### MASSACHUSETTS SCHOOL OF LAW
### ORIENTATION SCHEDULE OF CLASSES – FALL 2010

**August 16, 18, 19 & 21, 2010**

#### DAY ORIENTATION

**First Session:**

**Monday, August 16, 2010**

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
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<tbody>
<tr>
<td>2:00 - 2:10 p.m.</td>
<td>Welcoming remarks, Dean Lawrence R. Velvel and Paula Colby-Clements, Director of Admissions</td>
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<tr>
<td>2:10 - 3:10 p.m.</td>
<td>Structure of the Legal System and the Legal Process Associate Dean Michael Coyne</td>
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<tr>
<td>3:10 - 3:20 p.m.</td>
<td>Break</td>
</tr>
<tr>
<td>3:20 - 4:30 p.m.</td>
<td>Case Briefing and Analysis – Professor Starkis <em>Weinberger v. Romero Barcelo</em></td>
</tr>
<tr>
<td>4:40 – 5:45 p.m.</td>
<td>Orientation Dinner Introduction to Student Organizations</td>
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</tbody>
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**Second Session:**

**Wednesday, August 18, 2010**

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
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<tbody>
<tr>
<td>1:00 – 2:20 p.m.</td>
<td>MSL Steps for Academic Success Professor Furi-Perry</td>
</tr>
<tr>
<td>2:20 - 2:30 p.m.</td>
<td>Break</td>
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</tbody>
</table>
2:30 - 3:45 p.m. Case Briefing and Analysis
Property
Professor Peter Malaguti

Third Session:

Thursday, August 19, 2010

1:00 - 1:30 p.m. First year writing programs
Professors Andrej Starkis and Holly Vietzke
Available library resources
Professor Judith Wolfe

1:30 – 1:45 p.m. Welcome to Law School, Assistant Deans,
Paula Kaldis and Diane Sullivan

1:45 – 2:00 p.m. Break

2:00 - 3:30 p.m. Case Briefing and Analysis
Property
Professor Carmen Corsaro

Fourth Session:

Saturday, August 21, 2010

8:00 a.m. Coffee and Pastries

9:00 - 11:15 a.m. Case Briefing and Analysis
Civil Procedure
Professor Thomas Martin

11:15 a.m. Brief Library Tour
EVENING ORIENTATION

First Session:

*Monday, August 16, 2010*

4:45 - 5:45 p.m. Orientation Dinner
Introduction to Student Organizations

6:00 - 6:10 p.m. Welcoming remarks, Dean Lawrence R. Velvel and
Paula Colby-Clements, Director of Admissions

6:10 - 7:15 p.m. Structure of the Legal System and the Legal Process
Associate Dean Michael Coyne

7:15 - 7:30 p.m. Break

7:30 - 8:45 p.m. Case Briefing and Analysis – Professor Starkis
*Weinberger v. Romero Barcelo*

Second Session:

*Wednesday, August 18, 2010*

6:00 - 7:20 p.m. Academic Steps for Success
Professor Furi-Perry

7:20 - 7:30 p.m. Break

7:30 - 8:45 p.m. Case Briefing and Analysis
Property
Professor Peter Malaguti
Third Session:

*Thursday, August 19, 2010*

6:00 - 6:30 p.m.  First year writing programs  
Professors Andrej Starkis and Holly Vietzke  
Introduction to library resources  
Professor Judith Wolfe

6:30 - 6:45 p.m.  Welcome to Law School, Assistant Deans,  
Paula Kaldis and Diane Sullivan

6:45 - 8:45 p.m.  Case Briefing and Analysis  
Property  
Professor Carmen Corsaro

Fourth Session:

*Saturday, August 21, 2010*

8:00 a.m.  Coffee, pastries, and the like

9:00 - 11:15 a.m.  Case Briefing and Analysis  
Civil Procedure  
Professor Thomas Martin

11:15 a.m.  Brief Library Tour
MEMORANDUM

TO: ALL ENTERING FIRST SEMESTER STUDENTS
FROM: PROFESSORS COYNE, CORSARO, MALAGUTI AND MARTIN
DATE: JULY 26, 2010
RE: ORIENTATION PROGRAM

Welcome to law school. You should carefully read and review the material on time management and the *Weinberger v. Romero-Barcelo* case. Please also complete the sample brief format for all cases.

Please review the other memoranda in the packet regarding the schedule for reading the remaining civil procedure and property materials.

Enjoy the journey!
INTRODUCTION

Many times college students have not had to manage their time efficiently prior to college because they are bright and weren't really challenged in high school. The situation often changes in college because everyone who goes to college did well in high school but the full range of grades are assigned. Some students who received A's and B's in high school are now receiving C's and D's in college. Those receiving lower grades are probably no less capable than those receiving higher grades but often their study skills, including time management, are less effective.

If you can identify with any part of the above paragraph, working on improving your time management may be beneficial to you.

In this program, you will be given the opportunity to assess where your time goes and make some decisions about changes you would like to make to use your time more effectively. There is no one right way to manage your time; however, it is important to get to know yourself so you can make good decisions about how to use your time. We all have 168 hours in a week to use as we wish; however, some people make better use of this time than others. If you perceive that this is an area of your life that needs improvement, this program is for you. Throughout the program, you will learn ways to use your time more effectively.

On a piece of paper make a list of the top five ways you waste your time.

Now answer each of the following questions:

Do you meet assignment deadlines?

Do you write a daily "to do" list?

Do you begin working on smaller projects early in the semester?

Do you think of being a full-time student as you would a full-time job?
When you have answered all questions, click the Add Button to determine your Time Management Quiz score. If you have a high total score (10 is the maximum score possible), this indicates that you are using effective time management techniques. If your total score is low, it may be helpful to learn some techniques for using your study time more effectively.

FOUR STEPS TO IMPROVED TIME MANAGEMENT

There are four strategies that can be very useful for managing time more effectively. They are:

1. Create a semester schedule
2. Assess and plan your workload each week
3. Adjust your plan each day
4. Evaluate your schedule

Strategies for accomplishing each of these tasks will be discussed on the next few pages.

CREATE A SEMESTER SCHEDULE

Record known class assignments including quizzes, tests, projects and papers

Recording your class assignments from the beginning of the semester creates a framework for your semester. It lets you know when you are likely to have high academic demands and when you will have more flexibility for scheduling pleasurable activities.

Record co-curricular activities including work hours, meetings, social commitments and out-of-town weekends

Recording co-curricular activities allows you to have a more accurate picture of how full or open your schedule will be throughout the semester. These activities are important for providing balance in your schedule.

It will be important to update your semester schedule regularly. Remember that assignment due dates change, assignments are added and activities are planned. Keeping an accurate semester schedule facilitates the next step of this process, assessing and planning your weekly workload.
ASSESSING AND PLANNING YOUR WEEKLY SCHEDULE

Make a list of what you have to accomplish during the coming week, including class assignments and class attendance. Being inclusive in your list of school work that must be done for the week is essential for making your schedule work. Everything takes time, whether it's reading a chapter, working problems, or writing an outline for a research paper.

Include co-curricular activities, work hours, errands, exercise, meals and time with friends on your list of things to do for the week. Daily living activities and co-curricular activities are important and provide balance in your schedule but take time away from study time. Preparing dinner and cleaning up afterwards or attending a student organization meeting can take as much time as reading a chapter in a textbook.

Estimate how long each task will take. This is an essential, but often overlooked step in the time scheduling process. Activities take different amounts of time so to effectively use your time, it is important to estimate how long a task will take and allow that amount of time for the task. It's better to estimate conservatively if you don't know how long something will take. If you finish 30 minutes or an hour early, you can use that time however you would like but if you haven't allowed enough time, you'll have to take time away from another task to complete the one that is taking longer than planned.

Identify the day on which you will accomplish each task, keeping in mind the amount of time the task will take and other things you must also do that day. This facilitates the next step of this process, making a daily schedule. By looking at your whole week and realizing everything you need to accomplish during that week, you are more likely to avoid missing deadlines. You can make adjustments throughout the week instead of finding that you have a 6 hour task with only three hours remaining before the deadline. Making your schedule for the next week is a good activity for Friday afternoon or evening, before beginning your weekend. Weekends provide the largest blocks of time for study so if you will have a very full week ahead, it may be helpful to complete some of the tasks on the weekend to decrease the time crunch during the coming week.

ADJUST YOUR SCHEDULE EVERY DAY
Write out a daily schedule at the beginning of each day. Include uncompleted tasks from the previous day as well as new tasks. This should only take a few minutes because you can use your weekly schedule to create it quickly. Use an index card or a daily planner. Carry your schedule with you so you can refer to it as needed and cross items off once they are completed. This last step provides a sense of accomplishment.

As you write out your daily schedule, assess your priorities. Some activities must be done on a particular day while others may be optional for that day. You can use the A, B, C system of prioritizing your tasks. A's must be done that day and C's are optional. B's are important but not as important as A's. Try to accomplish all your A tasks before moving on to the B tasks and finally the C tasks. This can reduce your stress level.

EVALUATE YOUR SCHEDULE

Evaluate your schedule in the morning. Ask yourself whether the schedule for the day is realistic, given the amount of time each of the tasks will take. If it's not, remove some of the B and C priority items from your schedule so the schedule is manageable.

Evaluate your schedule in the evening. Did you accomplish everything on your list? If not, why not? Was the schedule unrealistic or was your time management ineffective? What adjustments can you make in the future to make your schedule work better for you?

Where Does Time Go?

It may seem like there aren't enough hours in the week to get everything done. That may be true or it may be that you are not using your time as efficiently as possible. To assess where your time goes, complete the inventory below. Be as honest with yourself as you can. Some of the items are done every day so those will need to be multiplied by 7 to arrive at a weekly total. One item may be done any number of times a week so you'll need to multiply that one by the number of times each week you do it. After you have responded to all the questions, you'll have an opportunity to see how many hours remain during the week for studying.
<table>
<thead>
<tr>
<th>Number of Hours per Day</th>
<th>Number of Days per Week</th>
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<tbody>
<tr>
<td>On the average, how many hours do you sleep in each 24-hour period, including those afternoon naps?</td>
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<tr>
<td>On the average, how many hours a day do you engage in grooming activities?</td>
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<td>On the average, how many hours a day do you spend on meals, including preparation and clean-up time?</td>
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<tr>
<td>How much time do you spend commuting to and from campus and how many times do you do this during a week? Include the amount of time it takes to park and walk from your car or the bus stop to class.</td>
<td></td>
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<tr>
<td>On the average, how many hours a day do you spend doing chores?</td>
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<td>On the average, how many hours do you spend each week doing co-curricular activities (student organizations, working out, church, etc.)?</td>
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<td>On the average, how many hours a week do you work at a job?</td>
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<tr>
<td>How many hours do you spend in class each week?</td>
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</tr>
<tr>
<td>On the average, how many hours per week do you spend with friends, family, or going out (not studying or working)?</td>
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<tr>
<td>Click the &quot;Add button to compute the number of hours you are spending each week engaged in daily living activities and school activities.</td>
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On the average, how many hours do you spend in each 24-hour period, including those afternoon naps?

On the average, how many hours a day do you engage in grooming activities?

On the average, how many hours a day do you spend on meals, including preparation and clean-up time?

How much time do you spend commuting to and from campus and how many times do you do this during a week? Include the amount of time it takes to park and walk from your car or the bus stop to class.

On the average, how many hours a day do you spend doing chores?

On the average, how many hours do you spend each week doing co-curricular activities (student organizations, working out, church, etc.)?

On the average, how many hours a week do you work at a job?

How many hours do you spend in class each week?

On the average, how many hours per week do you spend with friends, family, or going out (not studying or working)?

Click the Add button to compute the number of hours you are spending each week engaged in daily living activities and school activities.
WHAT DO I DO NEXT?

How many hours a week do I need for studying?

My assessment indicates that I don't have 30 hours a week to study but I need to study this much to make the grades I want to make.

I do have 30 or more hours a week to study but I don't use them effectively.

Most universities recommend that students study at least two hours outside of class for every hour spent in class, although some recommend even more. Many students are taking 15 hours per semester, which probably means spending about 15 hours a week in class. Therefore, studying at least 30 hours a week outside of classes would be recommended. Combining the 15 hours a week in class and the 30 study hours outside of class, many students will need to plan to spend about 45 hours a week on school.

Can you reduce the amount of time spent on other activities? If you were going to reduce these hours, what would you have to do to make this change in your schedule? Can you eliminate one or more activities from your schedule? What could you eliminate?

The next page in this program discusses several strategies for making your schedule work more effectively. As you read this page, think about which of these strategies might be most helpful for making better use of your study time.

MAKING YOUR SCHEDULE WORK

Here are some strategies that you may find helpful to try if your schedule is not working as efficiently or effectively as you would like. When trying any new strategy, it is important to practice it regularly and to practice it long enough that you have a way of evaluating whether or not it is helping. Tests are good ways to evaluate new study strategies. If you begin a new strategy after one test on which you didn't perform as well as you would like, try a new strategy until you receive the results of the next test to get an idea whether the new strategy is working for you.

Identify your best time of the day

Studying at your best time of the day, whether that is morning, afternoon, or early evening, will enable you to complete your assignments in less time. Research studies show that what we can accomplish in 60 minutes when we're less fatigued will take as much as 90 minutes to accomplish when we are more fatigued.
Study difficult or boring subjects first

Study subjects that are more of a challenge to you first when you are less fatigued. Save subjects you like to study for later, when you are feeling more tired but need to continue to study to keep up with your work. It will be easier to find the motivation to study something you find enjoyable when you are tired than for a subject you dread studying.

Use the same place to study every time

Studying in the same place each day is like going to class in the same room. You begin to associate a particular activity with a particular location so when you are in that location, you are able to focus on the task at hand more quickly. Studying on your bed or in your bedroom is not advised because you probably associate your bed and bedroom with sleeping, not studying. It's too easy to take those 10 minute naps that turn into 2 hour naps.

Use the library

Libraries are good places to study because this is the only activity we do in this environment. If there are reasons you choose not to use the library, try to find another location outside of your room that provides a good study environment and is relatively free of distractions.

Avoid distractions

Many things can provide a distraction to studying if we are looking for ways to procrastinate. Earlier in this program, you identified your top five time wasters. For the next few weeks, try to find ways to reduce the frequency with which these distracters are interfering with your study time. This might mean that finding another place to study would be helpful.

Use waiting time

If you use public transportation to commute to and from campus, there is probably some waiting time involved. This is a great time to study discrete pieces of information such as learning vocabulary for a foreign language class or memorizing a chemical reaction sequence. Write this information on note cards and carry them with you so you can study your cards during your waiting time.

Treat school as a full-time job

Try to accomplish as many of your school tasks as possible within a concentrated period of time, such as 8 a.m. - 5 p.m., Monday through Friday. If you use these hours either for attending class or studying, you'll have much more free time in the evenings and on the weekends to spend time with friends. Your classes are likely to get the amount of attention they require as well. It doesn't mean that you'll never need to study in the evenings or on the weekends because there will still be crunch times and you probably will. However, treating school as a full-time job and adopting the hours of a full-time job will probably result in better,
more efficient management of your time.

GOAL SETTING

Of the strategies that have been discussed, you may be doing some of them pretty well but there are probably at least one or two ways you could still improve your skill in this area. Think about what you've learned, print out this page, and write down the skill(s) you want to work on during the next few weeks. Keep them in a place where you'll be reminded of your goals frequently and practice them every day.

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Achieve Your Personal Best in Law School

Links, Advice, Insights, and Quality
Information to Help you Excel.

Whether you are pre-law, a wannelle, or a more advanced law student, the links and advice on these pages will provide you with answers to questions most frequently asked by law students.

Achieving Your Personal Best through Balance and Efficiency

Successful law careers begin in law school. Those students who understand that their first day of law school is the first day of their law career are the students who are on their way to achieving their personal best in law school.

This website is directed toward those students who are intent on excelling.

Excelling in law school requires balance and efficiency.

Balance
Before law school, students hear tales of never-ending study. "Forget your social life, forget your friends," they are warned. During the first year of law school, many students give up exercise, family life, church, pleasure reading, hobbies, nutritional eating, virtually all outside interests — even sleeping. Are you able to work at your highest potential when you avoid sleep, nutrition, relaxation, social stimulation, and spiritual fulfillment? Probably not. Three years of that (actually three months of that) can destroy a person. Successful lawyers do not follow that pattern — neither do successful law students. Both lead balanced lives.

Efficiency
Studying longer is not the answer. Studying smarter is the answer. Every element of your study regimen should be directed towards achieving your objectives. Efficient use of each of the 168 hours of every week will guarantee you enough time to attend to every component of "assessment-targeted study" — and still lead a balanced life.

Now you have some idea of what it's all about.
Now is the time to commit to achieving your personal best.

Are these your goals?

- Developing a rich, deep understanding of legal principle essential to the successful practice of law;

- Earning grades that reflect your personal best effort; and

- Passing the bar exam on the first try.
If you are just beginning your first days of law school, you have 1000 days until you sit for the bar examination – but you have only 90 days until you sit for your first semester final examinations. Consider working at your highest levels of efficiency and balance for 90 days. If you are beyond the first few days of school – even if you are in the second semester, consider working at your highest levels for the remainder of the semester you are in.

How do you work at your highest levels? Practice each of the Components of Assessment-Targeted Study in each tested class each week. Consider accepting the challenge to commit to the practice of law in law school with the same rigor, detail, planning and strategizing that you intend to employ in the professional practice of law. Take your finals with confidence and self-assurance. Note your grade point average. Then determine whether it was worth it.

(Text adapted from 1000 Days to the Bar – But the Practice of Law Begins Now)

From the Preface of
1000 Days to the Bar – But the Practice of Law Begins Now

Most law students have been anticipating the start of law school for weeks, months or years —some for a lifetime. They approach the start of school with a mix of excitement and apprehension, often with a sense of awe at the majesty of the enterprise they are about to begin. This hopeful group includes a mightily gifted, dynamic, achievement-oriented variety of individuals. They are determined to do well—and they should be. They have been selected by admissions committees across America adept at selecting only those students with the capability to succeed in law school, pass the bar examination, and enter into the professional practice of law.

Why, then, do so many first-year law students express high levels of anxiety, depression, isolation, “drowning,” a sense of imminent and inevitable failure, intense frustration, lack of control, and ominous foreboding within 90 days of beginning school? There are reasons. Most have recently exited successful positions of academic, social or executive leadership. They believe the institution they are entering—a “school”—is merely an advanced version of what they were so good at before—“school.” This belief is well founded, for the institution they are about to attend is called a “school,” and each matriculant has just completed these familiar “school” tasks:

- Application process, including writing an essay about goals.
- Purchase of a stack of expensive, important-looking, heavy books.
Attendance at orientation.

Campus tour—walking through school building hallways filled with pictures of former students in caps and gowns, passing offices of an assortment of deans, professors and identifiable administrators (Registrar, loan counselors and librarians).

No wonder they believe they are back for another semester of “school.” That’s even what the sign on the front of the building tells them. But they are not in school. They have just entered the practice of law—complete with everything except the clients and the paychecks.

Law students who approach law school, day after day, as if they are “students” going to “school” become confused and suffer the problems mentioned above. Law students who realize that the first day of law school is the first day of their career as lawyers are the law students who are ready to be empowered. They know they are about to begin to practice law; they need instruction in how to practice law. 1000 Days to the Bar — But the Practice of Law Begins Now provides that instruction.

An underlying premise of this book is that as law students commence their studies, they intend to do their personal best on the path to their doctoral degree and throughout their professional career. Thus, the thrust of this book is toward that goal—excellence. That lofty but ambiguous goal is more easily approached if it is divided into its most immediately realizable components:

- A rich, deep foundation for the professional practice of law.
- Grades reflecting the student’s personal best effort.
- First-time bar passage.

No one would suggest that to graduate from law school, to eventually pass a bar exam, or to practice law, everyone needs to follow the program set out in this book. Frankly, most students can achieve those simple objectives with a minimum of time and effort. If you are reading these words, thinking, “All I want to do is graduate—that’s enough for me,” then you probably ought to skim the pages, just to get the sense of what others
around you are doing. On the other hand, if you are thinking, "I want to work at my highest levels for these next 1000 days, while enjoying academic success, a satisfying family and social life, and fully preparing for an exciting and rewarding career as a lawyer," read on carefully.

After you have read a significant part of this book, you may say to yourself, "The rigor, detail, time commitment and strategizing that this book suggests is wholly unnecessary—I'll do just fine by simply studying harder than I did in college—much harder." Reconsider. Law school is not like college. Law school is your opportunity to begin the practice of law.

You have 1000 days until you sit for the bar examination—but you have only 90 days until you sit for your first semester final examinations. Accept my challenge to commit to the practice of law in law school with the same rigor, detail, planning and strategizing that you intend to employ in the professional practice of law. Take your finals with confidence and self-assurance. Note your grade point average. Then determine whether it was worth it.

Reprinted from--http://www.dennistonsing.com/index.html
Goals

Prioritizing & Organizing

Time Thieves

Suggestions for Improving Time Management

Swiss cheese method

Eliminate redundancy

Plan interruptions into your day

Always have written talking points for telephone calls you make

Seize the moment

Close door

Signs

Appointments

Coming out
We thought this might help first year students. Good luck.

Professors Coyne, Devlin and Sullivan

Student Briefs

(Piece has been adapted from an article prepared by CUNY law school faculty.)

A student brief is a short summary and analysis of a case prepared for use in classroom discussion. It is a set of notes, presented in a systematic way, in order to sort out the parties, identify the issues, ascertain what was decided and by whom, and analyze the reasoning behind decisions taken by the courts.

Although student briefs always include the same items of information, the form in which these items are set out can vary. The format for a student brief given to you in orientation is a good one to follow but you should use a format that is easy for you to refer to quickly.

THE PARTIES AND HOW TO KEEP TRACK OF THEM

Beginning students often have difficulty identifying relationships between the parties involved in court cases. The following definitions may help:

- Plaintiffs sue defendants in civil suits in trial courts.

- The Government (state or federal) prosecutes defendants in criminal cases in trial courts. The Government can also be a party in a civil suit.

The losing party in a criminal prosecution or a civil action may ask a higher (appellate) court to review the case on the ground that the trial court judge made a mistake. If the law gives the loser the right to a higher court review, his or her lawyers may appeal. If the loser does not have this right, his or her lawyers may ask the appellate court for a writ of certiorari. Under this procedure, the appellate court is being asked to exercise its lawful discretion in granting the case a hearing for review.

For example, a defendant convicted in a federal district court has the right to appeal this decision to the Circuit Court of Appeals and this court cannot refuse to hear it. The party losing in this appellate court can request that the Supreme Court review the case, but, unless certain special circumstances apply, has no right to a hearing.

These two procedures, appeals and petitions for certiorari are sometimes loosely grouped together as "appeals." However, there is, as shown, a difference between them, and you should know it.

A person who seeks a writ of certiorari, that is, a ruling by a higher court that it hear the case, is known as a petitioner. The person who must respond to that petition, that is, the winner in the lower court, is called the respondent.

A person who files a formal appeal demanding appellate review as a matter of right is known as the appellant. His or her opponent is the appellee.

The name of the party initiating the action in court, at any level on the judicial ladder, always appears first in the legal papers. For example, Ado Tatum and
others sued in Federal District Court for an
injunction against Secretary of Defense
Melvin Laird and others to stop the Army
from spying on them. Tatum and his
friends were the plaintiffs and the case was
then known as Tatum v. Laird. The Tatum
group lost in the District Court and
appealed to the Court of Appeals, where
they were referred to as the appellants, and
the defendants became the appellees. Thus
the case was still known as Tatum v.
Laird.

When Tatum and his fellow appellants
won in the Court of Appeals, Laird and his
fellow appellees decided to seek review by
the Supreme Court. They successfully
petitioned for a writ of certiorari from the
Supreme Court directing the Court of
Appeals to send up the record of the case
(trial court transcript, motion papers, and
assorted legal documents) to the Supreme
Court.

At this point the name of the case
changed to Laird v. Tatum: Laird and his
associates were now the petitioners, and
Tatum and his fellows were the
respondents. Several church groups and a
group of former intelligence agents
obtained permission to file briefs (written
arguments) on behalf of the respondents
and to help persuade the Court to arrive at
a decision favorable to them. Each of these
groups was termed an amicus curiae, or
"friend of the court."

In criminal cases, switches in the titles
of cases are common, because most reach
the appellate courts as a result of an appeal
by a convicted defendant. Thus, the case
of Arizona v. Miranda later became
Miranda v. Arizona.

