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Case Comments

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CONTRACTS—ACCEPTANCE OF OFFER BY FAILURE TO NOTIFY OFFEROR OF REJECTION. [Federal]

It is a popular maxim that silence implies assent, or as Oliver Goldsmith once stated, "silence gives consent."[1] Since the development of the contract as a legal instrument, there have been repeated attempts to gain contractual advantages by asserting as a comparable legal rule that failure to express a rejection of an offer may constitute an acceptance of it.[2] The recent case of *Russell v. The Texas Company*[3] stands as one of the relatively infrequent instances in which this contention has been upheld in the courts. Plaintiff was the owner of certain property (referred to as section 23) in which defendant owned the mineral rights and had the right to use such of the surface as might be necessary for the mining of minerals. During 1952, defendant had been conducting extensive mining operations on section 23, and also had been using the surface of section 23 in connection with mining operations on lands other than that section. On October 30, 1952, plaintiff sent defendant an offer for a revocable license to cover the use of section 23 in connection with mining operations on adjacent lands for $150 per day, the offer stating expressly that "your continued use of the roadway, water and/or materials will constitute your acceptance of this revocable license."[4] Without making any response, defendant continued to use section 23 until November 22, 1952, and in December, 1952, defendant sent plaintiff a rejection of the offer. In an action for damages for use of the surface, the district court[5] found that plaintiff's offer for a revocable license had been accepted by defendant, and accordingly, plaintiff was awarded $150 per day from the receipt of the offer by defendant to the time defendant ceased his wrongful conduct, together with damages for the use and occupancy of plaintiff's property during that time.[6] The Court of Appeals for the Ninth Circuit affirmed

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[1]Goldsmith, "The Good Natured Man," Act II.

[2]Such assertions have given rise to confusion in the law of contracts, the courts being faced with a situation similar to the truism of Paulus in the Pandects of Justinian: "He who remains silent certainly does not speak; but nevertheless it is true that he does not deny." Digest, L, 17, 142 (Paulus).

[3]238 F. (2d) 636 (C. A. 9th, 1956).

[4]238 F. (2d) 636, 641 (C. A. 9th, 1956).

[5]United States District Court for the District of Montana.

[6]The damages for use and occupancy which plaintiff sought were not in the nature of double compensation with the $150 per day, but rather were due under the

the finding that defendant's use of section 23 was tortious and that defendant's conduct amounted to an acceptance of the offer for a revocable license.[7] By way of dictum, the court indicated that there still would have been a valid contract formed here had defendant's conduct not been tortious. "But even in the absence of a tortious use, the true test would be whether or not the offeror was reasonably led to believe that the act of the offeree was an acceptance, and upon the facts of this case it seems evident that even this test is met."[8]

Contrary to the implications of the principal decision, it may be stated as a general rule that an offeror cannot bind the offeree by a stipulation that silence or inaction on the part of the offeree will constitute an acceptance of the offer.[9] Of course, that rule does not cover the distinguishable situation in implied-in-fact contract cases, where the obligations of the parties arise "from mutual agreement and intent to promise but where the agreement and promise have not been expressed in words."[10] In that situation, meaning is given to the acts of the parties "in relation to the previous usage and conduct of men."[11] But where the silence of the offeree is alleged to amount to an acceptance of the offer, the offeree's conduct, including his silence, has no standard by which its effect can be measured, because it is unique to

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terms of the mineral reservation for the use of section 23 in connection with mining operations on section 23. The $150 per day was alleged by plaintiff as owing for the use of section 23 in connection with mining operations on adjacent lands.

[7]The court applied the rule of the Restatement of Contracts in finding the creation of a valid contract through acceptance by silence. "Where the offeree exercises dominion over things which are offered to him, such exercise of dominion in the absence of other circumstances showing contrary intention is an acceptance. If circumstances indicate that the exercise of dominion is tortious the offeror may at his option treat it as an acceptance, though the offeree manifests an intention not to accept." Restatements, Contracts (1932) § 72 (2).

[8]238 F. (2d) 636, 643 (C. A. 9th, 1956). Note the apparent anomaly in the court's decision: If acceptance is to be found on the basis of *silence,* then how can the true test look to the *act* of the offeree? See further note 26, infra.

[9]Bank of Buchanan v. Continental Banks, 277 F. 385 (C. C. A. 8th, 1921); Excelsior Stove & Mfg. Co. v. Venturelli, 290 Ill. App. 502, 8 N. E. (2d) 702 (1937); Prescott v. Jones, 69 N. H. 305, 41 Atl. 352 (1898); Sell v. General Electric Supply Corp., 227 Wis. 242, 278 N. W. 442 (1938); 1 Corbin, Contracts (1950) § 72; 1 Williston, Contracts (2nd ed. 1936) § 91; Simpson, Contracts (1953) § 31. "The proper inference from failure to respond to a proposition of any kind is that it is rejected or declined. A party cannot be held to contract where there is no assent. Silence operates as an assent, and creates an estoppel, only when it has the effect to mislead. There must be such conduct on the part of the [offeree] as would, if it were not estopped, operate as a fraud on the party who has taken, or neglected to take, some action to his own prejudice in reliance upon it." More v. New York Bowery Fire Ins. Co., 130 N. Y. 537, 29 N. E. 757, 758 (1892).

[10]1 Williston, Contracts (2nd ed. 1936) 8.

[11]1 Corbin, Contracts (1950) 34

the particular fact situation and there is no general "conduct of men" upon which to interpret the offeree's silence as acceptance.[12]

The cases rarely state any reasons for this general rule, but rather merely assert the proposition that there can be no contract formed unless there is an acceptance to the offer, and that silence on the part of the offeree is not acceptance of the offer.[13] Apparently the true reason supporting the rule is so obvious that it is overlooked. A contract, being a voluntary undertaking imposing legal obligations on both parties, must necessarily require positive assent thereto. The offeror shows his positive assent to the contractual situation by making the offer, and the offeree must show his positive assent by affirmatively accepting the offer.[14] Otherwise there would be no meeting of the minds of the parties on a specific subject matter and no mutual agreement thereto, and consequently no contractual obligations would result.[15]

There are certain situations, however, in which exceptions to the general rule have been made and silence on the part of the offeree held to constitute an acceptance of the offer. One writer[16] has put these situations into two main categories, one of which is relevant to the principal case: where the offeree has received the benefit of the goods or services offered.[17] This category is subdivided into two situa-

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[12]Apart from contracts which do exist in fact, "courts recognize by the language of their opinions two classes of implied contracts. The one class consists of those contracts which are evidenced by the acts of the parties and not by their verbal or written words—true contracts which rest upon an implied promise in fact. The second class consists of contracts implied by law . . . and not by the intentions of the parties. A contract cannot be implied *in fact* where the facts are inconsistent with its existence; or against the declaration of the party to be charged; or where there is an express contract covering the subject-matter involved; or against the intention or understanding of the parties; or where an express promise would be contrary to law." Miller v. Schloss, 218 N. Y. 400, 406, 113 N. E. 337, 338 (1916). Contracts implied in fact are not included within the scope of this comment.

[13]E.g.: "It is well settled that 'a party cannot, by the wording of his offer, turn the absence of communication of acceptance into an acceptance, and compel the recipient of his offer to refuse it at the peril of being held to have accepted it.' Clark, Cont. 31, 32." Prescott v. Jones, 69 N. H. 305, 41 Atl. 352 (1898).

[14]The offeree, in accepting the offer, is not limited to a verbal or written mode of acceptance, for an acceptance may be indicated by acts as well as by words. 1 Williston, Contracts (2nd ed. 1936) § 22 A.

[15]"A contract is a promise, or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. This definition may seem somewhat unsatisfactory . . . [but it] at least makes clear that the obligation of a contractor is based on a promise made by him." 1 Williston, Contracts (2nd ed. 1936) § 1.

[16]Note (1939) 7 Duke B. A. J. 87.

[17]The second classification is purely a negative of the first: the offeree has received no benefit from the subject matter of the offer. In this situation, it would

ations: (1) where the offer did not expressly state a price for the goods or services; (2) where there was a definite price expressly stated by the offeror. In the former case, the finding of a contract produces the same result as would the application of a quasi contract theory—i.e., recovery by the offeror of the reasonable value of his goods or services, preventing the offeree from unjustly enriching himself. But where the offer expressly states a definite price, a different result arises from the imposition of contract sanctions, since the offeror is thereby enabled to recover his quoted price and thus secure the profit of his bargain. In order to impose the contract sanctions in the latter situation, the courts must find an acceptance of the offer. If found in this situation, acceptance is no more than intent—not so much intent to enter into the contract as intent to appropriate the subject matter of the offer to one's own use.[18] Further, the objective theory of contracts has tended to replace *actual* intent with *manifested* intent, so that an acceptance is easier to find. The court's holding in the *Russell* case can best be explained on this basis.

Of Williston's suggested four general situations in which silence amounts to an acceptance, only one seems related to the facts of the principal case: "where the offeree takes or retains possession of the property which has been offered to him, such taking or retention in the absence of other circumstances is an acceptance. If other circumstances indicate that the taking or retention is tortious, the offeror may nevertheless at his option treat it as an acceptance."[19] If the retention is non

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seem to be more difficult to find the existence of a valid contract: Truscon Steel Co. v. Cooke, 98 F. (2d) 905 (C. C. A. 10th, 1938); Gould v. Coates Chair Co., 147 Ala. 629, 41 So. 675 (1906); Hughes v. John Hancock Mut. Life Ins. Co., 163 Misc. 31, 297 N. Y. Supp. 116 (1937); Royal Ins. Co. v. Beatty, 119 Pa. St. 6, 12 Atl. 607 (1888). There can be no quasi-contractual recovery allowed by the court since the offeree has not unjustly enriched himself. If a recovery is to be allowed, the court must hold either: (1) that the breach of some duty to speak will support a damages action to reimburse the offeror for losses sustained through reliance on the reasonably assumed acceptance by the offeree, the theory of such recovery being closely akin to that of a tort recovery; or (2) that there was an acceptance by the silent offeree so that contract sanctions may be imposed, the theory of this recovery being similar to a recovery based on estoppel. In the latter situation, "The offeree's conduct is measured not in terms of its *intended* meaning, but in terms of what it *should* have meant. The duty notion reappears as the objective standard of a reasonable interpretation." Note (1939) 7 Duke B. A. J. 87, 93.

[18]Note (1939) 7 Duke B. A. J. 87 at 89.

[19]1 Williston, Contracts (2nd ed. 1936) § 91, p. 281. Williston's first three divisions of the cases are: (1) Where the offeree with reasonable opportunity to reject offered service takes the benefit of them under circumstances which would indicate to a reasonable man that they were offered with the expectation of compensation. 1 Williston, Contracts, supra, §§ 91, 91A. If the offeree receives a benefit from the services, he is to be held liable for their fair value, as where the owner of personal

tortious, it may amount to an acceptance if there are no circumstances to the contrary.[20] But these latter cases usually involve some special fact situation, as where goods are sent on approval, the approval being a condition precedent to the transfer of title.[21] If the retention or taking is tortious, then it seems that the offeror may treat it as an acceptance, even in the presence of circumstances negativing an intention on the part of the offeree to accept. It is in this category that the *Russell* case falls, if Williston's division of the cases is to be used. The court in the *Russell* case based its decision on a finding of tortious retention,[22]

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property which is in the hands of a third party is notified that a storage fee is going to be imposed, and the owner remains silent. Taylor v. Dexter Engine Co., 146 Mass. 613, 16 N. E. 462 (1888). This division is limited to services performed to the benefit of the offeree, and is qualified by the fact that there must be an inference of an expection of compensation. (2) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer. Williston, supra, §§ 91, 91B. As indicated by Williston, this classification is almost entirely theoretical, and is not given support by the cases. It is not applicable to the Russell case, for there is no evidence that the defendant there intended to accept the offer of the plaintiff; rather, the subsequent rejection of the offer indicates the opposite intention. (3) Where because of previous dealings or otherwise, the offeree has given the offeror reason to understand (expressly or through previous dealings of the parties) that the silence or inaction was intended by the offeree as a manifestation of assent, and the offeror does so understand. Williston, supra, §§ 91, 91C. This situation is extended somewhat to cover the case in which the offeree solicits an offer, and then remains silent and inactive once the offer is extended. In the Russell case, there was no express authorization to this effect, no previous dealings between the parties, and the defendant had not solicited the offer.

[20]Cf. 1 Williston, Contracts (2nd ed. 1936) 289, n. 2.

[21]In this type of case, it will usually be true that the vendee has initiated the offer for a sale on approval by either ordering the goods or assenting to their being shipped to him by the vendor. After the goods are received by the vendee, he fails to return the goods or to send the purchase price to the vendor, who then seeks to recover the purchase price from the vendee on the theory of a contract having been created by the vendee's silence or inaction. Markstein Bros. Millinery Co. v. White, 151 Ark. 1, 253 S. W. 39 (1921); Evans Piano Co. v. Tully, 116 Miss. 267, 76 So. 833, L. R. A. 1918B, 870 (1917), but these cases generally contain some factor in addition to a receipt of an offer, coupled with a receipt of goods by the offeree, and his resulting silence or inaction. There may have been a prior relation between the parties which justified the offeror in believing that the silence of the offeree was an acceptance of his offer. Wheeler v. Klaholt, 178 Mass 141, 59 N. E. 756 (1901); Hobbs v. Massasoit Whip Co., 158 Mass. 194, 33 N. E. 495 (1893). There may have been a tortious use made of the goods by the offeree, justifying the court's finding of a contract under the rule of the Restatement of Contracts (1932) § 72 (2), or other similar reasoning. In re Downing Paper Co., 147 Fed. 858 (E. D. Pa. 1905); Ostman v. Lee, 91 Conn. 731, 101 Atl. 23 (1917). At the very least, the offeree must have requested an offer or assented to its being made, and it appears that somehow, on the basis of this initiation, there evolves a duty on the offeree to reject, so that the offeror is justified in replying. See further note 28, infra.

[22]238 F. (2d) 636 at 642 (C. A. 9th, 1956).

quoting an almost identical rule from the Restatement of Contracts as being controlling.[23]

In the principal case, the court failed to take notice of whether dominion was exerted by the offeree over the goods before or after he received the offer. The offeree's exerting dominion over the object *after* the offer has been made may be regarded as acceptance by positive act, so that there is no need to rely on the concept of acceptance by inaction and silence. Though the offeree has remained silent, he has not remained inactive; and it is settled that assent to an offer may be indicated by acts as well as by words.[24] But where dominion has been exerted *before* the offer was made, the offeree does nothing more after receipt of the offer than he was doing before the offer was made. His conduct is ambiguous—*i.e.*, it is not expressive of his intent toward accepting or rejecting the offer.[25] Further, under such circumstances the offer may have been merely an attempt by the offeror to inflict a penalty on the offeree by means of liquidated damages, of which efforts the courts do not approve.[26] The court in the *Russell* case might well

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[23]Restatement, Contracts (1932) § 72 (2).

[24]Ludowici-Celadon Co. v. McKinley, 307 Mich. 149, 11 N. W. (2d) 839 (1934); Fanning v. C. I. T. Corp., 187 Miss. 45, 192 So. 41 (1939); Reichman v. Compagnie Generale Transatlantique, 290 N. Y. 344, 49 N. E. (2d) 474 (1943); Wood and Brooks Co. v. D. E. Hewitt Lumber Co., 89 W. Va. 254, 109 S. E. 242, 19 A. L. R. 467 (1921); Restatement, Contracts (1932) § 21. Contra: Chickamauga Mfg. Co. v. Augusta Grocery Co., 23 Ga. App. 163, 98 S. E. 114 (1919).

