoped that at the first opportunity the Court will reconsider the rule of *Racheotes* in the light of factors which appear not to have been fully argued to the Court before its decision on this §318 claim.

§3.3. Negligence: Insurance brokers. In *Rayden Engineering Corp. v. Church*, the plaintiff corporation sued a firm of insurance brokers for their failure to obtain a policy of insurance against accidental death of a key employee. About six weeks after the brokers' representative had said that he would “take care of it,” the key employee was killed in an automobile accident. No application had been signed and no premium paid; the brokers took no steps toward obtaining a policy, and did not notify the plaintiff corporation that further action by it and the key employee would be required before a policy could be issued. The Supreme Judicial Court observed that a principal-agency relationship was established, imposing upon the brokers a duty to proceed in accordance with instructions and to report what was being done, and that there was evidence from which the jury could have found that the plaintiff exercised due care and that the brokers were negligent. But a majority of the Court denied recovery on the ground that the plaintiff had failed to adduce proof that the brokers' negligence was a cause of substantial damage to the plaintiff, and that the plaintiff should not have a second chance to do so in a new trial. It was considered speculative whether a policy would have been issued and what terms a policy would have had if issued; there is no standard accident form and most companies require applications, including questions about health and habits, answers to which might have led to refusal to issue a policy.

The division of opinion on the Court is not surprising in view of the borderline quality of the evidence that a policy covering the death would have been in effect at that time if due diligence had been exercised by the brokers. But insofar as the majority decision is based on the idea that the plaintiff should not have a second chance to show that it sustained more than nominal damages, it is subject to the criticism that it denied recovery on a purely procedural ground. Of course the problem is one of weighing the full cost of a new trial, including

§3.3. 1 1958 Mass. Adv. Sh. 965, 151 N.E.2d 57. See further discussion of this case in §18.1 infra.

http://lawdigitalcommons.bc.edu/asml/vol1958/iss1/7

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the burden it casts upon the courts and the opposing party, against
the risk of denying a substantively valid claim. If that risk is not sub-
stantial, the denial of a new trial is warranted. But in situations such
as the Church case, involving moderately unusual facts and legal issues,
the risk of denying a valid claim is often substantial, and courts should
be somewhat more lenient in granting a new trial than in cases in-
volving run-of-the-mill fact situations.²

§3.4. Negligence: Construction of statutes: Left turns. Kretz-
schmar v. Boisjolie¹ involved an intersection collision which occurred
as plaintiff was making a left turn from a one way street. There were
verdicts for the defendants, the plaintiff having excepted to the portion
of the judge's charge which stated that one who is approaching for a
left turn “shall do so in the line of traffic to the right of and nearest to
the center line of the roadway and the left turn shall be made by pass-
ing to the right of the center line of the entering way.” Plaintiff
argued that in making a left turn from a one way street one is not re-
quired to stay on the right side of the center line of the one way street.
The Supreme Judicial Court observed that the charge was in the
language of G.L., c. 90, §14, as effective in 1952, and that since the
statute made no exception the trial court did not err in refusing to in-
struct that it did not apply to one way streets. In the face of such in-
tolerably literal construction, it is only small comfort that the statute
was amended in 1957, prior to the Kretzschmar decision, to provide
especially for a left turn from a one way street.² Even now, no special
provision has been made for a left turn from a two way street into a
one way street. If a similarly literal approach is used in construing
the 1957 act, the law still commands that a driver perform the patently
useless and often dangerous maneuver of crossing to the far side of the
one way street rather than making his left turn into the traffic lane on
the near side.³

² Another opinion illustrative of the Court's use of procedural grounds for dis-
position of cases is McNair v. Fraher, 336 Mass. 458, 146 N.E.2d 484 (1957). It
appeared that the plaintiff, an eighteen-year-old girl with no operator's license and
little training in the operation of vehicles, was driving because the defendant was
tired. It was argued that the defendant was grossly negligent in not supervising her
driving. One ground for the decision against the plaintiff was that the automobile
was not operated by the defendant, whereas the declaration alleged that “she was
riding in an automobile operated by the defendant” and “that as a result of the
gross negligence of the defendant in the operation of said automobile” she was
injured.