STUDENT BRIEFS

These can be extensive or short,
depending on the depth of analysis
required and the demands of the instructor.
A comprehensive brief includes the
following elements:

1. Title and Citation
2. Facts of the Case
3. Issues
4. Decisions [Holdings]
5. Reasoning [Rationale]
6. Separate Opinions
7. Analysis

1. Title and Citation

   Title. The title of the case shows who
   is opposing whom. The name of the
   person who initiated legal action in that
   particular court will always appear first.
   Since the losers often appeal to a higher
   court, this can get confusing. The first
   section of this guide shows you how to
   identity the players without a scorecard.

   Citation. This tells how to locate the
   report of the case in the appropriate case
   reporter. There are case reporters for every
   region of the country.

2. Facts of the Case

   A good student brief will include a
   summary of the pertinent facts and legal
   points raised in the case. It will show the
   nature of the litigation, who sued whom,
   based on what occurrences, and what
   happened in the lower court or courts.

   The facts are often conveniently
   summarized at the beginning of the court's
   published opinion. Sometimes, the best
   statement of the facts will be found in a
dissenting or concurring opinion. WARNING: Judges are not above being selective about the facts they emphasize. This can become of crucial importance when you try to reconcile apparently inconsistent cases, because the way a judge chooses to characterize and "edit" the facts often determines which way he or she will vote and, as a result, which rule of law will be applied.

The fact section of a good student brief will include the following elements:

- A one-sentence description of the nature of the case, to serve as an introduction.
- A statement of the relevant law, with quotation marks or underlining to draw attention to the key words or phrases that are in dispute.
- A summary of the complaint (in a civil case) or the indictment (in a criminal case) plus relevant evidence and arguments presented in court to explain who did what to whom and why the case was thought to involve illegal conduct.
- A summary of actions taken by lower courts, for example, defendant convicted; conviction upheld by appellate court; Supreme Court granted certiorari

3. Issues

The court often states the issues or questions of law raised by the facts peculiar to the case explicitly. Again, watch out for the occasional judge who misstates the questions raised in the lower court's opinion, by the parties on appeal, or by the nature of the case.

Constitutional cases frequently involve multiple issues, some of interest only to litigants and lawyers, others of broader and enduring significance to citizens and officials alike. Be sure you have mastered both.

With rare exceptions, the outcome of an appellate case will turn on the meaning of a provision of the Constitution, a law, or a judicial doctrine. Capture that provision or debated point in your restatement of the issue. Set it off with quotation marks or underline it. This will help you later when you try to reconcile conflicting cases.

When noting the issues, it may help to phrase them in terms of questions that can be answered with a precise "yes" or "no."

Example: The famous case of Brown v. Board of Education involved the applicability of a provision of the 14th Amendment to the U.S. Constitution to a school board's practice of excluding Black pupils from certain public schools solely on account of their race. The precise wording of the Amendment is "No State shall... deny to any person within its jurisdiction the equal protection of the laws." The careful student would begin by picking out the key phrases from this Amendment and deciding which of them were really at issue in this case. Assuming that there was no doubt that the school board was acting as the State, and that Miss Brown was a "person within its jurisdiction," then the key issue would be "Does the exclusion of students from a public school solely on the basis of race amount to a denial of "equal protection of the laws"?"

Of course, the implications of this case went far beyond the situation of Miss Brown, the Topeka school board, or even public education. They cast doubt on the continuing validity of prior decisions in which the Supreme Court had held that
restriction of Black Americans to "separate but equal" facilities did not deny them "equal protection of the laws." Make note of any such implications in your statement of issues at the end of the brief, in which you set out your observations and comments.

Note: More students misread cases because they fail to see the issues in terms of the applicable law or judicial doctrine than for any other reason. There is no substitute for taking the time to frame carefully the questions, in order that they actually incorporate the key provisions of the law in terms capable of being given precise answers. It may also help to label the issues, for example, "procedural issues," "substantive issue," "legal issue," and so on. Remember, too, that instructors may use the same case for different purposes, so the pain of briefing is to identify those issues in the case, which are of central importance to the topic under discussion in class.

4. Decisions

The decision, or holding, is the court's answer to a question presented to it for answer by the parties involved or raised by the court itself in its own reading of the case. There are narrow procedural holdings, for example, "case reversed and remanded," and broader substantive holdings, which deal with the interpretation of the Constitution, statutes, or judicial doctrines. If the issues have been drawn precisely, the holdings can be stated in simple "yes" or "no" answers or in short statements taken from the language used by the court.

5. Reasoning

The reasoning, or rationale, is the chain of argument, which led the judges in either a majority or a dissenting opinion to rule as they did. This should be detailed in a point-by-point fashion.

6. Separate Opinions

Both concurring and dissenting opinions should be subjected to the same depth of analysis to bring out the major points of agreement and disagreement with the majority opinion. Make a mental note of how each justice voted and how he or she lined up. Knowledge of how judges of a particular court normally line up on particular issues is essential to anticipating how they will vote in future cases involving similar issues.

7. Analysis

Here the student should evaluate the significance of the case, its relationship to other cases and the subject being studied, its place in history, what it shows about the Court, its members, its decision-making processes, or the impact it has on litigants, government, or society. It is here that the implicit assumptions and values of the Justices should be probed, the "rightness" of the decision debated, and the logic of the reasoning considered.

A CAUTIONARY NOTE

Don't brief the case until you have read it through at least once. Don't think that because you have found the judge's best purple prose you have necessarily extracted the essence of the decision. Look for unarticulated premises, logical fallacies, manipulation of the factual record, or distortions of precedent. Then ask, how does this case relate to other cases in the same general area of law? What does it show about judicial policy making? Does the result violate your sense of justice or fairness? How might it have better been decided?
ORDER OF ORIENTATION MATERIALS

1. Weinberger v. Romero-Barcelo

FOR TORTS:
2. Copley v. Wills
3. Stamp v. Eighty-Sixth Street etc.
5. Heidmann v. Wheaton et al.
6. Vaughn v. Miller Bros. etc.
7. Arnold J. Franken v. City of Sioux Center
8. Darci Lynn Mills etc. V. Ray O. Smith etc.

FOR CONTRACTS:
9. Lucy v. Zehmer etc.
10. Keller v. Holderman
11. Owen v. Tunison
14. Morris Lefkowitz v. Great Minneapolis
15. Willmott v. Giarraputo
The Navy, in the course of using an island off the Puerto Rico coast for air-to-ground weapons training, has discharged ordnance into the waters surrounding the island, when pilots missed land targets and accidentally bombed the waters or intentionally bombed water targets. Respondents sued in Federal District Court to enjoin the Navy's operations, alleging violation of, inter alia, the Federal Water Pollution Control Act (FWPCA). The District Court, while finding that the discharges have not harmed the quality of the water, held that the Navy had violated the FWPCA by discharging ordnance into the waters without first obtaining a permit from the Environmental Protection Agency, and ordered the Navy to apply for a permit but refused to enjoin the operations pending consideration of the permit application. The Court of Appeals vacated and remanded with instructions to order the Navy to cease the violation until it obtained a permit, holding that the FWPCA withdrew the District Court's equitable discretion to order relief other than an immediate prohibitory injunction.

Held:

The FWPCA does not foreclose completely the exercise of a district court's discretion, but, rather than requiring the court to issue an injunction for any and all statutory violations, permits the court to order relief it considers necessary to secure prompt compliance with the Act, which relief can include, but is not limited to, an order of immediate cessation. Pp. 311-320.

(a) The grant of jurisdiction to a court to ensure compliance with a statute does not suggest an absolute duty to grant injunctive relief under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law. Pp. 311-313.

(b) Here, an injunction is not the only means of ensuring compliance, TVA v. Hill, 437 U.S. 153, distinguished, since the FWPCA provides, for example, for fines and criminal penalties. While the FWPCA's purpose in preserving the integrity of the Nation's waters is to be achieved by compliance with the Act, including compliance with the permit requirements, in this case the discharge of the ordnance has not polluted [456 U.S. 305, 306] the waters, and, although the District Court refused to enjoin the discharge, it neither ignored the statutory violation nor undercut the purpose and function of the permit.
system. The FWPCA's prohibition against discharge of pollutants can be overcome by the very permit the Navy was ordered to seek. Pp. 313-316.

(c) The statutory scheme as a whole contemplates the exercise of discretion and balancing of equities, and suggests that Congress did not intend to deny courts the discretion to rely on remedies other than an immediate prohibitory injunction. Pp. 316-318.

(d) The provision of the FWPCA permitting the President to exempt federal facilities from compliance with the permit requirements does not indicate congressional intent to limit the court's discretion. The Act permits the exercise of a court's equitable discretion, whether the source of pollution is a private party or a federal agency, to order relief that will achieve compliance with the Act, whereas the exemption permits noncompliance by federal agencies in extraordinary circumstances. Pp. 318-319.

(e) Nor does the legislative history suggest that Congress intended to deny courts their traditional equitable discretion. P. 319.

643 F.2d 835, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENnan, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. POWELL, J., filed a concurring opinion, post, p. 321. STEVENS, J., filed a dissenting opinion, post, p. 322.

Elinor H. Stillman argued the cause for petitioners. On the briefs were Solicitor General Lee, Acting Assistant Attorney General Liotta, Edward J. Shawaker, Anne S. Almy, Thomas E. Flynn, and Richard M. Cornelius.

John A. Hodges argued the cause for respondents. With him on the brief were Hector Reichard de Cardona, Secretary of Justice of Puerto Rico, Gerardo A. Carlo, Timothy L. Harker, and Lawrence White.

JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is whether the Federal Water Pollution Control Act (FWPCA or Act), 86 Stat. 816, as amended, 33 U.S.C. 1251 et seq. (1976 ed. and Supp. IV), requires a district court to enjoin immediately all discharges of pollutants [456 U.S. 305, 307] that do not comply with the Act's permit requirements or whether the district court retains discretion to order other relief to achieve compliance. The Court of Appeals for the First Circuit held that the Act withdrew the court's equitable discretion. Romero-Barcelo v. Brown, 643 F.2d 835 (1981). We reverse.

I

For many years, the Navy has used Vieques Island, a small island off the Puerto Rico coast, for weapons training. Currently all Atlantic Fleet vessels assigned to the Mediterranean Sea and the Indian Ocean are required to complete their training at Vieques because it permits a full range of exercises under conditions similar to combat. During air-to-ground training, however, pilots sometimes miss land-based targets, and ordnance falls into the sea. That is, accidental bombings 000026
of the navigable waters and, occasionally, intentional bombings of water targets occur. The
District Court found that these discharges have not harmed the quality of the water.

In 1978, respondents, who include the Governor of Puerto Rico and residents of the island, sued
to enjoin the Navy's operations on the island. Their complaint alleged violations of numerous
federal environmental statutes and various other Acts. 1 After an extensive hearing, the District
Court found [456 U.S. 305, 308] that under the explicit terms of the Act, the Navy had violated the
Act by discharging ordnance into the waters surrounding the island without first obtaining a
permit from the Environmental Protection Agency (EPA). 2 Romero-Barcelo v. Brown, 478 F.
Supp. 646 (PR 1979).

Under the FWPCA, the "discharge of any pollutant" requires a National Pollutant Discharge
Elimination System (NPDES) permit. 33 U.S.C. 1311(a), 1323(a) (1976 ed. and Supp. IV). The
term "discharge of any pollutant" is defined as

"any addition of any pollutant to the waters of the contiguous zone or the ocean from any
point source other than a vessel or other floating craft." 33 U.S.C. 1362(12) (emphasis added).

Pollutant, in turn, means
"dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge,
munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked
[456 U.S. 305, 309] or discarded equipment, rock, sand, cellar dirt and industrial,
municipal, and agricultural waste discharged into water. . . ." 33 U.S.C. 1362(6)
(emphasis added).

And, under the Act, a "point source" is
"any discernible, confined and discrete conveyance, including but not limited to any pipe,
ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock,
concentrated animal feeding operation, or vessel or other floating craft from which
pollutants are or may be discharged. . . ." 33 U.S.C. 1362(14) (1976 ed., Supp. IV)
(emphasis added).

Under the FWPCA, the EPA may not issue an NPDES permit without state certification that the
permit conforms to state water quality standards. A State has the authority to deny certification
of the permit application or attach conditions to the final permit. 33 U.S.C. 1341.

As the District Court construed the FWPCA, the release of ordnance from aircraft or from ships
into navigable waters is a discharge of pollutants, even though the EPA, which administers the
Act, had not promulgated any regulations setting effluent levels or providing for the issuance of
an NPDES permit for this category of pollutants. 3 Recognizing that violations of the Act "must
be cured," 478 F. Supp., at 707, the District Court ordered the Navy to apply for an NPDES
permit. It refused, however, to enjoin Navy operations pending [456 U.S. 305, 310] consideration
of the permit application. It explained that the Navy's "technical violations" were not causing any
"appreciable harm" to the environment. 4 Id., at 706. Moreover, because of the importance of the
island as a training center, "the granting of the injunctive relief sought would cause grievous,
and perhaps irreparable harm, not only to Defendant Navy, but to the general welfare of this Nation." 5 Id., at 707. The District Court concluded that an injunction was not necessary to ensure
suitably prompt compliance by the Navy. To support this conclusion, it emphasized an equity
court's traditionally broad discretion in deciding appropriate relief and quoted from the classic description of injunctive relief in *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330 (1944): "The historic injunctive process was designed to deter, not to punish."

The Court of Appeals for the First Circuit vacated the District Court's order and remanded with instructions that the court order the Navy to cease the violation until it obtained a permit. 643 F.2d 835 (1981). Relying on *TVA v. Hill*, 437 U.S. 153 (1978), in which this Court held that an imminent violation of the Endangered Species Act required injunctive relief, the Court of Appeals concluded that the District Court [456 U.S. 305, 311] erred in undertaking a traditional balancing of the parties' competing interests. "Whether or not the Navy's activities in fact harm the coastal waters, it has an absolute statutory obligation to stop any discharges of pollutants until the permit procedure has been followed and the Administrator of the Environmental Protection Agency, upon review of the evidence, has granted a permit." 643 F.2d, at 861. The court suggested that if the order would interfere significantly with military preparedness, the Navy should request that the President grant it an exemption from the requirements in the interest of national security." 6

Because this case posed an important question regarding the power of the federal courts to grant or withhold equitable relief for violations of the FWPCA, we granted certiorari, 454 U.S. 813 (1981). We now reverse.

II

It goes without saying that an injunction is an equitable remedy. It "is not a remedy which issues as of course," Harrisonville v. W. S. Dickey Clay Mfg. Co., 289 U.S. 334, 337-338 (1933), or "to restrain an act the injurious consequences of which are merely trifling." Consolidated Canal Co. v. Mesa Canal Co., 177 U.S. 296, 302 (1900). An injunction should issue only where the intervention of a court of equity "is essential in order effectually to protect property rights against injuries otherwise irreparable." Cavanaugh v. Looney, 248 U.S. 453, 456 (1919). The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies. Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 61 (1975); Sampson v. Murray, 415 U.S. 61, 88 (1974); Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 506-507 (1959); Hecht Co. v. Bowles, supra, at 329.

Where plaintiff and defendant present competing claims of injury, the traditional function of equity has been to arrive at a "nice adjustment and reconciliation" between the competing claims, Hecht Co. v. Bowles, supra, at 329. In such cases, the court "balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." Yakus v. United States, 321 U.S. 414, 440 (1944). "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." Hecht Co. v. Bowles, supra, at 329.

In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction. Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941). Thus, the Court has noted that "[t]he award of an interlocutory
injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff," and that "where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." Yakus v. United States, supra, at 440 (footnote omitted). The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law. TVA v. Hill, 437 U.S., at 193; Hecht Co. v. Bowles, 321 U.S., at 329.

These commonplace considerations applicable to cases in which injunctions are sought in the federal courts reflect a "practice with a background of several hundred years of history," Hecht Co. v. Bowles, supra, at 329, a practice of which Congress is assuredly well aware. Of course, Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles. Hecht Co. v. Bowles, supra, at 329. As the Court said in Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946):

"Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' Brown v. Swann, 10 Pet. 497, 503 . . . ."

In TVA v. Hill, we held that Congress had foreclosed the exercise of the usual discretion possessed by a court of equity. There, we thought that "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer" than that before us. 437 U.S., at 173. The statute involved, the Endangered Species Act, 87 Stat. 884, 16 U.S.C. 1531 et seq., required the District Court to enjoin completion of the Tellico Dam in order to preserve the snail darter, a species of perch. The purpose and language of the statute under consideration in Hill, not the bare fact of a statutory violation, compelled that conclusion. Section 7 of the Act, 16 U.S.C. 1536, requires federal agencies to "insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of [any] endangered species . . . or result in the destruction or modification of habitat of such species which is determined . . . to be critical." The statute thus contains a flat ban on the destruction of critical habitats.

It was conceded in Hill that completion of the dam would eliminate an endangered species by destroying its critical habitat. Refusal to enjoin the action would have ignored the "explicit provisions of the Endangered Species Act." 437 U.S., at 173. Congress, it appeared to us, had chosen the snail darter over the dam. The purpose and language of the statute limited the remedies available to the District Court; only an injunction could vindicate the objectives of the Act.

That is not the case here. An injunction is not the only means of ensuring compliance. The FWPCA itself, for example, provides for fines and criminal penalties. 33 U.S.C. 1319(c) and (d).
Respondents suggest that failure to enjoin the Navy will undermine the integrity of the permit process by allowing the statutory violation to continue. The integrity of the Nation's waters, however, not the permit process, is the purpose of the FWPCA. As Congress explained, the objective of the FWPCA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). [456 U.S. 305, 315]

This purpose is to be achieved by compliance with the Act, including compliance with the permit requirements. Here, however, the discharge of ordnance had not polluted the waters, and, although the District Court declined to enjoin the discharges, it neither ignored the statutory violation nor undercut the purpose and function of the permit system. The court ordered the Navy to apply for a permit. It temporarily, not permanently, allowed the Navy to continue its activities without a permit.

In Hill, we also noted that none of the limited "hardship exemptions" of the Endangered Species Act would "even remotely apply to the Tellico Project." 437 U.S., at 188. The prohibition of the FWPCA against discharge of pollutants, in contrast, can be overcome by the very permit the Navy was ordered to seek. The Senate Report to the 1972 Amendments explains that the permit program would be enacted because "the Committee recognizes the impracticality of any effort to halt all pollution immediately." S. Rep. No. 92-414, p. 43 (1971). That the scheme as a whole contemplates the exercise of discretion and balancing of equities militates against the conclusion that Congress intended to deny courts their traditional equitable discretion in enforcing the statute.

Other aspects of the statutory scheme also suggest that Congress did not intend to deny courts the discretion to rely on remedies other than an immediate prohibitory injunction. Although the ultimate objective of the FWPCA is to eliminate all discharges of pollutants into the navigable waters by 1985, the statute sets forth a scheme of phased compliance. As enacted, it called for the achievement of the "best practicable control technology currently available" by July 1, 1977, and the "best available technology economically achievable" by July 1, 1983. 33 U.S.C. 1311(b). This scheme of phased compliance further suggests that this is a statute in which Congress envisioned, rather than curtailed, the exercise of discretion.

The FWPCA directs the Administrator of the EPA to seek an injunction to restrain immediately discharges of pollutants he finds to be presenting "an imminent and substantial endangerment to the health of persons or to the welfare of persons." 33 U.S.C. 1364(a) (1976 ed., Supp. IV). This rule of immediate cessation, however, is limited to the indicated class of violations. For other kinds of violations, the FWPCA authorizes the Administrator of the EPA "to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order.

..." 33 U.S.C. 1319(b). The provision makes clear that Congress did not anticipate that all discharges would be immediately enjoined. Consistent with this view, the administrative practice has not been to request immediate cessation orders. "Rather, enforcement actions typically result, by consent or otherwise, in a remedial order setting out a detailed schedule of compliance designed to cure the identified violation of the Act." Brief for Petitioners 17. See Milwaukee v. Illinois, 451 U.S. 304, 320-322 (1981). Here, again, the statutory scheme contemplates equitable consideration.
Both the Court of Appeals and respondents attach particular weight to the provision of the FWPCA permitting the President to exempt federal facilities from compliance with the permit requirements. 33 U.S.C. 1323(a) (1976 ed., Supp. IV). They suggest that this provision indicates congressional intent to limit the court's discretion. According to respondents, the exemption provision evidences Congress' determination that only paramount national interests justify failure to comply and that only the President should make this judgment.

We do not construe the provision so broadly. We read the FWPCA as permitting the exercise of a court's equitable discretion, whether the source of pollution is a private party or a federal agency, to order relief that will achieve compliance with the Act. The exemption serves a different and complementary purpose, that of permitting noncompliance by federal agencies in extraordinary circumstances. Executive Order No. 12088, 3 CFR 243 (1979), which implements the exemption authority, requires the federal agency requesting such an exemption to certify that it cannot meet the applicable pollution standards. "Exemptions are granted by the President only if the conflict between pollution control standards and crucial federal activities cannot be resolved through the development of a practicable remedial program." Brief for Petitioners 26, n. 30. [456 U.S. 305, 319]

Should the Navy receive a permit here, there would be no need to invoke the machinery of the Presidential exemption. If not, this course remains open. The exemption provision would enable the President, believing paramount national interests so require, to authorize discharges which the District Court has enjoined. Reading the statute to permit the exercise of a court's equitable discretion in no way eliminates the role of the exemption provision in the statutory scheme.

This Court explained in Hecht Co. v. Bowles, 321 U.S. 321 (1944), that a major departure from the long tradition of equity practice should not be lightly implied. As we did there, we construe the statute at issue "in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings ... in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect." Id., at 330. We do not read the FWPCA as foreclosing completely the exercise of the court's discretion. Rather than requiring a district court to issue an injunction for any and all statutory violations, the FWPCA permits the district court to order that relief it considers necessary to secure prompt compliance with the Act. That relief can include, but is not limited to, an order of immediate cessation.

The exercise of equitable discretion, which must include the ability to deny as well as grant injunctive relief, can fully protect the range of public interests at issue at this stage in the proceedings. The District Court did not face a situation in which a permit would very likely not issue, and the requirements and objective of the statute could therefore not be vindicated if discharges were permitted to continue. Should it become clear that no permit will be issued and that compliance with the FWPCA will not be forthcoming, the statutory scheme and purpose would require the court to reconsider the balance it has struck.

Because Congress, in enacting the FWPCA, has not foreclosed the exercise of equitable discretion, the proper standard for appellate review is whether the District Court abused its discretion in denying an immediate cessation order while the Navy applied for a permit. We reverse and remand to the Court of Appeals for proceedings consistent with this opinion.

It is so ordered.

Footnotes


[Footnote 2] The District Court also found that the Navy had violated the National Environmental Policy Act (NEPA) by failing to file an Environmental Impact Statement (EIS) or a reviewable environmental record to support a decision not to file such a statement, Romero-Barcelo v. Brown, 478 F. Supp. 646, 705 (PR 1979), and had failed to nominate historic sites to the National Register as required under the National Historic Preservation Act. Ibid. It ordered
the Navy to nominate such sites and to file an EIS. Id., at 708. The Court of Appeals remanded issues under the Endangered Species Act and the National Historic Preservation Act to the District Court for further consideration. Romero-Barcelo v. Brown, 643 F.2d 835, 858, 860, 862 (1981). It vacated the order involving NEPA and remanded with orders to dismiss because the Navy had filed an EIS in the interim. Id., at 862. Only the issue involving the FWPCA is before this Court.


[Footnote 4] The District Court wrote:

"In fact, if anything, these waters are as aesthetically acceptable as any to be found anywhere, and Plaintiff's witnesses unanimously testified as to their being the best fishing grounds in Vieques." 478 F. Supp., at 667. "[I]f the truth be said, the control of large areas of Vieques [by the Navy] probably constitutes a positive factor in its over all ecology. The very fact that there are in the Navy zones modest numbers of various marine species which are practically non-existent in the civilian sector of Vieques or in the main island of Puerto Rico, is an eloquent example of res ipsa loquitur." Id., at 682 (footnote omitted).

[Footnote 5] The District Court also took into consideration the delay by plaintiffs in asserting their claims. It concluded that although laches should not totally bar the claims, it did strongly militate against the granting of injunctive relief. Id., at 707.


"The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so . . . . No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption."