[25]A offers to sell goods to B, who has already been using the goods for some time. After receipt of the offer, B continues using the goods, but otherwise does not reject or accept the offer. This situation appears to be analogous to that in which the offeror attempts to attach meaning to some ordinary act of the offeree. In this type of situation the act of the offeree is ambiguous because it does not indicate whether the offeree acted in order to accept the offer or for some reason not relevant to the offer. See further 1 Corbin, Contracts (1950) 231.

[26]Defendant so argued in the Russell case, citing Wright v. County of Sonoma, 156 Cal. 475, 105 Pac. 409 (1909) and Sherman v. Associated Tel. Co., 100 Cal. App. (2d) 806, 224 P. (2d) 846 (1950). In the first case defendant county took water from plaintiff's land for the purpose of sprinkling a highway that it was building. Plaintiff sent defendant a notice to stop, stating that if defendant disregarded the notice, plaintiff hereby demanded $50 per day as compensation for the taking of the water. The court denied the plaintiff a recovery on the theory of a contract having been created between the parties, stating that all that plaintiff was entitled to was the reasonable value of the water. The notice to defendant amounted to a notice of the amount of damages plaintiff would claim for the wrongful taking of the water. In the second case, defendant exceeded the bounds of his easement across plaintiff's land for the stringing of telephone wires. Plaintiff notified defendant in writing to remove the wires, or else be charged $25 per day. The court citing the first case as authority, denied plaintiff a recovery, since there was no allegation or proof of the reasonable value of the use and occupation of the land. The federal court attempted to distinguish these cases from the Russell case on the ground that there the notices contained no offer for a license, easement or sale. "Hence, the notice was

have reasoned, however, that the communication from plaintiff to defendant was an order to cease use of section 23, coupled with an offer for a license for such use if defendant was willing to accept plaintiff's terms. If defendant then made use of section 23 for his mining operations on adjacent lands, it could have been held that he had accepted the offer by his act or conduct.[27]

Unless a duty to speak in order to reject exists under a particular fact situation,[28] it would seem that no acceptance should be based on the offeree's silence. If the offeree has received unjust enrichment at the expense of the offeror, courts, as in the *Russell* case, will sometimes hold that the offeree has accepted the offer by his silence because he exercised dominion over the goods offered. But a contract is a consensual arrangement, and should not be found to exist without the consent and assent of *both* parties thereto. Without creating a contract by fiction, the law can compensate the offeror for his lost goods or services on a quantum valebant or quantum meruit recovery, whereby the offeree is not permitted to enrich himself unjustly.[29]

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nothing more than an attempt to inflict a penalty by means of liquidated damages, and this court refused to approve. In this case at bar no such situation existed, since Russell, as the offeror, in clear and unmistakable terms, offered a license to the appellant, and appellant by its own conduct accepted the offer." 238 F. (2d) 636, 643 (C. A. 9th, 1956). This would seem to be a very weak distinction, however. Evidently, plaintiff in the Russell case was attempting to impose a penalty on defendant for his continued wrongful use of section 23, since there was such a great disproportion between the amount awarded plaintiff under the revocable license ($3,600.00) and the amount awarded as the reasonable value for the use of the entire section 23 under the terms of the mineral reservation ($237.60). It is true that there is not sufficient information in the opinion on which to determine accurately whether the $150.00 per day offer was excessive for the use that defendant was making of plaintiff's land, but it appears that the court should look to the results of the notices or offers, instead of looking merely at their form, in deciding whether the plaintiff was attempting to impose penalties by means of liquidated damages.

[27]Rather than try to find acceptance by silence and inaction in the principal case, it would seem that better reasoning would have treated plaintiff's notice to defendant as a notice to cease and desist, so that defendant's subsequent use of section 23 could be treated as exertion of dominion over the goods after they were offered.

[28]Such a duty has, in fact, been held to exist in certain cases, but it appears that the word duty "is used, not in the sense of a legal obligation, but, morally, a duty of conscience. The theory seems to be something akin to estoppel." Note (1920) 33 Harv. L. Rev. 595, 597. "He who is silent when conscience requires him to speak, shall be debarred from speaking when conscience requires him to be silent." Nicholas v. Austin, 82 Va. 817, 825, 1 S. E. 132, 137 (1887). "But if silence may be interpreted as assent where a proposition is made to one which he is bound to deny or admit, so also it may be if he is silent in the face of facts which fairly call upon him to speak." Day v. Caton, 119 Mass. 513, 515 (1876).

[29]"A *quasi* or constructive contract rests upon the equitable principle that a per-

It would seem, therefore, that there should be no doctrine of acceptance by silence in the field of contract law.[30] The entire controversy over the doctrine of acceptance by silence, and the confusion therefrom, in reality springs from efforts by courts to determine whether a valid contract was created by the parties—whether both the offeror and the offeree intended (as based on an objective standard) to agree to the terms of the alleged contract. An obvious solution to the dilemma is to make the intent of the parties controlling on the question of the formation of the contract. If the offer is made, and the offeree does some overt act to indicate his assent—some act called for by the terms of the offer—then there is little difficulty. But if the offer calls for silence as the manner of accepting the offer, and the offeree does in fact remain silent, absent prior agreement the intent on his part will be more difficult to prove. Nevertheless, this intent should be made controlling and courts should refuse to find the existence of a contract without clear proof of this intent. If the effect of the silence was

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son shall not be allowed to enrich himself unjustly at the expense of another. In truth it is not a contract or promise at all. It is an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it, and which *ex aequo et bono* belongs to another. Duty, and not a promise or agreement or intention of the person sought to be charged, defines it. It is fictitiously deemed contractual, in order to fit the cause of action to the contractual remedy." Miller v. Schloss, 218 N. Y. 400, 407, 113 N.E. 337, 338 (1916).

[29]In the field of sales law, the Uniform Commercial Code does not altogether ignore this problem, although it has no specific language on acceptance by silence as such. Part 2 of Article II has certain scattered sub-sections that might, through judicial interpretation and determination, bear on the question of the offeree's silence as a mode of expressing acceptance. Only one point seems fairly certain: if A offers to sell goods to B, and B accepts in terms additional to or different from those offered, such additional or different terms are to be construed as a part of the contract unless they materially alter the offer or a rejection of them is made by A within a reasonable time. §§ 2-207 (1), 2-207 (2). It does appear, however, that the Code will recognize the doctrine of estoppel where the silence of one party has the effect of misleading the other party, based on a prior course of dealings between the same parties. § 2-208.

[30]It would appear to be necessary to distinguish offers for unilateral and bilateral contracts in deciding whether there is acceptance by silence. If the offer is for a unilateral contract, either the offeree has done the act of creating the contract, thereby accepting the offer, or else he has not. If it is determined that a contract was made, and yet the offeree has done no act, then contract *must be* implied in fact by the courts. There can be no unilateral contract created until one party becomes liable, on the basis of prior promises, due to the performance of an act by the other party. However, a different situation is created by an offer for a bilateral contract, "where the 'acceptance' if effective would create a contract executory on both sides, [for here] we have presented the unavoidable question, May silence be construed as acceptance?" Note (1920) 33 Harv. L. Rev. 595, 596.

to mislead the offeror, acting as a reasonable man, into the assumption that an acceptance was intended, then the holding should be that the offeree is estopped to deny that he accepted the offer, rather than that he did in fact, by his silence, accept the offer. The concept of acceptance by silence seems inconsistent with the general principles underlying the theory of contracts; and even where this concept has been applied in finding the creation of a valid contract, it appears that the courts are in reality finding that the contract was created by estoppel.

If it is clear that the offeree did not by his silence intend to accept the offer, and the offeree has not exercised dominion over the goods offered, then no contract should be found to exist. Where the offeree has made use of the goods or services offered by the offeror and under such circumstances that the offeree's silence indicates no intent to accept the offer, then the courts should still refuse to find the existence of a contract. The offeror can be compensated by a quasi-contractual recovery in quantum valebant or quantum meruit. It is true that this approach denies to the offeror a recovery of the benefit of his proposed bargain, but nevertheless he is in no worse position than if the offeree had affirmatively rejected the offer and then wrongfully made use of the offeror's goods so as to enrich himself unjustly. This measure of recovery seems preferable to the result reached in the principal case, wherein the offeror was allowed to recover his own arbitrary charges for the goods without the actual agreement of the offeree to pay that amount. The court there should have found that no contract was created, and should have sent the cause to a jury to award damages in the amount of the reasonable value of the benefit obtained by the offeree through his wrongful conduct.

ROBERT E. STROUD

CRIMINAL LAW—DOUBLE JEOPARDY AS DEFENSE AGAINST RETRIAL FOR GREATER OFFENSE AFTER REVERSAL OF CONVICTION OF LESSER OFFENSE. [Federal]

Protection against double jeopardy in criminal prosecutions is found in the Federal Constitution, in the constitutions of at least forty-one states,[1] and in the common law under the rule of autrefois

[1]"... nor shall any person be subject for the same offense to be twice put in jeopardy...." U. S. Const., Amend. V. Citations to 41 state constitutions are collected in Kneir, Prosecution Under State Law and Municipal Ordinances as Double Jeopardy (1931) 16 Corn. L. Q. 201 at 202, n. 4.

convict or autrefois acquit.[2] This protection is based on the policy favoring finality of judicial proceedings, a principle common to all systems of jurisprudence.[3] It is generally held that the guaranty against being twice put in jeopardy is waived by the accused when an adverse verdict is set aside and a new trial granted on his motion in the trial court or where a conviction is reversed on his appeal.[4] But where the conviction which is set aside or reversed is not of the offense for which he was indicted, but of a lesser offense, the question as to the extent to which the guaranty against double jeopardy has been waived in the new trial is more troublesome.

This question was recently considered by the United States Court of Appeals for the District of Columbia in *Green v. United States*.[5] Green was indicted for arson and for murder in the first degree done in perpetration of arson,[6] and was convicted of arson and second degree murder.[7] He appealed only from the second degree murder conviction. The conviction was reversed and the case remanded on the ground that there was no evidence to sustain a conviction of second degree murder and that the trial court's instruction on second degree murder was erroneous because "all the testimony as to what occurred in the burning house pointed to murder in the first degree and nothing else."[8] During the argument of the appeal, the court took note of the fact that if the conviction were to be reversed, the jury in the second trial might find the accused guilty of the first degree murder and a death sentence might be imposed, but Green indicated that he recognized this possibility and would take the risk. On retrial, the judge did not instruct on second degree murder, and the jury found Green guilty of murder in the first degree. Green again appealed, principally on the ground of double jeopardy. On the second appeal, the question was stated to be: "Where one is convicted, not of the crime charged in the indictment under which he was tried but of a lesser included offense, and on his appeal the conviction is reversed and he is granted a new trial, may he be tried again for the crime charged in the indictment, or must the new trial be confined to the lesser offense of which

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[2]Autrefois convict is defined as formerly convicted, and autrefois acquit as formerly acquitted. Black, Law Dict. (1951) 170. See 1 Wharton, Criminal Law (12th ed. 1932) § 394.

[3]30 Am. Jur., Judgments § 162.

[4]Stroud v. United States, 251 U. S. 15, 40 S. Ct. 50, 64 L. ed. 103 (1919); People v. Bellows, 281 N. Y. 67, 22 N. E. (2d) 238 (1939); 15 Am. Jur., Criminal Law § 427.

[5]236 F. (2d) 708 (C. A. D. C., 1956).

[6]D. C. Code (1951) §§ 22-2401.

[7]Green v. United States, 218 F. (2d) 856 (C. A. D. C., 1955).

[8]Green v. United States, 218 F. (2d) 856, 859 (C. A. D. C., 1955).

he was first convicted?"[9] The Court of Appeals, relying on the 1905 Supreme Court decision in Trono v. United States,[10] held that Green could be tried again for first degree murder, declaring that the better doctrine is that the reversal of the conviction opens up the whole controversy, and that the accused may be proceeded against as if there had been no previous trial.[11] Three judges dissented on the ground that the conviction of second degree murder constituted an acquittal of first degree murder, and that Green did not, by his appeal, waive his constitutional right against being placed in jeopardy a second time for first degree murder.[12] Certiorari has been granted in this case by the United States Supreme Court.[13]

As the court pointed out in the principal case, there is a diversity of opinion among the state courts on this question.[14] The states holding in accord with the *Green* case conclude that when a new trial is granted, either by motion or on appeal, the defendant is in the same position as if there had been no trial and has waived his right to plead his prior conviction as double jeopardy.[15] Some courts adopt this theory by vir-

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[9]Green v. United States, 236 F. (2d) 708, 710 (C. A. D. C., 1956). The use of the term "lesser included offense" represents something of an inconsistency, since on the first appeal Green's conviction was reversed on the ground that second degree murder in this case was not a lesser *included* offense in the statutorily defined offense of arson-murder.

[10]199 U. S. 521, 26 S. Ct. 121, 50 L. ed. 292 (1905). One judge concurred in the result in the principal case solely because of the United States Supreme Court's decision in the Trono case.

[11]The court then considered the following question: (1) Does an unappealed conviction of arson bar a subsequent prosecution for felony murder arising out of the arson; and (2) was the McNabb rule of evidence violated? The court answered both questions negatively, with two judges dissenting from the court's decision on the second question.

[12]See 236 F. (2d) 708, 718 (C. A. D. C., 1956). The dissenting judges felt that the Trono case was not controlling, as it was appealed to the Supreme Court of the Philippine Islands under procedures which permitted the whole case to be reviewed and tried de novo in the appellate court.

[13]25 U. S. L. Wk. 3153 (Nov. 20, 1956).

[14]Green v. United States, 236 F. (2d) 708 at 710 (C. A. D. C., 1956).

[15]Trono v. United States, 199 U. S. 521, 26 S. Ct. 121, 50 L. ed. 292 (1905); Young v. People, 54 Colo. 293, 130 Pac. 1011 (1913); Perdue v. State, 134 Ga. 300, 67 S. E. 810 (1910); State ex rel. Lopez v. Killigrew, 202 Ind. 397, 174 N. E. 808 (1931) (new trial granted by writ of coram nobis); State v. McCord, 8 Kan. 232, 12 Am. Rep. 469 (1871); Hoskins v. Commonwealth, 152 Ky. 805, 154 S. W. 919 (1913); Butler v. State, 177 Miss. 91, 170 So. 148 (1936); State v. Higgins, 252 S. W. (2d) 641 (Mo. App. 1952); Gibson v. Somers, 31 Nev. 531, 103 Pac. 1073 (1909); People v. Palmer, 109 N. Y. 413, 17 N. E. 213 (1888); State v. Correll, 229 N. C. 640, 50 S. E. (2d) 717 (1948), cert. den. 336 U. S. 969, 69 S. Ct. 941, 93 L. ed. 1120 (1949); State v. Robinson, 100 Ohio App. 466, 137 N. E. (2d) 141 (1956); Pierce v. State, 96 Okla. Crim. App. 76, 248 P. (2d) 633 (1952); State v. Kessler, 15 Utah 142, 49 Pac. 293 (1897); State v. Hiatt, 187 Wash. 226, 60 P. (2d) 71 (1936). See Christensen v. State, 166 Kan. 671,

tue of statutes which specify that the defendant by appealing waives his right to set up the prior conviction as the basis for a plea of double jeopardy.[16] Other courts hold that the defendant waives his right in order to bring himself within the statutory power of the court to grant a new trial.[17] One court has merely declared it to be an "accepted principle of law" that there is no double jeopardy when the defendant has appealed.[18] The jurisdictions reaching this conclusion seem to reason that the defendant, having chosen to appeal, cannot contest the part of the first proceeding which affects him adversely (the conviction of the lesser offense) and yet stand on the part which is to his advantage (the absence of a conviction of the greater offense)—that is, he must take the burden with the benefit, and go back for a new trial of the whole case.

