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Footnotes which contain material other than a mere listing of sources and authorities are indicated throughout this REVIEW *by an asterisk placed after the footnote number.*

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NOTES AND COMMENTS

Eminent Domain—Compensation for Removal Costs

The United States Government, under the authority of the Second War Powers Act,[1]* condemned part of a warehouse leased by the defendant, General Motors Corporations. The defendant used this warehouse as the master warehouse for the storage and distribution of automobile parts and had installed equipment costing approximately $101,000. At the time of taking there was located about $250,000 worth of parts and machinery in the space confiscated by the Government. Five weeks were spent in removing the property and clearing the space, and much of the property which could not be moved had to be demolished. The defendant contended that the cost of removal

[1]* Title II of the Second War Powers Act, 56 STAT. 177, 50 U. S. C. A. APPENDIX §632 (1942). "The Secretary of War . . . may cause proceedings to be instituted . . . to acquire by condemnation, any real property, temporary use thereof, or other interest therein . . . that shall be deemed necessary, for military . . . or other war purposes. . . ."

should be an element in determining fair compensation for the condemnation. The trial court refused to allow this, and submitted to the jury the test that fair value was to be measured by only the fair market rental value of the space condemned. However, the Circuit Court of Appeals, one judge dissenting, reversed the trial court and allowed the elements of expense of moving and damage to the equipment to be considered by the jury in determining the fair compensation due the defendant.[2]

The general rule for computing compensation is the fair market value of the property confiscated,[3] although what constitutes "just compensation" in condemnation proceedings has given rise to broad statements which would apparently cover *every* element of damages. The Supreme Court recognizing a broad view has said: "Such compensation means the full and equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken."[4] At the same time the Supreme Court has pointed out that so many and varied are the circumstances which are to be taken into account in determining the value of the property condemned that it is almost impossible to formulate a rule governing the applicability in every case because exceptional circumstances would necessitate modifying the most well-guarded rule.[5] "It is a well-settled rule that while it is the owner's loss, not the taker's gain, which is the measure of compensation for the property taken . . . not all losses suffered by the owner are compensible under the Fifth Amendment."[6]

[2] General Motors Corp. v. United States, 140 F.(2d) 873 (C. C. A. 7th, 1944).

[3] Olson v. United States, 292 U. S. 246, 54 Sup. Ct. 704, 78 L. ed. 1236 (1934); United States v. Meyer, 113 F. (2d) 387 (C. C. A. 7th, 1940); United States *ex rel* T. V. A. v. Phillips, 50 Fed. Supp. 454 (Dist. D. Ga. 1913); City & County of Denver v. Minshall, 109 Colo. 31, 121 P. (2d) 667 (1942); *In re* Plymouth-Beacon Meadow-Otselic Center County Road, 145 Misc. 353, 261 N. Y. Supp. 76 (1932); Nantahala Power & Light Co. v. Moss, 220 N. C. 200, 17 S. E. (2d) 10 (1941); Carolina-Tennessee Power Co. v. Hiwassee River Power Co., 186 N. C. 179, 119 S. E. 213 (1923).

[4] United States v. Miller, 317 U. S. 369, 373, 63 Sup. Ct. 276, 279, 87 L. ed. 336, 342 (1943), *rehearing denied*, 318 U. S. 798, 63 Sup. Ct. 557, 87 L. ed. 1162 (1943); *accord*, Kansas City So. Ry. Co. v. Commissioner of Int. Rev., 52 F. (2d) 372 (C. C. A. 8th 1931), *cert. denied*, 284 U. S. 676, 52 Sup. Ct. 131, 76 L. ed. 572 (1931); United States v. Rayno, 136 F. (2d) 376 (C. C. A. 1st 1943); Fitzsimmons & Galvin v. Rodgers, 243 Mich. 649, 220 N. W. 881 (1928).

[5] United States v. Chandler-Dunbar Water Power Co., 229 U. S. 51, 77, 33 Sup. Ct. 667, 677, 57 L. ed. 1063, 1081 (1913); *accord*, United States v. Miller, 317 U. S. 369, 63 Sup. Ct. 276, 87 L. ed. 336 (1943), *rehearing denied*, 318 U. S. 798, 63 Sup. Ct. 557, 87 L. ed. 1162 (1943).