³ Another decision, Souza v. Torphy, 336 Mass. 584, 147 N.E.2d 157 (1958), though
less clearly subject to criticism than the one discussed above, also appears to repre-
sent an unduly rigid approach to statutory construction, and in this instance to
construction of precedents as well. The plaintiff alleged injuries from falling on
ice that had accumulated on a sidewalk adjacent to the property of the defendant's
testator, and that the notice required by G.L., c. 84, §21, as it stood in 1954, was not
given “as a result of the conduct and statements of the defendant's testator, . . .
made . . . for the purpose of inducing plaintiff to forbear giving written notice.”
§3.6. Negligence: Res ipsa loquitur. In Poulin v. H. A. Tobey Lumber Corp.\textsuperscript{1} the Supreme Judicial Court permitted a finding of negligence against the defendant upon evidence that, as a lumber truck wholly within the defendant’s control rounded a corner, a rope holding the load broke and a piece of flying lumber struck the plaintiff. In considering itself coerced by the precedent of prior decisions, despite the distinction that such decisions involved municipalities, against which waiver and estoppel would be unavailable, the Supreme Judicial Court held that allegations of waiver and estoppel were immaterial because the statute did not merely require notice as a condition precedent to enforcing a common law action against a private person but changed the nature of the action to one which has no existence in the absence of notice.

\textsuperscript{1} Gill v. Carrier, 1958 Mass. Adv. Sh. 581, 149 N.E.2d 632. The plaintiff testified that while crossing the grounds of the State House, she met three law students who advised her that steps leading up from Derne Street, which she knew had been blocked off during repairs, were again open to the public. For injuries sustained from a fall at the foot of the steps she brought an unsuccessful suit against the contractor.

\textsuperscript{2} 1958 Mass. Adv. Sh. 1045, 151 N.E.2d 287. This case is also discussed supra §1.1.

Brady v. Great A. and P. Tea Co.,\(^2\) an inference of actionable negligence was permitted upon evidence that a nine-months-old child fell when a strap broke away from one side of a shopping carriage, furnished by the defendant, as the child's mother was standing at the "empties" counter to get a refund. In DiRoberto v. Lagasse\(^3\) the necessary inference was permitted upon evidence that the plaintiff was injured by the collapse of an awning attached to a booth at a church carnival, that no one was on or about the roof of the booth, that the booth was not crowded, that little or no rain had occurred, and that the booth was owned and maintained by the defendant.

The phrase "res ipsa loquitur" appears in only one of these opinions (Brady) and then only in a quotation from the trial court's charge. One may infer that the Supreme Judicial Court is deliberately following this course to emphasize the fact that these decisions are based upon reasoned inferences from evidence and not upon special dispensations which might be thought to attach to an exotically named doctrine.\(^4\) This sensible approach makes it unnecessary to be concerned about whether borderline cases are within or without the scope of res ipsa loquitur.\(^5\)

\(\S 3.7.\) Negligence: Exoneration by parking ticket: Fraud. In King v. Motor Mart Garage Co.,\(^1\) the plaintiff sought damages for injury to an automobile stored with the defendant for hire, and for loss of personal property stolen from it. She testified that after giving notice that property of substantial value was in the car, and receiving assurances about its safety, she was in the act of backing the car into a parking space when an attendant asked her to sign a form, saying "We have to have a record of all locked cars." She signed, without reading, a paper stating that all personal property was left at her sole risk. When she called for the car the following day, the right vent was broken and