The states which, on the contrary, adopt the view that one who is indicted for a crime and convicted of a lesser offense cannot, after reversal of the conviction, be prosecuted for the greater offense on a new trial, proceed on the theory that the conviction of the lesser offense amounts to an acquittal of the higher charge.[19] When the jury returns a verdict of a lesser offense, it has returned an implied verdict of not guilty of the greater offense, and any error affecting the express verdict of guilty does not affect the conclusiveness of the implied verdict of acquittal. By appealing from the error in the conviction of the lesser

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203 P. (2d) 258, 261 (1949); State v. Hutter, 145 Neb. 798, 18 N. W. (2d) 203, 207 (1945); State v. Lamoreaux, 20 N. J. Super. 65, 89 A. (2d) 469, 474 (1952).

The court in the principal case may have had more than the usual reasons for applying a waiver theory: "At oral argument we inquired of his counsel whether Green clearly understood the possible consequence of success on this [the first] appeal, and were told the appellant, who is 64 years of age, says he prefers death to spending the rest of his life in prison." Green v. United States, 236 F. (2d) 708, 710 (C. A. D. C., 1956).

[16]E.g., People v. Palmer, 109 N. Y. 413, 17 N. E. 213 (1888). Cf. People v. McGrath, 202 N. Y. 445, 96 N. E. 92 (1911).

[17]E.g., State v. McCord, 8 Kan. 232, 12 Am. Rep. 469 (1871).

[18]State v. Correll, 229 N. C. 640, 50 S. E. (2d) 717, 718 (1948), cert. den. 336 U. S. 969, 69 S. Ct. 941, 93 L. ed. 1120 (1949).

[19]Thomas v. State, 255 Ala. 632, 53 S. (2d) 340 (1951); Application of Hess, 45 Cal. (2d) 171, 288 P. (2d) 5 (1955); People v. Newman, 360 Ill. 226, 195 N. E. 645 (1934); State v. Coleman, 226 Iowa 968, 285 N. W. 269 (1939); People v. Rock, 283 Mich. 171, 277 N. W. 873 (1938); Ex parte Williams, 58 N. M. 37, 265 P. (2d) 359 (1954); State v. Noel, 66 N. D. 676, 268 N. W. 654 (1936); State v. Steeves, 29 Ore. 85, 43 Pac. 947 (1896); Commonwealth v. Flax, 331 Pa. 145, 200 Atl. 632 (1938); Reagan v. State, 155 Tenn. 397, 293 S. W. 755 (1927); Brown v. State, 99 Tex. Crim. App. 19, 267 S. W. 493 (1924); Leigh v. Commonwealth, 192 Va. 583, 66 S. E. (2d) 586 (1951); State v. Franklin, 139 W. Va. 43, 79 S. E. (2d) 692 (1953). See Hearn v. State, 212 Ark. 360, 205 S. W. (2d) 477 (1947); State v. Elmore, 179 La. 1057, 155 So. 896, 899 (1934); State v. B, 173 Wis. 608, 182 N. W. 474, 480 (1921).

offense, the accused does not waive his right to rely on the implied acquittal as a final adjudication that he was not guilty of the greater offense.[20] On this reasoning it has been held to be unnecessary to decide whether the evidence would sustain a verdict of first degree murder in the second trial, since the jury had, in effect, acquitted the defendant of that offense in the first trial by finding him guilty of murder in the second degree;[21] and a second trial on a murder charge has been held to be barred because the manslaughter conviction in the first trial (though reversed on appeal as an impossible verdict under the evidence) amounted to an acquittal of the higher offense.[22] In *State v. Franklin*,[23] the West Virginia court was faced with a problem similar to that of the principal case on Green's first appeal. The defendant was indicted for rape but was convicted of an attempt to commit rape, though the evidence showed that if the defendant participated in the crime, he did so as a principal in the second degree. The court held that under the evidence the defendant could only be found not guilty or guilty of rape as a principal in the second degree; he could not properly be found guilty of an attempt to commit rape because that crime is not a lesser *included* offense of rape as a principal in the second degree. The defendant was awarded a new trial, but the court held that, in effect, the jury had found him not guilty of rape as charged in the indictment and that therefore he could not be retried for a crime higher than that of an attempt to commit rape.

In *Trono v. United States*,[24] upon which the decision in the principal case is based, the plaintiff-in-error appealed from the conviction of a lesser offense. The United States Supreme Court upheld the subsequent conviction of the higher offense on retrial on the ground that, when the defendant appealed, he waived the right to use the former acquittal of the higher offense contained in the judgment as a bar to further prosecution for the offense. Justice Holmes, who concurred in the result in the *Trono* case, had in the earlier case of *Kepner v. United States*[25] voiced the theory that a new trial for the greater offense "must be regarded as only a continuation of the jeopardy which began with the trial below."[26] In the *Kepner* case, the accused had been charged with embezzlement and acquitted, but was then convicted

[20]Application of Hess, 45 Cal. (2d) 171, 288 P. (2d) 5 (1955).
[21]Leigh v. Commonwealth, 192 Va. 583, 66 S. E. (2d) 586 (1951).
[22]People v. Newman, 360 Ill. 226, 195 N. E. 645 (1935).
[23]139 W. Va. 43, 79 S. E. (2d) 692 (1953).
[24]199 U. S. 521, 26 S. Ct. 121, 50 L. ed. 292 (1905).
[25]195 U. S. 100, 24 S. Ct. 797, 49 L. ed. 114 (1904).
[26]195 U. S. 100, 137, 24 S. Ct. 797, 806, 49 L. ed. 114, 127 (1904).

by the Supreme Court of the Philippine Islands on an appeal by the government. The United States Supreme Court ruled that this procedure had subjected the accused to double jeopardy, but Justice Holmes dissented on the ground that "a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried."[27] It was under a similar theory that the Connecticut court not only allowed the defendant to be retried for the higher offense, but also allowed the state, acting under a statute, to appeal in a criminal prosecution.[28]

When the defendant in the principal case first appealed, the court found that the giving of the second degree murder instruction in his original trial was erroneous and prejudicial to the defendant.[29] Some state courts would not have agreed that such error was prejudicial to the defendant, if the evidence was sufficient to sustain a verdict for the higher offense. In *State v. Gordon*,[30] the Ohio court ruled that the defendant, who had been found guilty of second degree murder, was not prejudiced by the failure of the trial court to instruct that the verdict must be first degree murder or acquittal, where the evidence was sufficient to sustain a verdict of first degree murder. In another instance, in which the jury returned a verdict of a lesser offense even though no instruction thereon had been given, the West Virginia court upheld the conviction of the lesser offense, saying: "They [the jury] have not exceeded the law, but stopped short of the law and of their duties. In other words, without warrant of law or moral right, they have exercised clemency, and dispensed what they conceived to be mercy."[31] If the court in the principal case had adopted this view on Green's first appeal, it would have upheld the trial court's original conviction on the theory that a convicted person cannot be heard to complain of an error in his favor.[32]

The greatest danger present in such a situation as the principal case is that of a compromise verdict. The jury may be uncertain of the defendant's guilt of *any* crime, and mistakenly translate its uncertainty into a compromise verdict. Thus, on an appeal by the de-

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[27]195 U. S. 100, 134, 24 S. Ct. 797, 806, 49 L. ed. 114, 126 (1904).

[28]State v. Lee, 65 Conn. 265, 30 Atl. 1110 (1894).

[29]Green v. United States, 218 F. (2d) 856 (C. A. D. C., 1955). Judge Prettyman, in his dissent, expressed the view that the error was not prejudicial to defendant. See 218 F. (2d) 856, 859 (C. A. D. C., 1955).

[30]87 Ohio App. 8, 92 N. E. (2d) 305 (1948).

[31]State v. Prater, 52 W. Va. 132, 143, 43 S. E. 230, 234 (1903).

[32]Dean v. State, 83 S. (2d) 777 (Fla. 1955); State v. Greigo, 61 N. M. 42, 294 P. (2d) 282 (1956); State v. Stephens, 244 N. C. 380, 93 S. E. (2d) 431 (1956).

fendant from a conviction of an analytically impossible offense, a court may feel that the conviction should be reversed and sent back for a retrial of the whole case in order to guard against this possibility. To be weighed against this consideration, however, is the argument that it should be within the jury's province to exercise clemency where it feels that the defendant's guilt does not for any reason justify a verdict for the crime charged in the indictment. The court in the principal case could have so reasoned and thus avoided the dilemma by upholding the conviction of the lesser offense, since the evidence was sufficient to sustain a conviction of the higher offense for which the defendant had been indicted. However, in a case in which it is imperative that the court reverse the conviction of a lesser offense (on some ground not related to the nature of the offense charged, such as misconduct of the jury) and this dilemma must be faced, it is believed that the prior conviction should act as a bar to any prosecution for the greater offense. The defendant's right of appeal should not be restricted by consideration of the danger that on retrial he may be convicted of the more serious crime.

THOMAS E. LOHREY, JR.

DAMAGES—INTEREST ON AWARD OF DAMAGES FOR BREACH OF EMPLOYMENT CONTRACT. [New Hampshire]

Ever since the common law abandoned the view that the charging of interest is a moral wrong,[1] and recognized that interest could properly be awarded as damages under certain circumstances,[2] courts have been attempting to formulate a set of rules to govern such awards.[3] A primary difficulty has arisen from a lack of agreement as to the principles which justify the awarding of interest. Originally, the purpose was to punish the defendant for the detention of money which should right-

[1]For an account of the evolution of the medieval law of usury and the historical development of interest, see McCormick, Damages (1935) § 51; Marshall v. Beeler, 104 Kan. 32, 178 Pac. 245 at 246 (1919).

[2]"The usual rule, applicable to cases at law and in equity, is that when money is not paid when due the plaintiff is entitled to interest, by way of damages, from the time when it should have been paid." Winchell v. Plywood Corp., 324 Mass. 171, 85 N. E. (2d) 313, 319 (1949).

[3]"There is no subject in the law with reference to which there is greater conflict and confusion in the cases than that of interest." Brown v. Home Development, 129 N. J. Eq. 172, 18 A. (2d) 742, 746 (1941). Sedgwick, though not so dogmatic, does mention that "the determination of the question whether interest can or cannot be allowed, is by no means free from difficulty." 1 Sedgwick, Damages (9th ed. 1920) 569.

fully have been in plaintiff's possession.[4] In more modern times, however, more concern has been given to the necessity for fully compensating plaintiff, since he had been deprived for some time of the use of money owing to him.[5]

Largely as a result of this uncertainty as to the logical basis for awarding interest as damages, the courts face a perplexing problem in determining what types of claims should be the subject of interest awards. Different standards have been proposed as solutions. The first approach was to allow interest only as a contract term and not as damages,[6] but this was soon recognized to be too great a limitation.[7] Then interest came to be allowed on claims which were liquidated,[8] the idea being that unfairness would result to defendant if he had to pay interest as a result of failure to pay an obligation, the true amount of which he could not readily determine.[9] Since most liquidated claims arise out of contract actions, while unliquidated claims, on the other hand, more generally stem from tort situations, a distinction has also been rested upon whether the action was in contract or in tort.[10]

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[4]See the discussion on this feature of the problem in Laycock v. Parker, 103 Wis. 161, 79 N. W. 327 at 332 (1899).

[5]Concordia Ins. Co. v. School District No. 98, 282 U. S. 545, 51 S. Ct. 275, 75 L. ed. 528 (1931); Miller v. Robertson, 266 U. S. 243, 45 S. Ct. 73, 69 L. ed. 265 (1924); Robberson Steel Co. v. Harrell, 177 F. (2d) 12 (C. A. 10th, 1949); In re Paramount Publix Corp., 85 F. (2d) 42, 106 A. L. R. 1116 (C. C. A. 2nd, 1936); Emery v. Tilo Roofing Co., 89 N. H. 165, 195 Atl. 409 (1937); A. L. Russell, Inc. v. City of New York, 138 N. Y. S. (2d) 455 (App. Div. 1954); Note (1947) 61 Harv. L. Rev. 136 at 137.

[6]"Beginning with a denial of interest in any case except where it was allowed by contract, the law first gave discretion to the jury to give interest as damages, and then allowed it as a matter of law in a constantly increasing number of cases." 1 Sedgwick, Damages (9th ed. 1920) 568. Also Sammis v. Clark, 13 Ill. 544 at 546 (1854).

[7]"[In England] by the end of the eighteenth century the common-law courts had accepted the view that interest as damages as distinguished from promises to pay interest, express or inferred from conduct or usage, could only be allowed upon a contract for payment of money on a day certain, such as a note or bill of exchange, and seemingly then only in the jury's discretion." McCormick, Damages (1935) 209. The writer also notes that the American "courts have from the first manifested a somewhat less intransigent attitude toward the extension of the limits of the recovery of interest as damages." McCormick, Damages (1935) 210.

[8]"The most general classification of causes of action with reference to interest is as to liquidated and unliquidated demands. The rule is quite general that interest is not allowed on unliquidated damages or demands." Geohegan v. United Elevated R., 266 Ill. 482, 107 N. E. 786, 791 (1915).

[9]"... interest is not allowed on an unliquidated damage that is not capable of ascertainment by mere computation, for the reason that the person liable does not know what sum he owes; he cannot compute the interest and therefore he is not in default for not paying." Burton v. Asbestos Limited, Inc., 92 F. Supp. 310, 319 (D. C. N. J. 1950). Also Laycock v. Parker, 103 Wis. 161, 79 N. W. 327 at 332 (1899); Smedley, Interest Damages in Virginia (1942) 28 Va. L. Rev. 1138, 1140.

[10]Smedley, Interest Damages in Virginia (1942) 28 Va. L. Rev. 1138, 1141.

These distinctions are, however, no longer strictly adhered to.[11] For one reason, many situations which arise cannot be satisfactorily relegated to one category or the other. Then, too, many courts have come to extend the awarding of interest beyond those cases involving purely liquidated claims, without regard to why defendant did not pay promptly, because interest is thought to be necessary to compensate the wronged plaintiff in full.[12] Therefore, in situations in which the amount of the true obligation owing to plaintiff is capable of being determined by some fixed external standard, interest is usually awarded. These are often called "determinable" or "liquidable" claims.[13]

That the problem has not yet been wholly resolved is indicated by such decisions as that of the New Hampshire court in the recent case of *McLaughlin v. Union-Leader Corporation*,[14] involving an action of covenant and assumpsit brought to recover damages for defendant's breach of a sealed contract of employment. Plaintiff was the advertising manager for defendant newspaper, and in November, 1947, he entered into a contract with defendant under which he was to receive $1,000 a month for five years in return for his services. The contract was breached by defendant in September, 1949, and this action was instituted shortly thereafter.[15] The trial court found defendant liable on the contract, and on appeal, the Supreme Court of New Hampshire affirmed the decision for plaintiff, holding, as to the interest feature, that the trial court was correct in allowing interest from No-

[11]"Courts are more and more coming to recognize that a rule forbidding an allowance for interest upon unliquidated damages is one well calculated to defeat that purpose [of fairly compensating one who has suffered an injury] in many cases, and that no right reason exists for drawing an arbitrary distinction between liquidated and unliquidated damages." Bernhard v. Rochester German Ins. Co., 79 Conn. 388, 65 Atl. 134, 138 (1906).