[Footnote 7] The objective of this statute is in some respects similar to that sought in nuisance suits, where courts have fully exercised their equitable discretion and ingenuity in ordering


[Footnote 9] The Navy applied for an NPDES permit in December 1979. In May 1981, the EPA issued a draft NPDES permit and a notice of intent to issue that permit. The FWPCA requires a certification of compliance with state water quality standards before the EPA may issue an NPDES permit. 33 U.S.C. 1341(a). The Environmental Quality Board of the Commonwealth of Puerto Rico denied the Navy a water quality certificate in connection with this application for an NPDES in June 1981. In February 1982, the Environmental Quality Board denied the Navy's reconsideration request and announced it was adhering to its original ruling. In a letter dated April 9, 1982, the Solicitor General informed the Clerk of the Court that the Navy has filed an action challenging the denial of the water quality certificate. United States v. Commonwealth of Puerto Rico, Civ. Action No. 82-0726 (Dist. Ct. PR).

[Footnote 10] As we have explained, the 1972 Amendments to the FWPCA established the NPDES as

"a means of achieving and enforcing the effluent limitations. Under the NPDES, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms. An NPDES permit serves [456 U.S. 305, 316] to transform generally applicable effluent limitations and other standards - including those based on water quality - into the obligations (including a timetable for compliance) of the individual discharger, and the Amendments provide for direct administrative and judicial enforcement of permits. . . . With few exceptions, for enforcement purposes a discharger in compliance with the terms and conditions of an NPDES permit is deemed to be in compliance with those sections of the Amendments on which the permit conditions are based. . . . In short, the permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the Amendments." EPA v. California ex rel. State Water Resources Control Board, 426 U.S. 200, 205 (1976) (footnote omitted).

[Footnote 11] We have, however, held some standards related to phased compliance to be absolute. See EPA v. National Crushed Stone Assn., 449 U.S. 64 (1980). In Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1 (1981), we concluded that the federal common law of nuisance was pre-empted by the FWPCA and other similar [456 U.S. 305, 317] Acts: "In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." Id., at 15; see Milwaukee v. Illinois, 451 U.S. 304 (1981). But, as we have also observed in construing this Act: "The question . . . is not what a court thinks is generally appropriate to the regulatory process, it is what Congress intended . . . ." E. I. du Pont de Nemours & Co. v. Train, 430 U.S., at

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Here we do not read the FWPCA as intending to abolish the courts' equitable discretion in ordering remedies.

[Footnote 12] The statute at issue in Hecht Co. v. Bowles, 321 U.S. 321 (1944), contained language very similar to that in 1319(b). It directed the Price Administrator to seek "a permanent or temporary injunction, restraining order, or other order" to halt violations. Id., at 322. The Court determined that such statutory language did not require the court to issue an injunction even when the Administrator had sued for injunctive relief. In Hecht Co., the court's equitable discretion overrode that of the Administrator. If a court can properly refuse an injunction in the circumstances of Hecht Co., the exercise of its discretion seems clearly appropriate in a case such as this, where the EPA Administrator was not a party and had not yet expressed his judgment. The action of the District Court permitted it to obtain the benefit of the EPA's recommendation before deciding to enjoin the discharge.

In Hecht Co., unlike here, the violations had ceased by the time the injunction was sought. The Court, however, explained that "the cessation of violations, whether before or after the institution of a suit by the Administrator, is no bar to the issuance of an injunction." Id., at 327. Thus, contrary to the dissent's characterization, post, at 327-328, the Court did not base its decision on the fact that violations had ceased.

[Footnote 13] See n. 6, supra.

JUSTICE POWELL, concurring.

I join the opinion of the Court. In my view, however, the record clearly establishes that the District Court in this case did not abuse its discretion by refusing to enjoin the immediate cessation of all discharges. Finding that the District Court acted well within the equitable discretion left to it under the Federal Water Pollution Control Act (FWPCA), I would remand the case to the Court of Appeals with instructions that the decision of the District Court should be affirmed. *

The propriety of this disposition is emphasized by the dissenting opinion of JUSTICE STEVENS, post, p. 322. I agree with his view that Congress may limit a court's equitable discretion in granting remedies under a particular statute, and that some statutes may constrain discretion more narrowly than others. I stand with the Court, however, in finding no indication that Congress intended to limit the court's equitable discretion under the FWPCA in the manner suggested by JUSTICE STEVENS. As the Court's remand order might be thought to leave open whether the District Court in this case acted within its range of permissible discretion under the FWPCA, it would promote both clarity and economy for us to hold now that the District Court did not abuse its discretion and that its decision should be reinstated.

[Footnote *] The District Court's thorough opinion demonstrates the reasonableness of its decision in light of all pertinent factors, including of course the evident purpose of the statute. The District Court concluded as matters of fact that the Navy's violations have caused no "appreciable harm," Romero-Barcelo v. Brown, 478 F. Supp. 646, 706 (PR 1979), and indeed that the Navy's control of the area "probably constitutes a positive factor in its over all ecology,"
id., at 682. Moreover, the District Court found it "abundantly clear from the evidence in the
record... that the training that takes place in Vieques is vital to the defense of the interests of
the United States." Id., at 707. Balancing the equities as they then stood, the District Court
declined to order an immediate cessation of all violations but nonetheless issued affirmative
orders aimed at securing compliance with the law. See id., at 708. As I read its opinion, the
District Court did not foreclose the possibility of ordering further relief that might become
appropriate under changed circumstances at a later date.

JUSTICE STEVENS, dissenting.

The appropriate remedy for the violation of a federal statute depends primarily on the terms of
the statute and the character of the violation. Unless Congress specifically commands a particular
form of relief, the question of remedy remains subject to a court's equitable discretion. Because
the Federal Water Pollution Control Act does not specifically command the federal courts to
issue an injunction every time an unpermitted discharge of a pollutant occurs, the Court today is
obviously correct in asserting that such injunctions should not issue "automatically" or
"mechanically" in every case. It is nevertheless equally clear that by enacting the 1972
Amendments to the FWPCA Congress channeled the discretion of the federal judiciary much
more narrowly than the Court's rather glib opinion suggests. Indeed, although there may well be
situations in which the failure to obtain an NPDES permit would not require immediate cessation
of all discharges, I am convinced that Congress has circumscribed the district courts' discretion
on the question of remedy so narrowly that a general rule of immediate cessation must be applied
in all but a narrow category of cases. The Court of Appeals was quite correct in holding that this
case does not present the kind of exceptional situation that justifies a departure from the general
rule.

The Court's mischaracterization of the Court of Appeals' holding is the premise for its essay on
equitable discretion. This essay is analytically flawed because it overlooks the limitations on
equitable discretion that apply in cases in which public interests are implicated and the
defendant's violation [456 U.S. 305, 323] of the law is ongoing. Of greater importance, the Court's
opinion grants an open-ended license to federal judges to carve gaping holes in a reticulated
statutory scheme designed by Congress to protect a precious natural resource from the
consequences of ad hoc judgments about specific discharges of pollutants.

Contrary to the impression created by the Court's opinion, the Court of Appeals did not hold that
the District Court was under an absolute duty to require compliance with the FWPCA "under any
and all circumstances," ante, at 313, or that it was "mechanically obligated to grant an injunction
for every violation of law," ibid. The only "absolute duty" that the Court of Appeals mentioned
was the Navy's duty to obtain a permit before discharging pollutants into the waters off Vieques
Island. In light of the Court's opinion the point is worth repeating - the Navy, like anyone else,
must obey the law. [456 U.S. 305, 324]

The Court of Appeals did not hold that the District Court had no discretion in formulating
remedies for statutory violations. It merely "conclude[d] that the district court erred in
undertaking a traditional balancing of the parties' competing interests." Romero-Barcelo v. Brown, 643 F.2d 835, 861 (CA1 1981). The District Court was not free to disregard the "congressional ordering of priorities" and "the judiciary's responsibility to protect the integrity of the . . . process mandated by Congress." Ibid. (quoting Jones v. Lynn, 477 F.2d 885, 892 (CA1 1973)). The Court of Appeals distinguished a statutory violation that could be deemed merely "technical" from the Navy's "[utter disregard of] the statutory mandate." 643 F.2d, at 861-862. It then pointed out that an order prohibiting any discharge of ordnance into the coastal waters off Vieques until an NPDES permit was obtained would not significantly affect the Navy's training operations because most, if not all, of the Navy's targets were land-based. Id., at 862, n. 55. Finally, it noted that the statute authorized the Navy to obtain an exemption from the President if an injunction would have a significant effect on national security. Id., at 862; see 33 U.S.C. 1323(a) (1976 ed., Supp. IV).

Under these circumstances - the statutory violation is blatant and not merely technical, and the Navy's predicament was foreseen and accommodated by Congress - the Court of Appeals essentially held that the District Court retained no discretion to deny an injunction. The discretion exercised by the District Court in this case was wholly at odds with the intent of Congress in enacting the FWPCA. In essence, the District Court's remedy was a judicial permit exempting the Navy's operations in Vieques from the statute until such time as it could obtain a permit from the Environmental Protection Agency or a statutory exemption from the President. The two principal bases for the temporary judicial permit were matters that Congress did not commit to judicial discretion. First, the District Court was persuaded that the pollution [456 U.S. 305, 325] was not harming the quality of the coastal waters, see Romero-Barcelo v. Brown, 478 F. Supp. 646, 706-707 (PR 1979); and second, the court was concerned that compliance with the Act might adversely affect national security, see id., at 707-708. The Court of Appeals correctly noted that the first consideration is the business of the EPA and the second is the business of the President. 5

The Court unfairly uses the Court of Appeals' opinion in this case as a springboard for a lecture on the principles of equitable remedies. The Court of Appeals' reasoning was correct in all respects. It recognized that the statute categorically prohibits discharges of pollutants without a permit. Unlike the Court, see ante, at 314-315, it recognized that the requested injunction was the only remedy that would bring the Navy into compliance with the statute on Congress' timetable. 6 It then demonstrated that none of the reasons offered [456 U.S. 305, 326] by the District Court for refusing injunctive relief was consistent with the statute or was compelling under the circumstances. The position of the Court of Appeals in effect was that the federal courts' equitable discretion is constrained by a strong presumption in favor of enforcing the law as Congress has written it. By reversing, the Court casts doubt on the validity of that position. This doubt is especially dangerous in the environmental area, where the temptations to delay compliance are already substantial. 7

II

Our cases concerning equitable remedies have repeatedly identified two critical distinctions that the Court simply ignores today. The first is the distinction between cases in which only private interests are involved and those in which a requested injunction will implicate a public interest.

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Second, within the category of public interest cases, those cases in which there is no danger that
a past violation of law will recur have always been treated differently from those in which an
existing violation is certain to continue.

Yakus v. United States, 321 U.S. 414, illustrates the first distinction. The Court there held that
Congress constitutionally could preclude a private party from obtaining an injunction against
enforcement of federal price control regulations pending an adjudication of their validity. In any
balancing process, the Court explained, special deference must be given to the public interest:
[456 U.S. 305, 327]

"Even in suits in which only private interests are involved the award is a matter of sound
judicial discretion, in the exercise of which the court balances the conveniences of the
parties and possible injuries to them according as they may be affected by the granting or
withholding of the injunction. . . .

"But where an injunction is asked which will adversely affect a public interest for whose
impairment, even temporarily, an injunction bond cannot compensate, the court may in
the public interest withhold relief until a final determination of the rights of the parties,
though the postponement may be burdensome to the plaintiff." Id., at 440 (footnote
omitted).

In that case, the public interest, reflected in an Act of Congress, was in opposition to the
availability of injunctive relief. The Court stated, however, that the public interest factor would
have the same special weight if it favored the granting of an injunction:

"This is but another application of the principle, declared in Virginia Ry. Co. v. System
Federation, 300 U.S. 515, 552, that 'Courts of equity may, and frequently do, go much
farther both to give and withhold relief in furtherance of the public interest than they are
accustomed to go when only private interests are involved.'" Id., at 441.

Hecht Co. v. Bowles, 321 U.S. 321, which the Court repeatedly cites, did involve an attempt to
obtain an injunction against future violations of a federal statute. That case fell into the category
of cases in which a past violation of law had been found and the question was whether an
injunction should issue to prevent future violations. Cf. United States v. W. T. Grant Co., 345
the record established that the past violations were inadvertent, [456 U.S. 305, 328] that they had
been promptly terminated, and that the defendant had taken vigorous and adequate steps to
prevent any recurrence, the Court held that the District Court had discretion to deny injunctive
relief. But in reaching that conclusion, the Court made it clear that judicial discretion "must be
exercised in light of the large objectives of the Act. For the standards of the public interest, not
the requirements of private litigation, measure the propriety and need for injunctive relief in
these cases." 321 U.S., at 331. Indeed, the Court emphasized that any exercise of discretion
"should reflect an acute awareness of the Congressional admonition" in the statute at issue. Ibid.

In contrast to the decision in Hecht, today the Court pays mere lipservice to the statutory
mandate and attaches no weight to the fact that the Navy's violation of law has not been
corrected. The Court cites no precedent for its holding that an ongoing deliberate violation of a
federal statute should be treated like any garden-variety private nuisance action in which the
chancellor has the widest discretion in fashioning relief. 2
Our prior cases involving the appropriate remedy for an ongoing violation of federal law establish a much more stringent test than the Court applies today. Thus, in United States v. City and County of San Francisco, 310 U.S. 16, a case in which the Government claimed that the city's disposition of electric power was prohibited by an Act of Congress, the Court held that "this case does not call for a balancing of equities or for the invocation of the generalities of judicial maxims in order to determine whether an injunction should have issued." Id., at 30. "The equitable doctrines relied on do not militate against the capacity of a court of equity as a proper forum in which to make a declared policy of Congress effective." Id., at 31. An injunction to prohibit continued violation of that policy "is both appropriate and necessary." Ibid. 10

In Albemarle Paper Co. v. Moody, 422 U.S. 405, the Court plainly stated that an equitable remedy for the violation of a federal statute was neither automatic on the one hand, nor simply a matter of balancing the equities on the other. 11 Albemarle holds that the district court's remedial decision must be measured against the purposes that inform the Act of Congress that has been violated. Id., at 417.

III

The Court's discussion of the FWPCA creates the impression that Congress did not intend any significant change in the enforcement provisions of the Rivers and Harbors Appropriation Act of 1899. See ante, at 319. The Court goes so far as to suggest that the FWPCA is little more than a codification of the common law of nuisance. 12 The contrast between this casual attitude toward the FWPCA and the Court's writing in Milwaukee v. Illinois, 451 U.S. 304, is stark. In that case the Court refused to allow federal judges to supplement the statutory enforcement scheme by enjoining a nuisance, whereas in this case the question is whether a federal judge may create a loophole in the scheme by refusing to enjoin a violation. Why a different standard should be used to define the scope of judicial discretion in these two situations is not explained.

In Milwaukee v. Illinois the Court described the FWPCA in these terms:

"The statutory scheme established by Congress provides a forum for the pursuit of such claims before expert agencies by means of the permit-granting process. It would be quite inconsistent with this scheme if federal courts were in effect to "write their own ticket" under the guise of federal common law after permits have already been issued and permittees have been planning and operating in reliance on them." Id., at 326. Ironically, today the Court holds that federal district courts may in effect "write their own ticket" under the guise of federal common law before permits have been issued.

The Court distinguishes TVA v. Hill, 437 U.S. 153, on the ground that the Endangered Species Act contained a "flat ban" on the destruction of critical habitats. Ante, at 314. But the statute involved in this case also contains a flat ban against discharges of pollutants into coastal waters without a permit. 13 Surely the congressional directive to protect the Nation's waters from gradual but possibly irreversible contamination is no less clear than the command to protect the snail darter. 14 To assume that Congress has placed a greater value on the protection
of vanishing forms of animal life than on the protection of our water resources is to ignore the text, the legislative history, 15 and the previously consistent interpretation of this statute. 16

It is true that in TVA v. Hill there was no room for compromise between the federal project and the statutory objective to preserve an endangered species; either the snail [456 U.S. 305, 333] darter or the completion of the Tellico Dam had to be sacrificed. In the FWPCA, the Court tells us, the congressional objective is to protect the integrity of the Nation's waters, not to protect the integrity of the permit process. Ante, at 314. Therefore, the Court continues, ante, at 315, a federal court may compromise the process chosen by Congress to protect our waters as long as the court is content that the waters are not actually being harmed by the particular discharge of pollutants.

On analysis, however, this reasoning does not distinguish the two cases. Courts are in no better position to decide whether the permit process is necessary to achieve the objectives of the FWPCA than they are to decide whether the destruction of the snail darter is an acceptable cost of completing the Tellico Dam. Congress has made both decisions, and there is nothing in the respective statutes or legislative histories to suggest that Congress invited the federal courts to second-guess the former decision any more than the latter.

A disregard of the respective roles of the three branches of government also tarnishes the Court's other principal argument in favor of expansive equitable discretion in this area. 17 The Court points out that Congress intended to halt water pollution gradually, not immediately, and that "the scheme as a whole contemplates the exercise of discretion and balancing of equities." Ante, at 316. In the Court's words, Congress enacted a "scheme of phased compliance." Ibid. Equitable discretion in enforcing the statute, the Court states, is therefore consistent with the statutory scheme.

The Court's sophistry is premised on a gross misunderstanding of the statutory scheme. Naturally, in 1972 Congress did not expect dischargers to end pollution immediately. 18 Rather, it entrusted to expert administrative [456 U.S. 305, 334] agencies the task of establishing timetables by which dischargers could reach that ultimate goal. These timetables are determined by the agencies and included in the NPDES permits; the conditions in the permits constitute the terms by which compliance with the statute is measured. 19 Quite obviously, then, the requirement that each discharger subject itself to the permit process is crucial to the operation of the "scheme of phased compliance." By requiring each discharger to obtain a permit before continuing its discharges of pollutants, Congress demonstrated an intolerance for delay in compliance with the statute. It is also obvious that the "exercise of discretion and balancing of equities" were tasks delegated by Congress to expert agencies, not to federal courts, yet the Court simply ignores the difference.

IV

The decision in TVA v. Hill did not depend on any peculiar or unique statutory language. Nor did it rest on any special interest in snail darters. The decision reflected a profound [456 U.S. 305, 335] respect for the law and the proper allocation of lawmaking responsibilities in our Government. 20 There we refused to sit as a committee of review. Today the Court authorizes
freethinking federal judges to do just that. Instead of requiring adherence to carefully integrated statutory procedures that assign to nonjudicial decisionmakers the responsibilities for evaluating potential harm to our water supply as well as potential harm to our national security, the Court unnecessarily and casually substitutes the chancellor's clumsy foot for the rule of law.

I respectfully dissent.


[ Footnote 2 ] "Whether or not the Navy's activities in fact harm the coastal waters, it has an absolute statutory obligation to stop any discharges of pollutants until the permit procedure has been followed and the Administrator of the Environmental Protection Agency, upon review of the evidence, has granted a permit." Romero-Barcelo v. Brown, 643 F.2d 835, 861 (CA1 1981).

This statement by the Court of Appeals is entirely consistent with the comments in the Senate Report on the legislation that "[e]nforcement of violations . . . should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay," and that "the issue before the courts would be a factual one of whether there had been compliance." S. Rep. No. 92-414, pp. 64, 80 (1971).


[ Footnote 4 ] "Not only are the technical problems difficult - doubtless the reason Congress vested authority to administer the Act in administrative agencies possessing the necessary expertise - but the general area is particularly unsuited to the approach inevitable under a regime of federal common law. Congress criticized past approaches to water pollution control as being 'sporadic' and 'ad hoc,' S. Rep. No. 92-414, p. 95 (1971), 2 Leg. Hist. 1511, apt characterizations of any judicial approach applying federal common law, see Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 319 (1955)." Milwaukee v. Illinois, 451 U.S. 304, 325.

[ Footnote 5 ] In my opinion the national security considerations that were persuasive to the District Court are not matters that are suitable for judicial evaluation. Congress has wisely given the President virtually unlimited authority to exempt the military from the statute on national defense grounds. If those grounds justify an exemption in this case, the Navy clearly should have obtained it from its Commander in Chief, not from a judge unlearned in such matters. This Court, however, makes the curious argument that the Presidential exemption was intended to permit noncompliance with the statute and therefore merely complements the equitable discretion of a district court also to authorize noncompliance. Ante, at 318-319.

It is ironic that the Court comes to the aid of the Navy even though Congress authorized an executive exemption for federal (particularly military) operations but no analogous exemption for important private activities, and even though Congress intended federal agencies to assume a leadership role in the water pollution control effort. To paraphrase the Senate Report, the Federal Government cannot expect private industry to obey the law by ceasing discharges of pollutants until a permit is obtained if the Federal Government is not willing to obey the same law or at least invoke a statutory exemption. See S. Rep. No. 92-414, p. 67 (1971).

The Navy has been in continuous violation of the statute during the entire decade since its enactment.

Indeed, I am unaware of any case in which the Court has permitted a statutory violation to continue.

In the steel seizure case, Justice Frankfurter rejected "the Government's argument that overriding public interest prevents the issuance of the injunction despite the illegality of the seizure":

"'Balancing the equities' when considering whether an injunction should issue, is lawyers' jargon for choosing between conflicting public interests. When Congress itself has struck the balance, has defined the weight to be given the competing interests, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 609-610 (concurring opinion).

"The petitioners contend that the statutory scheme provides no guidance, beyond indicating that backpay awards are within the District Court's discretion. We disagree. It is true that backpay is not an automatic or mandatory remedy; like all other remedies under the Act, it is one which the courts 'may' invoke. The scheme implicitly recognizes that there may be cases calling for one remedy but not another, and - owing to the structure of the federal judiciary - these choices are, of course, left in the first instance to the district courts. However, such discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.' United States v. Burr, 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.). The power to award backpay was bestowed by Congress, as part of a complex legislative design directed at a historic evil of national proportions. A court must exercise this power 'in light of the large objectives of the Act,' Hecht Co. v. Bowles, 321 U.S. 321, 331 (1944). That the court's discretion is equitable in nature, see Curtis v. Loether, 415 U.S. 189, 197 (1974), hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review. In Mitchell v. DeMario Jewelry, 361 U.S. 288, 292 (1960), this Court held, in the face of a silent statute, that 456 U.S. 305, 330 district courts enjoyed the 'historic power of equity' to award lost wages to workmen unlawfully discriminated against under 17 of

"It is true that 'equity eschews mechanical rules ... [and] depends on flexibility.' Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946). But when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not 'equity [which] varies like the Chancellor's foot.' Important national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.' Moragne v. States Marine Lines, 398 U.S. 375, 405 (1970)." Albemarle Paper Co. v. Moody, 422 U.S. 405, 415-417 (footnotes omitted).

[ Footnote 12 ] "The objective of this statute is in some respects similar to that sought in nuisance suits, where courts have fully exercised their equitable discretion and ingenuity in ordering remedies. E. g., Spur Industries, Inc. v. Del E. Webb Development Co., 108 Ariz. 178, 494 P.2d 700 (1972); Boomer v. Atlantic Cement Co., 26 N. Y. 2d 219, 257 N. E. 2d 870 (1970)." Ante, at 314, n. 7.

[ Footnote 13 ] Indeed, this proposition has been consistently, repeatedly, and unequivocally reaffirmed by this Court:

"The discharge of 'pollutants' into water is unlawful without a permit issued by the Administrator of the EPA or, if a State has developed a program that complies with the FWPCA, by the State." Train v. Colorado Public Interest Research Group, 426 U.S. 1, 7.

"Under the NPDES, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms." EPA v. California ex rel. State Water Resources Control Board, 426 U.S. 200, 205.

"We conclude that, at least so far as concerns the claims of respondents, Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." Milwaukee v. Illinois, 451 U.S., at 317.

In EPA v. National Crushed Stone Assn., 449 U.S. 64, the Court read the "plain language of the statute," id., at 73, to require private firms "either to conform to BPT standards or to cease production." Id., at 76.

[ Footnote 14 ] "Congress' intent in enacting the Amendments was clearly to establish an all-encompassing program of water pollution regulation. Every point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." Milwaukee v. Illinois, supra, at 318 (emphasis in original; footnote omitted).
The Senate Report emphasized that "if the timetables established throughout the Act are to be met, the threat of sanction must be real, and enforcement provisions must be swift and direct." S. Rep. No. 92-414, p. 65 (1971).

"The establishment of such a self-consciously comprehensive program by Congress, which certainly did not exist when Illinois v. Milwaukee[406 U.S. 91, ] was decided, strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." Milwaukee v. Illinois, supra, at 319.

Today's holding that a federal court has inherent power to grant exemptions from the statutory permit requirement presents a dramatic contrast with the holding in Milwaukee v. Illinois:

"Federal courts lack authority to impose more stringent effluent limitations under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme." 451 U.S., at 320.

See also n. 5, supra.