\(^4\) This policy has been pursued previously by the Court. See 1957 Ann. Surv. Mass. Law §13.4.  
\(^5\) An example of such a borderline case is Flaherty v. New York, New Haven & Hartford R.R., 1958 Mass. Adv. Sh. 733, 149 N.E.2d 670, in which the Court permitted an inference of the defendant's negligence to be drawn from evidence that the defendant unloaded five thousand bags of asbestos weighing 125 pounds apiece into a shed, and that a few days later when the plaintiff approached to move them they fell on him as a result of being stacked insecurely and contrary to accepted practice. There was no evidence of intermeddling during the intervening period and the Court held it a reasonable inference that the defendant put them in the condition in which the plaintiff found them, since it is unlikely that any one would take them down and restack them in the same place. See comment on this case in §3.1 \textit{supra}. Another example is Harrington v. Central Greyhound Lines, Inc., 1958 Mass. Adv. Sh. 1191, 1192, 146 N.E.2d 483, 484. "While it is said that the mere occurrence of a rear end collision of vehicles on a highway is no evidence of negligence . . . the circumstances of the collision may create a reasonable inference based on common experience that it would not have occurred if the operator of the colliding vehicle had been careful."

\(\S 3.7.\) 1 336 Mass. 422, 146 N.E.2d 365 (1957).
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the personal property was missing. Allowing a judgment for the plaintiff, the Supreme Judicial Court held that the evidence warranted findings that the attendant accepted not only the automobile but also its contents for storage, that the defendant was negligent, and that the "release" was obtained by fraudulent misrepresentation as to its contents, in circumstances where the party signing it did so without reading it, relying on that misrepresentation.

§3.8. Gross negligence: Guests. Several cases decided during the 1958 Survey year involved the question as to whether the evidence offered would support a finding of gross negligence. In Doherty v. Spano,\(^1\) the Supreme Judicial Court held that while speed alone was not enough to prove gross negligence, and driving with one arm on the back of the front seat behind the 17-year-old girl whom defendant had offered a ride home at about midnight was not enough, "these things in combination, together with the fact that on four or five occasions within the period of a minute the defendant turned to talk to the plaintiff," presented a question for the jury.

In Tompkins v. Pratt\(^2\) a finding of gross negligence was held to be warranted by evidence that the defendant approached a blind corner on the left of the road and in a path from which, because of parked cars on his left and moving traffic on his right, he was unable to turn, and at a speed (30 to 35 miles an hour) that prevented him from making a sudden stop.

But compare these cases with Lalumiere v. Kiele.\(^3\) The plaintiff testified that he twice told the defendant to slow down because of ice and snow and the bad condition of the steering wheel, and each time the defendant, a professional musician, replied that he had to get to a club in another town to see a singer before she left. While proceeding at 45 m.p.h. on a straightaway, the car skidded and crashed. A majority of the Supreme Judicial Court held that the "additional factors" of "the warnings of the plaintiff and the defendant's answers" did not distinguish the case from earlier decisions holding that "driving at an unreasonable speed does not constitute gross negligence." A formulation based on finding additional factors besides speed is likely to be misleading; speed is always relative to the circumstances. In Lalumiere itself there were icy roads, limited visibility, and prior skidding. Why are these less significant than the additional factors in Doherty of the defendant's turning to talk with the plaintiff and putting his arm behind her, and the additional factors in Tompkins of approaching a blind corner while unable to swerve because of parked cars on the left and moving traffic on the right? While comparison of a catalogue of additional factors is useful, the underlying distinction is that the conduct in Doherty and Tompkins was somewhat more serious than that in Lalumiere, when judged by the degree of risk and indifference to it. Note the language in Tompkins: "His act was de-

liberate and so plainly involved danger to others that a jury would be warranted in finding such indifference to legal duty on his part as to constitute gross negligence." 4

_Bogley v. Burkholder_5 arose under the distinctive Massachusetts rule that one who enters upon a gratuitous undertaking for the benefit of another owes the other only a duty to refrain from gross negligence.6 The plaintiff and the defendant, truck drivers, were at a terminal on work for their respective employers. It was the plaintiff's duty to close the rear doors of a trailer, and this could not be done without moving the trailer. The defendant connected his tractor to the trailer and moved it; during efforts to separate the tractor and trailer the tractor ran over the plaintiff's leg. On evidence considered sufficient for a finding of ordinary but not gross negligence, the plaintiff lost. The Supreme Judicial Court reasoned that the defendant entered the undertaking only as an accommodation and that, no relevant trade custom among truckers having been proved, the prospect that the defendant would receive similar aid in the future was too conjectural to bring the case within the rule imposing liability for ordinary negligence because of some business advantage to the defendant.