[12]Concordia Ins. Co. v. School District No. 98, 282 U. S. 545, 51 S. Ct. 275, 75 L. ed. 528 (1931); Miller v. Robertson, 226 U. S. 243, 45 S. Ct. 73, 69 L. ed. 265 (1924); J. P. (Bum) Gibbins, Inc. v. Utah Home Fire Ins. Co., 202 F. (2d) 469 (C. A. 10th, 1953); Robberson Steel Co. v. Harrell, 177 F. (2d) 12 (C. A. 10th, 1949); Emery v. Tilo Roofing Co., 89 N. H. 165, 195 Atl. 409 (1937); A. L. Russell, Inc. v. City of New York, 138 N .Y. S. (2d) 455 (App. Div. 1954); Grobe v. Kramer, 178 Misc. 247, 33 N. Y. S. (2d) 901 (1942).

[13]Sawyer v. E. F. Drew & Co., 113 F. Supp. 527 (D. C. N. J. 1953); Huntoon v. Hurley, 137 Cal. App. (2d) 33, 290 P. (2d) 14 (1955); Katz v. Enos, 68 Cal. App. (2d) 266, 156 P. (2d) 461 (1945); Fidelity-Phenix Fire Ins. Co. v. Board of Education, 201 Okla. 250, 204 P. (2d) 928 (1948); Mall Tool Co. v. Far West Equipment Co., 45 Wash (2d) 158, 273 P. (2d) 652 (1954); Laycock v. Parker, 103 Wis. 161, 79 N. W. 327 (1899); 15 Am. Jur. 583; 25 C. J. S. 539.

[14]127 A. (2d) 269 (N. H. 1956).

[15]Several of the pertinent facts were ascertained from an earlier record of this case on a separate appeal. McLaughlin v. Union-Leader Corp., 99 N. H. 492, 116 A. (2d) 489 (1955).

vember, 1952, the date of the completion of the contract term. Though this result may have been justified on a practical basis, the reasoning used by the court presents a graphic example of the confusion of thought which pervades this field.

Both parties excepted to the trial court's ruling on the issue of interest, plaintiff contending that he should receive interest on each month's salary payment as it came due, since he had lost the use of the money from that time, and defendant maintaining that because it was unable to compute the actual amount owed plaintiff—since he had a duty to minimize his damages by seeking other employment—no interest at all should be awarded. In attacking the interest problem, the court first made some general observations which seemed to indicate that it favored the argument advanced by plaintiff,[16] and pointed out that defendant's "argument sacrifices principle to expediency since the defendant's 'liability does not await liquidation but is absolute,' as soon as the breach occurs."[17] Continuing, the court set forth what it held to be the New Hampshire rule: "Our law is that the test to determine whether interest is payable before verdict 'is not to inquire whether it [the debt] is liquidated, but whether it is due . . .' since 'interest is given as damages for the failure to pay money *at the time it is due*'."[18] In this regard it was futher reasoned that plaintiff should not be barred from recovery of interest simply because of the uncertainty of the principal debt, and that since defendant never indicated a desire to pay, it cannot now claim any favor based on lack of knowledge of how much to pay. Thus, the conclusion was apparently reached that to have allowed plaintiff no interest on the sums due him, merely because defendant did not know the exact amount due, "would have been an abuse of discretion."[19]

After having supported plaintiff's position up to this point of the opinion, the court seems to have experienced an abrupt change of heart, asserting that "courts have recognized to some degree the practical difficulty confronting the defendant in cases similar to the one before us and have made allowance for it."[20] Once this statement was made, knocking out the foundation for the argument previously ten-

[16]"If we adopt this [defendant's] argument we take from the plaintiff substantial sums which he can reasonably claim are his, and allow the defendant, which the jury has found in default, to retain them." McLaughlin v. Union-Leader Corp., 127 A. (2d) 269, 271 (N. H. 1956).

[17]127 A. (2d) 269, 271 (N. H. 1956).

[18]127 A. (2d) 269, 271 (N. H. 1956).

[19]127 A. (2d) 269, 272 (N. H. 1956).

[20]127 A. (2d) 269, 272 (N. H. 1956).

dered, the court pointed out that this was a matter in which the trial court must exercise its discretion. The path was thus left open for the court to reach a vacillating and apparently illogical compromise (or rather to adopt the compromising solution which the trial court had reached) that interest should be awarded from the date at which the employment under the contract was to have ended.

At the end of the contract term, plaintiff's duty to minimize damages was admittedly past. For that reason defendant would no longer be able to argue that it could not pay plaintiff because it did not know how much plaintiff would minimize in the future. Still, the court's compromise solution does not answer: (1) defendant's point that it does not know how much plaintiff has or should have minimized in the past and cannot know that sum until a court and jury determine the extent of plaintiff's duty in this regard; or (2) plaintiff's point that he is being deprived of *all interest* on the money due during the contract period merely because of the possibility that he may have been able to minimize *to some extent.* In accepting as sufficient the judgment of the trial court, the New Hampshire Supreme Court seems to have yielded to expediency without attempting to meet squarely and reconcile the conflicting principles advanced by each party.

The court's difficulty perhaps originated in its statement of what it felt the New Hampshire decisional law to be on this subject—i.e., that the test "is not to inquire whether it [the debt] is liquidated, but whether it is due. . . ."[21] While it is true that interest as damages can be awarded only from the time when the debt is due, the above statement seems to indicate that the court would grant interest as damages on every obligation from the time it first became due, without any regard for the matter of the uncertainty of the amount of the obligation. While that rule would have the merit of providing full compensation for the plaintiff, and while the law may be moving slowly in that direction, no court has yet been known to adopt the rule in anything like the breadth of the terms employed in the principal case.[22] Apparently,

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[21]This statement was quoted from a 1908 New Hampshire decision, Dame v. Wood, 75 N. H. 38, 70 Atl. 1081, 1082 (1908), which in turn relied on a slightly earlier case in that jurisdiction as authority for the proposition stated. It is interesting to note that this latter decision, Wright v. Pemigewasset Power Co., 75 N. H. 3, 70 Atl. 290 (1908), is not only an action sounding in tort instead of contract, but also fails to mention the troublesome word "due." Thus, it is somewhat of a puzzle as to how the New Hampshire test could be so definitively stated by the court in the principal case.

[22]Under the provisions of the New York Civil Practice Act, Practice Manual Ann. (Clevenger 1955) § 480, the awarding of interest is made mandatory as part of the damages for breach of any contract, whether the damages were liquidated or

the New Hampshire court failed to follow the test it semed to be establishing, for defendant's obligation to pay plaintiff's monthly salary surely could not be regarded as not due until completion of the five-year contract term. Rather, an obligation for $1000 became due at the end of each month.

The determination of when an obligation is due has generally created more problems in the tort field than in contract cases. Although defendant's obligation to compensate plaintiff for a tort theoretically becomes due at the moment the wrong is done, nevertheless as a practical matter the uncertain nature of the tort liability renders plaintiff's claim unliquidated and non-liquidable by defendant, a factor which is regarded as sufficient to excuse defendant from paying the obligation, even though it is due.[23] Some courts have sought to strengthen the justification for non-payment under these circumstances by declaring that defendant's obligation is not due until the exact amount has been fixed by judgment.[24] Broadly speaking, there is less uncertainty as

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unliquidated. Thus, under a justification somewhat different from the language employed in the principal case, courts which rely on this New York statute would reach seemingly the same result—full compensation of the claimant in the form of interest for every breach of contract. E.g., Rigopoulos v. Kervan, 53 F. Supp. 829 (S. D. N. Y. 1943); Stentor Electric Mfg. Co. v. Klaxon Co., 30 F. Supp. 425 (D. C. Del. 1939); Hollwedel v. Duffy-Mott Co., 263 N. Y. 95, 188 N. E. 266, 90 A. L. R. 1312 (1933).

The concept of granting interest has also been broadened by allowing the decision to rest more in the discretion of the court than upon application of any arbitrary rules. An oft-quoted phrase is that found in a leading case in this field: "Generally, interest is not allowed upon unliquidated damages.... But when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages." Miller v. Robertson, 266 U. S. 243, 258, 45 S. Ct. 73, 78, 69 L. ed. 265, 275 (1924). Also Thorp v. American Aviation & General Ins. Co., 113 F. Supp. 764 at 765 (E. D. Pa. 1953); St. Paul Mercury Indemnity Co. v. United States, 201 F. (2d) 57 at 62 (C. A. 10th, 1952); United States v. Bethlehem Steel Corp., 113 F. (2d) 301 at 308 (C. C. A. 3rd, 1940); Wells Laundry & Linen Supply Co. v. Acme Fast Freight, Inc., 138 Conn. 458, 85 A. (2d) 907 at 910 (1952).

[23]See generally, 1 Sedgwick, Damages (9th ed. 1920) § 319; McCormick, Damages (1935) 222: "... it is fairly clear that at a given time the claimant has suffered a distinct and measurable financial loss.... Should he for delay in receiving this compensation be additionally compensented by allowing interest upon the claim? The earlier judges, with their distaste for interest upon unliquidated claims where the debtor cannot know the precise sum which the law will exact, frowned upon interest in this class of claims, but the marked tendency to-day is toward the allowance of interest in such cases."

[24]"Interest is compensation for the use of money which is due. But the money which the wrongdoer is required by law to pay for the future suffering, expense or loss of time of one whom he has injured is not due until judgment is made up. It is not a debt and does not become a definite obligation until a verdict of finding has been finally entered." Cochran v. City of Boston, 211 Mass. 171, 97 N. E. 1100,

to when the defendant's obligation under a contract is due, since that factor is normally established or made readily ascertainable by the contract terms.[25]

It appears that the court in the *McLaughlin* case perhaps realized that its result was inconsistent with the rule it declared to be in force, but it did not see fit to attempt to resolve the conflicting complaints of plaintiff and defendant. Surprisingly enough, little in the way of precedent exists with regard to the specific issue which the principal case presented. In suits to recover damages for breach of employment contracts, it seems that plaintiffs regularly would attempt to recover interest on the principal sum, which in most cases would be a liquidated amount. In some cases, interest has been granted to plaintiff with hardly any consideration of the problems involved.[26] However, to defeat such a claim for interest, it would be only natural to assume that defendant, in order to demonstrate that the wage claim is unliquidated in nature, would point to the general duty on plaintiff to minimize damages by securing (or seeking to secure) other employment.[27] Very few cases have been found in which this exact pattern has been followed, and when the issue has been presented in this form, varying results have been reached. The courts which accept defendant's argument explain that plaintiff's claim becomes unliquidated by virtue of the uncertainty, stemming from his duty to minimize his damages, as to how much his recovery should be reduced below the full amount of wages lost.[28] On the other hand, those courts which award interest to plaintiff despite the duty of minimization justify their decision on the fact that plaintiff's measure of damages is prima facie the amount due him under the contract for the remainder of the contract

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1101 (1912). For the same sort of apparently irrational talk: Connelly v. Fellsway Motor Mart, Inc., 270 Mass. 386, 170 N. E. 467 at 469 (1930); Louisville & N. R. v. Wallace, 91 Tenn. 35, 17 S. W. 882 at 883, 14 L. R. A. 548 at 549 (1891).

[25]" 'Where a contract provides for the payment of money upon the happening of an event, it is not due until the event transpires, and interest does not begin to run until that time'.... It is also the general rule that 'interest, when allowed as damages, runs from the date when the right to recover a sum certain is vested in the plaintiff. In actions for breach of contract, it ordinarily runs from the date of the breach or the time when payment was due under the contract." Prudential Ins. Co. v. Goldsmith, 239 Mo. App. 188, 192 S. W. (2d) 1, 3 (1945).

[26]Charlton v. Pan American World Airways, Inc., 116 Cal. App. (2d) 550, 254 P. (2d) 128 (1953); Morris v. Taliaferro, 75 Ill. App. 182 (1897); Catholic Press Co. v. Ball, 69 Ill. App. 591 (1897).

[27]Fifty years ago it was pointed out that "a tendency seems to be developing toward taking matters of mitigation into consideration in adopting a rule of damages." Note (1907) 6 L. R. A. (N. S.) 49, 121.

[28]Seymour v. Oelrichs, 162 Cal. 318, 122 Pac. 847 (1912); Crawford v. Mail & Express Pub. Co., 22 App. Div. 54, 47 N. Y. Supp. 747 (1897).

term.[29] Since the burden rests on defendant to prove the amount which plaintiff did minimize or should have minimized his losses by obtaining other work during the contract term, the view applied in these latter cases is apparently that defendant can, theoretically at least, ascertain the proper minimization figure and so know the amount of his liability to plaintiff.[30] Thus, plaintiff is held entitled as a matter of right to interest from the time the salary becomes due, because the amount of his claim was liquidable.[31] In still other cases, the effect of plaintiff's duty of minimization is regarded for this purpose as analogous to that of set-offs or counterclaims raised by defendant, which, even though unliquidated, are generally held not to defeat plaintiff's right to recover interest on the principal sum due him.[32]

The Restatement of Contracts has specifically approved the granting of interest as damages in situations such as that involved in the *McLaughlin* case, in stating the rule to be that "interest is allowed on the amount of the debt or money value from the time performance was

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[29]Ansley v. Jordan, 61 Ga. 483 (1878); Bang v. International Sisal Co., 212 Minn. 135, 4 N. W. (2d) 113, 141 A. L. R. 657 (1942); Laming v. Peters Shoe Co., 71 Mo. App. 646 (1897); Note (1907) 6 L. R. A. (N. S.) 49, 121: "... the prevailing practice is to regard the claim for damages as a liquidated one upon which the servant is entitled to interest."

[30]Bang v. International Sisal Co., 212 Minn. 135, 4 N. W. (2d) 113, 141 A. L. R. 657 (1942); Laming v. Peters Shoe Co., 71 Mo. App. 646 (1897). Judge Learned Hand justified the allowance of interest in the following manner: "... when the debtor discharged the claimant, and the claimant chose to treat the discharge as a breach, an unconditional liability resulted at once for the whole future salary less future earnings; but since no one knew how much he would earn, the debtor could tender nothing in performance. As time passed, however, this liability became progressively liquidated, so that when the trial took place it could be completely ascertained.... Complete restitution demands interest from the date of the breach; the promisor is let off only because of a tenderness to him, since he is thought to be practically unable to perform, which, as we have already said, is a concession against principle. There seems to be good warrant for withdrawing that concession in proportion as the ground for its creation ceases. For these reasons it was an abuse of discretion not to allow interest." In re Paramount Publix Corp., 85 F. (2d) 42, 45, 106 A. L. R. 1116, 1121 (C. C. A. 2nd, 1936).

[31]"A discharged employee, entitled to recover from his employer as damages the entire amount of his salary less what he has earned in the meantime by other employment, is also entitled, as a matter of right, to interest thereon from the termination of the period of his employment." Note (1907) 6 L. R. A. (N. S.) 49, 91.