"The Committee believes that the no-discharge declaration in Section 13 of the 1899 Refuse Act is useful as an enforcement tool. Therefore, this section declares the discharge of pollutants unlawful. The Committee believes it is important to clarify this point: No one has the right to pollute.

"But the Committee recognizes the impracticality of any effort to halt all pollution immediately. Therefore, this section provides an exception if the discharge meets the requirements of this section, Section 402, and others listed in the bill." S. Rep. No. 92-414, supra, at 43.

An NPDES permit serves to transform generally applicable effluent limitations and other standards - including those based on water quality - into the obligations (including a timetable for compliance) of the individual discharger, and the Amendments provide for direct administrative and judicial enforcement of permits. With few exceptions, for enforcement purposes a discharger in compliance with the terms and conditions of an NPDES permit is deemed to be in compliance with those sections of the Amendments on which the permit conditions are based. In short, the permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the Amendments." EPA v. California ex rel. State Water Resources Control Board, 426 U.S., at 205 (citations omitted).

"Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto. The lines ascribed to Sir Thomas More by Robert Bolt are not without relevance here:
"'The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal. . . . I'm not God. The currents and eddies of right and wrong, which you find such plain-sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester. . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you - where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast - Man's laws, not God's - and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake.' R. Bolt, A Man for All Seasons, Act I, p. 147 (Three Plays, Heinemann ed. 1967).

"We agree with the Court of Appeals that in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches." TVA v. Hill, 437 U.S. 153, 194-195. [456 U.S. 305, 336]
FRANKLIN v. BROWN.


Dec. 20, 1889.

Appeal from a judgment of the general term of the superior court of the city of New York, affirming a judgment in favor of the plaintiff entered upon the report of a referee.

This action was brought to recover the rent reserved by a lease of a furnished dwelling-house. The answer pleaded a counter-claim for damages alleged to have been sustained by the defendant on account of a breach of an implied covenant that said house was fit for immediate and permanent occupation. The referee found that on the 14th of September, 1883, the parties entered into a written agreement whereby the plaintiff leased to the defendant the dwelling-house known as ‘No. 6 West Seventeenth Street,’ in the city of New York, for the term of one year, at the annual rental of $3,100, and that the defendant covenanted to pay said sum in equal monthly payments, commencing on the 1st day of November thereafter. He also found due performance on the part of the plaintiff, and a failure to perform on the part of the defendant, who omitted to pay the rent which became due for the months of July, August, and September, 1884, the last three months of the term. Upon the request of the defendant, the referee further found that said house was leased to her to be used as a private residence; that the furniture therein was a large and important element in determining the amount of rent to be paid; that, during the time covered by the lease, noxious gases, and strong, unhealthy, and disagreeable odors, ‘existed generally, and in very large quantities, throughout said furnished dwelling-house,’ making the defendant sick, and rendering the house unhealthy and unfit for human habitation, and that she incurred certain expenses as the immediate and necessary result of occupying said premises. The referee, however, added to these requests, as found, that said gases, odors, etc., did not arise in or from any part of said house, but that they came from the adjoining premises, which were used for a livery stable, and that neither party knew of their existence when the lease was executed.

*113 VANN, J., (after stating the facts as above.)

It is not claimed that any deceit was practiced or false representations made by the plaintiff as to the condition of the house in question, or its fitness for the purpose for which it was let. The defendant thoroughly examined the premises before she signed the lease, and she neither ceased to occupy nor attempted to rescind until the last quarter of the term. Neither party knew of the existence of the offensive odors when the contract was made. They were not caused by the landlord, and did not originate upon his premises, but came from an adjoining tenement. The lease contained no covenant to repair, or to keep in repair, and no express covenant that the house was fit to live in. The defendant, however, contends that, as the demise was of a furnished house for immediate use as a residence, there was an implied covenant that it was reasonably fit for habitation. It is not open to discussion in this state, that a lease of real property only, contains no implied covenant of this character, and that, in the absence of an express covenant, unless there has been fraud, deceit, or wrong-doing on the part of the landlord, the tenant is without remedy, even if the demised premises are unfit for occupation. Witty v. Matthews, 52 N. Y. 512; Jaffe v. Harteau, 56 N. Y. 398; Edwards v. Railroad Co., 98 N. Y. 245; Cleves v. Willoughby, 7 Hill, 83; Mumford v. Brown, 6 Cow. 475; *114Westlake v. De Graw, 25 Wend. 669; Tayl. Landl. & Ten. (8th Ed.) § 382; Wood, Landl. & Ten. § 379.

But it is argued that the letting of house-hold goods for immediate use raises an implied warranty that they are rea-
sonably fit for the purpose, and that, when the letting includes a house furnished with such goods, the warranty extends to the place where they are to be used. This position is supported by the noted English case of Smith v. Marrable, 11 Mees. & W. 5, which holds that, when a furnished house is let for temporary residence at a watering place, there is an implied condition that it is in a fit state to be habited, and that the tenant is entitled to quit upon discovering that it is greatly infested with bugs. This case has been frequently discussed, and occasionally criticised. It was decided in 1843, yet during that year it was distinguished and questioned by two later decisions of the same court. Sutton v. Temple, 12 Mees. & W. 52; Hart v. Windsor, Id. 68. It was approved and followed in 1877 by Wilson v. Finch Hatton, L. R. 2 Exch. Div. 336, in which, however, there was an important fact that did not appear in the earlier case, as before the lease was signed there was a representation made in behalf of the landlord that she believed the drainage to be in perfect order, whereas it was in fact defective, and the contract was promptly rescinded on this account. The principle that there is an implied condition or covenant in a lease that the property is reasonably fit for the purpose for which it was let, as laid down in Smith v. Marrable, has been frequently questioned by the courts of this country, and has never been adopted as the law of this state. Edwards v. Railroad Co., 98 N. Y. 248; Howard v. Doolittle, 3 Duer, 475; Carson v. Godley, 26 Pa. St. 117; Dutton v. Gerrish, 9 Cush. 89; Chadwick v. Woodward, 13 Abb. N. C. 441; Coulson v. Whiting, 14 Abb. N. C. 60; Sutphen v. Seebass, Id. 67; Meeks v. Bowerman, 1 Daly, 99. We have been referred to no decision of this court involving the application of this principle to the lease of a ready-furnished house, and it is not necessary to now pass upon the question because the case under consideration differs from the English cases above mentioned in two significant particulars: (1) It involves a lease for the ordinary period of one year, instead of a few weeks or months during the fashionable season. (2) The cause of complaint did not originate upon the leased premises, was not under the control of the lessor, and was not owing to his wrongful act or default. It was simply a nuisance arising in the neighborhood, but neither caused nor increased by the house in question. Hence we are not called upon in this case to decide whether a lease of a furnished dwelling contains an implied covenant against inherent defects either in the house or in the furniture therein, but simply whether the lease under discussion contains an implied covenant against external defects, which originated upon the premises of a stranger, and were unknown to the lessor when he entered into the contract.

It is uniformly held in this state that the lessee of real property must run the risk of its condition, unless he has an express agreement on the part of the lessor covering that subject. As was said by the learned general term when deciding this case: ‘The tenant hires at his peril, and a rule similar to that of caveat emptor applies, and throws on the lessee the responsibility of examining as to the existence of defects in the premises, and of providing against their ill effects.’ 53 N. Y. Super. Ct. 479. In Cleves v. Willoughby, 7 Hill, 83, 86, Mr. Justice BEARDSLEY, speaking for the court, said: ‘The defendant offered to show that the house was altogether unfit for occupation, and wholly untenable. The principle on which this offer was made, however, cannot, I think, be maintained. There is no such implied warranty on the part of the lessor of a dwelling-house as the offer assumes. It is quite unnecessary to look at the common-law doctrine as to implied covenants and warranties, or to its modification by statute. 3 Rev. St. 594. That doctrine has a very limited application, for any purpose, to a lease for years, and in every case has reference to the title, and not to the quality or condition, of the property. The maxim caveat emptor applies to the transfer of all property, real, personal, and mixed, and the purchaser generally takes the risk of its quality and condition, unless he protects himself by an express agreement on the subject.’ In O'Brien v. Capwell, 29 Barb. 504, the court declared that, ‘as between landlord and tenant, * * * when there is no fraud or false representations or deceit, and in the absence of an express warranty or covenant to repair, there is no implied covenant that the demised premises are suitable *116 for fit or occupation, or for the particular use which the tenant intends to make of them, or that they are in a safe condition for use.’ In Edwards v. Railroad Co., 98 N. Y. 249, it was said in behalf of this court: ‘If a landlord lets premises, and agrees to keep them in repair, and he fails to do so, in consequence of which any one lawfully upon the premises suffers injury, he is responsible for his own negligence to the party injured. * * * If he creates a nuisance upon his premises, and then demises them, he remains liable for the consequences of the nuisance, as the creator thereof. * * * But where the landlord has created no nuisance, and is guilty of no willful wrong or fraud or culpable negligence, no case can be found imposing any liability upon him for any injury suffered by any person occupying or going upon the premises during the term of the demise, and there is no distinction stated in any authority between cases of a demise of dwelling-houses and of buildings to be used for public purposes. The responsibility of the landlord is the same in all cases. If guilty of negligence or other delictum which leads directly to the accident and wrong complained of, he is liable; if not so guilty, no liability attaches to him.’
These quotations illustrate the strictness with which the courts have refused to imply covenants on the part of the lessor as to conditions under his control. What sound reason, then, is there for claiming that the law will imply a covenant as to conditions not under his control, and with reference to which neither lessor nor lessee can reasonably be supposed to have contracted, as they knew nothing about them? The fact that personal property was in part the subject of the lease can have no bearing upon this question, because neither the furniture, nor the place provided for its use, was the cause of the unpleasant odors. They were not a part of the leased property, either real or personal, but were independent of it in origin, and accidental in their effect. If smoke from a neighboring manufactory had blown through the windows, or gas had escaped from a leaky main in the street and entered the house, could the lessee have abandoned the premises, or have called upon the lessor to respond in damages? If any nuisance had existed in the vicinity without the landlord's agency or knowledge, but which materially lessened the value of the lease, upon whom would the loss fall? These questions suggest the danger of departing from the established rule as to implied covenants with reference to the condition of leased real property, simply because personal property is included in the lease. The furniture was not the basis of the contract, but a mere incident, and in law the rent is deemed to issue out of the realty. 1 Wood, Landl. & Ten. (2d Ed.) 128; Newman v. Anderton, 2 Bos. & P. (N. R.) 224; Emott's Case, 2 Dyer, 212b. The difficulty is still more serious when the effort is made to extend the contract of the lessor, by implication only, to causes having only an accidental connection with the property leased, whether real or personal. We do not think that there was any covenant in the lease in question, implied either by common law or from the acts or relations of the parties, that extended to the grievance of which the defendant complaints. The judgment should therefore be affirmed, with costs. All concur.

N.Y. 1889
Franklin v. Brown
73 Sickels 110, 118 N.Y. 110, 23 N.E. 126

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Exceptions from Superior Court, Suffolk County; John H. Brown, Judge.

Action by Mary Fiorntino against Frank Mason, trustee. Verdict for plaintiff, and defendant excepts. Exceptions sustained, and judgment ordered for defendant.

RUGG, C. J.

The plaintiff occupied as tenant at will the second floor of a house of the defendant. A part of the premises let to her was a platform with outside uncovered steps. There was evidence tending to show that the plaintiff while carefully descending the steps was injured by reason of their defective condition.

The kinds of relations between landlord and tenant which have arisen in our decisions out of oral contracts establishing a tenancy at will may be divided into three general classes:

[1] First. The ordinary oral contract for tenancy at will without further agreement. The respective rights and obligations of the landlord and tenant under such a contract for a tenancy at will are well settled. There is no implied agreement, apart from fraud, that the demised premises are or will continue to be fit for occupancy or safe and in good repair. The tenant takes the premises as he finds them and there is no obligation on the landlord to make repairs. The landlord is not liable for injuries arising from a defective condition unless he has undertaken to make repairs and has made them negligently. Kearines v. Cullen, 183 Mass. 298, 67 N. E. 243; Mackey v. Loner- gan, 221 Mass. 296, 108 N. E. 1062, L. R. A. 1916F, 1098.

[2][3] Second. The parties may agree that the landlord shall make necessary repairs during the tenancy and thus vary the rights and obligations implied by the law as part of the ordinary relation of tenancy at will. An agreement to repair as a part of the letting is an agreement to make repairs on notice. Failure to comply with such agreement gives rise merely to a right of action for breach of contract, where the damages commonly are only the cost of making the repairs. A negligent omission to repair is not ground for an action of tort. Tuttle v. Gilbert Manufacturing Co., 145 Mass. 169, 13 N. E. 465. The landlord under such a contract is not liable for personal injuries resulting from a defective condition of the premises unless he makes repairs and makes them negligently. Conahan v. Fisher, 233 Mass. 234, 124 N. E. 13, where cases are collected.

[4] Third. The parties may make a still different agreement to the effect that the landlord shall keep and maintain the premises in a condition of safety on his own responsibility and without reference to notice from the tenant of defective conditions, and by virtue of the agreement for letting shall have and constantly retain such possession of the premises as in necessary for that purpose. It is one thing for a landlord to agree with a tenant that he will make repairs on the demised premises on notice that repairs are needed. That is an agreement of the second class. It is quite another and different thing for a landlord to agree that he continuously undertakes to keep the demised premises in repair and to relieve the tenant from any attention or thought respecting notice from any attention or thought respecting notice may be as care free respecting the condition of the demised premises as is the guest in a hotel respecting the room assigned for his occupancy. Under such an agreement the landlord assumes the duty of looking after the tenement as to safety and retains so far as necessary to that end the possession thereof and the right to enter upon it at all times. There is nothing impossible in fact or law about such an agreement. Miles v. Janvrin, 196 Mass. 431, 82 N. E. 708, 13 L. R. A. (N. S.) 378, 124 Am. St. Rep. 575; Id., 200 Mass. 514, 86 N. E. 785. It is, however, a most onerous undertaking. See Ryall v. Kidwell [1914] 3 K. B. 135, 142. It is not made out by a simple agreement.
that the landlord will keep the premises in repair. That *454 means no more than that he will keep them in repair on notice from the tenant. Such an agreement is of the second class. An agreement of the third class goes much further. It can be supported and proved only by evidence far more explicit than a mere general agreement to maintain in repair. It imposes an obligation on the landlord to enter upon the demised premises at all reasonable times for the purpose of inspection and ascertainment of any defective condition. The landlord thereby assumes direct and initial responsibility for the condition of the premises as to safety at all times. Under such an agreement liability devolves upon the landlord for any failure reasonably to discover and remedy a defect or want of repair whereby injury ensues to any person to whom he owes the duty to inspect, discover and repair defects.

[5] In the case at bar the plaintiff as tenant at will of the defendant seeks to recover by virtue of a contract of the third class. Confessedly she has no right of action under the first or second classes of contracts. The only point to be decided is whether there is any substantial evidence of a contract of that kind.

The plaintiff's testimony respecting her contract with the defendant was this:

'He says: 'Don't worry; move in and I will fix it up in good condition and good order and safe, and don't be worried.' * * * Q. What did he say about fixing the railing on the piazza? A. He says: 'All right; everything is all right, good and safe.' * * * Q. Did Mr. Mason say anything about what he would do while living there? A. He says my man come and look at the house and what you want done. * * * Q. Now, did you say anything to Mr. Mason or he say anything to you as to what he was going to do about taking care of the property while you were living there? A. He says he would care for the house and fix everything right along good and safe. That is what he says. * * * And Mr. Mason, he says: 'All right, and I will keep the house in good condition and fix it up for you good and safe.' * * * Q. And then he said he would repair those stairs? A. Yes, 'I would repair the stairs, and fix the lower stairs way up.' * * * Q. When you wanted repairs done, did you see Mr. Sweeney or Mason, when Sweeney came to collect the rent? A. When he collect the rent, he ask what I wanted done, and he send a man to fix it. Q. Whenever you wanted anything done, you told Mr. Sweeney? A. Yes. Q. And Mr. Sweeney would have it done? *455 A. Yes. * * * Q. Now, do you remember whether he did any other things that you didn't ask him to do? A. I asked him when I wanted to fix the stairs and he fixed stairs. * * * Q. Did he fix anything there that you didn't ask him to fix? A. I asked him if he fixed the stairs, and he fixed the bannisters and the lower stairs. Q. Did he fix everything you asked him to fix? A. Yes; he fixed downstairs. Q. Did he fix any other things that you did not ask him to fix? A. He fixed nothing only what I asked him. Q. Was there anything else that he said about it? A. He said he would repair any time 'you want'; good repair and it be kept good-don't worry-and safe. That is what he said-Mr. Mason did.'

This does not warrant a finding of an agreement on the part of the defendant to look after the property and himself assume with reference to it the obligation of a landlord respecting common stairs and passageways. The only fair import of it all is that the defendant agreed to keep the tenement in good repair when his attention was called to defects by the tenant, or possibly when he knew of defects of his own observation. But it does not go far enough to impose the initial obligation on the defendant as landlord to search for and remedy defects regardless of notice or request from the tenant. If the case stood on the plaintiff's testimony alone, she must fail.

The defendant's testimony was this:

'Q. You intend in your dealings with your tenants generally and in this particular case to keep the premises in good order and condition all the time? A. According to the tenant I have. Q. And particularly with reference to the question of keeping it in such order and condition as to make it reasonably safe, you have no doubt about that at all, have you? A. I always look after that sort of thing. Q. And Mr. Sweeney was instructed by you to notify you about this and other places, so you didn't wait for the tenant? If you knew there was a step broken or in condition to be dangerous, you would fix it? A. I would fix it. Q. Didn't **285 you say to Mrs. Fiorntino at that time: 'I will do the same thing I have always done, Mrs. Fiorntino. I will keep the place in the usual good condition, and all right and safe'? A. Well, anything as general as that I don't remember about, I am sure. * * * Q. That is what you did intend to do, wasn't it? A. I certainly intended to put the house in repair and look after it. Q. And keep it in repair? A I never *456
made an agreement with her or anybody else on such line as that.'

That is not fairly susceptible of the inference that the landlord assumed the obligation to retain such control of the premises as would enable him continuously to make sufficient inspection to detect and correct incipient defects. It goes no further, so far as concerns obligations, than to repair on notice from the tenant, or possible, if the defect came under his own observation. It does not include right and duty of constant inspection of the premises and continuous prevention from their falling into any want of repair.

The exceptions, in the opinion of a majority of the court, must be sustained. There appears to have been a full and fair trial. In accordance with St. 1909, c. 236, judgment may be entered for the defendant.

So ordered.

Mass. 1919
Fiorntino v. Mason
233 Mass. 451, 124 N.E. 283

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Supreme Court of Minnesota.
Patricia A. JOHNSON and Wilford Johnson, Respondents,
v.
(Cornelius O'Brien) Sarah O'BRIEN, executrix of Estate of Cornelius O'Brien, deceased, substituted as appellant,
and Sadie O'Brien, Appellants.

Nos. 37800, 37801.


Action for injuries sustained by guest of tenant who while using stairway in rented building fell to the ground and sustained injuries. From order denying defendants' motion for judgment notwithstanding the verdict or for new trial in the District Court, Crow Wing County, Arnold C. Forbes, J., the defendants appealed. The Supreme Court, Frank T. Gallagher, J., held that whether the landlord had information leading a reasonably prudent owner to exercise due care to suspect the danger from the step was properly submitted to the jury; that act of plaintiff's counsel informing jury as to the effect of an answer to a question of the special verdict upon the ultimate right of the party to recover was not prejudicial and that comments of the trial court with respect to removal of the stairway by the defendants was not prejudicial.

Affirmed.

Knutson, J., and Dell, C. J., dissented.

Syllabus by the Court

*502 1. Where a landlord has information which would lead a reasonably prudent owner exercising due care to suspect that danger exists on the leased premises at the time the tenant takes possession, and that the tenant exercising due care would not discover it for himself, then he must at least disclose such information to the tenant.

2. It is error for the court or counsel to, expressly or by necessary implication, inform the jury of the effect of an answer to a question of the special verdict upon the ultimate right of either party to recover, or upon the ultimate liability of either party. Held, under the circumstances here, however, we do not regard the error as prejudicial where the court instructed the jury to disregard the comments *503 of counsel immediately after they were made, and also in its instructions stated not to speculate as to the legal result of their answers. Also the evidence is sufficient to sustain the findings on the special questions.

3. Evidence of one's property transfers after the occurrence of some event which may render him liable in damages is admissible to show a consciousness of liability and a purpose to evade satisfaction of it.

Ryan, Ryan & Ebert, Brainerd, for respondents.

Carl E. Erickson, Brainerd, for respondents.

FRANK T. GALLGHER, Justice.

Two appeals from an order denying defendants' motion for judgment notwithstanding the verdict or for a new trial in two personal injury actions which were tried together.

The cases were submitted to the jury for a special verdict under Rule 49.01, Rules of Civil Procedure, and arose out of the following fact situation.
Defendants owned a two-story building in Deerwood, Minnesota. The first floor was rented and used as a grocery store, the second floor was divided into two apartments, front and back. Both apartments were served by an inside stairway and the back apartment was served by an outside stairway of wooden construction which was built sometime prior to 1923.

On July 10, 1955, an agent of the defendants rented the back apartment to the Mrs. Elletson, age 70, on an oral month-to-month tenancy. There was no covenant to repair by the defendants. The outside stairway was leased as part of the back apartment and was not used in common by the other tenant.

On October 3, 1955, Mrs. Elletson's son and his wife, the plaintiffs, came to visit her. While they were using the back stairway, one of the treads, second from the top, gave way and the son's wife fell to the ground and sustained a fracture of the anterior border of the sixth cervical vertebra.

Defendants do not question the amount of the damages awarded. However, with respect to their liability and the conduct of the trial, defendants raise four basic issues which are necessary to a determination of this appeal.

Defendants contend first that the rule of law applied by the court as to the liability of a landlord is incorrect. In that connection the court instructed the jury as follows:

‘In the absence of agreement, he is under no obligation to repair things damaged or deteriorating after the start of the lease. He has no responsibility to persons on the land for conditions developing after the start of the lease. The owner is, however, under obligation to disclose to the lessee, Mrs. Elletson in this case, concealed, dangerous conditions existing when the possession is transferred, when he has information which would lead a reasonable prudent owner, exercising due care, to suspect that the danger exists and that the tenant, exercising due care, would not discover it for himself and which conditions are not open to the observation of the tenant then he must at least disclose such information to the tenant or be found lacking in due care.’

In the memorandum accompanying its order denying defendants' motion for a new trial, the court relied on Breimhorst v. Beckman, 227 Minn. 409, 418, 419, 35 N.W.2d 719, 726, where we stated that the liability of a landlord is not restricted to those instances where the lessor has actual knowledge of the dangerous condition of the premises, but includes those cases where he has information which would lead an ordinarily reasonable man to suspect that danger exists, and that 'The liability for concealing or failing to disclose a dangerous condition unknown to the lessee is based on the theory of negligence.' This rule was applied in the Breimhorst case in determining whether the trial court erred in directing a verdict for the landlord and in denying plaintiff's motion for a new trial. There was no evidence in that case from which a jury could justifiably have found that the lessor ought reasonably to have suspected that a dangerous condition existed.

Defendants contend that the authorities cited in the Breimhorst case do not support the rule therein followed. They contend that in Murphy v. Barlow Realty Co., 214 Minn. 64, 7 N.W.2d 684, actual knowledge of the defect was present and that Anderson v. Winkle, 213 Minn. 77, 5 N.W.2d 355, involved a situation in which an injury occurred on a stairway used in common with other tenants.

We find in 1 Tiffany, Landlord and Tenant, s 96b, also cited by the court in the Breimhorst case, that a lessor is liable to persons rightfully on the premises for injuries caused by defects or dangerous conditions existing at the time of the leasing, which, while not apparent to the lessee, were known to the lessor and of which he failed to inform the lessee, ‘And his liability extends not only to dangerous conditions of which he actually knows, but also to those the existence of which he has reasonable ground to suspect.’

In 32 Am.Jur., Landlord and Tenant, ss 672 and 673, a distinction is made between a majority and a minority view,
the majority holding that the landlord must have actual knowledge. The minority view is that the landlord who rents premises which are in an unsafe and dangerous condition on account of latent defects is under a duty to exercise reasonable care to discover such defects and apprise the tenant thereof and that a failure to exercise such care renders him liable to the tenant [FN1] for injury he may receive therefrom without negligence on his part. For this same distinction, see also 52 C.J.S. Landlord and Tenant s 417.