[6] United States *ex rel* T. V. A. v. Powelson, 319 U. S. 266, 281, 63 Sup. Ct. 1047, 1056, 87 L. ed. 1390, 1401; *accord*, United States v. Miller, 317 U. S. 369, 63 Sup. Ct. 276, 87 L. ed. 336 (1943), *rehearing denied*, 318 U. S. 798, 63 Sup. Ct. 557, 87 L. ed. 1162 (1943); United States v. Chandler-Dunbar Water Power Co., 229 U. S. 51, 53 Sup. Ct. 667, 57 L. ed. 1063 (1913); Boston Chamber of Commerce v. Boston, 217 U. S. 189, 30 Sup. Ct. 459, 54 L. ed. 725 (1910); United States *ex rel* T. V. A. v. Phillips, 50 Fed. Supp. 454 (Dist. D. Ga. 1943); City of Los Angeles v. Harper, 139 Cal. App. 331, 33 P. (2d) 1029 (1934); Hudson

From the broad statements of the Supreme Court it would seem that the condemnee would be entitled to every element of damage due to the condemnation. But certainly this has not been the case. The pendulum swings from those cases which allow compensation for only the fair market value of the bare real property taken[7] to the instant case which allowed compensation for the cost of removal and demolition.[8*] This discussion will deal with compensation for removal of and injury to (1) "trade fixtures" and (2) other goods and equipment.

The general rule for compensation in regard to removal expense has been stated as follows: "Fixtures upon the property taken must be valued and paid for as part of the real estate. . . . But damages to personal property, or the expense of removing it from the premises cannot be considered in estimating the compensation to be paid."[9] By using the law of fixtures as an approach,[10*] some courts have allowed recovery for the removal expense of trade fixtures where the interest involved was a freehold. Two examples of this are *United States* v. *Becktold*[11] and *United States* v. *Wiener*.[12] The former case followed the general procedure of looking to the law of the state of the situs of the property to determine whether the equipment was to be regarded as fixtures that had become so affixed to the realty as to be treated a part of it. Thus fixtures were included in the calculation of what realty had been taken.[13*] The significant statement quoted by the Circuit Court of Appeals from an earlier case to the effect that it would be intolerable for the state, after condemning a factory or warehouse, to surrender to the owner a stock of second-hand machinery and thus discharge the full measure of its duty is, perhaps, indicative of an attempt to use the law of fixtures to justify allowing the cost of removal. In the *Wiener* Case printing and engraving machines were fastened to the floor of a building by bolts and supported by wooden

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River Regulating Dist. v. Cady, 131 Misc. 768, 228 N. Y. Supp. 159 (1928); Nantahala Power & Light Co. v. Moss, 220 N. C. 200, 17 S. E. (2d) 10 (1941).

[7] See note 3, *supra*.

[8*] The scope of this note will not include a discussion as to the consideration of good will, cost of labor lost, or damages in future profit as elements to be considered in compensation.

[9] 2 LEWIS, EMINENT DOMAIN (2d ed. 1900) 1082.

[10*] WALSH, A TREATISE ON THE LAW OF PROPERTY (2d ed. 1927) §10. "When a chattel is attached to land in a permanent way, with the intention on the part of the person who makes the annexation to incorporate the thing annexed with the land permanently, as a part thereof, it loses its character as a movable, becomes part of the land and becomes a fixture; it is no longer personal property, but has become real property."

[11] 129 F. (2d) 473 (C. C. A. 8th, 1942).

[12] 210 Fed. 832 (C. C. A. 2d, 1914).

[13*] When the fixtures are held to be part of the realty, and when the owner elects to keep them and remove them from the premises, the method of computing the damages is the value of the land as so enhanced less the value of the fixtures after deducting from the value the cost of removal.

and concrete beams. Although no statement was made as to the law of the situs of the property controlling, this case likewise held the machinery to be fixtures. To the contrary is *Futrovsky* v. *United States*[14] where large refrigerating equipment was treated as personalty. The Court of Appeals of the District of Columbia stated the rule, applicable to fixtures in buildings in Federal condemnations, that if the fixtures could be removed without substantial injury either to the real estate or the fixtures, they remained personalty and need not be taken as part of the realty. On the basis of this rule it was found that there would be no substantial injury *but* the court went on to say that the inconvenience and expense of removing a going business and its equipment from the property taken could not be paid for directly and could not operate indirectly to change chattels into real estate. Likewise in *Potomac Electric Power Co.* v. *United States*,[15] following the *Futrovsky* Case, it was held that generators and power converters attached to the building by concrete foundations were not affixed to the realty because no substantial injury would be caused by their removal.[16*] From the similarity of the fact situations in these four cases, and from the opinions, it would seem that the courts are disposed to hold that trade fixtures have become part of the realty when they desire to avoid the rule that removal of personal property is not to be considered as an element of damages in eminent domain proceedings; while those courts which endeavor to uphold the rule have been inclined to find that the equipment remained personal property.[17*] By contrast with these last cases an Oklahoma decision,[18] involving a freehold interest, allowed the cost of removal for a cotton gin. Without referring to the law of fixtures, it was held to be the settled law of that state that the cost of removal was a proper element of damages to be considered.