[32]Sawyer v. E. F. Drew & Co., 113 F. Supp. 527 (D. C. N. J. 1953); Lacy Mfg. Co. v. Gold Crown Mining Co., 52 Cal. App. (2d) 568, 126 P. (2d) 644 (1942); Spurck v. Civil Service Board, 231 Minn. 183, 42 N. W. (2d) 720 (1950). See Note (1919) 3 A. L. R. 809, where the rule is stated to be that "where the amount of a claim under a contract is certain and liquidated, or is ascertainable but is reduced by reason of the existence of an unliquidated set-off or counterclaim thereto, interest is properly allowed on the balance found to be due from the time it became due and was demanded, or suit commenced therefor."

due, *after making all the deductions to which the defendant may be entitled.*"[33] In elaboration on this rule, it is observed: "The amount of this reduction is nearly always unliquidated and uncertain, so that the balance payable by the defendant is also uncertain. But full performance would have put the plaintiff in possession of the full amount promised, with the value of its use from the day of payment. The balance due from the defendant is less than this full amount, and its uncertainty prior to verdict does not prevent the allowance of interest."[34] Thus, the court in the principal case could, with strong justification, have adopted the rule which favors the plaintiff in this controversy. This approach is in closer accord with the long-range trend of the law to allow interest as damages in ever-widening scope as a means of providing full compensation for the losses sustained through contract breaches.

J. HARDIN MARION, III

DOMESTIC RELATIONS—HEARTBALM STATUTE AS BARRING ACTION FOR DAMAGES FOR FRAUDULENT INDUCEMENT TO MARRY. [California]

As a result of the sensational newspaper publicity during the late 20's and early 30's concerning the extortion, blackmail and fraud which were connected with breach of promise suits and to a lesser extent with seduction, alienation of affections and criminal conversation suits,[1] the public and through it state legislators were made aware of the implications of an old adage: "We shall find no fiend in hell can match the fury of a disappointed woman."[2] In an attempt to eliminate those abuses as well as such other evils as excessive damages verdicts, sixteen states enacted the so-called "heartbalm" statutes which abolished the breach of promise action.[3] In essence, the typical "heartbalm"

[33]Restatement, Contracts (1932) § 337 (a) [italics supplied]. See especially Restatement, Contracts (1932) 547, Illustration 8 of Clause (a).

[34]Restatement, Contracts (1932) § 337 (a), comment (h) on Clause (a).

[1]"There will be little regret at the passing of the action for breach of promise to marry. But there is room for an honest difference of opinion as to the actions of alienation of affections and possibly of criminal conversation. . . ." Feinsinger, Legislative Attack on "Heart Balm" (1935) 33 Mich. L. Rev. 979, 1008.

[2]Colley Cibber, Love's Last Shift (1696) Act IV, Sc. 1.

[3]The following statutes affect the causes of action for breach of promise, seduction, alienation of affections and criminal conversation: Ala. Code (1941) tit. 7, §§ 114-117; Cal. Civ. Code (Deering 1949) § 43.5; Colo. Stat. Ann. (Michie 1951 Supp.) c. 24A, §§ 1-10; 21 Fla. Stat. Ann. (Harrison & West 1955 Supp.) §§ 771.01 771.08; Ill. Rev. Stat. (1941) c. 38, §§ 246.1-246.6 [contained only a penalty provision

statute as it concerns the breach of promise suit provides that no contract to marry shall give rise to any cause of action for the breach thereof.[4]

Since the statutes employ general terms, the courts are faced with the problem of interpreting the scope of the prohibition intended by the legislatures. It appears that the only cause of action which is *clearly* abolished is that in which the plaintiff alleges as the sole basis for recovery the breach of a contract to marry. Because many of the statutes include sections making the mere filing of such suits unlawful, suits based on that express allegation are rare.[5] Therefore, a court usually must decide whether to apply the statute as prohibiting only the

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for bringing the actions but did not abolish them, and was held unconstitutional in Heck v. Schupp, 394 Ill. 296, 68 N. E. (2d) 464 (1946)];Ind. Stat. Ann. (Burns 1946) §§ 2-508-2-517; 3 Mich. Comp. Laws (1948) §§ 551.301-551.311; N. J. Stat. Ann. (West 1939) §§ 2:39A1-2:39A9; N. Y. Civil Practice Act (Clevenger) § 61-a-61-i; Wyo. Comp. Stat. Ann. (1945) §§ 3-512-3-516.

The following affect only causes of action for breach of promise and alienation of affections: Md. Code Ann. (Flack 1947 Supp.) art. 75C, §§ 1-8; Nev. Comp. Laws Ann. (1943-1949 Supp.) §§ 4071.01-4071.07; Pa. Stat. Ann. (Purdon 1954 Supp.) tit. 48, §§ 170-177.

The following affect only the cause of action for breach of promise: 6A Mass. Ann. Laws (1955) c. 207, § 47A; 3 Me. Rev. Stat. (1954) c. 112, § 91; 2 N. H. Rev. Laws (1942) c. 385, § 11.

Illinois enacted a statute which contained only a penalty provision for bringing the actions, but did not abolish them. This statute was held unconstitutional in Heck v. Schupp, 394 Ill. 296, 68 N. E. (2d) 464 (1946). Thereafter, Illinois enacted statutes which do not abolish the causes of action but limit recovery to actual damages. Ill. Ann. Stat. (Smith-Hurd 1956 Supp.) c. 68, §§ 34-47 ,alienation of affections and criminal conversation); Ill. Ann. Stat. (Smith-Hurd 1956 Supp.) c. 89, §§ 25-34 (breach of promise). See Note (1952) 52 Col. L. Rev. 242, n. 3-4.

[4]The wording differs slightly from statute to statute. An example of the substantive form most commonly followed is found in Pa. Stat. Ann. (Purdon 1954 Supp.) tit. 48, §§ 171-172: "All causes of action for breach of contract to marry are hereby abolished. No contract to marry, which shall hereafter be made within this commonwealth, shall operate to give rise, either within or without this Commonwealth, to any cause of action for breach thereof."

Some states have enacted statutes which appear narrower: 6A Mass. Ann. Laws (1955) c. 207, § 47A provides that "Breach of contract to marry shall not constitute an injury or wrong recognized by law, and no action, suit or proceeding shall be maintained therefor." Cal. Civ. Code (Deering 1949) § 43.5 states only: "No cause of action arises for: . . . (d) Breach of promise of marriage."

[5]The statutes in Colorado, Florida, Indiana, Maryland, Michigan, Nevada, New Jersey, New York, Pennsylvania and Wyoming all contain provisions which in essence make it unlawful to file, cause to be filed, threaten to file, or threaten to cause to be filed any such action. In Pennington v. Stewart, 212 Ind. 553, 10 N. E. (2d) 619 (1937) (a cause of action for alienation of affections), this provision of the Indiana statute was declared unconstitutional. For general treatment of the constitutionality of "heartbalm" statutes, see cases cited in Magierowski v. Buckley, 39 N. J. Super. 534, 121 A. (2d) 749 at 757 (1956); Notes (1947) 167 A. L. R. 235; (1945) 158 A. L. R. 617 at 618.

cause of action expressly mentioned, or to broaden the prohibition to cover any kind of suit which may produce the evils against which the statute is directed. In so deciding they must balance and attempt to effectuate harmoniously two vital judicial policies: keeping the courts open for the enforcement of just claims,[6] and preventing the fraudulent use of the judicial processes to extort settlements of unjust claims.[7]

One of the perplexing phases of this interpretive problem was presented in the recent California case of *Langley v. Schumacker*.[8] Plaintiff's complaint alleged that "defendant fraudulently induced her to resign her position on representations that he intended to marry her, to consummate the marriage, and to maintain a normal and natural marital relationship...."[9] She and defendant went through a ceremony of marriage, and only thereafter did she learn that he never intended in good faith to consummate the marriage. Plaintiff obtained a decree of annulment on that ground and subsequently brought the present action to recover damages for the fraud.

The trial court sustained defendant's demurrer on the ground that the action was barred by the California "heartbalm" statute.[10] The District Court of Appeals affirmed the order, holding that, under the marital immunity doctrine, one spouse may not sue the other for a personal tort even after an annulment of a marriage, because the annulment of a voidable marraige does not give rise to a cause of action which did not previously exist.[11] The Supreme Court of California, in

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[6]"...the very purpose of courts is to separate the just from the unjust causes.... [I]t is against public policy to close the doors to people who may have just claims or grievances and whose only peaceable remedy is through the courts...." Wilder v. Reno, 43 F. Supp. 727, 729 (M. D. Pa. 1942).

[7]"...such remedies having been exercised by unscrupulous persons for their unjust enrichment, and such remedies having furnished vehicles for the commission or attempted commission of crime and in many cases having resulted in the perpetration of frauds, it is hereby declared as the public policy of the state that the best interests of the people of the state will be served by the abolition of such remedies." N. Y. Civil Practice Act (Clevenger 1955) § 61-a.

[8]46 Cal. (2d) 601, 297 P. (2d) 977 (1956), noted in (1956) 4 U. C. L. A. L. Rev. 114; (1957) 70 Harv. L. Rev. 1098.

[9]46 Cal. (2d) 601, 297 P. (2d) 977, 978 (1956).

[10]See Note (1956) 4 U. C. L. A. L. Rev. 114.

[11]283 P. (2d) 343 (Cal. App. 1955).

Because husband and wife were looked upon as a single entity or unity, it was fundamental at common law that no action could be maintained between spouses. This "unity" theory was abolished by the various Married Women's Acts giving separate property rights to the wife. While these Acts have generally been held to provide authority for property actions by a wife against her spouse, there is a conflict of authority as to personal tort actions. In some jurisdictions statutes expressly permit one spouse to sue the other for personal injuries. Absent statute the majority of the courts adhere to the common law "marital immunity" doctrine.

reversing the judgment, ruled that the tort inherent in the commission of fraud is a property tort, to which the marital immunity doctrine does not apply.[12] The court further stated that the cause of action was not barred by the "heartbalm" statute because "the language of the code section indicates that it was only intended to abolish causes of action based on an alleged breach of contract.... The plaintiff's complaint states a cause of action for fraud—the making of promises without any intention of performing them."[13] The dissent, in rejecting this interpretation, argued that the statute does not confine itself to abolishing actions ex contractu, but abolishes all actions arising out of a breach of promise of marriage regardless of the form and regardless of whether a marriage ceremony has been performed or not.[14]

Few decisions have been so liberal in sustaining such a cause of action. On the contrary, the courts which have considered the matter have more often tended toward a broader interpretation of the prohibition of the "heartbalm" acts so as to effectuate their basic purpose—i.e., the prevention of extortion, blackmail, and excessive damages verdicts.[15] It is reasoned that to confine the application of the statutes

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although the minority view is supported by most legal writers. The differing results are apparently caused by several factors, including the interpretation given by the particular court to the applicable Married Women's Act, the relative emphasis placed on the protection of domestic tranquility, the view that recognizing such causes of action would encourage litigation, and the conclusion that it is at least a matter for the legislature. Crowell v. Crowell, 180 N. C. 516, 105 S. E. 206 (1920); 3 Vernier, American Family Laws (1935) § 180; McCurdy, Torts Between Persons in Domestic Relation (1930) 43 Harv. L. Rev. 1030.

The determination of whether or not the "marital immunity" bars a personal injury action between spouses whose marriage has been annulled depends, it appears, on the ground for the annulment. See generally, Note (1955) 43 A. L. R. (2d) 632. It is usually reasoned that the marital immunity doctrine does not prevent actions between a man and woman whose marriage is held to be void *ab initio*. E.g., Blossom v. Hall, 37 N. Y. 434 (1868). Some courts reason that a wife can sue her husband for fraud only where a void marriage is in question because a voidable marriage is valid for all civil purposes until annulled, and though such annulment destroys the marriage from the beginning as a source of rights and duties, it does not relate back so as to create a cause of action which did not previously exist. E.g., Callow v. Thomas, 322 Mass. 550, 78 N. E. (2d) 637, 2 A. L. R. (2d) 632 (1948). Cf. American Surety Co. v. Conner, 251 N. Y. 1, 166 N. E. 783, 65 A. L. R. 244 (1929). Other courts, however, have held that an annulment of a voidable marriage relates back to destroy the marriage from the beginning and that *all* the consequences of a void marriage follow in that the parties are not and never have been legally married and that therefore a tort suit between them is not between spouses. E.g., see Levanthal v. Liberman, 262 N. Y. 209, 186 N. E. 675 at 676 (1933).

[12]46 Cal. (2d) 601, 297 P. (2d) 977 at 979 (1956). See Prosser, Torts (2nd ed. 1955) 672, n. 24; 3 Vernier, American Family Laws (1935) § 180.

[13]46 Cal. (2d) 601, 297 P. 2d) 977, 979 (1956).

[14]See 46 Cal. (2d) 601, 297 P. (2d) 977, 980 (1956).

[15]A.B. v. C.D., 36 F. Supp. 85 (E. D. Pa. 1940); Thibault v. Lalumiere, 318 Mass.

to actions expressly based on breach of contract would allow plaintiffs to circumvent the legislative intent by merely choosing a different label for the cause of action.[16]

Some causes of action arising out of marriage contracts have, however, received recognition by various jurisdictions. Those in which plaintiff seeks property restitution have been sustained by some courts in recent years.[17] A plaintiff who has made gifts of personalty, such as an engagement ring, in reliance upon the defendant's promise to marry has been allowed to recover the property or its value. The courts reason that such actions are not based on a breach of promise of marriage, but rather on conditional gift or on quasi contract, and further that to refuse recovery would be to enrich the defendant unjustly, a result which would be especially distasteful where the defendant's marriage promise was fraudulently made. A few courts have not been content to restrict

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72, 60 N. E. (2d) 349, 158 A. L. R. 613 (1945); Rubenstein v. Lopsevich, 3 N. J. 282, 72 A. (2d) 518 (1950); Brandes v. Agnew, 275 App. Div. 843, 88 N. Y. S. (2d) 553 (1949); Josephson v. Dry Dock Savings Institution, 292 N. Y. 666, 56 N. E. (2d) 96 (1944); Andie v. Kaplan, 263 App. Div. 884, 32 N. Y. S. (2d) 429 (1942) aff'd 288 N. Y. 685, 43 N. E. (2d) 82 (1942); Sulkowski v. Szewczyk, 255 App. Div. 103, 6 N. Y. S. (2d) 97 (1938); Note (1945) 158 A. L. R. 617, 623 et seq.

[16]"The plaintiff's cause of action arises out of a breach of promise of marriage, and she cannot circumvent the statute by bringing an action in tort for damages...." Thibault v. Lalumiere, 318 Mass. 72, 60 N. E. (2d) 349, 351, 158 A. L. R. 613, 617 (1945).

[17]Even where there has been no fraud recovery for engagement rings is allowed. Priebe v. Sinclair, 90 Cal. App. (2d) 79, 202 P. (2d) 577 (1949); Gikas v. Nicholis, 96 N. H. 177, 71 A. (2d) 785 (1950); Beberman v. Segal, 6 N. J. Super. 472, 69 A. (2d) 587 (1949); Restatement, Restitution (1937) § 58, comment (c). Where the promise is fraudulent and later breached, plaintiffs have recovered property other than rings. Mack v. White, 97 Cal. App. (2d) 497, 218 P. (2d) 76 (1950) (proceeds from sale of house); Norman v. Burks, 93 Cal. App. (2d) 687, 209 P. (2d) 815 (1949) (house and ring); Security-First National Bank v. Schaub, 71 Cal. App. (2d) 467, 162 P. (2d) 966 (1945) (annulment of deed to land); Restatement, Restitution (1937) § 26. See Weber v. Bittner, 75 Pa. D. & C. 54 (1950); Bullen v. Neuweiller, 73 Pa. D. & C. 207 (1949); Notes (1952) 52 Col. L. Rev. 242, n. 44; (1941) 55 Dick. L. Rev. 361.