FN1. Duties and liabilities of a landlord to those on the premises by consent of the tenant are the same as to the tenant, and such guest or invitee will have no greater right than the tenant himself would have had. 52 C.J.S. Landlord and Tenant s 418.

In Prosser, Torts (2 ed.) s 80, we find the following comment:

**247** ‘Some courts apparently require that the lessor have actual knowledge of the existence of the condition before he is under any duty in regard to it. The greater number have held, however, that it is sufficient that he has information which would lead a reasonable man to suspect that the danger exists, and that he must at least disclose such information to the tenant. Tennessee has gone even further, and has imposed upon the lessor an affirmative duty to use reasonable care to inspect the premises before transfer; but the decision has not been followed in other jurisdictions, where it is generally agreed that there is no obligation to inspect or investigate in the absence of some reason to believe that there is a danger. There is of course no duty to disclose conditions which are known to the tenant, or which are so open and obvious that he may be expected to discover them when he takes possession.’ (Italics supplied.)

It would serve no useful purpose to analyze in detail the authorities cited by the defendants in support of their contention. We believe that the rule established in the Breimhorst case, as embodied in the instructions of the present case, is correct and well founded in reason and justice.

1. Accordingly, where a landlord has information which would lead a reasonably prudent owner exercising due care to suspect that danger exists on the leased premises at the time the tenant takes possession, and that the tenant exercising due care would not discover it for himself, then he must at least disclose such information to the tenant. [FN2] Under the circumstances here a question of fact was properly presented for the jury.


We agree with the trial court that ‘To require one to use that care which an ordinarily prudent person would exercise under the same or similar circumstances can hardly be onerous, unreasonable or oppressive.’

The following Minnesota authorities may be referred to in support of defendants' position: Harpel v. Fall, 63 Minn. 520, 65 N.W. 913; Tvedt v. Wheeler, 70 Minn. 161, 72 N.W. 1062; Kayser v. Lindell, 73 Minn. 123, 75 N.W. 1038; Farley v. Byers, 106 Minn. 260, 118 N.W. 1023; Ames v. Brandvold, 119 Minn. 521, 138 N.W. 786; Daley v. Towne, 127 Minn. 231, 149 N.W. 368; Keegan v. G. Heileman Brg. Co., 129 Minn. 496, 152 N.W. 877; L.R.A.1916F, 1149; Cederberg v. Nelson, 179 Minn. 104, 228 N.W. 352; Normandin v. Freidson, 181 Minn. 471, 233 N.W. 14; Murphy v. Barlow Realty Co., 214 Minn. 64, 7 N.W.2d 684; Anderson v. Winkle, 213 Minn. 77, 5 N.W.2d 355; Mani v. E. Hugo Erickson, Inc., 209 Minn. 295 N.W. 506; Nickelsen v. Minneapolis, N. & S. Ry., 168 Minn. 118, 209 N.W. 646; Mix v. Downing, 176 Minn. 156, 222 N.W. 913; Johnson v. Theo. Hamm Brg. Co., 213 Minn. 12, 4 N.W.2d 778; Ryberg v. Ebnet, 218 Minn. 115, 15 N.W.2d 456; Honan v. Kinney, 205 Minn. 485, 286 N.W. 404. To the extent that the rule in these cases might be interpreted as meaning that only actual knowledge of defects on leased premises constitutes a prerequisite to the liability of a landlord, they are expressly overruled.

The second issue is whether counsel may comment to the jury as to the legal effect of its answer to question in rendering a special verdict pursuant to Rule 49.01, Rules of Civil Procedure.
Four questions pertinent to this issue were submitted to the jury.

1. Did a condition involving unreasonable risk of bodily harm to persons using the outside stairway exist on the date of leasing of these premises to Mrs. Elletson, July 10, 1955?

2. Should Cornelius and Sadie O'Brien have been aware of the existence of the said dangerous condition in the exercise of due and reasonable care at the time of leasing to Mrs. Elletson, July 10, 1955?

3. Did Mrs. Elletson know of the said dangerous condition at the time of leasing, July 10, 1955, or at any time prior to the date of the stair failure, October 3, 1955?

4. Should Mrs. Elletson have become aware of the said dangerous condition in the exercise of due and reasonable care between July 10, 1955 and October 3, 1955?

With respect to the foregoing questions No. 3 and No. 4 counsel for the plaintiffs stated to the jury:

"* * * Now I have also indicated to you what I believe is the appropriate answer to that question, the answer to Number 3 and Number 4 should be, 'No.'

'If the answers to Number 3 and Nuber 4 were to be answered in any other way, then the burden would be shifted from the shoulders of Mr. and Mrs. O'Brien to the shoulders of Mrs. Elletson.'

Defendants contend here that these statements to the jury constitute prejudicial error as arguing the ultimate legal effect of answers to the special questions. In McCourtie v. United States Steel Corp., 253 Minn. 501, 93 N.W.2d 552, we held that it was prejudicial error for the court to inform the jury in its instruction, expressly or by necessary implication, of the effect of an answer to a question of the special verdict upon the ultimate right of either party to recover or on the ultimate liability of either party, where the verdict pursuant to such instruction was excessive. We agree that the conduct of counsel here does constitute error in view of the purpose of the special verdict, which is as stated in the McCourtie case (253 Minn. 516, 93 N.W.2d 562):

"* * * to permit the jury to make findings of ultimate facts, free from bias, prejudice, and sympathy and without regard to the effect of their answers upon the ultimate outcome of the case.'


We do not believe, however, that such error constituted grounds for a new trial unless it was prejudicial. Bailey v. Bach, 257 Wis. 604, 44 N.W.2d 631; Texas Employers' Ins. Ass'n v. Sevier, Tex.Civ.App., 279 S.W.2d 473; Ferderer v. Northern P. Ry. Co., 77 N.D. 169, 42 N.W.2d 216.

At the termination of the alleged misconduct of plaintiffs' counsel, defendants moved for a mistrial which motion was denied by the court. The trial judge heard the argument and was able to observe the effect, if any, upon the jury. Under Rule 61 of Rules of Civil Procedure, errors or defects in the proceeding which do not affect the substantial right of the party must be disregarded. Also error may be rendered harmless where the court instructs the jury to disregard remarks of counsel. 2 Mason's Dunnell, Minn.Practice, s 3310.

Under the record here immediately after counsel's comments the court instructed him to refrain from arguing the results of the answers and admonished the jury to 'eradicate it entirely from your mind so far as it may influence
your decision in this case.’ Also in the instructions the court stated: ‘Do not speculate as to the legal result of your answers. You are concerned only with deciding these disputes between these parties which we cannot agree upon.’

A review of the record shows evidence to sustain the findings as made by the jury **249 to special questions Nos. 3 and 4, namely: That Mrs. Elletson, the tenant, did not know of the dangerous condition at any time between July 10 and October 3, 1955, nor should she have become aware of the said dangerous condition in the exercise of due and reasonable care between the aforementioned dates. Under these circumstances we cannot say that the error was prejudicial and constituted grounds for a new trial.

[5] 3. Defendants also raise as an issue the admissibility of evidence regarding property transfers made by the defendants to their children shortly after this injury occurred; also the comment made by the court as to what the jury could consider regarding this evidence. As near as can be determined, with the exception of one authority, [FN3] it is uniformly held that evidence of one's property transfers after the occurrence of *510 some event which may render him liable in damages is admissible to show a consciousness of liability and a purpose to evade satisfaction of it. 20 Am.Jur., Evidence, s 279; 2 Wigmore, Evidence (3 ed.) s 282; Annotations, 80 A.L.R. 1139 and 65 A.L.R. 1307; Klein v. Pasch, 153 Minn. 291, 190 N.W. 338.

FN3. Amsinger v. Najim, 335 Mo. 528, 73 S.W.2d 214, cited in 2 Wigmore, Evidence (3 ed.) s 282, note 3, as unsound.

[6] As to this issue the court instructed the jury that the evidence of property transfers by the defendants to their children ‘was only admitted as it might have some weight as indicating, if it does, that the defendants, O'Briens, felt they had done something wrong to right which their property might be resorted to. It was only admitted for your consideration as to whether or not it showed a consciousness of liability and a purpose or intent to evade the satisfaction of it. Their own conclusions as to their liability may have been entirely erroneous. In this connection, you should remember and give proper weight to the evidence of the defendants as to the reasons which prompted their transfer.’

In view of the applicable law, we do not regard the admission of evidence as to the property transfers as error, and accordingly the instructions were proper.

The defendants' fourth contention is that they were prejudiced by certain portions of the instructions given to the jury. One of which, namely, the admissibility of evidence of property transfers, has been discussed previously and it is not necessary to reiterate here. See, 1 Mason's Dunnell, Minn. Practice, s 1537, note 10.

[7] Defendants also referred to comments of the trial court with respect to the removal of the stairway by the defendants, which removal was ‘undoubtedly the exercise of good business judgment rather than to repair it.’ Defendants contend that this statement infers the necessity of repairing the whole stairway rather than merely the damaged step.

Upon a review of the instructions it appears that the purpose of the court's comment was to correct a comment made by plaintiffs' counsel to the effect that the defendants could have brought the whole stairway or certain portions of it into the courtroom. Whereupon the court commented that the defendants 'preserved that stairway so long as it furnished any purpose in this lawsuit and so tear it down was undoubtedly*511 the exercise of good business judgment rather than to repair it. To let that act or those acts enter into your determination as to what an ordinarily, prudent person should have done in the exercise of due care before October 3, 1955 would be unfair, highly prejudicial to all of the defendants in this case, and be a travesty upon justice. You are specifically instructed to disregard that evidence and Mr. Erickson's argument in regard thereto.’

At best the prejudice, if any, would have to result from inference. Under these circumstances, and in view of the instructions **250 subsequently given, we do not believe the comment was prejudicial.
KNUTSON, Justice (dissenting).
I cannot agree with the majority in this case. At least since Harpel v. Fall, 63 Minn. 520, 524, 65 N.W. 913, 914, we have followed the rule that-

‘* * * where there is no agreement to repair leased premises by the landlord, and he is not guilty of any fraud or concealment as to their safe condition, and the defects in the premises are not secret, but obvious, the tenant takes the risk of their safe occupancy; and the landlord is not liable to him or to any person entering under his title, or who is upon the premises by his invitation, for injuries sustained by reason of the unsafe condition of the premises.’[FN4]


*512 In Mix v. Downing, 176 Minn. 156, 158, 222 N.W. 913, 914, 13 Minn.L.Rev. 392, we said:

‘Where a landlord makes no agreement to repair the obvious unsafe condition of the leased premises he is not liable, in the absence of fraud or concealment, to the tenant or to persons entering upon the premises at the tenant's invitation for injuries sustained by reason of such unsafe condition.’

In probably the last case in which this question was directly considered, Ryberg v. Ebnet, 218 Minn. 115, 117, 15 N.W.2d 456, 457, we said:

‘* * * It is a well-known rule, settled in this state and universally accepted, that if there is no agreement by the landlord to repair the demised premises; if he is not guilty of fraud or concealment as to their safe condition; if defects in the premises are obvious and do not constitute a hidden danger, nuisance, or trap; and if there is no showing that at the time the premises were leased they were unfit for their intended purpose, the tenant takes the risk as to the safety of their occupancy, and the landlord is not liable in tort to invitees of the tenant for injuries received upon the premises by reason of such defects.’

Now, on the basis of Breimhorst v. Beckman, 227 Minn. 409, 35 N.W.2d 719, the majority would overrule this entire line of cases. What we said in the Breimhorst case with respect to the liability of a landlord was purely dictum. We neither considered nor overruled the cases in which the liability of a landlord under these circumstances has been settled and consistently followed for over 60 years, and it is unthinkable that in that case we intended to overrule all these cases by implication. It is my opinion that we should adhere to our former rule and that the case should be sent back for a new trial based upon the rule of law which we have followed over all these years.

The majority admits that it was error to permit plaintiffs' counsel to argue to the jury the legal effect of a special verdict but held that it was error without prejudice. I cannot agree with this position. In *513 McCourtie v. United States Steel Corp., 253 Minn. 501, 93 N.W.2d 552, we held that it was prejudicial error for the trial court to instruct the jury as to the legal effect of a special verdict. It is equally devastating to permit counsel for a plaintiff to argue to the jury that which we have held the court may not do. Here, again, I think the error was prejudicial and that it re-
quires a new trial.

With respect to the admissibility of evidence regarding property transfers made by defendants after the injury occurred, I have serious doubts as to the propriety of admitting such evidence in a case involving nothing more than pure negligence. In cases where such transfers might be evidence of a guilty conscience, clearly it is admissible. Here, however, there is nothing involved but failure to exercise due care, and it is difficult to see how such evidence can have any bearing on the liability which rests upon such negligence, if any there was.

DELL, Chief Justice (dissenting).
I certainly cannot agree with the majority either. I concur with everything that has been said in the dissent written by Mr. Justice KNUTSON.

MINN 1960.
Johnson v. O'Brien
258 Minn. 502, 105 N.W.2d 244, 88 A.L.R.2d 577

END OF DOCUMENT
Supreme Court of Wisconsin.
Burton PINES et al., Respondents,
v.
Leon PERSSION, Appellant.

Action by lessees to recover sum deposited with lessor for fulfillment of lease plus cost of labor performed by lessees on leased premises. From a judgment of the Circuit Court, Dane County, Richard W. Bardwell, Circuit Judge, in favor of lessees, less one month's rent, the lessor appealed and the lessees filed a motion for review as to the allowance of one month's rent. The Supreme Court, Martin, C. J., held that under lease providing that house was suitable for student housing, there was no express covenant that house would be in a habitable condition, but there was an implied warranty of habitability and such implied warranty was breached when inspection disclosed plumbing, heating and wiring systems were defective and violated building code, and such breach relieved lessees of any liability to pay rent and they were liable only for reasonable rental value of premises during time of actual occupancy. Cause remanded with instructions.

Action by plaintiffs Burton Pines, Gary Weissman, David Klingenstein and William Eaglestein, lessees, against defendant Leon Perssion, lessor, to recover the sum of $699.99, which was deposited by plaintiffs with defendant for the fulfillment of a lease, plus the sum of $137.76 for the labor plaintiffs performed on the leased premises. After a trial to the court findings of fact and conclusions of law were filed which determined that plaintiffs could recover the lease deposit plus $62 for their labor, but less one month's rent of $175. From a judgment to this effect defendant appeals. Plaintiffs have filed a motion for review of that part of the judgment entitling defendant to withhold the sum of $175.

At the time this action was commenced the plaintiffs were students at the University of Wisconsin in Madison. Defendant was engaged in the business of real estate development and ownership. During the 1958-1959 school year plaintiffs were tenants of the defendant in a student rooming house. In May of 1959 they asked the defendant if he had a house they could rent for the 1959-1960 school year. Defendant told them he was thinking of buying a house on the east side of Madison which they might be interested in renting. This was the house involved in the lease and is located at 1144 East Johnson street. The house had in fact been owned and lived in by the defendant since 1951, but he testified he misstated the facts because he was embarrassed about its condition.

Three of the plaintiffs looked at the house in June, 1959 and found it in a filthy condition. Pines testified the defendant stated he would clean and fix up the house, paint it, provide the necessary furnishings and have the house in suitable condition by the start of the school year in the fall. Defendant testified he told plaintiffs he would not do any work on the house until he received a signed lease and a deposit. Pines denied this.

The parties agreed that defendant would lease the house to plaintiffs commencing September 1, 1959 at a monthly rental of $175 prorated over the first nine months of the lease term, or $233.33 per month for September through May. Defendant was to have a lease drawn and mail it to plaintiffs. It was to be signed by the plaintiffs' parents as guarantors and a deposit of three months' rent was to be made.

Defendant mailed the lease to Pines in Chicago in the latter part of July. Because the plaintiffs were scattered around the country, Pines had some difficulty in securing the necessary signatures. Pines and the defendant kept in touch by letter and telephone concerning the execution of the lease, and Pines came to Madison in August to see the defendant and the house. Pines testified the house was still in terrible condition and defendant again promised him it would be ready for occupancy on September 1st. Defendant testified he said he had to receive the lease and the deposit before he would do any work on the house, but Pines could not remember him making such a statement.
On August 28th Pines mailed defendant a check for $175 as his share of the deposit and on September 1st he sent the lease and the balance due. Defendant received the signed lease and the deposit about September 3rd.

Plaintiffs began arriving at the house about September 6th. It was still in a filthy condition and there was a lack of student furnishings. Plaintiffs began to clean the house themselves, providing some cleaning materials of their own, and did some painting with paint purchased by defendant. They became discouraged with their progress and contacted an attorney with reference to their status under the lease. The attorney advised them to request the Madison building department to inspect the premises. This was done on September 9th and several building code violations were found. They included inadequate electrical wiring, kitchen sink and toilet in disrepair, furnace in disrepair, handrail on stairs in disrepair, screens on windows and doors lacking. The city inspector gave defendant until September 21st to correct the violations, and in the meantime plaintiffs were permitted to occupy the house. They vacated the premises on or about September 11th.

The pertinent parts of the lease, which was dated September 4, 1959, are as follows:

1. For and in consideration of the covenants and agreements of the Lessees hereinafter mentioned, Lessor does hereby devise, lease and let unto Lessees the following described premises, to-wit:
   ‘The entire house located at 1144 East Johnson Street, City of Madison, Dane County, Wisconsin, including furniture to furnish said house suitable for student housing.’

2. Lessees shall have and hold said demised premises for a term of one (1) year commencing on the first day of September, 1959 * * *

3. [Total annual rent was $2100, to be paid in monthly installments in advance, prorated over the first nine months of the term, or $233.33 per month. The deposit of three months’ rent of $699.99 was to be applied for March, April and May of 1960.]

4. The Lessees also agree to the following: * * * to use said premises as a private dwelling house only * * *

7. If Lessees shall abandon the demised premises, the same may be re-let by Lessor for such reasonable rent, comparable to prevailing rental for similar premises, and upon such reasonable terms as the Lessor may see fit; and if a sufficient sum shall not be realized, after paying the expenses of re-letting, the Lessees shall pay and satisfy all deficiencies * * *’

The trial court concluded that defendant represented to the plaintiffs that the house would be in a habitable condition by September 1, 1959; it was not in such condition and could not be made so before October **412 1, 1959; that sec. 234.17, Stats, applied and under its provisions plaintiffs were entitled to surrender possession of the premises; that they were not liable for rent for the time subsequent to the surrender date, which was found to be September 30, 1959.

Wilkie, Anderson, Bylsma & Eisenberg, Madison, for appellant.

Immell, Herro, Buehner & DeWitt, Duane P. Schumacher, Robert D. Martinson, Madison, for respondents.

MARTIN, Chief Justice.

We have doubt that sec. 234.17, Stats, applies under the facts of this case. In our opinion, there was an implied warranty of habitability in the lease and that warranty was breached by the appellant.

[1] There is no express provision in the lease that the house was to be in habitable condition by September 1st. We cannot agree with respondents’ contention that the provision for ‘including furniture to furnish said house suitable for student housing’ constitutes an express covenant that the house would be in habitable condition. The phrase ‘suitable for student housing’ refers to the ‘furniture’ to be furnished and not to the general condition of the house.

[2] Parol evidence is inadmissible to vary the terms of a written contract which is complete and unambiguous on its face. Hunter v. Hathaway, 1901, 108 Wis. 620, 84 N.W. 996; 32 Am.Jur., Landlord and Tenant, secs. 130, 134.
The general rule is that there are no implied warranties to the effect that at the time a lease term commences the premises are in a tenantable condition or adapted to the purposes for which leased. A tenant is a purchaser of an estate in land, and is subject to the doctrine of "caveat emptor." His remedy is to inspect the premises before taking them or to secure an express warranty. Thus, a tenant is not entitled to abandon the premises on the ground of uninhabitability. See I American Law of Property, sec. 3.45; 32 Am.Jur., Landlord and Tenant, sec. 247.

There is an exception to this rule, some courts holding that there is an implied warranty of habitability and fitness of the premises where the subject of the lease is a furnished house. This is based on an intention inferred from the fact that under the circumstances the lessee does not have an adequate opportunity to inspect the premises at the time he accepts the lease. Premises at the time he accepts the lease. 35 N.Y.Univ.L.Rev. 1279, 1283-1287; Collins v. Hopkins (1923), 2 K.B. 617, 34 A.L.R. 703, 705. In the Collins Case the English court said:

‘Not only is the implied warranty on the letting of a furnished house one which, in my own view, springs by just and necessary implication from the contract, but it is a warranty which tends in the most striking fashion to the public good and the preservation of public health. It is a warranty to be extended rather than restricted. (Emphasis supplied.)’


We have not previously considered this exception to the general rule. Obviously, however, the frame of reference in which the old common law rule operated has changed.

Legislation and administrative rules, such as the safeplace statute, building codes and health regulations, all impose certain duties on a property owner with respect to the condition of his premises. Thus, the legislature has made a policy judgment that it is socially (and politically) desirable to impose these duties on a property owner-which has rendered the old common law rule obsolete. To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, "caveat emptor." Permitting landlords to rent ‘tumbledown’ houses is at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for conscientious landowners.

There is no question in this case but that the house was not in a condition reasonably and decently fit for occupation when the lease term commenced. Appellant himself admitted it was ‘filthy,’ so much so that he lied about owning it in the first instance, and he testified that no cleaning or other work was done in the house before the boys moved in. The filth, of course, was seen by the respondents when they inspected the premises prior to signing the lease. They had no way of knowing, however, that the plumbing, heating and wiring systems were defective. Moreover, on the testimony of the building inspector, it was unfit for occupancy, and:

‘The state law provides that if the building is not in immediate danger of collapse the owner may board it up so that people cannot enter the building. His second choice is to bring the building up to comply with the safety standards of the code. And his third choice is to tear it down.’

The evidence clearly showed that the implied warranty of habitability was breached. Respondents' covenant to pay rent and appellant's covenant to provide a habitable house were mutually dependent, and thus a breach of the latter by appellant relieved respondents of any liability under the former.

*597 Since there was a failure of consideration, respondents are absolved from any liability for rent under the lease
and their only liability is for the reasonable rental value of the premises during the time of actual occupancy. That period of time was determined by the trial court in its finding No. 9, which is supported by the evidence. Granting respondents' motion for review, we direct the trial court to find what a reasonable rental for that period would be and enter judgment for the respondents in the amount of their deposit plus the amount recoverable for their labor, less the rent so determined by the court.

Cause remanded with instructions to enter judgment for the respondents consistent with this opinion. Respondents may tax double costs in this court for appellant's failure to comply with Rule 6(3), W.S.A. 251.26 as to inclusion of record or appendix page references in the statement of facts.

Wis. 1961
Pines v. Perssion
14 Wis.2d 590, 111 N.W.2d 409

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Guest brought negligence action against landlord and tenant for personal injuries sustained in fall from second story front porch of apartment. The Superior Court, Hampden County, Moriarty, J., entered judgment against tenant on jury verdict in favor of the guest but entered judgment on landlord's motion for judgment notwithstanding the verdict, and the guest appealed. After bringing the case before it on its own motion, the Supreme Judicial Court, Liacos, J., held that landlord was liable to tenant's guest for injuries resulting from landlord's negligent failure to maintain safety of porch railing on second story front porch of apartment, even though the porch was part of the demised premises and was not under landlord's control.

Reversed and remanded with order to reinstate jury verdict.
accessible only from the tenant's living room, was part of the demised premises, not under the landlord's control. In answer to the judge's special questions, the jury found that the landlord did not exercise reasonable care in his maintenance of the premises, that his negligence was the proximate cause of the plaintiff's injuries, and that she was not at all negligent herself. \[FN1\]

\textbf{FN1.} The judge instructed the jury to assume that there was an implied duty imposed on the landlord to exercise reasonable care to maintain the rental premises in a reasonably safe condition. By doing this, he utilized the device of special questions so that the jury could determine whether the landlord had violated such duty. He states in his report that he did so “in the hope of obviating the necessity of a new trial if an appellate court did decide in this case that landlords are under such a duty.” We commend the judge for this approach as being consistent with the intent of \textit{Mass.R.Civ.P. 50(b)}, 365 Mass. 814 (1974), and the conservation of limited judicial resources. See, e. g., Smith v. Ariens Co., -- Mass. --, -- (1978) \textit{Mass.Adv.Sh.} (1978) 1857, 1866; \textit{Soares v. Lakeville Baseball Camp, Inc.}, 369 Mass. 974, 975, 343 N.E.2d 840 (1976).