The law of fixtures approach has also been applied to leasehold interests. Missouri,[19] Michigan[20] and Iowa[21] have allowed the cost of removal of trade fixtures on the theory that the property, while it might be regarded as personal property between landlord and tenant, yet as between tenant and third parties it was properly to be regarded

[14] 66 F. (2d) 215 (App. D. C. 1933).
[15] 85 F. (2d) 243 (App. D. C. 1936).
[16*] However, concrete bases, conduits within the building, and the electrical structure consisting of a blower, motor, and pipes were considered to be part of the realty.
[17*] It is interesting to note that the *Potomac* Case, though decided 3 years later, was heard by four of the same judges as the *Futrovsky* Case.
[18] Oil Fields & S. F. Ry. Co. v. Treese Cotton Co., 78 Okla. 25, 187 Pac. 201 (1920).
[19] City of St. Louis v. St. Louis, I. M. & S. Ry. Co., *266* Mo. 694, 182 S. W. 750 (1916).
[20] *In re* Gratiot Ave., City of Detroit, 294 Mich. 569, 293 N. W. 755 (1940).
[21] Des Moines Wet Wash Laundry v. City of Des Moines, 197 Iowa 1082. 198 N. W. 486 (1924).

as realty. The Iowa decision stated that the machinery and fixtures which gave the property its distinctive character as a laundry should be taken into account.

A Maryland[22] case held that removal expense for fixtures could not be allowed because the tenant would have to move the equipment at some time and that shortening the tenancy would result in no greater expense to the lessee than he would ultimately have. Minnesota[23] and New Jersey[24] decisions have refused to allow the expense of removal of trade fixtures, but the New Jersey Equity Court admitted that it was following "hard law" and suggested that the remedy lay with the Legislature. On the other hand an Illinois case,[25] upholding several previous decisions, allowed the cost of removal of fixtures on the basis of the argument that the loss and expense of removal would be considerations in determining the price if there were a voluntary sale, and that there should be no difference when the sale was a compulsory one. Pennsylvania has allowed the cost of removing printing machinery,[26] and a Federal Court, sitting in that state, allowed the cost of removal of dental equipment.[27]

Consequently, it seems that the result of the instant case in allowing the cost of removal of the fixtures as an element in computing the compensation can be justified on two grounds. The first of these could be the method of applying the law of fixtures to leaseholds and allowing the cost of removal of trade fixtures on the theory that the property, while regarded as personal property between landlord and tenant, between tenant and third parties the same property might be treated as realty. The second ground of justification is to be found in those

[22] Mayor of Baltimore v. Gamse & Bros., 132 Md. 290, 104 Atl. 429 (1918).
[23] Kafka v. Davidson, 135 Minn. 389, 160 N. W. 1021 (1917).
[24] City of Newark v. Cook, 99 N. J. Eq. 527, 133 Atl. 875 (Ch. 1926), *aff'd*, 100 N. J. Eq. 581, 136 Atl. 915 (Ch. 1927).
[25] Metropolitan West Side El. R. Co. v. Siegal, 161 Ill. 638, 44 N. E. 276 (1896); Atchison, T. S. & S. F. Ry. Co. v. Schneider, 127 Ill. 144, 20 N. E. 41 (1889); Chicago, M. & St. P. Ry. Co. v. Hock, 118 Ill. 587, 9 N. E. 205 (1886). *But see*, Braun v. Metropolitan West Side El. R. Co., 166 Ill. 434, 438, 46 N. E. 974, 976 (1896), where the Court did not repudiate the above decisions but rather explained them. "All cases recognize the general rule as stated, and it is certainly true that, when the owner has been allowed the full, cash market price of his property, taking into consideration the use to which he has devoted it, he has received just compensation therefor; and, whenever a consideration of matters of personal convenience to the owner, loss of profits, damages to personal property, and cost of removal is permissible, it must be when a sufficient foundation therefor has been laid, so that their consideration simply aids the jury and court in determining the fair cash value of the property, in view of its present use. There is nothing in this case to bring it within any exception to the general rule. . . . Whether such removal will be absolutely necessary or not is not shown. . . ."
[26] James McMillin Printing Co. v. Pittsburgh, C. & W. Ry. Co., 216 Pa. 504, 65 Atl. 1091 (1907); *see also* Iron City Automobile Co. v. City of Pittsburgh, 253 Pa. 478, 98 Atl. 679 (1916).
[27] National Laboratory and Supply Co. v. United States, 275 Fed. 218 (E. D. Pa. 1921).

decisions which allowed the cost of removal because of the equities of the situation.