New York Courts have generally denied all causes of action for gift recoveries. Brandes v. Agnew, 275 App. Div. 843, 88 N. Y. S. (2d) 553 (1949) (real property); Andie v. Kaplan, 263 App. Div. 884, 32 N. Y. S. (2d) 429 (1942) aff'd 288 N. Y. 685, 43 N. E. (2d) 82 (1942) (money and jewelry). But see Kaufman v. Rosenbach, 208 Misc. 265, 143 N. Y. S. (2d) 722 (1955) (cause of action upheld for money, part of which was given for safekeeping and part in reliance on promise of marriage); Unger v. Hirsch, 180 Misc. 381, 39 N. Y. S. (2d) 965 (1943) (cause of action upheld for jewelry when marriage contract was mutually rescinded).

In 1947 the New York Law Revision Commission proposed an amendment to the "heartbalm" statute which would allow courts to grant restitution for property or money given in contemplation of the performance of a marriage contract which is not performed. N. Y. Law Rev. Comm. (1947) 225 at 227. After passage in both houses of the legislature, however, it was vetoed by the governor.

this interpretation to recoveries of specific property. Thus, a woman who in good faith lived with a man under a mistaken belief that they were husband and wife has been allowed recovery for household services rendered,[18] and in one instance for contributions made in acquisition of property accumulated by the parties during the relationship.[19]

Where there has been no ceremony of marriage between the parties, however, recoveries for other than specific property are generally denied[20] unless "the elements necessary for recovery . . . can be established without relying upon the promise to marry for support."[21] A typical example of such a collateral promise is seen in *Glazer v. Klughaupt*.[22] There plaintiff was hired for secretarial work by defendant, who withheld her wages on the promise that they would be paid upon the marriage of the parties. Defendant breached his contract to marry, and plaintiff sued for the wages. The court granted recovery, reasoning that the cause of action was based upon the express contract of hire, and not on the contract to marry.[23]

In situations such as that presented in the principal case, where plaintiff alleges fraud or deceit as the basis of the cause of action and seeks damages therefor, it is more difficult to trace any uniformity of reasoning or result. However, it appears that the courts do draw some distinction between situations in which there has been a fraudulently induced marriage *ceremony* and those in which there has not. Recovery of damages seems less likely where there has been no ceremony, apparently because the courts feel that the cause of action must of necessity

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[18]Lazzarevich v. Lazzarevich, 88 Cal. App. (2d) 708, 200 P. (2d) 49 (1948) (value of services in quasi contract where defendant fraudulently represented to plaintiff that divorce proceedings between them had been discontinued when in fact divorce had become effective).

[19]Walker v. Walker, 330 Mich. 332, 47 N. W. (2d) 633, 31 A. L. R. (2d) 1250 (1951) (value of services and contributions made to accumulation of property during the relationship where defendant fraudulently concealed the fact that he had a living spouse). See Moslander v. Moslander's Estate, 110 Ind. App. 122, 38 N. E. (2d) 268 at 272 (1941). Cf. Sclamberg v. Sclamberg, 220 Ind. 209, 41 N. E. (2d) 801 (1942); Fowler v. Fowler, 97 N. H. 216, 84 A. (2d) 836 (1951).

[20]See note 15, supra.

[21]Rubenstein v. Lopsevich, 4 N. J. 282, 72 A. (2d) 518, 520 (1950).

[22]116 N. J. L. 507, 185 Atl. 8 (1936).

[23]Accord: Horby v. King, 13 N. J. Super. 395, 80 A. (2d) 476 (1951) (suit for medical expenses and support of illegitimate child sustained where cause of action was held to be based on defendant's promise to pay therefor and not on incidental promise of marriage); Warneck v. Kielly, 68 N. Y. S. (2d) 157 (1946) (cause of action upheld for funds given by plaintiff who breached contract to marry where cause of action was based on trust agreement between the parties). Cf. De Paola v. Greenspan, 167 Misc. 467, 3 N. Y. S. (2d) 590 (1938).

depend upon a breach of promise and is more likely to foster the evils which the "heartbalm" statutes seek to prevent.[24]

The effect of a ceremony is illustrated by a comparison of two cases decided in New York. In *Sulkowski v. Szewczyk*[25] the plaintiff, relying on defendant's fraudulent representation that he was single when in fact he was married, accepted defendant's proposal of marriage, and by reason thereof she suffered damages. The court held that plaintiff's cause of action was one which the legislature intended to prohibit by the statute abolishing breach of promise suits because such cause of action is "one of those in which the service of the summons or merely the threat to do so is sufficient to cause a settlement even where there is not any merit in the alleged cause of action."[26] In *Snyder v. Snyder*,[27] under facts which were the same as in the *Sulkowski* case except that plaintiff and defendant went through a marriage ceremony, the court sustained the cause of action, stating: "[it] is not one which is subject to abuse or manipulation by unscrupulous persons. It is neither within the letter nor the intendment of the law. The gravamen of this complaint is the injury resulting from the change of status of the parties. In no conceivable aspect is the plaintiff seeking damages for any breach of promise to marry. Accordingly there has been no resort to the form of action in deceit as a subterfuge and the attempt to circumvent the statutory prohibition."[28]

A federal district court, applying Pennsylvania law in a case in which no ceremony was involved, cited and followed the *Sulkowski* decision.[29] However, in doing so the court rejected the *Snyder* case, ap-

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[24]Thibault v. Lalumiere, 318 Mass. 72, 60 N. E. (2d) 349, 158 A. L. R. 613 (1945).

[25]255 App. Div. 103, 6 N. Y. S. (2d) 97 (1938).

[26]255 App. Div. 103, 6 N. Y. S. (2d) 97, 99 (1938).

[27]172 Misc. 204, 14 N. Y. S. (2d) 815 (1939).

[28]172 Misc. 204, 14 N. Y. S. (2d) 815, 816 (1939). In Friedman v. Libin, 157 N. Y. S. (2d) 474, 484 (1956), an action against decedent's administratrix for the fraudulent inducement of plaintiff by decedent to enter into a void marriage, the court said: "The plaintiff does not here assert that the decedent wronged her in *failing* to marry her; rather, ... that decedent wronged her in fraudulently inducing her to marry. The ... complaint is based on what the decedent did, and not on what he refused to do." [italics supplied]. In Levine v. Levine, 1 Misc. (2d) 100, 146 N. Y. S. (2d) 393, 395 (1955) the court, reasoning that had there been no marriage plaintiff could not have recovered, denied recovery of damages for property given defendant prior to the marriage but allowed damages for injuries sustained through the marriage itself. The court said: "Thus, proper effect can be given both to the [heartbalm] statute and to the plaintiff's present cause of action without intermingling and confusing both into one." But see Mandell, Family Law (1956) 31 N. Y. U. L. Rev. 1515.

[29]A. B. v. C. D., 36 F. Supp. 85 (E. D. Pa. 1940), aff'd 123 F. (2d) 1017 (C. C. A. 3rd, 1941), cert. den. 314 U. S. 691, 62 S. Ct. 361, 86 L. ed. 553 (1941).

parently failing to recognize the distinctive effect of a fraudulently induced ceremony. The rejection appeared to rest solely on the sweeping generalization that the policy enunciated by the statute is broader than its letter and that "The evil sought to be overcome was reasonably deemed serious enough to justify a denial of the judicial process to those asking relief from real as well as fictitious wrongs."[30] However, the reasoning behind this policy seems inapplicable in cases in which there has been a fraudulently induced ceremony. It is at least arguable that the existence of a marriage ceremony entered into in reliance on a defendant's representations is a prima facie indication of plaintiff's good faith in bringing suit, and further is strong evidence that there was an agreement of marriage between the parties.[31] Thus, the threat to the policy considerations which prompted passage of the "heartbalm" statutes is less probable, and the balance is tipped in favor of that policy consideration which keeps the courts open for the enforcement of just claims. It would seem that the courts should not apply these statutes when they are more likely to protect than to prevent unscrupulous conduct.[32]

However, the language of the court in the principal case, indicating that the statute abolishes only ex contractu actions, perhaps narrows the effect of the statute more than was necessary for reaching the de-

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[30]36 F. Supp. 85, 87 (E. D. Pa. 1940).

[31]Thus, it would seem that the requirement suggested by some writers in order to preserve the cause of action—i.e., more formal evidence of the promise—is satisfied where the parties have actually entered into a marriage ceremony. See text at note 32, infra.

[32]Note (1950) 21 Tenn. L. Rev. 451 at 452. It should be noted that some decisions which might involve the "heartbalm" statutes, where there has been a fraudulently induced ceremony, may be subject to misinterpretation with regard to the distinction between void and voidable marriages. See note 11, supra. Analytically, whether or not a marriage is invalid from its inception has no direct bearing on whether or not a cause of action for fraud is prohibited by the "heartbalm" statute. However, there may be some basis for confusion in that the facts which justify the courts in declaring the marriage void may be the same facts which indicate that the fraud involved is of such a nature as to justify the court's refusal to apply the "heartbalm" statute. For example, in Amsterdam v. Amsterdam, 56 N. Y. S. (2d) 19 (1945), the court allowed plaintiff recovery for fraud where she had been induced to enter into a void marriage by defendant's fraudulent representations; the decision was based on the removal by statute of the spousal disability in tort suits. The court made no reference to breach of promise or to the "heartbalm" statute. It did, however, distinguish the voidable from the void marriage: "The consequences in the latter may be regarded as even more damaging than in the former which might be valid at the election of the injured party." 56 N. Y. S. (2d) 19, 22 (1945). In Lee v. Lee, 184 Misc. 686, 57 N. Y. S. (2d) 97 (1945) the court held plaintiff was entitled to an annulment and damages for fraud in the same action because she never was legally a married woman. No mention was made in the opinion of the "heartbalm" statute.

cision, and such a strict interpretation would seem to be no more desirable than overextending the scope and statute to bar all causes of action remotely relating to a breach of promise, regardless of form and substance. The breach of promise action is of a dual nature, being neither wholly ex contractu nor wholly ex delicto.[33] Thus, acceptance of the controlling distinction in the principal case would seem to invite circumvention of the statute, thereby defeating the purpose for which it was enacted.

A practical solution to the problem of statutory interpretation has been offered by some writers who suggest that the courts should impose restrictions on the cause of action by requiring more formal evidence of the marriage promise, by widening the defenses to the action, and by limiting recovery in such suits to actual pecuniary loss.[34] A similar solution has been enacted into law in Tennessee.[35] The legislators in that state apparently recognized that the "heartbalm" statutes in other jurisdictions were subject to overzealous interpretation, and attempted to reach a middle ground between the two extremes. The Tennessee statute provides in substance that the plaintiff's evidence of a contract to marry must be in writing or be proved by two disinterested witnesses, that the jury shall take into consideration the age and experience of the parties, and that when the defendant is over sixty years of age recovery shall be limited to actual pecuniary loss. Though it is not perfect, inasmuch as defendants fearing unsavory publicity may still provide a ready source of revenue for blackmailers and extortionists, the Tennessee statute appears to be a step in the right direction. In large measure it accomplishes the purposes of the "heartbalm" statutes in that it greatly lessens the probability of unjust claims, extortion and blackmail, while at the same time offering a legal remedy to persons with just claims—the balance and the goal which each jurisdiction should seek to attain.

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[33]See Keezer, Marriage and Divorce (3rd ed. 1946) § 104; Brockelbank, The Nature of the Promise to Marry (1946) 41 Ill. L. Rev. 1 at 4.

[34]See 1 Vernier, American Family Laws (1931) 29; Feinsinger, Legislative Attack on "Heart Balm" (1935) 33 Mich. L. Rev. 979 at 985; Brockelbank, The Nature of the Promise to Marry (1946) 41 Ill. L. Rev. 199 at 209 (proposing a model curative statute which provides an arbitrary maximum amount for mental suffering and humiliation be allowed).

[35]6 Tenn. Code Ann. (1955) §§ 36-701—36-706.

EQUITY—EXERCISE OF DISCRETIONARY POWER TO ENJOIN PROSECUTION OF SUIT IN FOREIGN COURT. [New Jersey]

Generally a plaintiff has the right to prosecute his action in any court which has jurisdiction over the subject matter of his case and which can obtain jurisdiction over the parties.[1] Nonetheless, it is universally agreed that in appropriate cases courts of equity have the power to restrain persons within their jurisdiction from exercising their usual right to bring suits in foreign courts.[2] The power being conceded, the problem that has preplexed the courts is the determination of the proper circumstances for the exercise of that power.[3]

The early American cases acknowledged the existence of this power, but it was seldom exercised.[4] This reluctance to act stemmed from several factors, in addition to the fundamental principle that equity acts only in extraordinary cases.[5] First, the courts were fearful of violating the principles of comity, and thus stressed the respect due other courts.[6] Further, these early decisions placed great emphasis upon

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[1]Tennessee Coal, Iron, & R. R. v. George, 233 U. S. 354 at 359, 34 S. Ct. 587 at 588, 58 L. ed. 997 at 1000 (1914); Atchison, T. & S. F.Ry. v. Sowers, 213 U. S. 55 at 67, 29 S. Ct. 397 at 401, 53 L. ed. 695 at 701 (1909); Dennick v. Railroad Co., 103 U. S. 11 at 18, 26 L. ed. 439 at 441 (1881); Royal League v. Kavanagh, 233 Ill. 175, 84 N. E. 178 at 181 (1908); Boston & M. R. R. v. Whitehead, 307 Mass. 106, 29 N. E. (2d) 916 at 917 (1940); Carson v. Dunham, 149 Mass. 52, 20 N. E. 312 at 314, 3 L. R. A. 203 at 205 (1889); McClintock, Equity (2nd ed. 1948) 466; Notes (1941) 27 Iowa L. Rev. 76; (1950) 10 La. L. Rev. 302.

[2]Cole v. Cunningham, 133 U. S. 107, 10 S. Ct. 269, 33 L. ed. 538 (1890); Royal League v. Kavanagh, 233 Ill. 175, 84 N. E. 178 at 180 (1908); Pitcairn v. Drummond, 216 Ind. 54, 23 N. E. (2d) 21 at 22 (1939); Culp v. Butler, 69 Ind. App. 688, 122 N. E. 684 at 685 (1919); Oates v. Morningside College, 217 Iowa 1059, 252 N. W. 783 at 784 (1934); Boston & M. R. R. v. Whitehead, 307 Mass. 106, 29 N. E. (2d) 916 at 917 (1940); Carson v. Dunham, 149 Mass. 52, 20 N. E. 312 at 312, 3 L. R. A. 203 at 204 (1889); Poole v. Mississippi Publishers Corp., 208 Miss. 364, 44 S. (2d) 467 at 471 (1950); 14 Am. Jur., Courts § 255; Pound, The Progress of the Law—Equity (1920) 33 Harv. L. Rev. 420 at 425; Notes (1922) 22 Col. L. Rev. 360; (1919) 33 Harv. L. Rev. 92; (1932) 31 Mich L. Rev. 88.

[3]Pound, The Progress of the Law—Equity (1920) 33 Harv. L. Rev. 420 at 426; Notes (1922) 22 Col. L. Rev. 360; (1919) 33 Harv. L. Rev. 92 (1941) 27 Iowa L. Rev. 76; (1950) 10 La. L. Rev. 302 at 305; (1932) 31 Mich. L. Rev. 88.