§3.9. _Fraud: Statute of Frauds._ In _Middlesex County National Bank v. Redd Auto Sales, Inc._1 the trial judge found that an agent of the defendant, a dealer in new and used automobiles, willfully misrepresented to the plaintiff bank that one Rideout had bought a used car from the defendant for $595, making a down payment of $200, and desired to finance the balance. In fact the purchase price was $495 and the down payment was $75 or $100. The trial judge also found that the "defendant knew that the plaintiff would not finance a customer unless he had made a down payment of one third of the purchase price," 2 and that the plaintiff had relied upon the representations in granting the loan. The representations were oral, and the defendant pleaded the statute of frauds, G.L., c. 259, §4,3 derived from Lord Tenterden's Act.4 Considering itself bound by precedents,5 the Su-

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6 This is a minority view, except in so far as it has been adopted by statutes pertaining to automobile guests. See, e.g., Lyngaug v. Payte, 247 Minn. 186, 76 N.W.2d 660, 56 A.L.R.2d 1090 (1956); 38 Am. Jur., Negligence §17.

§3.9. 1 336 Mass. 727, 147 N.E.2d 790 (1958). See §4.6 infra for further comment on this case.
2 336 Mass. at 728, 147 N.E.2d at 791.
3 "No action shall be brought to charge a person upon or by reason of a representation or assurance made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such representation of assurance is made in writing and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."
4 The history of the statute is reviewed in Walker v. Russell, 186 Mass. 69, 71 N.E. 86 (1904).
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preme Judicial Court held for the defendant, on the ground that the statute of frauds was a bar.

The decision may be justified because of the close analogy to prior cases. But the Court intimated that it might have reached a contrary result were the question one of first impression. This intimation of disaffection for broad application of the statute suggests that, except within the range of close analogy to precedents, the Court is not likely to accept the notion that a mantle of immunity is drawn over a whole set of oral representations intended to induce an extension of credit to another if in some aspect they concern his "character, conduct, credit, ability, trade or dealings."

§3.10. False imprisonment. In Morrill v. Hamel the plaintiff sued two deputy tax collectors for false imprisonment. The plaintiff was on active duty with the Air Force, and was in uniform at his home in the city of Newburyport when the defendants appeared with a tax warrant issued by the city tax collector instructing them to collect the excise tax on the plaintiff's automobile and failing that to arrest him. After the plaintiff informed them that he did not have the money, they arrested and held him in jail until military representatives from the plaintiff's Air Force base came and paid the tax. The plaintiff claimed exemption from arrest on this warrant because of the Soldiers' and Sailors' Civil Relief Act of 1940. In holding for the defendants, the Supreme Judicial Court rested its decision on the broad principle that an officer is bound only to see that the process is in regular form and issues from one having jurisdiction of the subject.

Tellefsen v. Fee was urged as a precedent against the result reached in Morrill. In that case the plaintiff was master of a Norwegian vessel docked in Boston. He was arrested under a writ issued out of the Boston Municipal Court upon a claim by a member of his crew for back wages. A treaty between the United States and the Kingdom of Sweden and Norway provided that disputes between the captain and crew of vessels of the signatory nations should be adjusted before their respective consulates. The majority opinion recognized the rule that if the writ is issued "from a court of general jurisdiction over the subject matter," the arrest is not rendered unjustifiable by "irregularities making the process voidable"; also, it recognized that in Tellefsen the Municipal Court of Boston had general jurisdiction over the subject matter. But it nevertheless held for plaintiff on the ground that before making the arrest the officer was informed of facts from which he was bound to know the law that the Municipal Court had no jurisdiction over the particular controversy between the parties, and no jurisdiction over their persons, because of the treaty. Tellefsen might have been distinguished from Morrill on the ground that the Soldiers'
and Sailors’ Civil Relief Act does not affect jurisdiction but merely provides for suspension and delay of proceedings. The Court did not, however, make this distinction; rather, it noted that in a previous Massachusetts opinion Tellefsen had been described as an “exceptional” rule for “very unusual circumstances” and that Prosser had cited Tellefsen as a minority view. Thus it appears doubtful that the Court would now follow Tellefsen even in the “exceptional” circumstances it involved, and at the least Tellefsen is to be narrowly restricted. The Court observed that the effect of its decision in Morrill is that interpretation and enforcement of the federal act will rest with courts, determination of claims of false arrest will not be dependent upon conversations between the process server and the taxpayer, and officers will not be dissuaded by fear of personal liability from serving a valid warrant.