Allowing the cost of removal of the defendant's stock of goods is harder to justify than the removal expenses for fixtures. A stock of goods falls strictly within the category of personal property. In those decisions involving freehold interests even the *Becktold* and *Wiener* Cases would apparently deny the cost of removal of a stock of goods in accord with the *Futrovsky* and *Potomac* Cases. In the leading case of *Joslin Manufacturing Co.* v. *City of Providence*,[28] the Supreme Court upheld a statute as non-discriminatory which gave compensation for all removal costs, both as to fixtures and personalty, only to those in possession before the statute was enacted. The *Joslin* decision was rendered on the theory that there could be no complaint if the Legislature saw fit to extend the liability of the condemnor to include rights for the condemnee that were otherwise generally excluded. Inferences from a Louisiana case[29] seem to indicate a contrary rule to that established by the statute upheld in the *Joslin* Case. The plaintiff claimed $50 for the cost of removing residence furnishings, and the Court, although not holding that such expense could be considered, simply stated that the plaintiff had not offered satisfactory evidence to show what the cost would be.

The split of decisions is more apparent in regard to allowing the cost of removal of personal property from leasehold interests. The leading case cited by both the majority and dissenting judges in the instant case is *Gershon Bros.* v. *United States*.[30] Here the Circuit Court of Appeals, in refusing to consider the cost of moving and loss and breakage of stock from a leased warehouse, said: "Inconvenience and expense incident to vacating premises upon the expiration of the right to retain them are not proper subjects of consideration in determining the just compensation to be paid by the party acquiring the right to possess them." The *Gershon* Case cited as authority the case of *Ranlet* v. *Concord Railroad*[31] where the cost of removing sheds and quantities of coal and wood were borne by the condemnee. Both Minnesota[32] and New Jersey,[33] which refused to allow the cost of removal of fixtures, consistently held at the same time that the cost of removal of personal property was not to be considered. The Missouri,[34] Mich-

[28] 262 U. S. 668, 43 Sup. Ct. 684, 67 L. ed. 1167 (1923).
[29] Housing Authority of Shreveport v. Green, 200 La. 463, 8 So. (2d) 295 (1942).
[30] 284 Fed. 849 (C. C. A. 5th, 1922).
[31] 62 N. H. 561 (1883).
[32] Kafka v. Davidson, 135 Minn. 389, 160 N. W. 1021 (1917).
[33] City of Newark v. Cook, 99 N. J. Eq. 527, 133 Atl. 875 (Ch. 1926), *aff'd*, 100 N. J. Eq. 581, 136 Atl. 915 (Ch. 1927).
[34] City of St. Louis v. St. Louis, I. M. & S. Ry. Co., 266 Mo. 694, 182 S. W. 750 (1916).

igan[35] and Iowa cases,[36] which allowed recovery for the removal of the fixtures on the theory that they were to be considered part of the realty, nevertheless followed the general rule as to personal property and refused to allow the cost of removal of stocks of goods. The Missouri Court made the observation that one lessee might purposely move his business farther than would another lessee thus incurring a greater expense, and said further that the lessee should stand in no better position than the owner of a fee. Of the Illinois[37] and Pennsylvania[38] cases which allowed the cost of removal of the fixtures, only the Illinois case involved the removal of a stock of goods too. In this decision removal expenses for both were allowed.

The decision in the instant case has perhaps opened a new avenue of relief for the individual who has been placed in the awkward position of being forced from his property by condemnation proceedings. The strict rule, so often controlling in many cases and contended for by the Government in the *General Motors* Case, is based on the fair market value of the space in its naked form—regardless of whether the property was in use or vacant. In view of the broad statements laid down by the Supreme Court and the various other courts which have reiterated the same idea—"the owner is to be put in as good position as if his property had not been taken"—it would seem that many more elements should be considered in determining the fair amount of compensation whether the interest confiscated be a leasehold or a freehold. Perhaps the strictness of the rules of damages in condemnation proceedings can be accredited to the epoch in which eminent domain had its most flourishing period—that time when the United States was a growing nation which needed a policy that would foster rather than hinder the development of railroads and other utilities. Now that the needs of the development period no longer take precedence over the rights of the individual it might be well to relax the strict and "hard law" of compensation in eminent domain proceedings. It must be remembered that condemnation is not to be considered a voluntary transaction but rather a forced sale. True, the good of the whole should be paramount to the (minute) detriment to the individual, but whenever possible these equities should be a little more evenly balanced.