[4]Mead v. Merritt, 2 Paige 402 (N. Y. 1831); Schuyler v. Pelissier, 3 Edw. Ch. 191 (N. Y. 1838); Burgess v. Smith, 2 Barb. Ch. 276 (N. Y. 1847); Bank of Bellows Falls v. Rutland & B. R. R., 28 Vt. 470 (1856); Harris v. Pullman, 84 Ill. 20 (1876); Wells Lumber Co. v. Menominee River Boom Co., 203 Mich. 14, 168 N. W. 1011 (1918); Note (1949) 6 A. L. R. (2d) 896 at 899.

Inasmuch as the historical development of the law is emphasized in this comment, citation of cases will be in chronological rather than alphabetical order in all the following footnotes.

[5]Note (1941) 27 Iowa L. Rev. 76 at 77.

[6]Mead v. Merritt, 2 Paige 402 at 406 (N. Y. 1831); Schuyler v. Pelissier, 3 Edw. Ch. 191 at 193 (N. Y. 1838); Burgess v. Smith, 2 Barb. Ch. 276 at 280 (N. Y. 1847).

the doctrine that as between courts of equal dignity the first court to acquire jurisdiction should be allowed to dispose of the case without interference.[7] And finally, it was feared that the use of these injunctions would lead to retaliation in kind by the foreign courts.[8] This apprehension was expressed in *Peck v. Jennesses*:[9] "For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other." In short, the early cases, in denying the injunction, relied heavily upon comity, fearing that any other policy would lead to interstate disharmony.[10]

Gradually, however, it came to be realized that an in personam order restraining a *person* subject to the jurisdiction of the restraining court was not a direct interference with the foreign *court,* because the injunction did not operate against that court, but only against the person restrained.[11] Thus, such an injunction was merely a "charge upon the conscience" of the enjoined party,[12] which charge operated upon him even though he was no longer within the territorial limits of the enjoining state, and even though the acts enjoined were to take place outside the state.[13] As a necessary corollary, it became equally clear that the foreign court was not bound by comity to stop its proceedings.[14]

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[7]Peck v. Jenness, 7 How. 612 at 625, 12 L. ed. 841 at 846 (U. S. 1849); Bank of Bellows Falls v. Rutland & B. R. R., 28 Vt. 469 at 477 (1856); Home Ins. Co. v. Howell, 24 N. J. Eq. 238 at 241 (1873); Carson v. Dunham, 149 Mass. 52, 20 N. E. 312 at 314, 3 L. R. A. 203 at 204 (1889); Freick v. Hinkly, 122 Minn. 24, 141 N. W. 1096 at 1096 (1913); Wade v. Crump, 173 S. W. 538 at 539 (Tex. Civ. App. 1915).

[8]Mead v. Merritt, 2 Paige 402 at 406 (N. Y. 1831); Durant v. Pierson, 12 N. Y. Supp. 145 at 147 (1890).

[9]7 How. 612, 625, 12 L. ed. 841, 846 (U. S. 1849).

[10]Mead v. Merritt, 2 Paige 402 at 406 (N. Y. 1831); Schuyler v. Pelissier, 3 Edw. Ch. 191 at 194 (N. Y. 1838); Harris v. Pullman, 84 Ill. 20 at 28 (1876).

[11]Dehon v. Foster, 4 Allen 545 at 553 (Mass. 1862); Vail v. Knapp, 49 Barb. Ch. 299 at 309 (N. Y. 1867); Engel v. Scheuerman, 40 Ga. 207 at 210 (1869); Snook v. Snetzer, 25 Ohio St. 516 at 519 (1874); Cole v. Cunningham, 133 U. S. 107, 10 S. Ct. 269 at 273, 33 L. ed. 538 at 544 (1890); Sandage v. Studebaker Bros. Mfg. Co., 142 Ind. 148, 41 N. E. 380 at 383 (1895); Royal League v. Kavanagh, 233 Ill. 175, 84 N. E. 178 at 180 (1908); Bossung v. District Ct., 140 Minn. 494, 168 N. W. 589 at 591 (1918); Lancaster v. Dunn, 153 La. 15, 95 So. 385 at 387 (1922). Cf. McClintock, Equity (2nd ed. 1948) 463.

[12]Note (1932) 31 Mich. L. Rev. 88, 92.

[13]French v. Hay, 22 Wall. 250 at 252, 22 L. ed. 857 at 858 (U. S. 1875); State v. Fredlock, 52 W. Va. 232, 43 S. E. 153 at 156, (1903); Royal League v. Kavanagh, 233 Ill. 175, 84 N. E. 178 at 181 (1908); Bigelow v. Old Dominion Copper Mining and Smelting Co., 74 N. J. Eq. 457, 71 Atl. 153, 160 (1908).

[14]Nichols and Shephard Co. v. Wheeler, 150 Ky. 169, 150 S. W. 33 at 34 (1912); Bossung v. District Ct., 140 Minn. 494, 168 N. W. 589 at 591 (1918); Frye v. Chicago, R. I. & P. Ry., 157 Minn. 52, 185 N. W. 629 at 632 (1923); Kepner v. Cleveland C. C. & St. L. Ry., 322 Mo. 299, 15 S. W. (2d) 825 at 829 (1939); Hall v. Milligan, 221 Ala. 233, 128 So. 438 at 440, 69 A. L. R. 618 at 622 (1930); Wells v.

This new understanding of the manner in which an injunction against foreign judicial proceedings operated was best stated in *Vail v. Knapps*:[15] "While as a general rule, the propriety of which is apparent, the courts of this state decline to interfere by injunction, to restrain its citizens from proceeding in an action which has been commenced in the court of a sister state, yet there are exceptions to this rule, and when a case is presented, fairly constituting such exception, extreme delicacy should not deter the court from controlling the conduct of a party within its jurisdiction to prevent oppression or fraud. No rule of comity or policy prevents this." Thus, the *Vail* case laid down the principle that the power to enjoin foreign judicial proceedings should be used to prevent oppression or fraud, but the power was to be used only sparingly and with due regard to the comity doctrine.[16]

As the courts began to grant these injunctions with more regularity, an attack was made on their constitutionality. But in *Cole v. Cunningham*,[17] the United States Supreme Court, by holding that such an injunction violated neither the Full Faith and Credit Clause nor the Privilege and Immunities Clause of the Constitution, put at rest the question of the power of equity to restrain the prosecution of a cause of action brought in another state. However, the question as to when this purely discretionary power should be used has never been adequately answered.[18]

The recent case of *Trustees of Princeton University v. Trust Com-*

Wells, 230 Ala. 430, 161 So. 794 at 795 (1935); Cf. New York C. & St. L. Ry. v. Nortoni, 331 Mo. 764, 55 S. W. (2d) 272 at 273 (1932). Contra: Fisher v. Pacific Mutual Life Ins. Co., 112 Miss. 30, 72 So. 846 (1916). Discussions will be found in Notes (1941) 27 Iowa L. Rev. 76 at 79; (1924) 72 U. of Pa. L. Rev. 429; (1930) 39 Yale L. J. 719; (1919) 1 A. L. R. 148.

[15]49 Barb. 299, 305 (N. Y. 1867).

[16]A discussion of the significance of the Vail case is to be found in Note (1932) 31 Mich L. Rev. 88 at 90, which presents the argument at pages 88 and 90 that injunctions against foreign judicial proceedings should issue just as any other injunction without regard to the doctrine of comity. "... the true basis for the issuance of an injunction in cases of this nature should involve only an application of the usual equitable principles. A court is confronted with no more difficult a problem when called upon to enjoin foreign litigation than is presented when a request is made to restrain parties from taking part in local proceedings." Note (1932) 31 Mich L. Rev. 88, 92. For similar arguments: Notes (1922) 22 Col. L. Rev. 360 at 362; (1950) 10 La. L. Rev. 302 at 305. For arguments contra: McClintock, Equity (2nd ed. 1948) 463; Pound, The Progress of the Law—Equity (1920) 33 Harv. L. Rev. 420 at 425.

[17]133 U. S. 107, 10 S. Ct. 269, 33 L. ed. 538 (1890).

[18]Hawkins v. Ireland, 64 Minn. 339, 67 N. W. 73 at 75 (1896); Lancaster v. Dunn, 153 La. 15, 95 So. 385 at 387 (1922); Notes (1922) 22 Col. L. Rev. 360; (1941) 27 Iowa L. Rev. 76; (1950) 10 La. L. Rev. 302 at 305; (1932) 31 Mich. L. Rev. 88. See also, note 16, supra.

pany of New Jersey[19] illustrates some of the uncertainties inherent in this question. Prior to this action one Cane had died in Florida, leaving a will expressly stating he was a domicillary of New Jersey. There was substantial evidence tending to support this claim of domicile. However, decedent, a man of considerable wealth, left both real and personal property in New York, as well as in New Jersey. The will was admitted to probate in New Jersey, but the widow, who was also the executrix, consented to the New Jersey probate only on the condition that she did not thereby waive any rights she or the estate might have by virtue of the fact that the testator was domiciled in New York at the time of his death. The widow subsequently filed a petition for probate in New York. At this point the Trustees of Princeton University, as the residuary legatees under the will, brought the present action in the New Jersey Superior Court, seeking a determination that the testator had died domiciled in New Jersey, and an injunction restraining the executors and executrix from further prosecuting probate procedings in New York. An interlocutory injunction was granted, and the widow and executors appealed. The Supreme Court of New Jersey affirmed, finding that the evidence was sufficient to make out a prima facie case for the issuance of an interlocutory injunction, and further pointing out that the jurisdiction of New Jersey was prior in time and that the Superior Court had the right to protect that prior jurisdiction, at least until such time as the issue of domicile could be decided on the merits.[20]

The determination of whether this was a proper case for the issuance of an injunction necessarily involved a balancing of the considerations in favor of having the issue of domicile decided in New Jersey, as against the considerations in favor of allowing the executors to exercise their legal right to bring probate proceedings in the State of New York, it being remembered that both real and personal assets lie in each state. The New Jersey Supreme Court found that the equities favoring an initial determination of domicile by New Jersey outweighed the naked legal right of the widow to proceed with the New York probate proceedings.[21]

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[19]22 N. J. 587, 127 A. (2d) 19 (1956).

[20]22 N. J. 587, 127 A. (2d) 19 at 25, 26 (1956).

[21]The appellants contended that there was no showing of urgent necessity to support the injunction, to which contention the New Jersey Supreme Cout replied: "... there was an adequate showing of urgent necessity, for without the preliminary injunction there would be the continuing and ever present danger of the parties going forward on the issue of domicile in the New York proceeding; that is the very thing which the Chancery Division could equitably seek to prevent upon the application of Princeton or other interested parties." 22 N. J. 587, 127 A. (2d) 19, 26 (1956).

The principal case could be regarded as within two or three general classes of cases in which equity will exercise its power to restrain the prosecution of foreign judicial proceedings.[22] The first class rests upon the doctrine that as between residents of the same state, the *statutory laws* of that state are binding to the extent that those statutes provide for positive immunities or exemptions or freedom from certain judicial remedies. [23] Thus, an equity court will enjoin an attempt by a resident to sue in a foreign court in order to evade the effect of these domestic statutory provisions.[24] However, the injunction will not issue for the sole purpose of forcing the resident litigant to use the courts of his own state;[25] nor will an injunction be granted merely because the party seeking it has reason to fear a less favorable result in the foreign forum,[26] because, aside from attempts to evade strong domestic policy,[27]

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[22]These various classes of cases in which equity will enjoin a foreign cause of action are more fully discussed in Note (1949) 6 A. L. R. (2d) 896 at 901. For other classifications see Pound, The Progress of the Law—Equity (1919) 33 Harv. L. Rev. 420 at 426; Notes (1941) 27 Iowa L. Rev. 76 at 87; (1950) 10 La. L. Rev. 302 at 305; (1954) 8 Rutgers L. Rev. 549.

[23]Note (1949) 6 A. L. R. (2d) 896 at 901. See Note (1930) 69 A. L. R. 591.

[24]Allen v. Buchanan, 97 Ala. 399, 11 So. 777 (1892) (resident defendant enjoined from further prosecuting action for attachment and garnishment in Louisiana court to reach money due to plaintiff in Louisiana, which was exempt from legal process under laws of Alabama, but not under laws of Louisiana); Miller v. Gittings, 85 Md. 601, 37 Atl. 372 (1897) (Maryland resident enjoined from bringing suit in New York against another Maryland resident to enforce debt which arose in Maryland out of transaction within Maryland statute prohibiting gambling); Culp v. Butler, 69 Ind. App. 668, 122 N. E. 648 (1919) (action brought in another state to evade the statute of limitations of the home state enjoined). Contra: Thorndike v. Thorndike 142 Ill. 450, 32 N. E. 510, 21 L. R. A. 71 (1892). [Whether the statute of limitations is a sufficient immunity to warrant an injunction against a foreign proceeding is an unsettled question. See Note (1949) 6 A. L. R. (2d) 896 at 908]. Pere Marquette Ry. v. Slutz, 268 Mich. 388, 256 N. W. 458 (1934) (Michigan resident, injured in collision with Michigan corporation's train, enjoined from prosecuting personal injury action, which was brought in violation of Michigan venue statute, in Illinois); Morad v. Williams, 177 Misc. 933, 32 N. Y. S. (2d) 463 (1942) (New York resident enjoined from prosecuting alienation of affections suit in Florida after he had fraudulently induced other party, also a resident of New York, to go to Florida, so that suit, which is prohibited under the laws of New York, could be instituted). For extensive listing of similar cases, see Notes (1930) 69 A. L. R. 591; (1949) 6 A. L. R. (2d) 896. The divorce cases are multitudinous, and are annotated separately. Note (1940) 128 A. L. R. 1467.

[25]Carson v. Dunham, 149 Mass. 52, 20 N. E. 312 at 314 (1889); Royal League v. Kavanagh, 233 Ill. 175, 84 N. E. 178 at 181 (1909); Pound, The Progress of the Law—Equity (1920) 33 Harv. L. Rev. 420 at 427; Note (1922) 22 Col. L. Rev. 360.

[26]Carson v. Dunham, 149 Mass. 52, 20 N. E. 312 at 314 (1889); Thorndike v. Thorndike, 142 Ill. 450, 32 N. E. 510 at 510 (1892); Royal League v. Kavanagh, 233 Ill. 175, 84 N. E. 178 at 181 (1908); Pound, The Progress of the Law—Equity (1920) 33 Harv. L. Rev. 420 at 427; Notes (1922) 22 Col. L. Rev. 360; (1930) 69 A. L. R. 591 at 594.

[27]"It is generally said that where a suit in a foreign jurisdiction would result

it is generally considered just that a plaintiff should be permitted to seek the forum in which he can best serve his own interests.[28] On similar reasoning, it is also held that the *principles of equity* which are recognized by the home state will be binding on fellow residents to the extent that one resident will not be allowed to bring a foreign action against another resident for the purpose of depriving him of a fair trial, or of imposing undue hardship, or of acquiring an unconscionable advantage over him. Thus, as between residents, equity will enjoin vexatious, oppressive, and inequitable litigation.[29] It is generally held, however, that mere inconvenience is not a sufficient ground to warrant the issuance of an injunction against foreign judicial proceedings.[30]

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in an evasion of a strong domestic policy, such will be enjoined." Note (1932) 31 Mich. L. Rev. 88, 93. See also Notes (1941) 27 Iowa L. Rev. 76 at 92; (1930) 69 A. L. R. 591; (1940) 128 A. L. R. 1467; (1949) 6 A. L. R. (2d) 896.