Thus, this case presents a question we have reserved before. \textit{DiMirzo v. S. & P. Realty Corp.}, 364 Mass. 510, 514, 306 N.E.2d 432 (1974). See **1047\textit{Markarian v. Simonian}, 373 Mass. 669,[FNa] 369 N.E.2d 718 (1977). In the absence of the landlord's express agreement to keep the rented premises in repair, is he liable to his tenant's guest for injuries resulting from his negligent failure to maintain the safety of the premises?


Common law rules defining a landowner's liability in negligence to people coming onto the land reflected the needs of an agrarian society. The landowner was a petty sovereign within his boundaries. The character of his duty to an injured party varied with the party's relationship with the sovereign. \textit{Mounsey v. Ellard}, 363 Mass. 693, 695, 297 N.E.2d 43 (1973). Thus, the common law distinguished several classes of tort plaintiffs; among them, trespassers, licensees, invitees, and tenants.

\*165 The traditional approach to tenants turned on the concept of a lease as a conveyance of property. The tenant “bought” the leasehold at his peril, so he could not expect the landlord to have repaired preexisting defects, and at the time of the letting, the landlord ceded to the tenant his dominion over the rented premises. Under this ancient view, the axiom was “there is no law against letting a tumbledown house.” Robbins v. Jones, 15 C.B.(N.S.) 221, 240, 143 Eng.Rep. 768, 776 (1863). The landlord might have been liable for negligent maintenance of common areas, but was not generally liable for the negligent maintenance of the premises themselves. See generally, Restatement (Second) of Property Landlord & Tenant c. 17, Introductory Note & s 17.3 (1977); 2 R. Powell, Real Property s 233 (at 330.69-330-70); s 234(2)(b) (P. Rohan 1977).

The landlord “was under a separate and limited duty toward each tenant and that tenant's visitors to exercise reasonable care to maintain the common areas in a condition not less safe than they were, or appeared to be in, at the time of the letting to the particular tenant.” \textit{King v. G & M Realty Corp.}, 373 Mass. 658, 660 [FNb], 370 N.E.2d 413, 414 (1977); \textit{Lindsey v. Massios}, 372 Mass. 79, 81-82, 360 N.E.2d 631 (1977). As to the demised premises, caveat emptor reigned. The tenant took the premises as he found them. See \textit{Gade v. National Creamery Co.}, 324 Mass. 515, 518, 87 N.E.2d 180 (1949). “The general rule is that the landlord is not liable to the tenant for defects in the premises existing at the time of the letting unless they are hidden defects of which he is aware and does not warn the tenant.” \textit{Ackarey v. Carbonaro}, 320 Mass. 537, 539, 70 N.E.2d 418, 419-420 (1946). The defect had to be one that was not discoverable by the tenant. \textit{Cooper v. Boston Hous. Auth.}, 342 Mass. 38, 40, 172 N.E.2d 117 (1961). [FN2]

We set out the remaining rules in \*166\textit{DiMarzo v. S. & P. Realty Corp., supra at 513, 306 N.E.2d 432. As we stated in DiMarzo, during the term of the rental, “there could be no tort liability for nonfeasance in the absence of an agreement, for consideration, that the landlord would keep the premises in a condition of safety, and make all repairs without notice.}


FN2 In addition to the hidden defects exception, many jurisdictions require landlords who lease property for a purpose involving admission of the public to exercise reasonable care to discover and remedy defects existing at the time of the letting, if the landlord can reasonably expect that the tenant will admit the public before the property is made safe. Restatement (Second) of Property Landlord & Tenant s 17.2 (1977). This broad exception never came into the law of the Commonwealth. Mallard v. Waldman, 340 Mass. 288, 163 N.E.2d 658 (1960). See G.L. c. 21, s 17C. But see Simons v. Murray Realty, Inc., 330 Mass. 194, 196-197, 112 N.E.2d 264 (1953); Oxford v. Leathe, 165 Mass. 254, 255, 43 N.E. 92 (1896) (licensing of public hall for brief period). For a thorough discussion of exceptions to the rule of nonliability, see generally 2 R. Powell, Real Property s 234 (P. Rohan (1977).

After seven years of reconsideration and reform, little remains of this obsolete machinery of the common law. Much of the reform has been accomplished judicially. [FN3] “Recent *167 decisions of this court clearly reflect . . . a shift in philosophy with regard to status distinctions in tort standards of care . . . .” Poirier v. Plymouth, -- Mass. --, -- [FNc], 372 N.E.2d 212, 224 (1978).[FN4] In Mounsey v. Ellard, 363 Mass. 693, 297 N.E.2d 43 (1973), we did away with the legal significance in tort of categories of licensee and invitee and held that a landowner owes a duty of reasonable care to all lawful visitors. We said: “The problem of allocating the costs and risks of human injury is far too complex to be decided solely by the status of the entrant, especially where the status question often prevents the jury from ever determining the fundamental question whether the defendant has acted reasonably in light of all the circumstances in the particular case.” Id. at 707, 297 N.E.2d at 51. Since Mounsey, we have eliminated other limits based on status. E. g., Soule v. Massachusetts Elec. Co., -- Mass. -- [FNd], 390 N.E.2d 716 (1979) (foreseeable child trespasser); Poirier v. Plymouth, supra (employee of independent contractor); Pridgen v. Boston Hous. Auth., 364 Mass. 696, 308 N.E.2d 467 (1974) (helplessly trapped trespasser).

FN3 For examples of statutory reform, see G.L. c. 111, ss 127A-127K (public and private remedies for sanitary code violations); G.L. c. 111, s 127L (repair and deduct); G.L. c. 186, s 14 (criminal and civil penalties for failure to furnish essential services or for interference with quiet enjoyment); G.L. c. 186, ss 15-15F (limits on freedom of contract); G.L. c. 186, s 18 (penalties for reprisals against tenants); G.L. c. 186, s 19 (tort action against landlord who fails to correct unsafe condition after notice); G.L. c. 186, s 20 (tenant's recovery of attorney's fees); G.L. c. 239, s 2A (reprisal against tenant for reporting violations of law or joining tenant's union is defense to summary process action); G.L. c. 239, s 8A (defenses and counterclaims in summary process proceedings; rent withholding). For a discussion of a tenant's remedies under the consumer protection statute, G.L. c. 93A, see Note, Consumer Protection Legislation and the Assertion of Tenant Rights; The Massachusetts Paradigm, 59 B.U.L.Rev. 483 (1979).


FN4 A parallel shift in philosophy has occurred in the area of tort immunity. We have repeatedly demonstrated our readiness to reconsider common law immunity doctrines. See, e. g., Colby v. Carney Hosp., 356
In the landlord-tenant field, we have held that a landlord is liable to a tenant's guest for failing to exercise due care in maintaining common passageways under the landlord's control without regard to their condition at the time of the letting. Lindsey v. Massios, supra. We said that "the status of the person visited, landowner or lessee, should not affect the visitor's right to personal safety or the landowner's obligation reasonably to maintain premises in his control."  Id. at 82, 360 N.E.2d at 634. In King v. G & M Realty Corp., supra, we extended the landlord's general and continuing duty to exercise reasonable care as to the safety of common passageways to include tenants as well as their visitors.

We have also attacked the theory on which the tenant's status classification depends. In the line of cases creating and applying the implied warranty of habitability, we have overthrown the doctrine of caveat emptor and the notion that a lease is a conveyance of property. Berman & Sons v. Jefferson, -- Mass. -- [FNe], 396 N.E.2d 981 (1979), Crowell v. McCaffrey, -- Mass. -- [FNf], 386 N.E.2d 1256 (1979). Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973). Moreover, we have invoked the doctrine of warranty to afford a tenant compensation not only for economic loss, as in Berman and Hemingway, but for personal injury.  Crowell v. McCaffrey, supra at -- -- -- [FNg], 386 N.E.2d 1256. Thus, at least to the extent required by the relevant housing and building codes, a landlord may be liable to his tenant for failing to maintain areas not under the landlord's control.

Today, we do away with the ancient law that bars a tenant's guest from recovering compensation from a landlord for injuries caused by negligent maintenance of areas rented to the tenant. Like the other rules based on status, this rule has prevented a whole class of people from raising the overriding issue: whether the landlord acted reasonably under the circumstances. The practical result of this archaic rule has been to discourage repairs of rented premises. In cases like the one before us, a landlord with knowledge of a defect has less incentive to repair it. And the tenant, who often has a short-term lease, limited funds, and limited experience dealing with such defects, will not be inclined to pay for expensive work on a place he will soon be leaving.  [FN5] Thus, the defect may go unrepaired until an unsuspecting plaintiff finds herself with a lawsuit that care could have prevented.

Of course, nothing we say here as to the landlord's duty of care is to be construed as relieving a tenant of his legal responsibility to exercise reasonable care as to the demised premises.

Seven years ago, in Sargent v. Ross, 113 N.H. 388, 397-398, 308 A.2d 528, 534 (1973), Chief Justice Kenison wrote: "Henceforth, landlords as other persons must exercise reasonable care not to subject others to an unreasonable risk of harm. A landlord must act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk. We think this basic principle of responsibility for landlords as for others 'best expresses the principles of justice and reasonableness upon which our law of torts is founded' " (citations omitted). Henceforth, this basic principle of responsibility applies to Massachusetts landlords as well. Accord, Brennan v. Cockrell Invs., Inc., 35 Cal.App.3d 796, 111 Cal.Rptr. 122 (1973); Willcox v. Hines, 100 Tenn. 538, 46 S.W. 297 (1898); Pagelsdorf v. Safeco Ins. Co. of

FN6. In reaction against the traditional rule, courts have “expended considerable energy and exercised great ingenuity in attempting to fit various factual settings into the recognized exceptions.” Restatement (Second) of Property Landlord & Tenant c. 17, Reporter's Note to Introductory Note 2, at 157 (1977). By eliminating the rule entirely, we obviate the need for its exceptions. Thus, the hidden defect doctrine, which we criticized in a related context in Poirier v. Plymouth, --Mass. -- (1978) (Mass.Adv.Sh. (1978) 100), 372 N.E.2d 212, has lost its raison d' etre. The question now must be whether the landlord, in the exercise of reasonable care, should have discovered the defect and repaired it within a reasonable time. See Greaney, Developing Duties of a Landlord with Regard to Tenant Safety, 63 Mass.L.Rev. 61, 66 (1978). The comparative negligence statute, G.L. c. 231, s 85, sets the plaintiff's responsibilities if, in the exercise of reasonable care, he should have discovered the defect.

**1050 *170 The former rule was not without its reasons. When a landlord rents an apartment to a tenant, he gives up his right to enter. Ordinarily, absent a contractual agreement or the tenant's permission, the landlord can neither inspect for defects nor make repairs on the rented premises. See G.L. c. 186, s 15B(1)(a). This obstacle, however, does not justify the landlord's wholesale absolution from liability.\[FN7\] Matters of control, like matters of status, can be components of familiar negligence analysis; they can affect such questions as reasonableness and foreseeability. So, too, may matters of intervening negligence by the tenant or others be so treated. Cf. G.L. c. 186, s 19. In particular, a landlord should not be liable in negligence unless he knew or reasonably should have known of the defect\[FN8\] and had a reasonable opportunity to repair it.\[FN9\]

FN7. In fact, under our cases, the landlord was not liable even after the right to obtain control of the premises reverted to him. Liability attached only after the landlord actually obtained control. Cassidy v. Welsh, 319 Mass. 615, 67 N.E.2d 226 (1946).

FN8. Because the landlord here had knowledge of the defect, we need not consider the extent to which landlords may be chargeable with knowledge.


Our statutes do not support limiting a landlord's negligence liability to areas under his control. General Laws c. 186, s 19.\[FN10\] requires most landlords to exercise reasonable care to correct an unsafe condition of which the tenant or a code enforcement agency has given him notice. If a landlord fails to correct the condition within a reasonable time, the tenant or any person rightfully on the premises has a tort action against the landlord for injuries sustained. General Laws c. 186, s 15.\[FN11\] renders invalid any lease clause which has the effect of indemnifying the landlord or exculpating him from “any . . . negligence . . . on or about the leased . . . premises.” In St.1974, c. 575, s 1, the Legislature deleted the phrase “and not within the exclusive control of the lessee or tenant.” Thus, the landlord is liable in negligence for defects\[**1051\] of which he has notice, even though the defect occurs on the rented premises. Furthermore, the landlord cannot exculpate himself from liability for negligent maintenance of the rented premises. Both of these statutes are consistent with the result we reach today.\[FN12\]
FN10. The statute, inserted by St.1972, c. 665, provides: “A landlord or lessor of any real estate except an owner-occupied two- or three-family dwelling shall, within a reasonable time following receipt of a written notice from a tenant forwarded by registered or certified mail of an unsafe condition, not caused by the tenant, his invitee, or any one occupying through or under the tenant, exercise reasonable care to correct the unsafe condition described in said notice except that such notice need not be given for unsafe conditions in that portion of the premises not under control of the tenant. The tenant or any person rightfully on said premises injured as a result of the failure to correct said unsafe condition within a reasonable time shall have a right of action in tort against the landlord or lessor for damages. Any waiver of this provision in any lease or other rental agreement shall be void and unenforceable. The notice requirement of this section shall be satisfied by a notice from a board of health or other code enforcement agency to a landlord or lessor of residential premises not exempted by the provisions of this section of a violation of the state sanitary code or other applicable by-laws, ordinances, rules or regulations.”

FN11. The statute, as amended by St.1974, c. 575, s 1, provides: “Any provision of a lease or other rental agreement relating to real property whereby a lessee or tenant enters into a covenant, agreement or contract, by the use of any words whatsoever, the effect of which is to indemnify the lessor or landlord or hold the lessor or landlord harmless, or preclude or exonerate the lessor or landlord from any or all liability to the lessee or tenant, or to any other person, for any injury, loss, damage or liability arising from any omission, fault, negligence or other misconduct of the lessor or landlord on or about the leased or rented premises or on or about any elevators, stairways, hallways or other appurtenance used in connection therewith, shall be deemed to be against public policy and void.”

FN12. The statutes also raise a number of questions which we need not decide. Although we do not construe them today, the statutes are not limited by their terms to residential properties. We do not decide whether our rule today should extend to nonresidential properties. Cf. Berman & Sons v. Jefferson, supra; Crowell v. McCaffrey, supra; Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 199, 293 N.E.2d 831, 843 (1973) (warranty of habitability limited to “rental of any premises for dwelling purposes”). Section 19 excludes from its coverage unsafe conditions in owner-occupied two- or three-family dwellings. We need not consider whether negligence liability should be similarly limited. Cf. Crowell v. McCaffrey, supra at 1256 (Mass.Adv.Sh. (1979) at 580), 386 N.E.2d 1256 (refusing to make exception in warranty context). Finally, s 19 applies to both tenants and other persons rightfully on the premises. In its narrowest application, our rule today governs only plaintiffs who are the tenant’s guests. Compare King v. G & M Realty Corp., 373 Mass. 658 (1977) (Mass.Adv.Sh. (1977) 2372), 370 N.E.2d 413, and Lindsey v. Massios, 372 Mass. 79, 360 N.E.2d 631 (1977) (persons lawfully on premises may sue for landlord’s negligent maintenance of areas he controls), with Crowell v. McCaffrey, supra (tenant may recover in warranty).

*172 We reverse the judgment and remand the case to the Superior Court with orders that the jury’s verdict be reinstated.

So ordered.
Supreme Court of the United States
UNION PAC. RY. CO.
v.
BOTSFORD.
May 25, 1891.

**1001 In error to the circuit court of the United States for the district of Indiana.

*250 The original action was by Clara L. Botsford against the Union Pacific Railway Company for negligence in the construction and care of an upper berth in a sleeping-car in which she was a passenger, by reason of which the berth fell upon her head, bruising and wounding her, rupturing the membranes of the brain and spinal cord, and causing a concussion of the same, resulting in great suffering and pain to her in body and mind, and in permanent and increasing injuries. Answer, a general denial. Three days before the trial (as appeared by the defendant's bill of exceptions) 'the defendant moved the court for an order against the plaintiff, requiring her to submit to a surgical examination in the presence of her own surgeon and attorneys, if she desired their presence; it being proposed by the defendant that such examination should be made in manner not to expose the person of the plaintiff in any indelicate manner, the defendant at the time informing the court that such examination was necessary to enable a correct diagnosis of the case, and that without such examination the defendant would be with out any witnesses as to her condition. The court overruled said motion, and refused to make said order, upon the sole ground that this court had no legal right or power to make and enforce such order.' To this ruling and action of the court the defendant duly excepted, and after a trial, at which the plaintiff and other witnesses testified in her behalf, and which resulted in a verdict and judgment for her in the sum of $10,000, sued out this writ of error.

BREWER and BROWN, JJ., dissenting.

Mr. Justice GRAY, after stating the facts as above, delivered the opinion of the court.

The single question presented by this record is whether in a civil action for an injury to the person, the court, on application of the defendant, and in advance of the trial may order the plaintiff without his or her consent, to submit to a surgical examination as to the extent of the injury sued for. We concur with the circuit court in holding that it had no legal right or power to make and enforce such an order. No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley: 'The right to one's person may be said to be a right of complete immunity; to be let alone.' Cooley, Torts, 29. For instance, not only wearing apparel, but a watch or a jewel, worn on the person, is, for the time being, privileged from being taken under distress for rent, or attachment on mesne process or execution for debt, or writ of replevin. 3 Bl. Comm. 8; Sunbolf v. Alford, 3 Mees. & W. 248, 253, 254; *252 Mack v. Parks, 8 Gray, 517; Maxham v. Day, 16 Gray, 213. The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass; and no order of process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are a ware, introduced into this country. In former times, the English courts of common law might, if they saw fit, try by inspection or examination, without the aid of a jury, the question of the infancy or of the identity of a party; or, on an appeal of mayhem, the issue of mayhem or no mayhem; and, in an action of trespass for mayhem, or for an atrocious battery, might after a verdict for the plaintiff, and on his motion, and upon their own inspection of the wound, super visum vulneris, increase the damages at their discretion. In each of those exceptional cases, as Blackstone tells us, 'it is not thought necessary to summon a jury to decide it,' because 'the fact, from its nature, must be evident to the court, either from ocular demonstration or other irrefrangible proof;' and therefore, 'the law departs from its usual resort, the verdict of twelve men and relies on the judgment of the court alone.' The inspection was not had for the purpose of submitting
the result to the jury, but the question was thought too easy of decision to need submission to a jury at all. 3 Bl. Comm. 331-333. The authority of courts of divorce, in determining a question of impotence as affecting the validity of a marriage, to order an inspection by surgeons of the person of either party, rests upon the interest which the public, as well as the parties, have in the question of upholding or dissolving the marriage state, and upon the necessity of such evidence to enable the court to *253 exercise its jurisdiction, and is derived from the civil and canon law, as administered in spiritual and ecclesiastical courts, not proceeding in any respect according to the course of the common law. Briggs v. Morgan 2 Hagg. Coust. 324, 3 Phillim. Ecc. 325; Devanbagh v. Devanbagh, 5 Paige, 554; Le Barron v. Le Barron 35 Vt. 365. The writ de ventre inspiciendo, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother.

The only purpose, we believe, for which the like writ was allowed by the common law, in a matter of civil right, was to protect the rightful succession to the property of a deceased person against fraudulent claims of bastards, when a widow was suspected to feign herself with child in order to produce a supposititious heir to the estate, in which case the heir or devisee might have this writ to examine whether she was with child or not, and, if she was, to keep her under proper restraint till delivered. 1 Bl. Comm. 456; Bac. Abr. ‘Bastard, A.’ In cases of that class, the writ has been issued in England in quite recent times. In re Blakemore, 14 Law J. Ch. 336. But the learning and research of the counsel for the plaintiff in error have failed to produce an instance of its ever having been considered, in any part of the United States, as suited to the habits and condition of the people. So far as the books within our reach show, no order to inspect the body of a party in a personal action appears to have been made, or even moved for, in any of the English courts of common law, at any period of their history. The most analogous cases in England that have come under our notice are two in the common bench, in each of which an order for the inspection of a building was asked for in an action for work and labor done thereon, and was refused for want of power in the court to make or enforce it. In one of them, decided in 1838, counsel moved for an order that the plaintiff and his witnesses have a view of the building, and an inspection of the work done thereon; and stated that *254 the object of the motion was to prevent great expense, to obviate the necessity of calling a host of surveyors, and to avoid being considered trespassers. Thereupon one of the judges said, ‘Then you are asking the court to make an order for you to commit a trespass;’ and Chief Justice TINDAL said: ‘Suppose the defendants keep the door shut; you will come to us to grant an attachment. Could we grant it in such a case? You had better see if you can find any authority to support you, and mention it to the court again.’ On a subsequent day, the counsel stated that he had not been able to find any case in point, and therefore took nothing by his motion. Newham v. Tate, 1 Arn. 244, 6 Scott, 574. In the other case, in 1840, the court discharged a similar order, saying: ‘The order, if valid, might, upon disobedience to it, be enforced by attachment. Then it is evidently one which a judge has no power to make. If the party should refuse so reasonable a thing as an inspection, it may be a matter of argument before the jury, but the court has no power to enforce it.’ Turquand v. Strand Union, 8 Dowl. 201, 4 Jur. 74. In the English common law procedure act of 1854, enlarging the powers which the courts had before, and authorizing them, on the application of either party, to make an order ‘for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute,’ the omission to mention inspection of the person is significant evidence that no such inspection, without consent, was allowed by the law of England. Tayl. Ev. (6th Ed.) §§ 502-504. Even orders for the inspection of documents could not be made by a court of common law, until expressly authorized by statute, except when the document was counted or pleaded on, or might be considered as held in trust for the moving party. Tayl. Ev. §§ 1588-1595; 1 Greenl. Ev. § 559.

In the case at bar, it was argued that the plaintiff in an action for personal injury may be permitted by the court, as *255 in Mulhado v. Railroad, 30 N. Y. 370, to exhibit his wounds to the jury in order to show their nature and extent, and to enable a surgeon to testify on that subject, and therefore may be required by the court to do the same thing, for the same purpose, upon the motion of the defendant. But the answer to this is that any one may expose his body, if he chooses, with a due regard to decency, and with the permission of the court; but that he cannot be compelled to do so, in a civil action, without his consent. If he unreasonably refuses to show his injuries, when asked to do so, that fact may be considered by the jury as bearing on his good faith, as in any other case of a party declining to produce the best evidence in his power. Clifton v. U. S., 4 How. 242; Bryant v. Stilwell, 24 Pa. St. 314;
Turquand v. Strand Union, above cited. In this country, the earliest instance of an order for the inspection of the body of the plaintiff in an action for a personal injury appears to have been in 1868, by a judge of the superior court of the city of New York in Walsh v. Sayre, 52 How. Pr. 334; since overruled by decisions in general term in the same state. Roberts v. Railroad, 29 Hun, 154; Neuman v. Railroad, 50 N. Y. Super. Ct. 412; McSweny v. Railroad Co., 7 N. Y. Supp. 456. And the power to make such an order was peremptorily denied in 1873 by the supreme court of Missouri, and in 1882 by the supreme court of Illinois. Loyd v. Railroad Co., 53 Mo. 509; Parker v. Enslow, 102 Ill. 272. Within the last 15 years, indeed, as appears by the cases cited in the brief of the plaintiff in error, a practice to grant such orders has prevailed in the courts of several of the western and southern states, following the lead of the supreme court of Iowa in a case decided in 1877. The consideration due to the decisions of those courts has induced us fully to examine, as we have done above, the precedents and analogies on which they rely. Upon mature advisement, we retain our original opinion that such an order has no warrant of law. In the state of Indiana, the question appears not to be settled. The opinions of its highest court are conflicting and indecisive. Kern v. Bridwell, 119 Ind. 226, 229, 21 N. E. Rep. 664; Hess v. Lowrey, 122 Ind. 225, 233, 23 N. E. Rep. 156; Railroad v. Brunker, (Ind.) 26 N. E. Rep. 178. And the only statute which could be supposed to bear upon the question simply authorizes the court to order a view of real or personal property which is the subject of litigation, or of the place in which any material fact occurred. Rev. St. Ind. 1881, c. 2, § 538.