The Supreme Court in *Mitchell* v. *United States* has seemingly adopted the wider test of the fair market value when it said: "The special value of the land due to its adaptability for use in a particular

[35] *In re* Gratiot Ave., City of Detroit, 294 Mich. 569, 293 N. W. 755 (1940).
[36] Des Moines Wet Wash Laundry v. City of Des Moines, 197 Iowa 1082, 198 N. W. 486 (1924).
[37] Metropolitan West Side El. R. Co. v. Siegal, 161 Ill. 638, 44 N. E. 276 (1896).
[38] James McMillin Printing Co. v. Pittsburgh, C. & W. Ry. Co., 216 Pa. 504, 65 Atl. 1091 (1907).

business is an element which the owner of the land is entitled, under the Fifth Amendment, to have considered in determining the amount to be paid as just compensation upon the taking by eminent domain."[39] If the transaction were a voluntary sale, certainly the items of removal of equipment, machinery and goods would be elements to be considered in the price arrangement. If by chance the prospective purchaser or lessee were interested in obtaining all the property, both real and personal, he would be willing to pay more; and if he did not desire the personal property, it would be worth a considerable amount to have it removed.

The inequities of the forced sale seem even more acute in regard to condemnation of leasehold interests. The cost of removal of the fixtures and the stock of goods should be considered among the elements of damages. In considering whether the market value test is appropriate for the condemned leasehold interest a Pennsylvania court aptly bared the situation when it said: "But the market value is an unsatisfactory test of the value to a tenant of the leasehold interest. It is really no test at all because the lease rarely has any market value. Generally it is not assignable at the will of the tenant, and he pays in rent all the right of occupation is worth. The right of which he is deprived, and for which he is entitled to full compensation, is the right to remain in undisturbed possession to the end of the term. The loss resulting from the deprivation of this right is what he is entitled to recover. The value of the right he is forced to sell cannot ordinarily be measured by its market price, for there is no market for it; nor can it always be measured by the difference between the rent reserved and the rental value if the lease be a favorable one. If, as was the case here, a tenant, engaged in a business requiring the use of heavy machinery and appliances, should secure a new place equally well adapted to his business; and at the same rent, he would still be at the expense of removal, and at a loss because of the stoppage of his business."[40]

One consideration often overlooked is the duration of the confiscation. Property is commonly taken outright. If, however, it is condemned for only a term of years in the case of a freehold, the owner must under the general rule bear the cost of removal and then the subsequent cost of moving back. If only part of the term of a leasehold interest is condemned, as in the instant case where the Government condemned the space for a year out of six-year lease,[41*] the tenant

[39] 267 U. S. 341, 344, 45 Sup. Ct. 293, 294, 69 L. ed. 644, 648 (1925).

[40] James McMillin Printing Co. v. Pittsburgh, C. & W. Ry. Co., 216 Pa. 504, 511, 65 Atl. 1091, 1094 (1907).

[41*] Subsequent to the trial, an amendment to the petition for condemnation was filed which changed the period from one year to a term renewable for additional yearly periods thereafter during the existing national emergency. A footnote on p. 874 to the opinion stated: "We do not understand, however, that

likewise has not only the cost of removal but also the cost of moving back to complete the term of the lease. Often the lessee has the right to renewal or an option to renew on a favorable lease. The only method available to the tenant to lessen this expense would be to sublet the remaining part of the term, or in the case of renewal, to give up this profitable right.

In the instant case the Government deprived the General Motors Corporation not only of its space, but also required the removal of fixtures and a stock of goods much of which was demolished because it could not be moved. It cannot be argued logically that the Government did not "take" this property. The defendant was deprived of the space and of the *use* of that space and was put to considerable expense. The demolition and removal expense were no criteria of the value of the *space* condemned, but they were definite criteria of the value of the *use* to which that space had been put.

The decision in this case opened a pathway through the old test of using the fair market value of the bare realty confiscated. Perhaps it points the way to a standard of evaluation in which the owner or lessee will actually be put in as good position pecuniarily as he would have occupied if his property had not been taken. The result is a realistic approach to this problem.[42*]

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Torts—Liability of Parent for Torts of Child—Dangerous Weapons

What is the liability of a parent for torts committed by a child with a gun given by the parent? The question was raised in a recent West

this amended petition has any bearing upon the issues before the court below or here."