B. LEGISLATION

§3.11. Actions for death. Heretofore, Chapter 229 of the General Laws, concerning actions for death, has had separate sections for claims for death from a defective way (§1), death of a passenger or other non-employee caused by negligence, etc., of a railroad or street railway (§2A), death of a passenger by negligence, etc., of other common carriers of passengers (§2), death of an employee (§2B), and other deaths caused by negligence, etc. (§2C). Chapter 238 of the Acts of 1958 consolidates former Sections 2, 2A, and 2C. The new Section 2 applies generally to claims for death, except claims against the employer of the deceased (as to which Section 2B remains in effect) and claims for death from a defective way (as to which Section 1 remains in effect). Other sections of Chapter 229 are amended to conform, and amended Section 6E provides that the amount of recovery under Section 2B, like that under new Section 2, shall be not less than $2000 nor more than $20,000.

§3.12. Actions for personal injury: Admissibility of medical and hospital bills. Chapter 323 of the Acts of 1958 adds Section 79G to G.L., c. 233. The new section provides that in personal injury actions an itemized bill sworn to by the physician, dentist or authorized agent of the hospital rendering services shall be admissible as evidence of the fair and reasonable charge for such services. The bill shall not include references to the injury itself or to the history, and a notice given ten days before trial is required. The statute provides that it does not limit the right of the defendant to summon the witness at his own expense “for the purpose of cross examination with respect to such bill or

7 Prosser, Torts §25 n.68 (2d ed. 1955), cites Tellefsen as contrary to the assertion that “the weight of authority probably is that the officer is privileged to execute [a writ valid on its face] even though he has personal knowledge of facts which should prevent the arrest.”
record or to rebut the contents thereof, or for any other purpose," or to adduce other testimony regarding the bill or record.

§3.13. Motor vehicle actions. Chapter 369 of the Acts of 1958 repeals the requirement that actions of tort arising out of the use of motor vehicles be commenced in the District Court and authorizes the Superior Court on its own motion or the motion of a party to transfer to a District Court a case in which, "if the plaintiff prevails, there is no reasonable likelihood that recovery will exceed one thousand dollars." A party aggrieved by the decision of the District Court may as of right have the case retransferred for determination by the Superior Court, the decision of the District Court being prima facie evidence on such matters as are put in issue by the pleadings.

§3.14. X-ray machines for shoe-fitting. General Laws, c. 111, §5C, inserted by Acts of 1956, c. 595, provides for the Department of Public Health to regulate the use of fluoroscopic shoe-fitting machines. Chapter 79 of the Acts of 1958 amends G.L., c. 111 by repealing Section 5C and adding Section 186A, providing that no person shall operate or maintain a shoe-fitting device which uses fluoroscopic, X-ray or radiation principles, except for diagnostic or therapeutic purposes by or under the direction of a physician or chiropodist registered under the laws of the Commonwealth.

§3.15. False imprisonment: Detention on suspicion of shoplifting. Chapter 337 of the Acts of 1958 amends G.L., c. 231 by adding Section 94B, which gives a merchant and his authorized representatives a privilege to detain, "in a reasonable manner and for not more than a reasonable length of time," if there are "reasonable grounds to believe that the person so detained" was shoplifting. The act provides for a presumption of reasonable grounds for such belief if goods not purchased are concealed by the person detained. Prior to this act, the merchant had a considerably narrower privilege.1