But this is not a question which is governed by the law or practice of the state in which the trial is had. It depends upon the power of the national courts, under the constitution and laws of the United States. The constitution, in the seventh amendment, declares that in all suits at common law, where the value in controversy shall exceed $20, trial by jury shall be preserved. Congress has enacted that ‘the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided,’ and has then made special provision, for taking depositions. Rev. St. §§ 861, 863 et seq. The only power of discovery or inspection conferred by congress is to ‘require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery,’ and to nonsuit or default a party failing to comply with such an order. Rev. St. § 724. And the provisions of section 914, by which the practice, pleadings, and forms and modes of proceeding in the courts of each state are to be followed in *257 actions at law in the courts of the United States held within the same state, neither restricts nor enlarges the power of these courts to order the examination of parties out of court. Nudd v. Burrows, 91 U. S. 426, 442; Railroad Co. v. Horst, 93 U. S. 291, 300; Ex parte Fisk, 113 U. S. 717, 7 Sup. Ct. Rep. 724. But this court, speaking by Mr. Justice MILLER, held that this was a matter of evidence, and governed by that section, saying: ‘Its purpose is clear to provide a mode of proof in trials at law, to the exclusion of all other modes of proof.’ ‘It is not according to common usage to call a party in advance of the trial, was applicable after an action begun in a court of the state had been removed into the circuit court of the United States. It was argued that the object of section 861 of the Revised Statutes of the United States was to provide a mode of proof on the trial, and not to affect this proceeding in the nature of discovery, conducted in accordance with the practice prevailing in New York. 113 U. S. 717, 7 Sup. Ct. Rep. 724. But this court, speaking by Mr. Justice MILLER, held that this was a matter of evidence, and governed by that section, saying: ‘Its purpose is clear to provide a mode of proof in trials at law, to the exclusion of all other modes of proof.’ ‘It is not according to common usage to call a party in advance of the trial, was applicable after an action begun in a court of the state had been removed into the circuit court of the United States. It was argued that the object of section 861 of the Revised Statutes of the United States was to provide a mode of proof on the trial, and not to affect this proceeding in the nature of discovery, conducted in accordance with the practice prevailing in New York. 113 U. S. 717, 7 Sup. Ct. Rep. 724. But this court, speaking by Mr. Justice MILLER, held that this was a matter of evidence, and governed by that section, saying: ‘Its purpose is clear to provide a mode of proof in trials at law, to the exclusion of all other modes of proof.’ ‘It is not according to common usage to call a party in advance of the trial, was applicable after an action begun in a court of the state had been removed into the circuit court of the United States. It was argued that the object of section 861 of the Revised Statutes of the United States was to provide a mode of proof on the trial, and not to affect this proceeding in the nature of discovery, conducted in accordance with the practice prevailing in New York.
without her consent and in advance of the trial, was not according to the common law, to common usage, or to the statutes of the United States. The circuit court, to adopt the words of Mr. Justice MILLER, ‘has no power to subject a party to such an examination as this.’

Judgment affirmed.

*258 BREWER, J., (dissenting.)

Mr. Justice BROWN and myself dissent from the foregoing opinion. The silence of common-law authorities upon the question in cases of this kind proves little or nothing. The number of actions to recover damages, in early days, was, compared with later times, limited; and very few of those difficult questions, as to the nature and extent of the injuries, which now form an important part of such litigations, were then presented to the courts. If an examination was asked, doubtless it was conceded without objection, as one of those matters the right to which was beyond dispute. Certainly the power of the courts and of the common-law courts to compel a personal examination was, in many cases, often exercised, and unchallenged. Indeed, wherever the interests of justice seemed to require such an examination, it was ordered. The instances of this are familiar; and in those instances the proceedings were, as a rule, adverse to the party whose examination was ordered. It would be strange that, if the power to order such an examination was conceded in proceedings adverse to the party ordered to submit thereto, it should be denied where the suit is by the party whose examination is sought. In this country the decisions of the highest courts of the various states are conflicting. This is the first time it has been presented to this court, and it is therefore an open question. There is here no inquiry as to the extent to which such an examination may be required, or the conditions under which it may be held, or the proper provisions against oppression or redress, nor any inquiry as to what the court may do for the purpose of enforcing its order. As the question is presented, it is only whether the court can make such an order.

The end of litigation is justice. Knowledge of the truth is essential thereto. It is conceded, and it is a matter of frequent occurrence, that in the trial of suits of this nature the plaintiff may make in the courtroom, in the presence of the jury, any not indecent exposure of his person to show the extent of his injuries; and it is conceded, and also a matter of frequent occurrence, that in private he may call his personal friends and his own physicians into a room, and there permit them a full examination of his person, in order that they may testify as to what they see and find. In other words, he may thus disclose the actual facts to the jury if his interest require; but by this decision, if his interests are against such a disclosure, it cannot be compelled. It seems strange that a plaintiff may, in the presence of a jury, be permitted to roll up his sleeve and disclose on his arm a wound of which he testifies; but, when he testifies as to the existence of such a wound, the court, though persuaded that he is perjuring himself, cannot require him to roll up his sleeve, and thus make manifest the truth, nor require him, in the like interest of truth, to step into an adjoining room, and lay bare his arm to the inspection of surgeons. It is said that there is a sanctity of the person which may not be outraged. We believe that truth and justice are more sacred than any personal consideration; and if in other cases, in the interests of justice, or from considerations of mercy, the courts may, as they often do, require such personal examination, why should they not exercise the same power in cases like this, to prevent wrong and injustice?

It is not necessary, nor is it claimed, that the court has power to fine and imprison for disobedience of such an order. Disobedience to it is not a matter of contempt. It is an order like those requiring security for costs. The court never fines or imprisons for disobedience thereof. It simply dismisses the case or stays the trial until the security is given. So it seems to us that justice requires, and that the court has the power to order, that a party who voluntarily comes into court alleging personal injuries, and demanding damages therefor, should permit disinterested witnesses to see the nature and extent of those injuries, in order that the jury may be informed thereof by other than the plaintiff and his friends; and that compliance with such an order may be enforced by staying the trial or dismissing the case. For these reasons we dissent.

U.S. 1891
Union Pac. R. Co. v. Botsford

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141 U.S. 250, 11 S.Ct. 1000, 35 L.Ed. 734

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This case comes here upon a certificate from the circuit court of appeals for the third circuit, under the act of 1891, chapter 517, section 6 (26 Stat. at L. 826). The action was brought in the circuit court of the United States for the district of New Jersey, by the plaintiff against the railway company, to recover damages for an alleged injury to his person caused by the neglect of the defendant while the plaintiff was a passenger on one of defendant's cars. At the time that he brought suit plaintiff was a citizen of the state of Pennsylvania, the railway company being a corporation of the state of New Jersey. The alleged neglect and injury occurred on the 13th day of July, 1896, in the city of Camden, in the state of New Jersey, and at that time the plaintiff was a citizen of that state.

On the 12th of May, 1896, the legislature of New Jersey passed and the governor approved an act which reads as follows:

'1. On or before the trial of any action brought to recover damages for injury to the person, the court before whom such action is pending may, from time to time, on application of any party therein, order and direct an examination of the person injured, as to the injury complained of, by a competent physician or physicians, surgeon or surgeons, in order to qualify the person or persons making such examination, to testify in the said cause as to the nature, extent, and probable duration of the injury complained of; and the court may in such order direct and determine the time and place of such examination; provided, this act shall not be construed to prevent any other person or physician from being called and examined as a witness as heretofore.'

When the case was called for trial on March 31, 1898, and after a jury had been impaneled, but before the case was opened to the jury, the defendant's counsel asked in open court that the plaintiff should submit himself to examination by a competent surgeon. The plaintiff would not consent, and the court held that it had no power to order the plaintiff to subject himself to examination by physicians against his will, and it therefore refused to make the order asked for by counsel for the defendant, who was thereupon allowed an exception to the ruling. The trial proceeded and resulted in a verdict and judgment for the plaintiff. The defendant brought the case by writ of error before the circuit court of appeals, and that court, desiring the instruction of this court upon the matter, made the foregoing statement and ordered the following questions to be certified here:

'1. Is the above-recited statute of the state of New Jersey, the act of May 12, 1896, applicable to an action to recover damages for injury to the person brought and tried in the circuit court of the United States for the district of New Jersey?

'2. Is said statute applicable to an action to recover damages for injury to the person brought and tried in the circuit court of the United States for the district of New Jersey, where the injury occurred in the state of New Jersey, and both the plaintiff and the defendant at the time of the injury were citizens of that state?
3. Had the circuit court the legal right or power to order a surgical examination of the plaintiff?

Mr. Justice Peckham, after stating the facts, delivered the opinion of the court:

An answer to the third question, ‘Had the circuit court the legal right or power to order a surgical examination of the plaintiff?’—will be all that is necessary for the action of the court below.

It is settled in this court that no power to make such an order exists at common law; in other words, the court has no inherent power to make it. *Union P. R. Co. v. Botsford*, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000. In that case there was no statute of the state in which the United States court was held which authorized the order. There is no intimation in the opinion that a statute of a state directly authorizing such examination would be a violation of the Federal Constitution, or invalid for any other reason.

In this case we have such a statute, and by section 721 of the Revised Statutes of the United States it is provided that ‘the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in courts of the United States, in cases in which they apply.’

Does not this statute of the state apply in trials at common law in the United States courts sitting in the state where the statute exists?

The case before us is a common-law action; it is one to recover damages for a tort, which is an action of that nature. It was being tried in the state which enacted the statute, and the court was asked to apply such statute to the trial of an action at common law.

**Neither the Constitution, treaties, nor statutes of the United States otherwise require or provide. The statute concerns the evidence which may be given on a trial in New Jersey, and it does not conflict with any statute of the United States upon that subject. It is not a question of a general nature, like the law merchant, but simply one concerning evidence based upon a local statute applicable to actions brought within the state to recover damages for injury to the person. The statute comes within the principle of the decisions of this court holding a law of the state of such a nature binding upon Federal courts sitting within the state. *Swift v. Tyson*, 16 Pet. 1, 18, 10 L. ed. 865, 871; *Nichols v. Levy*, 5 Wall. 433, 18 L. ed. 596; *Watson v. Tarpley*, 18 How. 517, 520, 15 L. ed. 509, 511; *Ex parte Fisk*, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724.**

It was held in *United States v. Reid*, 12 How. 361, 13 L. ed. 1023, that the provision of the law of Congress did not extend to criminal offenses against the United States, for that would be to give to the states the power of prescribing the rules of evidence in trials for offenses against the United States. It was said, however, that the section was intended to confer upon the courts of the United States the jurisdiction necessary to enable them to administer the laws of the states.

We are not aware of any reason why this law of the state does not apply to courts of the United States under the section of the Revised Statutes above quoted. There is no claim made that the statute violates the Federal Constitution, and we are of opinion that such a claim would have no foundation, if made.

Counsel for plaintiff refers in his argument to the opinion in the *Botsford Case*, where it is stated (at page 256, 35 L. ed. 739, 11 Sup. Ct. Rep. 1002), that the question is one which is not governed by the law or practice of the state in which the trial is had, but that it depends upon the power of the national courts under the Constitution and laws of the United States, and he argues therefrom that the state statute is immaterial, and can furnish no foundation for the exercise of the power by the Federal court. We do not dispute that if there were no law of the United States which, in connection with the state law, could be referred to as in effect providing for the exercise of the power, the court
could not grant the order under the decision in the case of Botsford. But we say there is a law of the United States which does apply the laws of the state where the United States court sits; and where the state has a law which provides for the making of an order for the examination of the person of a plaintiff in a case like this, the law of the United States applies that law to cases of such a nature on trial in Federal courts sitting in that state. In the Botsford Case there was no state law, and consequently no foundation for the application of the law of the United States.

*176 In Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724, the statute of the state of New York, in relation to the examination of parties before trial, was held to be in conflict with the act of Congress providing for the examination of witnesses in courts of the United States, and was therefore inapplicable in those courts; but the statute in this case is not in conflict with any statute of the United States. It does not conflict with § 861 of the Revised Statutes, providing for the oral examination of witnesses in open court. On the contrary, whatever information may be obtained by the surgeon who examines the plaintiff under the statute in question can be availed of only by the defendant's producing the witness and examining him in open court, or by deposition, if he come within the exception mentioned in § 863 and the following sections.

The validity of this statute has been affirmed by the supreme court of New Jersey in McGovern v. Hope, 42 Atl. 830, to appear in 63 N. J. L. The opinion of the court was delivered by Mr. Justice Depue, and the court held that the act was within the power of the legislature, and was not an infringement upon the constitutional rights of the party.

The validity of a statute of this nature has also been upheld in Lyon v. Manhattan R. Co. 142 N. Y. 298, 25 L. R. A. 402, 37 N. E. 113, although the particular form of that statute would probably be regarded as conflicting with the law of Congress in relation to the examination of a party as a witness before trial, and hence might not be enforced in courts of the United States sitting within the state of New York, but the validity of a statute providing for the examination of the person of a plaintiff in an action to recover for injuries is upheld and declared not to be in violation of the constitutional rights of the party.

The citizenship of the plaintiff at the time of the injury is not material so long as the court below has jurisdiction of the case and the parties at the time of the commencement of the action.

In those states in which it has been held that the court has inherent power to order the examination of a plaintiff in this class of action without the aid of a statute, all has been said that could be urged in favor of such power on grounds connected with public policy and the due and proper administration of *177 justice by the courts. This court has taken another view of the subject, in the decision of Botsford's Case, above cited. But by reason of the statute of New Jersey, in which state this action was brought, there being no law of Congress in conflict therewith, we hold that the courts of the United States therein sitting have the power, under the statute and by virtue of § 721 of the Revised Statutes of the United States, to order the examination of the person of the plaintiff, and we therefore answer the third question of the court below in the affirmative, and it will be so certified.

Mr. Justice Harlan dissented.
U.S. 1900
Camden & S. Ry. Co. v. Stetson
177 U.S. 172, 20 S.Ct. 617, 44 L.Ed. 721

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Mr. Justice FRANKFURTER, Mr. Justice BLACK, Mr. Justice DOUGLAS, and Mr. Justice MURPHY, dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Action for injuries by Hertha J. Sibbach against Wilson & Co., Inc. A judgment finding plaintiff guilty of contempt and ordering that she be committed to jail until she complied with order requiring her to submit to physical examination by a physician appointed by court, or until she was otherwise legally discharged, was affirmed by the Circuit Court of Appeals, 108 F.2d 415, and plaintiff brings certiorari.

Reversed and remanded.

Mr. Justice ROBERTS delivered the opinion of the Court.

This case calls for decision as to the validity of Rules 35 and 37 of the Rules of Civil Procedure for District Courts of the United States. FN1

FN1 28 U.S.C.A. following s 723c.

In an action brought by the petitioner in the District Court for Northern Illinois to recover damages for bodily injuries, inflicted in Indiana, respondent answered denying the allegations of the complaint, and moved for an order requiring the petitioner to submit to a physical examination by one or more physicians appointed by the court to determine the nature and extent of her injuries. The court ordered that the petitioner submit to such an examination by a physician so appointed.

Compliance having been refused, the respondent obtained an order to show cause why the petitioner should not be punished for contempt. In response the petitioner challenged the authority of the court to order her to submit to the examination, asserting that the order was void. It appeared that the courts of Indiana, the state where the cause of action arose, hold such an order proper, FN2 whereas the courts of Illinois, the state in which the trial court sat, hold that such an order cannot be made. FN3 Neither state has any statute governing the matter.


The court adjudged the petitioner guilty of contempt, and directed that she be committed until she should obey the order for examination or otherwise should be legally discharged from custody. The petitioner appealed.

The Circuit Court of Appeals decided that Rule 35, which authorizes an order for a physical examination in such a case, is valid, and affirmed the judgment. The writ of certiorari was granted because of the importance of the question involved.

FN4 7 Cir., 108 F.2d 415.

The Rules of Civil Procedure were promulgated under the authority of the Act of June 19, 1934, which is:


‘Be it enacted * * * That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

‘Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: Provided, however, That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment of the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session.’

The text of the relevant portions of Rules 35 and 37 is:

‘Rule 35. Physical And Mental Examination Of Persons

‘(a) Order for Examination. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.’

‘Rule 37. Refusal To Make Discovery: Consequences

‘(a) Refusal to Answer. * * *

‘(b) Failure to Comply With Order.

‘(1) Contempt. If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

9 ‘(2) Other Consequences. If any party refuses to obey an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and
among others the following:

‘(i) An order that * * * the physical or mental condition of the party * * * shall be taken to be established for the
purposes of the action in accordance with the claim of the party obtaining the order;

‘(ii) An order * * * prohibiting (the disobedient party) * * * from introducing evidence of physical or mental condi-
tion;

‘(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or
dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient
party;

‘(iii) An order striking out pleadings or orders or in addition thereto, an order directing the arrest of any party or
agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.’

The contention of the petitioner, in final analysis, is that Rules 35
and 37 are not within the mandate of Congress to
this court. This is the limit of permissible debate, since argument touching the broader questions of Congressional
power and of the obligation of federal courts to apply the substantive law of a state is foreclosed.

[1] Congress has undoubted power to regulate the practice and procedure of federal courts, FN6 and may exercise that
power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes *10 or
Constitution of the United States; FN7 but it has never essayed to declare the substantive state law, or to abolish or
nullify a right recognized by the substantive law of the state where the cause of action arose, save where a right or
duty is imposed in a field committed to Congress by the Constitution. On the contrary it has enacted that the state
law shall be the rule of decision in the federal courts. FN8

FN6 Wayman v. Southard, 10 Wheat. 1, 21, 6 L.Ed. 253; Bank of United States v. Halstead, 10 Wheat. 51,
53, 6 L.Ed. 264; Beers v. Haughton, 9 Pet. 329, 359, 361, 9 L.Ed. 145.

FN7 Wayman v. Southard, supra, 10 Wheat. 42, 6 L.Ed. 264; Bank of the United States v. Halstead, supra,
10 Wheat. 61, 6 L.Ed. 264; Beers v. Haughton, supra, 9 Pet. 359, 9 L.Ed. 145.


[2] Hence we conclude that the Act of June 19, 1934, was purposely restricted in its operation to matters of pleading
and **425 court practice and procedure. Its two provisos or caveats emphasize this restriction. The first is that
the court shall not ‘abridge, enlarge, nor modify the substantive rights’, in the guise of regulating procedure. The second
is that if the rules are to prescribe a single form of action for cases at law and suits in equity, the constitutional right
to jury trial inherent in the former must be preserved. There are other limitations upon the authority to prescribe
rules which might have been, but were not mentioned in the Act; for instance, the inability of a court, by rule, to
extend or restrict the jurisdiction conferred by a statute. FN9

FN9 Hudson v. Parker, 156 U.S. 277, 284, 15 S.Ct. 450, 453, 39 L.Ed. 424; Venner v. Great Northern R.
Gibson, 213 U.S. 10, 18, 29 S.Ct. 324, 326, 53 L.Ed. 675; Meek v. Centre County Banking Co., 268 U.S.
426, 434, 45 S.Ct. 560, 563, 69 L.Ed. 1028.

[3] Whatever may be said as to the effect of the Conformity Act FN10 while it remained in force, the rules, if they are
within the authority granted by Congress, repeal that statute, and the District Court was not bound to follow the Illi-
nois practice respecting an order for physical examination. On the other hand if the right to be exempt from such an order is one of substantive law, the Rules 11 of Decision Act\textsuperscript{11} required the District Court, though sitting in Illinois, to apply the law of Indiana, the state where the cause of action arose, and to order the examination. To avoid this dilemma the petitioner admits, and, we think, correctly, that Rules 35 and 37 are rules of procedure. She insists, nevertheless, that by the prohibition against abridging substantive rights, Congress has banned the rules here challenged. In order to reach this result she translates ‘substantive’ into ‘important’ or ‘substantial’ rights. And she urges that if a rule affects such a right, albeit the rule is one of procedure merely, its prescription is not within the statutory grant of power embodied in the Act of June 19, 1934. She contends that our decisions and recognized principles require us so to hold.


\textsuperscript{FN11} Supra, note 8.

The petitioner relies upon Union Pacific Railway Co. v. Botsford, 141 U.S. 250, 11 S.Ct. 1000, 35 L.Ed. 734, and Camden & Suburban R. Co. v. Stetson, 177 U.S. 172, 20 S.Ct. 617, 44 L.Ed. 721. But these cases in reality sustain the validity of the rules. In the Botsford case an action to recover for a personal injury suffered in the territory of Utah\textsuperscript{12} was instituted in the United States Circuit Court for Indiana, which refused to order a physical examination. This court affirmed, on the ground that no authority for such an order was shown. There was no suggestion that the question was one of substantive law. The court first examines the practice at common law and finds that it never recognized such an order. Then, acknowledging that a statute of the United States authorizing an order of the sort would be valid, the opinion finds there is none. Thus the matter is treated as one of procedure, for Congress has not, if it could, declared by statute the substantive law of a state. After \textsuperscript{12} stating that the decision law of Indiana on the subject appeared not to be settled, and that a cited statute of that State was not in point, the court added that the question was not one of the law of Indiana but of the law of the United States and that the federal statutes by their provisions as to proof in actions at law precluded the application of the Conformity Act. Again, therefore, the opinion recognized that the matter is one of procedure, for both the cited federal statutes, concerning the mode of proof in federal courts, and the Conformity Act, deal solely with procedure.

\textsuperscript{FN12} The opinion does not so state, but the record filed in this court so shows.

In fine, the decision was only that the making of such an order is regulable by statute, that the federal statutes forbade it, and hence the Conformity Act could not be thought to authorize the practice by reference to and incorporation of state law.

In the Stetson case the action was brought in the District Court for New Jersey by a citizen of Pennsylvania, who, while a citizen of New Jersey, had been injured in the latter state. A statute of New Jersey authorized the state courts to order a physical examination of a plaintiff in an action for damages pending therein. The District Court refused to order such an examination on the ground that it lacked power so to do. After a verdict and judgment for plaintiff the defendant appealed to the Circuit Court of Appeals, assigning the refusal as error. That court certified the question, 3 Cir., 104 F. 1004, \textsuperscript{13} and this court answered that the District Court had power to order the examination.

The court stated that in the Botsford case there was no statute authorizing such an order, but said that here there was a state statute which by the Rules of Decision Act was made a law of the United States and must be given effect in a trial in a federal court. While it is true the court referred to the Rules of Decision Act, R.S. s 721, 28 U.S.C.A. s 725, and not to the Conformity Act, R.S. s 914, 28 U.S.C.A. s 724, the \textsuperscript{13} entire discussion goes upon the assumption that the matter is procedural. In any event, the distinction between substantive and procedural law was immaterial, for the cause of action arose and the trial was had in New Jersey.

\textsuperscript{FN13} As above pointed out, if the matter is one of substantive law, R.S. s 721 requires the application of
the law of Indiana, which authorizes an order for examination.

In the instant case we have a rule which, if within the power delegated to this court, has the force of a federal statute, and neither the Botsford nor the Stetson case is authority for ignoring it.

The remaining case on which petitioner leans is Stack v. New York, etc., R. Co., 177 Mass. 155, 58 N.E. 686, 52 L.R.A. 328, 83 Am St Rep. 269, where the court agreed with the view expressed in the Botsford case that common-law practice did not warrant the entry of such an order and said it was for the legislature rather than the courts to alter the practice. But if Rule 35 is within the authority granted, the federal legislature sanctioned it as controlling all district courts.

[4] We are thrown back, then, to the arguments drawn from the language of the Act of June 19, 1934. Is the phrase ‘substantive rights’ confined to rights conferred by law to be protected and enforced in accordance with the adjective law of judicial procedure? It certainly embraces such rights. One of them is the right not to be injured in one’s person by another’s negligence, to redress infraction of which the present action was brought. The petitioner says the phrase connotes more; that by its use Congress intended that in regulating procedure this court should not deal with important and substantial rights theretofore recognized. Recognized where and by whom? The state courts are divided as to the power in the absence of statute to order a physical examination.\textsuperscript{FN14} In a number such an order is authorized\textsuperscript{*14} by statute or rule.\textsuperscript{FN15} The rules in question accord with the procedure now in force in Canada and England.\textsuperscript{FN16}

\textsuperscript{FN14} See Wigmore on Evidence, 3d Ed., s 2220, note 13.

\textsuperscript{FN15} See Notes to the Rules of Civil Procedure, printed by the Advisory Committee March 1938, p. 32.

\textsuperscript{FN16} Wigmore on Evidence, 3d Ed., s 2220, note 13; 31 & 32 Vict. c. 119, s 26.

The asserted right, moreover, is no more important than many others enjoyed by litigants in District Courts sitting in the several states, before the Federal Rules of Civil Procedure altered and abolished old rights or privileges and created new ones in connection with the conduct of litigation. The suggestion that the rule offends the important right to freedom from invasion of the person ignores the fact that as we hold, no invasion of freedom from personal restraint attaches to refusal so to comply with its provisions. If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded. The test must be whether a rule really regulates procedure,-the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. That the rules in question are such is admitted.