[42*] Two decisions handed down by District Judge Yankwich since this note was originally written have refused to allow the cost of removal to be considered. One of these, United States v. Certain Parcels of Land, 54 Fed. Supp. 561 (S. D. Cal. 1944) was decided 8 days after the General Motors Case and without reference to it. The other, United States v. 0.64 Acres of Land, 54 Fed. Supp. 562 (S. D. Cal. 1944) a month later, noted the decision handed down by the Circuit Court of Appeals, 7th Circuit, but refused to follow it and approved the views of the dissenting judge . . . that if the owner of the fee was not entitled to cost of removal, there could be no reason for allowing it to the tenant in a leasehold interest. This entirely overlooks the distinctions just noted above and the special hardship present in the cases where less than the condemnee's full term is taken. At page 563 District Judge Yankwich made this observation: "Had a principle of law which would allow relocation cost when the owner occupies the premises and deny it when a tenant occupies them would establish a criterion of differentiation would has no reasonable foundation in fact." Aside from the difficulties of sentence structure it might be said of this statement that it has no foundation in the cases. It is conceded that the owner of a freehold has been denied this element of compensation, for the most part, *but* that the leasehold tenant has been given special consideration. There has not been found any line of authority which would approve of allowing cost of removal to the owner of the fee and denying it to the tenant under the leasehold interest.

Virginia case[1] in which the complaint alleged that the defendant parents gave their four-year-old son an air rifle, knowing by reason of his infancy that he was incapable of the use of judgment, care, and discretion in the use of an air rifle; and, knowing that the air rifle was a dangerous instrumentality, permitted him to have it under his control; and that the infant carelessly discharged a shot which destroyed the vision of the plaintiff's eye. The defendant demurred on the ground that the declaration did not allege any negligent misconduct on the defendant's part proximately causing plaintiff's injuries. The court held that an air rifle was not inherently dangerous, but the complaint alleged sufficient facts without minute circumstances constituting evidence which was sufficient for overruling the demurrer.

It is well settled under common law that a parent is liable for the torts of his child only on such grounds as would make him liable for the torts of any other person.[2] The mere relationship of parent and child is not sufficient to hold the parent liable for torts committed by his child[3] in the absence of statute to the contrary; rather infants are liable for torts committed the same as are adults.[4]

Where a child has committed a tort with a gun, the gist of the parent's liability is upon agency or employment,[5*] or upon his own negligence in permitting his incapable minor child to have the gun, or access to one, whereby the damage proximately resulted.

A dangerous weapon is one likely to produce death or great bodily harm.[6] Although a gun is a dangerous weapon under some circumstances, mere possession or use is not *per se* unlawful.[7] Therefore a parent is not negligent for simply putting a firearm in the hands of an

[1] Mazzocchi v. Seay, —— W. Va. ——, 29 S. E. (2d) 12 (1944).

[2] 1 COOLEY, TORTS (3rd ed. 1906) 180; NOTE (1941) N. C. L. REV. 605.

[3] Palm v. Ivorson, 117 Ill. App. 535 (1905); Basset v. Riley, 131 Mo. App. 721, 111 S. W. 596 (1908); Brittingham v. Stadiem, 151 N. C. 299, 66 S. E. 128 (1909).

[4] Wilson v. Garrard, 59 Ill. 51 (1874); Paul v. Hummel, 43 Mo. 119, 97 Am. Dec. 381 (1888).

[5*] The general rules of agency apply in such a case. In the case of Figone v. Guisti, 43 Cal. App. 606, 185 Pac. 694 (1919) the defendant hired his minor son to work in a saloon. In response to a threat of a patron to shanghai him, the minor discharged a pistol, kept in case of robbery, killing the patron. A California court held the master parent not liable for the results, since they arose out of a private quarrel and were not within the scope of the employment.

In Winkler v. Fisher, 95 Wis. 355, 70 N. W. 477 (1897) the Wisconsin court held a minor son who had been directed to kill crows in a corn field, but who had gone two miles away to hunt squirrels, not to be within the scope of the employment, thereby releasing the parent from liability.

However the parent is liable for torts committed within the scope of the employment. Carmouche v. Bovis, 6 La. Ann. 95, 54 Am. Dec. 558 (1851); Dixon v. Bell, 5 Maule & Sel. 198, 105 Eng. Rep. 1023 (1816); Brittingham v. Stadiem, 151 N. C. 299, 66 S. E. 128 (1909).

[6] Parman v. Lemmon, 120 Kan. 370, 244 Pac. 227 (1926).

[7] Clarine v. Addison, 182 Minn. 310, 234 N. W. 295 (1931).

infant son.[8] It is generally held that a BB gun (air rifle) is not a dangerous weapon and does not belong to any branch of the weapon family.[9*]

The negligence of the parent is divided into two general fields: (1) Where the parent negligently places a weapon where an incompetent child can get it, and (2) where the parent is negligent in permitting an incapable infant to possess or use a firearm.

A parent is negligent when he places a loaded gun where an infant child can reach it, provided that a prudent man would have perceived danger, though not necessarily the specific harm.[10*] One case approaches the imposition of absolute liability on the parent.[11] The parent had broken the stock from the gun and had thrown both stock and barrel under the bed. He had ordered the son not to bother the gun and did not know the son had it. A Rhode Island court affirmed a charge to the jury which would hold a parent liable if the jury found the parent negligent in leaving the gun where the son would find it and use it; and the son was of insufficient age and experience to be trusted with the weapon.

In order to hold the parent negligent in permitting an infant child to have or use a gun, the following requisites must be shown:

1. The child must have been careless in the past or was of such tender years as would be indicative of his being incapable to handle a dangerous weapon. Generally it is not age but experience which determines whether the parent could have foreseen possible harm.[12*]

[8] Wood v. O'Neill, 90 Conn. 497, 97 Atl. 753 (1916); Clarine v. Addison, 182 Minn. 310, 234 N. W. 295 (1931).

[9*] Capps v. Carpentar, 129 Kan. 462, 283 Pac. 655 (1930). But *see* Archibald v. Jewell, 70 Pa. Sup. Ct. 247 (1918) where the court was unable to say as a matter of law that an irresponsible boy with the full knowledge of his father may possess and use as an innocent toy a device loaded with 50 BB shot, capable of being discharged with such force as to destroy the eye of a human being at a distance of 50 feet.

[10*] Sullivan v. Creed, [1904] 2K. B. 317 (Parent left gun inside the stile of his own land, next to a path leading from a public road to his cottage.); Sojka v. Dlugosz, 293 Mass. 419, 200 N. E. 554 (1936) (Parent left gun and cartridges on pantry shelf without any instruction to the child as to the use thereof.); Phillips v. Barnett, 2 N. Y. City Ct. Rep. 20 (1889) (Parent left loaded revolver in an unlocked bureau drawer. The court held the father liable on the ground that he was negligent in keeping such a dangerous weapon within reach of the child.) But *see* Swanson v. Crandall, 2 Pa. Sup. Ct. 85 (1896) (Parent left a loaded revolver in the upper drawer of a chiffonier used exclusively by him in his bedroom. The Pennsylvania court held the father not to be negligent when his five-year-old daughter found the gun and fired it, injuring the plaintiff. The shooting of the revolver was not the natural and probable consequence and could not be anticipated as the usual and natural result. Hence the keeping of the loaded revolver was not the proximate cause of the accident.)

In Frellesen v. Colburn, 156 Misc. 254, 281 N. Y. Supp. 471 (1935) the father separated the shells and gun. There was no evidence that the father had any knowledge that his son had ever used the gun before. When the son shot a dog, the parent was held to be free from negligence under the circumstances.

[11] Salisbury v. Crudale, 41 R. I. 33, 102 Atl. 731 (1918).

[12*] Palm v. Ivorson, 117 Ill. App. 535 (1905) (Parent was not negligent where

2. The parent must have been notified that the child was careless, negligent, or reckless. It is immaterial whether such knowledge was derived from seeing his child's act of negligence or from being informed of them by others.[13*] The fact that the father is momentarily absent from the house at the time of the shooting does not suffice either to exempt him from responsibility or to transfer it to the mother who is present.[14*]

3. The parent, having a knowledge of the carelessness, negligence, and recklessness must have made it possible for the child to do the mischief. It is essential that the parent be able to foresee the negligence of the child.[15*] Thus it is held that a parent cannot reasonably foresee that his child will lend it to a third party who will commit a tort upon the plaintiff.[16*] When a child discharges the gun, and for some

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the 12-year-old child was a thoroughly experienced marksman.); Turner v. Snider, 16 Manitoba Rep. 79 (1907) (Defendant's 14-year-old son was carefully trained in the use of a gun and ordinarily used great skill in handling it under such circumstances that the father was justified in assuming that he would use reasonable care. When the son negligently discharged his gun, setting fire to the prairie grass, the parent was not liable.); Herndobler v. Rippen, 75 Ore. 22, 146 Pac. 140 (1915) (Defendant's son had owned and used a rifle since he was nine years old. Through his negligence he shot the plaintiff. The defendant was not liable.).