\textsuperscript{**427 [5]} Finally, it is urged that Rules 35 and 37 work a major change of policy and that this was not intended by Congress. Apart from the fact already stated, that the policy of the states in this respect has not been uniform, it is to be noted that the authorization of a comprehensive system of court rules was a departure in policy, and that the new policy envisaged in the enabling act of 1934 was that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth. The challenged rules comport with this policy. Moreover, in accordance with the Act, the rules were submitted\textsuperscript{*15} to the Congress so that that body might examine them and veto their going into effect if contrary to the policy of the legislature.

The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose.\textsuperscript{FN17} Evidently the Congress felt the rule was within the ambit of the statute as no effort was made to eliminate it from the proposed body of rules, although this specific rule was attacked and defended before the committees of the two Houses.\textsuperscript{FN18} The Preliminary Draft of the rules called attention to the
contrary practice indicated by the Botsford case, as did the Report of the Advisory Committee and the Notes prepared by the Committee*16 to accompany the final version of the rules. FN19 That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found. We conclude that the rules under attack are within the authority granted.

FN17 An analogy is found in the organic acts applicable to some of the territories, before their admission to statehood, which provided that laws passed by the territorial legislature should be valid unless Congress disapproved. s 5 of the Ordinance of 1787; see Pease v. Peck, 18 How. 595, 15 L.Ed. 518. Territory of Florida, s 5 of the act of March 30, 1822 (3 Stat. 655); territory of Louisiana, s 4 of the act of March 26, 1804 (2 Stat. 284), and s 3 of the act of March 3, 1805 (2 Stat. 331); territory of Minnesota, s 6 of the Act of March 3, 1849 (9 Stat. 405); territory of New Mexico, s 7 of the act of September 9, 1850 (9 Stat. 449); territory of Oregon, s 6 of the act of August 14, 1848 (9 Stat. 325, 326); territory of Utah, s 6 of the act of September 9, 1850 (9 Stat. 455); territory of Washington, s 6 of the act of March 2, 1853 (10 Stat. 175); territory of Wisconsin, s 6 of the act of April 20, 1836 (5 Stat. 12, 13). Similar provisions are now applicable to Alaska, Puerto Rico, the Virgin Islands and the Philippines. 48 U.S.C. ss 90, 826, 1405o, 1054, 48 U.S.C.A. ss 90, 826, 1405o, 1054.


FN18 Hearings before the Committee on the Judiciary, House of Representatives, 75th Cong., 3rd Sess., pp. 117, 141; Hearings before a Subcommittee of the Committee on the Judiciary, U.S. Senate, 75th Cong., 3rd Sess., pp. 36, 37, 39, 51.


[6] The District Court treated the refusal to comply with its order as a contempt and committed the petitioner therefor. Neither in the Circuit Court of Appeals nor here was this action assigned as error. We think, however, that in the light of the provisions of Rule 37 it was plain error of such a fundamental nature that we should notice it. FN20 Section (b)(2)(iv) of Rule 37 exempts from punishment as for contempt the refusal to obey an order that a party submit to a physical or mental examination. The District Court was in error in going counter to this express exemption. The remedies available **428 under the rule in such a case are those enumerated in Section (b)(2)(i)(ii) and (iii). For this error we reverse the judgment and remand the cause to the District Court for further proceedings in conformity to this opinion.


Reversed and remanded.

Mr. Justice FRANKFURTER (dissenting).

Union Pacific Railway Co. v. Botsford, 141 U.S. 250, 11 S.Ct. 1000, 35 L.Ed. 734, denied the power of the federal courts in a civil action to compel a plaintiff suing for injury to the person to submit to a physical examination. Nine years later, in Camden & Suburban Railway Co. v. Stetson, 177 U.S. 172, 20 S.Ct. 617, 44 L.Ed. 721, *17 the Botsford decision was treated as settled doctrine. The present issue is whether the authority which Congress gave to this Court to formulate rules of civil procedure for the district courts allows displacement of the law of the Botsford case. Stated more particularly, is Rule 35, authorizing such physical examination, valid under the Rules Enabling Act of
June 19, 1934, 48 Stat. 1064, 28 U.S.C. ss 723b, 723c, 28 U.S.C.A. ss 723b, 723c. It is urged that since this Rule pertains to procedure, it is valid because outside the limitations of that Act, whereby ‘said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant’.

Speaking with diffidence in support of a view which has not commended itself to the Court, it does not seem to me that the answer to our question is to be found by an analytic determination whether the power of examination here claimed is a matter of procedure or a matter of substance, even assuming that the two are mutually exclusive categories with easily ascertainable contents. The problem seems to me to be controlled by the policy underlying the Botsford decision. Its doctrine was not a survival of an outworn technicality. It rested on considerations akin to what is familiarly known in the English law as the liberties of the subject. To be sure, the immunity that was recognized in the Botsford case has no constitutional sanction. It is amenable to statutory change. But the ‘inviolability of a person’ was deemed to have such historic roots in Anglo-American law that it was not to be curtailed ‘unless by clear and unquestionable authority of law’. In this connection it is significant that a judge as responsive to procedural needs as was Mr. Justice Holmes, should, on behalf of the Supreme Judicial Court of Massachusetts, have supported the Botsford doctrine on the ground that ‘the common law was very slow to sanction any violation of or interference with the person of a free citizen’.  Stack v. New York, etc., R. Co., 177 Mass. 155, 157, 58 N.E. 686, 52 L.R.A. 328, 83 Am.St.Rep. 269.

So far as national law is concerned, a drastic change in public policy in a matter deeply touching the sensibilities of people or even their prejudices as to privacy, ought not to be inferred from a general authorization to formulate rules for the more uniform and effective dispatch of business on the civil side of the federal courts. I deem a requirement as to the invasion of the person to stand on a very different footing from questions pertaining to the discovery of documents, pre-trial procedure and other devices for the expeditious, economic and fair conduct of litigation. That disobedience of an order under Rule 35 cannot be visited with punishment as for contempt does not mitigate its intrusion into an historic immunity of the privacy of the person. Of course the Rule is compulsive in that the doors of the federal courts otherwise open may be shut to litigants who do not submit to such a physical examination.

In this view little significance attaches to the fact that the Rules, in accordance with the statute, remained on the table of Congress without evoking any objection to Rule 35 and thereby automatically came into force. Plainly the Rules are not acts of Congress and cannot be treated as such. Having due regard to the mechanics of legislation and the practical conditions surrounding the business of Congress when the Rules were submitted, to draw any inference of tacit approval from non-action by Congress is to appeal to unreality. And so I conclude that to make the drastic change that Rule 35 sought to introduce would require explicit legislation.

Ordinarily, disagreement with the majority on so-called procedural matters is best held in silence. Even in the present situation I should be loath to register dissent did the issue pertain merely to diversity litigation. But Rule 35 applies to all civil litigation in the federal courts, and thus concerns the enforcement of federal rights and not merely of state law in the federal courts.

Mr. Justice BLACK, Mr. Justice DOUGLAS, and Mr. Justice MURPHY agree with these views.

U.S. 1941.
Sibbach v. Wilson & Co.
312 U.S. 1, 312 U.S. 655, 61 S.Ct. 422, 85 L.Ed. 479

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White male applicant for position on law school faculty brought suit alleging that his race and sex accounted for decision not to hire him. The United States District Court, Western District of Wisconsin, John C. Shabaz, J., denied applicant's motion for preliminary injunctive relief and ordered applicant to submit to mental examination. Applicant appealed. The Court of Appeals, Easterbrook, Circuit Judge, held that: (1) applicant's request for preliminary injunction requiring law school to obtain court approval before hiring or promoting anyone, or spending money for two programs designed to support minority teachers and scholars was properly denied; (2) applicant's request that Court of Appeals order trial judge to postpone trial was outside Court of Appeals' jurisdiction; and (3) order that applicant submit to mental examination was not final, appealable order.

Affirmed in part, dismissed in part.

Before BAUER, Chief Judge, and EASTERBROOK and RIPPLE, Circuit Judges.

EASTERBROOK, Circuit Judge.

E.H. Reise, who was graduated in the top 5% of his class from the Law School of the University of Wisconsin at Madison, applied for a position on its faculty. The Law School did not hire him. He believes that his race and sex account for the decision, that in recent years the Law School has been unwilling to consider anyone, no matter how skilled, who is not black, female, or otherwise eligible for preferential treatment. According to Reise, only one of the last thirteen appointments to the faculty has been a white male, and that appointment was made in 1985. The Law School says that the persons it hired are better lawyers and scholars than Reise. The district court has set a trial for this coming April to get at the truth. Meanwhile Reise is engaged in jousting.

[1] Reise sought a preliminary injunction that would require the Law School to obtain the court's approval before hiring or promoting anyone, or spending money for two programs designed to support minority teachers and scholars. The judge denied this request. Reise's demand is so extravagant that we need know nothing about the merits to conclude that the district court did not abuse its discretion. "Remedies" of this kind would be problematic even if Reise were to prevail at trial. As demands for preliminary relief, they are absurd.

[2] Riding piggyback on Reise's appeal from the denial of a preliminary injunction is his request that we order the judge to postpone the trial. According to Reise, the backbreaking schedule needed to complete discovery in time for trial has overtaxed his lawyer and is destroying his own practice. Yet Reise contends that the published policies of the Law School, and the hiring decisions that have ensued, speak for themselves; why this case should lead to complex discovery eludes us, unless Reise is uncomfortable with his own theory and seeks to scour the defendants' files in the hope that something will turn up. At all events, if it turns out that the schedule was too abbreviated, relief will be available later. Apart from orders respecting preliminary injunctions and a few other categories, only "final decisions" are appealable, and the schedule for trial is hardly a final decision. Reise's request that we supervise the time line of the case is outside our jurisdiction.
Reise has filed a separate appeal asking us to reverse the judge's order that he submit to a mental examination under Fed.R.Civ.P. 35. Reise demands $4 million in compensatory damages on account of the mental anguish, emotional distress, and illness that he says he has endured as a result of the Law School's decision not to hire him. Not surprisingly, the Law School wants to obtain a medical opinion on Reise's mental state, so that it may present evidence on that subject at trial. Reise insists that because he is over his distress and is not seeking damages on account of his current mental condition, an examination would reveal nothing of value. Again not surprisingly, the Law School is not content with Reise's say-so and wants to check. The district judge, siding with the Law School, ordered Reise to undergo an examination.

Although Reise contends that the examination is unnecessary and that the judge should at all events have ensured that the physician would be independent of the University, we shall have nothing to say about the dispute. Details of discovery are a long way from final decision. Cf. Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 107 S.Ct. 1177, 94 L.Ed.2d 389 (1987); Kerr v. United States District Court, 426 U.S. 394, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976); Richards v. Firestone Tire & Rubber Co., 928 F.2d 241 (7th Cir.1991). Reise invokes Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964), and Winters v. Travia, 495 F.2d 839 (2d Cir.1974), both of which issued writs of mandamus to stop scheduled examinations. Reise filed a notice of appeal, not a petition for mandamus. Even if we were to treat the former as the latter, we would not exercise discretion in Reise's favor. Schlagenhauf found a usurpation of power when a district judge ordered the defendant to undergo multiple examinations despite the lack of any disputed medical issue; Winters dealt with an order directing a Christian Scientist with sincere religious objections to undergo a marginally relevant examination. Reise has claimed no religious scruples against examination. Schlagenhauf remarked that a plaintiff "who asserts mental or physical injury ... places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury." 379 U.S. at 119, 85 S.Ct. at 243. Schlagenhauf does not support relief, and cases such as Kerr and Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 101 S.Ct. 188, 66 L.Ed.2d 193 (1980), make mandamus less readily available than it was in 1964 or 1974.

All then depends on whether an order under Rule 35 is a final decision for purposes of 28 U.S.C. § 1291. One case holds that it is. Acosta v. Tenneco Oil Co., 913 F.2d 205 (5th Cir.1990), concludes that a direction to undergo examination is a "collateral order" appealable under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). The order to submit to the examination is "final," the subject is important to the parties, and once the examination has been conducted, any injury the process inflictions cannot be undone. So Acosta thought the conditions of Cohen satisfied. We respectfully disagree. The reasoning of Acosta would make every discovery order appealable. The travail and expense of discovery and trial cannot be reversed at the end of the case, yet this has never been thought sufficient to allow pre-trial appeals. See, e.g., Lauro Lines s.r.l. v. Chasser, 490 U.S. 495, 109 S.Ct. 1976, 104 L.Ed.2d 548 (1989); Van Cauwenberghe v. Biard, 486 U.S. 517, 108 S.Ct. 1945, 100 L.Ed.2d 517 (1988); Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988). Indeed, even orders to produce information over strong objections based on privilege are not appealable, despite the claim that once the cat is out of the bag the privilege is gone. We added in Powers v. Chicago Transit Authority, 846 F.2d 1139 (7th Cir.1988), that refusal to produce the assertedly-privileged information, followed by a fine in civil contempt, still is not an appealable final decision. (Contrast Sibbach v. Wilson & Co., 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479 (1941), which accepted an appeal when the party resisting discovery was jailed for contempt of court.) Powers declined to follow cases such as Southern Methodist University Ass'n v. Wynne & Jaffe, 599 F.2d 707 (5th Cir.1979), that like Acosta took jurisdiction by invoking Cohen. See Acosta, 913 F.2d at 208 (relying on Wynne & Jaffe ). We could not follow Acosta without explicitly or implicitly overruling Powers, Richards, and the many other cases holding discovery orders-even exceedingly burdensome discovery orders-to be non-appealable. See also, e.g., R.R. Donnelley & Sons Co. v. FTC, 931 F.2d 430 (7th Cir.1991).

It is too late in the day to waste words explaining why interlocutory orders, and discovery orders in particular, are not appealable despite their irreversible costs. Because almost all interlocutory appeals from discovery orders would end in affirmance (the district court possesses discretion, and review is deferential), the costs of delay via appeal, and the costs to the judicial system of entertaining these appeals, exceed in the aggregate the costs of the few erro-
neous discovery orders that might be corrected were appeals available. And the technical argument is straightforward. A “final” decision usually means the order ending the litigation. Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631, 633-34, 89 L.Ed. 911 (1945). Cohen treats as “final” some important decisions that are “effectively unreviewable on appeal from a final judgment.” Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 431, 105 S.Ct. 2757, 2758, 86 L.Ed.2d 340 (1985); see also, e.g., Lauro Lines, 490 U.S. at 498, 109 S.Ct. at 1978. An order under Rule 35 does not meet the standards of Cohen as recent cases interpret it. (Acosta does not cite a single case in the Cohen line, even though a parade of decisions by the Supreme Court during the last decade has shed substantial light on its meaning.)

Discovery orders, including orders to submit to an examination, are readily reviewable after final decision. A party aggrieved by the order assures eventual review by refusing to comply. The district judge then imposes sanctions under Fed.R.Civ.P. 37(b)(2). The probable sanction in a case such as this is an order striking Reise’s claim for damages on account of mental and physical distress. If Reise should prevail on the merits but not obtain damages because of the order striking his claim, he may obtain full review on appeal: if the district judge abused his discretion in requiring Reise to submit to an examination, we will remand for further proceedings. True, this procedure creates a potential for two trials, but then so does any other discovery order, or an order disqualifying or failing to disqualify counsel (see Richardson-Merrell), or any order granting or denying partial summary judgment. The expense and inconvenience of multiple trials is not the sort of “unreviewability” that permits a Cohen appeal. E.g., Lauro Lines; Van Cauwenberghe; Donnelley. And requiring the complaining party to take some risk—to back up his belief with action—winnows weak claims. Only persons*296 who have substantial objections to the examination and believe their legal positions strong will follow a path that could end in defeat. Among those who take the risk by balking at the order, some will lose on the merits, and their discovery disputes will become moot. Most of the remaining cases will end in affirmance, given deferential review. The number of retrials entailed by the procedure is small, the number of appeals avoided large.

As an order to submit to a physical or mental examination is not appealable under Cohen, appeal No. 91-3844 is dismissed for want of jurisdiction. Appeal No. 91-3414 is dismissed to the extent Reise seeks review of the scheduling orders. The order denying preliminary injunctive relief is affirmed.

C.A.7 (Wis.),1992.

END OF DOCUMENT
Rule 35. Physical and Mental Examinations

(a) Order for an Examination.

(1) In General. The court where the action is pending may order a party whose mental or physical condition--including blood group--is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

(2) Motion and Notice; Contents of the Order. The order:

(A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and

(B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

(b) Examiner's Report.

(1) Request by the Party or Person Examined. The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined.

(2) Contents. The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(3) Request by the Moving Party. After delivering the reports, the party who moved for the examination may request--and is entitled to receive--like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

(4) Waiver of Privilege. By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have--in that action or any other action involving the same controversy--concerning testimony about all examinations of the same condition.

(5) Failure to Deliver a Report. The court on motion may order--on just terms--that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial.

(6) Scope. This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

CREDIT(S)


Amendments received to 05-01-10
ON A CERTIFICATE from the United States Circuit Court of Appeals for the Third Circuit presenting questions as to the right of a Federal court to order a physical examination of plaintiff. \textit{Answered in the affirmative.}

Statement by Mr. Justice Peckham:

*172 This case comes here upon a certificate from the circuit court of appeals for the third circuit, under the act of 1891, chapter 517, section 6 (26 Stat. at L. 826). The action was brought in the circuit court of the United States for the district of New Jersey, by the plaintiff against the railway company, to recover damages for an alleged injury to his person caused by the neglect of the defendant while the plaintiff was a passenger on one of defendant's cars. At the time that he brought suit plaintiff was a citizen of the state of Pennsylvania, the railway company being a corporation of the state of New Jersey. The alleged neglect and injury occurred on the 13th day of July, 1896, in the city of Camden, in the state of New Jersey, and at that time the plaintiff was a citizen of that state.

On the 12th of May, 1896, the legislature of New Jersey passed and the governor approved an act which reads as follows:

‘1. On or before the trial of any action brought to recover damages for injury to the person, the court before whom such action is pending may, from time to time, on application of any party therein, order and direct an examination of the person injured, as to the injury complained of, by a competent physician or physicians, surgeon or surgeons, in order to qualify the person or persons making such examination, to testify in the said cause as to the nature, extent, and probable duration of the injury complained of; and the court may in such order direct and determine the time and place of such examination; provided, this act shall not be construed to prevent any other person or physician from being called and examined as a witness as heretofore.’

When the case was called for trial on March 31, 1898, and after a jury had been impaneled, but before the case was opened to the jury, the defendant's counsel asked in open court that the plaintiff should submit himself to examination by a competent surgeon. The plaintiff would not consent, and the court held that it had no power to order the plaintiff to subject himself to examination by physicians against his will, and it therefore refused to make the order asked for by counsel for the defendant, who was therefore allowed an exception to the ruling. The trial proceeded and resulted in a verdict and judgment for the plaintiff. The defendant brought the case by writ of error before the circuit court of appeals, and that court, desiring the instruction of this court upon the matter, made the foregoing statement and ordered the following questions to be certified here:

‘1. Is the above-recited statute of the state of New Jersey, the act of May 12, 1896, applicable to an action to recover damages for injury to the person brought and tried in the circuit court of the United States for the district of New Jersey?

‘2. Is said statute applicable to an action to recover damages for injury to the person brought and tried in the circuit court of the United States for the district of New Jersey, where the injury occurred in the state of New Jersey, and both the plaintiff and the defendant at the time of the injury were citizens of that state?

‘3. Had the circuit court the legal right or power to order a surgical examination of the plaintiff?’

*174 Mr. Justice Peckham, after stating the facts, delivered the opinion of the court:

An answer to the third question, ‘Had the circuit court the legal right or power to order a surgical examination of the plaintiff?’—will be all that is necessary for the action of the court below.

It is settled in this court that no power to make such an order exists at common law; in other words, the court has no inherent power to make it. \textit{Union P. R.}
Nichols v. Watson.

The statute of the state of New York is sitting within the state. Does not this statute of the state apply in trials at common law in the United States courts sitting in the state where the statute exists? The case before us is a common-law action; it is one to recover damages for a tort, which is an action of that nature. It was being tried in the state which enacted the statute, and the court was asked to apply such statute to the trial of an action at common law.

Neither the Constitution, treaties, nor statutes of the United States otherwise require or provide. The statute concerns the evidence which may be given on a trial in New Jersey, and it does not conflict with any statute of the United States upon that subject. It is not a question of a general nature, like the law merchant, but simply one concerning evidence based upon a local statute applicable to actions brought within the state to recover damages for injury to the person. The statute comes within the principle of the decisions of this court holding a law of the state of such a nature binding upon Federal courts sitting within the state. Swift v. Tyson, 16 Pet. 1, 18, 10 L. ed. 865, 871; Nichols v. Levy, 5 Wall. 433, 18 L. ed. 596; Watson v. Tarpley, 18 How. 517, 520, 15 L. ed. 509, 511; Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724.

It was held in United States v. Reid, 12 How. 361, 13 L. ed. 1023, that the provision of the law of Congress did not extend to criminal offenses against the United States, for that would be to give to the states the power of prescribing the rules of evidence in trials for offenses against the United States. It was said, however, that the section was intended to confer upon the courts of the United States the jurisdiction necessary to enable them to administer the laws of the states.

We are not aware of any reason why this law of the state does not apply to courts of the United States under the section of the Revised Statutes above quoted. There is no claim made that the statute violates the Federal Constitution, and we are of opinion that such a claim would have no foundation, if made.

Counsel for plaintiff refers in his argument to the opinion in the Botsford Case, where it is stated (at page 256, 35 L. ed. 739, 11 Sup. Ct. Rep. 1002), that the question is one which is not governed by the law or practice of the state in which the trial is had, but that it depends upon the power of the national courts under the Constitution and laws of the United States, and he argues therefrom that the state statute is immaterial, and can furnish no foundation for the exercise of the power by the Federal court. We do not dispute that if there were no law of the United States which, in connection with the state law, could be referred to as in effect providing for the exercise of the power, the court could not grant the order under the decision in the case of Botsford. But we say there is a law of the United States which does apply the laws of the state where the United States court sits; and where the state has a law which provides for the making of an order for the examination of the person of a plaintiff in a case like this, the law of the United States applies that law to cases of such a nature on trial in Federal courts sitting in that state. In the Botsford Case there was no state law, and consequently no foundation for the application of the law of the United States.

In Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724, the statute of the state of New York, in relation to the examination of parties before trial, was held to be in conflict with the act of Congress providing for the examination of witnesses in courts of the United States, and was therefore inapplicable in those courts; but the statute in this case is not in conflict with any statute of the United States. It does not conflict with § 861 of the Revised Statutes, providing for the oral examination of witnesses in open court. On the contrary, whatever information may be obtained by the surgeon who examines the plaintiff under the statute in question can be availed of only by the defendant's producing the witness and
examining him in open court, or by deposition, if he come within the exception mentioned in § 863 and the following sections.

The validity of this statute has been affirmed by the supreme court of New Jersey in McGovern v. Hope, 42 Atl. 830, to appear in 63 N. J. L. The opinion of the court was delivered by Mr. Justice Depue, and the court held that the act was within the power of the legislature, and was not an infringement upon the constitutional rights of the party.

The validity of a statute of this nature has also been upheld in Lyon v. Manhattan R. Co. 142 N. Y. 298, 25 L. R. A. 402, 37 N. E. 113, although the particular form of that statute would probably be regarded as conflicting with the law of Congress in relation to the examination of a party as a witness before trial, and hence might not be enforced in courts of the United States sitting within the state of New York, but the validity of a statute providing for the examination of the person of a plaintiff in an action to recover for injuries is upheld and declared not to be in violation of the constitutional rights of the party.

The citizenship of the plaintiff at the time of the injury is not material so long as the court below has jurisdiction of the case and the parties at the time of the commencement of the action.

In those states in which it has been held that the court has inherent power to order the examination of a plaintiff in this class of action without the aid of a statute, all has been said that could be urged in favor of such power on grounds connected with public policy and the due and proper administration of *177 justice by the courts. This court has taken another view of the subject, in the decision of Botsford's Case, above cited. But by reason of the statute of New Jersey, in which state this action was brought, there being no law of Congress in conflict therewith, we hold that the courts of the United States therein sitting have the power, under the statute and by virtue of § 721 of the Revised Statutes of the United States, to order the examination of the person of the plaintiff, and we therefore answer the third question of the court below in the affirmative, and it will be so certified.

Mr. Justice Harlan dissented.

U.S. 1900

Camden & S. Ry. Co. v. Stetson
177 U.S. 172, 20 S.Ct. 617, 44 L.Ed. 721