[13*] Gudiewski v. Stemplesky, 263 Mass. 103, 160 N. E. 334 (1914) (Evidence that the mother had seen the son shooting in yard and vicinity with an air rifle was held admissible to show that the parents knew of their minor son's negligence.); Kuchlick v. Feuer, 239 App. Div. 338, 268 N. Y. Supp. 256 (1933) (Son had been shooting at street lamps. The parent knew or "should have known."); Johnson v. Glidden, 11 S. D. 237, 76 N. W. 933, 74 Am. St. Rep. 933 (1898) (On previous occasions the son had called people abusive names and frequently discharged firearms at passers-by in the presence of the parent.); Haverson v. Nokes, 60 Wis. 511, 19 N. W. 382, 50 Am. Rep. 381 (1884) (Defendant's two sons had fired at Plaintiff's horses, frightening them, on previous occasions in the defendant's presence.); *cf.* Whitesides v. Wheeler, 158 Ky. 121, 164 S. W. 335 (1914) (The court refused evidence to prove that others thought the defendant's son was insane. Nothing but overt acts of violence are competent on this issue, and even such overt acts must be within the knowledge of the defendant to make him liable.); Basset v. Riley, 130 Mo. App. 721, 111 S. W. 596 (1908) (Defendant's 17-year-old son stepped out the door, telling his father that he was going to scare a dog. The parent was not liable for the accidental shooting of the dog by the son because the parent had no way to know that the son's intention was tortious.). Ritter v. Thibordeaux, 41 S. W. 492 (Tex. App., 1897) (A father who does not permit his minor son to use a gun is not responsible in damages for the tort of his son, who purposely and carelessly shoots a companion while on a hunting trip made without the father's knowledge.).

[14*] Mullins v. Blaise, 37 La. Ann. 92 (1886); but *see* Charton v. Jackson, 183 Mo. App. 613, 167 S. W. 670 (1914) (Mother as well as father is liable in permitting the child to use the firearm, where in the father's absence, she fails to exercise the authority devolving upon her.).

[15*] Meers v. McDowell, 110 Ky. 926, 62 S. W. 1013 (1901) (Defendant plied his minor son of weak and undeveloped mind with liquors, and while the son was under the influence thereof, permitted the son to have a loaded rifle with which the son subsequently shot the plaintiff.).

[16*] Harris v. Cameron, 81 Wis. 239, 51 N. W. 437 (1892) (By implication the purchase of the gun by the parent was not the proximate cause, and he could not reasonably foresee such an act.); *cf.* Chaddock v. Plummer, 88 Mich. 225, 50 N. W. 135, 14 L. R. A. 675 (1892).

undisclosed reason a match is expelled, injuring the plaintiff, the purchase of the gun is not the proximate cause; and the parent is not liable.[17] But if the parent knows that his child is using a firearm in a careless and negligent manner, it is his parental duty to interpose and prevent a course of conduct on the part of the child which is likely to produce injury to others.[18*] If the minor child is suspended, even temporarily, from the parental authority and subjected to the authority of another, the parent is not liable.[19*]

4. The child must have inflicted injury upon the plaintiff from which the plaintiff could have recovered from the child. It is obligatory on the plaintiff that he must not contribute to his own negligence. All defenses that the child may have had are available to the parent.[20*]

Where the child has committed a tort, and the parent subsequently promises to pay for the damage done, the parent is not liable for breach of contract if he later refuses to pay. Such a promise is made without consideration, and no valid contract is created.[21]

Under Louisiana statutes[22] the parent is liable for torts committed by unemancipated children. The courts of that state have held the parent liable for injuries resulting from such acts, intentional or careless, on the part of the child.[23] Georgia, by statute,[24] holds the parent liable for the tort of his child "committed at the parent's command, or in the persecution and within the scope of his business." In a case under this statute the parent is liable if the child acts as the parent's servant or agent.[25]

Thus under pleadings the plaintiff in the *Mazzocchi* Case, *supra,* has stated a good cause of action.

CECIL J. HILL.

[17] Fleming v. Kravitz, 260 Pa. 428, 103 Atl. 831 (1918).

[18*] Johnston v. Glidden, 11 S. D. 237, 76 N. W. 933, 74 Am. St. Rep. 933 (1898); *contra,* Hagerty v. Powers, 66 Cal. 368, 5 Pac. 622 (1885) (Case based upon precedent alone, and no case having been cited which held a parent liable, the court held for the defendant.).

[19*] Coats v. Roberts, 35 La. Ann. 891 (1883) (The minor son was lawfully summoned by the sheriff to serve on a posse and while engaged negligently shot another member.).

[20*] Miller v. Meche, 111 La. 143, 35 So. 491 (1903) (Plaintiff was the aggressor in the affray.); Moran v. Burroughs, 27 Ont. L. Rep. 539, 10 D. L. R. 181 (1912) (Doctrine of contributory negligence applied.).

[21] Baker v. Morris, 33 Kan. 580, 7 Pac. 267 (1885).

[22] LA. CIV. CODE ANN. (Dart, 1932) §§2315-2318; NOTE (1932) TULANE L. R. 119; NOTE (1934) CORN. L. Q. 643.

[23] Wright v. Petty, 7 La. App. 584 (1927); Sutton v. Champagne, 141 La. 470, 75 So. 209 (1917); Marrioneaux v. Brugier, 35 La. Ann. 13 (1883).

[24] GA. CODE (1933) §105-108.

[25] Chastain v. Johns, 160 Ga. 977, 48 S. E. 343 (1904).