[28]Carson v. Dunham, 149 Mass. 52, 20 N. E. 312 at 314 (1889); Thorndike v. Thorndike, 142 Ill. 450, 32 N. E. 510 at 510 (1892); Notes (1932) 31 Mich. L. Rev. 88 at 95; (1941) 27 Iowa L. Rev. 76 at 86.

Consequently a mere showing of a difference in the substantive law of the foreign jurisdiction is not sufficient to warrant an injunction against the foreign proceeding. Bigelow v. Old Dominion Copper Mining and Smelting Co., 74 N. J. Eq. 457, 71 Atl. 153 (1908); Freick v. Hinkly, 122 Minn. 24, 141 N. W. 1096, 46 L. R. A. (N. S.) 695 (1913); American Express Co. v. Fox, 135 Tenn. 489, 187 S. W. 1117 (1916). Note (1930) 69 A. L. R. 591 at 593. These decisions would appear sound because "under principles of conflict laws the foreign court will presumably apply the *lex loci*, and unless there is a showing that it will not do so in a particular case, the equity court will not act on the basis of distrust of or possible error by the foreign court." Note (1941) 27 Iowa L. Rev. 76, 94. Also see Note (1949) 6 A. L. R. (2d) 896 at 910.

Likewise where the difference between the laws of the two jurisdictions is merely procedural, an injunction usually will not issue to restrain the foreign suit. Pound, The Progress of the Law—Equity (1920) 33 Harv. L. Rev. 420 at 427. Illustrative cases denying injunctions: Edgell v. Clarke, 19 App. Div. 199, 45 N. Y. Supp. 979 (1897) (plaintiff sought injunction against foreign action because rules of evidence were more favorable to defendant in the foreign court); J. W. Wells Lumber Co v. Menominee River Boom Co., 203 Mich. 14, 168 N. W. 1011 (1918) (plaintiff sought injunction against foreign action because under law of that jurisdiction his setoff claim was barred by statute of limitations); Chicago, M. & St. P. Ry. v. McGinley, 175 Wis. 565, 185 N. W. 218 (1921) (plaintiff sought injunction against foreign proceeding because foreign jurisdiction allowed verdict by agreement of only ten jurors).

[29]Hawkins v. Ireland, 64 Minn. 339, 67 N. W. 73 at 75 (1896); Bigelow v. Old Dominion Copper Mining and Smelting Co., 74 N. J. Eq. 457, 71 Atl. 153 at 163 (1908); Mason v. Harlow, 84 Kan. 277, 114 Pac. 218 at 219 (1911); Reed's Adm'x v. Illinois Cent. R. R., 182 Ky. 455, 206 S. W. 794 at 798 (1918). Also within this class of cases are the many divorce cases in which injunctions have been issued. Note (1940) 128 A. L. R. 1467.

[30]Notes (1922) 22 Col. L. Rev. 360 at 361; (1941) 27 Iowa L. Rev. 76 at 102; (1932) 31 Mich. L. Rev. 88 at 98; (1928) 57 A. L. R. 77; (1938) 115 A. L. R. 237. The problem, however, is to determine where mere inconvenience ends, and true hardship begins.

In the second class of cases the injunction against prosecution of a foreign action issues, not to protect some duty owed by one resident to another, but to preserve the court's jurisdiction in order that the court may be able to decree adequate and final justice to the parties before it. In this type of case, unlike those in the first class, it does not matter whether the party enjoined be a resident or a non-resident of the enjoining state; in either event equity has the right to protect its jurisdiction.[31]

Third, an injunction will issue against the prosecution of a foreign proceeding where that proceeding conflicts with the prosecution of a local quasi-in-rem action, such as receivership,[32] insolvency,[33] and the administration of estates in probate.[34] In these cases the local court has taken possession of the property in controversy to determine the respective rights of the litigants therein, and to administer and distribute the property accordingly. Here again it usually does not matter whether the party enjoined is a resident or a non-resident of the enjoining state; all that is required is that the foreign action have a disruptive effect upon the local court's effort to settle the rights of the parties in the property over which the local court has assumed possession.[35]

It is readily apparent that these broad classifications are not mutually exclusive and consequently that some cases will fall appropriately into more than one class, as indeed, the principal case itself may be placed in both the first and third classes. The fact situations and the legal circumstances that have been found sufficient to warrant the issuance of these injunctions are so multitudinous and diverse that no such pedagogical classification can be truly adequate.

In the light of the above principles the decision of the New Jersey Supreme Court, in affirming the interlocutory injunction against the widow and the executors, would appear to be sound. The decision rests ultimately upon the common sense consideration that neither the estate, nor the widow, nor the beneficiary plaintiff would derive

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[31]This second class of cases is more fully discussed in Note (1949) 6 A. L. R. (2d) 896 at 902. For a breakdown of the cases falling within this class see in the same annotation at: § 17 (suits conflicting with general equity jurisdiction); § 18 (cancellation and rescission); § 19 (relief against judgments); § 20 (title to property); § 21 (interpleader); § 22 (trusts and fiduciary relations); § 23 (performance of contracts).

[32]For discussion and illustrative cases, see Note (1949) 6 A. L. R. (2d) 896 at 938.

[33]For discussion and illustrative cases, see Note (1949) 6 A. L. R. (2d) 896 at 941.

[34]For discussion and illustrative cases, see Note (1949) 6 A. L. R. (2d) 896 at 938 and 943.

[35]See Note (1949) 6 A. L. R. (2d) 896 at 902.

any benefit from simultaneous litigation in two states determining the issue of domicile. Such multiplicity would serve no useful purpose, but rather would increase the expense of probate for the estate as well as for the plaintiff. It also would place an unnecessary burden on the already over-crowded courts, and thus increase the expense to be borne by the tax-paying public. These considerations must have been recognized by the New York court, inasmuch as it has indicated its willingness to act in deference to the New Jersey injunction by ordering "appropriate reservation and adjournment"[36] of the New York action.

It is important to note, however, that New Jersey's determination on the issue of the decedent's domicile will not be binding on the New York court, because by the great weight of authority domicile is a jurisdictional fact.[37]

Thus, New York may still decide that the decedent was domiciled in New York, even if New Jersey decides on the merits that he was domiciled in New Jersey.[38] That the New Jersey court was fully aware of this fact is implicit in its statement that "the interests of the estate as well as the interests of sound judicial administration would be notably disserved by the parties' active prosecution of simultaneous proceedings in New Jersey and New York for the *original determination* of domicile."[39] But even though it be admitted that a final New Jersey decision on the merits will not be conclusive, that does not render this preliminary decision any the less sound. On the contrary, it way well be argued that the danger of a finding of double domicile would have been greater if the two states were deciding this question simultaneously than where one of the states first makes the original determination, thus giving the second state the benefit of its findings. This is manifestly so because it must be presumed that a court will decide the issue fairly and impartially. In lessening, though not eliminating, the danger of a find-

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[36]22 N. J. 587, 127 A. (2d) 19, 26 (1956).

[37]Note (1935) 121 A. L. R. 1200. See Hopkins, The Extraterritorial Effect of Probate Decrees (1944) 53 Yale L. J. 221.

[38]A graphic example of a finding of double domicile is In re Dorrance's Estate, 115 N. J. Eq. 268, 170 Atl. 601 (1934) aff'd 118 N. J. Eq. 1, 176 Atl. 902 (1935) aff'd 116 N. J. L. 362, 184 Atl. 743 (1936), cert den., 298 U. S. 678, 56 S. Ct. 949, 80 L. ed. 1399 (1936), rehearing den., 298 U. S. 692, 56 S. Ct. 957, 80 L. ed. 1410 (1936). The Dorrance litigation is discussed in Harper, Final Determination of Domicile in the United States (1934) 19 Pa. Bar. Quar. 213, reprinted in Notes (1934) 9 Ind. L. J. 586; (1934) 34 Col. L. Rev. 1151; (1934) 18 Minn. L. Rev. 736; (1934) 82 U. of Pa. L. Rev. 796; (1932) 81 U. of Pa. L. Rev. 177.

[39]22 N. J. 587, 127 A. (2d) 19, 26 (1956). Italics supplied.

ing of double domicile, the principal decision thus tends to avoid a situation in which the estate would be subjected to greatly increased taxation, to the disadvantage of all parties concerned in this controversy.

LYNN F. LUMMUS

EVIDENCE—PRIOR CRIMINAL CONVICTION AS EVIDENCE OF GUILT IN SUBSEQUENT CIVIL ACTION. [Arkansas].

One convicted of a crime may thereafter become involved in a civil suit in which the vital question arises as to whether he actually did commit the offense of which he was found guilty in the criminal prosecution. In such situations, the courts have been unable to agree on whether a copy of a criminal conviction is admissible as evidence in a subsequent civil proceeding to prove the facts on which it was based.[1] This recurring problem was recently illustrated in the Arkansas case of *Smith v. Dean*,[2] where it was again demonstrated that sound logic and the weight of authority are in opposition to each other on this question. In this case, a wife who had been convicted of her husband's murder came into the probate court to claim a statutory allowance in his estate. Other interested parties, with claims adverse to the wife, introduced in evidence a copy of the murder conviction in an attempt to bar her claim against her husband's estate. In view of a common law doctrine adopted by this court that, if one spouse murders the other spouse, the guilty spouse cannot share in the estate of the other,[3] the probate court accepted the copy in evidence and rejected the wife's claim. On appeal, however, the majority of the Arkansas Supreme Court, following the view which prevails generally in both America and England, ruled that a certified copy of a criminal conviction is inadmissible as evidence in a later civil suit to prove the facts upon which that criminal

[1]There are four divergent views: (1) the traditional view holding the copy inadmissible, see text at note 4; (2) the view holding criminal convictions admissible as conclusive evidence, see text at notes 22 and 23; (3) the rule holding the copy admissible as prima facie evidence subject to rebuttal, see text at note 26; and (4) authority allowing the admission of the conviction as persuasive evidence, see text at note 25.

[2]290 S. W. (2d) 439 (Ark. 1956).

[3]290 S. W. (2d) 439 at 440 (Ark. 1956). The state statute [5 Ark. Stat Ann. (1947) § 61-230] preventing a spouse convicted of murder from being "endowed" in the estate of the other spouse was held applicable to dower and curtesy only, and not to the statutory allowance claimed here.

conviction was based.[4] The court reasoned that "the practical advantage of the traditional view lies in its assurance that in every case the triers of the fact will have the testimony itself before them and not merely a written record of the conclusion reached by some other tribunal."[5] Thus, the adverse claimants will be required to re-try, in the probate proceedings, the question of the wife's actual guilt.

On cursory examination this ruling appears to be a repudiation of the doctrine of res judicata,[6] or more aptly here, the subdivision thereof termed "collateral estoppel," in view of the fact that two separate actions, rather than the same cause of action is involved.[7] However, collateral estoppel is not pertinent in this instance as that rule is designed to prevent a second litigation of facts and issues already decided upon in another cause of action where the *same* parties have been involved in both adjudications. The same parties are not involved in this situation in which a criminal conviction is followed by civil proceedings between private litigants, because the state, which prosecuted the criminal case, is not a party to the subsequent civil suit.[8]

The fact that the parties do differ in the two proceedings is the basis for the principal reason advanced in support of the traditional rule adopted in the instant case. It is argued that a *private party's* claim for remuneration against an alleged wrongdoer should be al-

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[4]Eggers v. Phillips Hardware Co., 88 S. (2d) 507 (Fla. 1956); Silva v. Silva, 297 Mass. 217, 7 N. E. (2d) 601 (1937); Girard v. Vermont Mutual Fire Ins. Co., 103 Vt. 330, 154 Atl. 666 (1931); Interstate Dry Goods Stores v. Williamson, 91 W. Va. 156, 112 S. E. 301, 31 A. L. R. 258 (1922); Hollington v. F. Hewthorn & Co., [1943] 1 K. B. 587; 2 Freeman, Judgments (5th ed. 1925) § 635; 5 Wigmore, Evidence (3rd ed. 1940) § 1671 (a); 20 Am. Jur. 854; 50 C. J. S. 269; Coutts, The Effect of a Criminal Judgment on a Civil Action (1955) 18 Mod. L. Rev. 231 at 233; Notes (1943) 39 Va. L. Rev. 995; (1951) 4 Fla. L. Rev. 115; (1927) 41 Harv. L. Rev. 241; (1951) 18 A. L. R. (2d) 1289. Note, however, that many of the cases cited in support of the majority view actually involve the inadmissibility of acquittals, not convictions.

[5]Smith v. Dean, 290 S. W. (2d) 439, 440 (Ark. 1956).

[6]Under the doctrine of res judicata, once a cause of action has been litigated, it cannot be relitigated as to those same parties in a new proceeding. 30 Am. Jur., Judgments § 161 et seq.; 37 W. & P., Res Judicata (Perm. ed. 1950) 616.

[7]The force of res judicata not only prevents relitigation of the *same cause of action* between the *same parties* but also prevents a second adjudication of such facts and issues, between those *same parties,* as have already been passed on by a court in a *different cause of action;* this latter phase of the doctrine is called collateral estoppel. State v. Hoag, 21 N. J. 496, 122 A. (2d) 628 at 632 (1956); Scott, Collateral Estoppel by Judgment (1942) 56 Harv. L. Rev. 1; 7A W. & P. Collateral Estoppel (Perm. ed. 1952) 212; Restatement, Judgments (1942) § 68.

[8]This distinction is pointed out in United States v. Gramer, 191 F. (2d) 741 at 744 (C. A. 9th, 1951); Interstate Dry Goods Stores v. Williamson, 91 W. Va. 156 at 159, 112 S. E. 301 at 303, 31 A. L. R. 258 at 260 (1922); Notes (1924) 31 A. L. R. 261 at 262; (1927) 41 Harv. L. Rev. 241.

lowed to proceed independently of the success or failure of a criminal case, to which the private person was not a party, brought by the *public* against that same alleged wrongdoer.[9] Yet this argument, which justifies the exclusion of the conviction in the criminal case as evidence, on the ground that it protects the private litigant from possible hardship, is suspect because the private litigant is not the party who objects to the admission of such evidence. To have the conviction of the wrongdoer admitted, far from creating hardship, will be of considerable benefit to the private litigant in that it relieves him of proving anew the facts indicating that the other party committed the criminal act.

A second reason often advanced for the traditional exclusion rule is the variation in the degree of proof required for criminal as distinct from civil suits.[10] However, this consideration seems to provide support for *admitting* the conviction in evidence rather than for *excluding* it. Defendant's commission of the offense having been proven in the criminal case beyond a reasonable doubt, the conviction would appear to be strongly convincing proof of the same fact in the civil case, where only a preponderence of the evidence is required.[11]

Perhaps the courts which are troubled by the variation in the degree of proof factor are taking into consideration a third basis upon which the exclusion rule has been rested: that inasmuch as an acquittal in the criminal case is almost never admissible in evidence

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[9]This reason (often referred to under the maxim of res inter alios acta by which is meant: Things done between two strangers ought not to operate to the disadvantage of a third not a party to them) has been mentioned in the following: Burt v. Union Central Life Ins. Co., 187 U. S. 362 at 367, 23 S. Ct. 139 at 141, 47 L. ed. 216 at 220 (1902); Stone v. United States, 167 U. S. 178 at 185, 17 S. Ct. 778 at 781, 42 L. ed. 127 at 130 (1897); Diamond v. New York Life Ins. Co., 42 F. (2d) 910 at 912 (N. D. Ill. 1930); Schindler v. Royal Ins. Co., 259 N. Y. 310, 179 N. E. 711, 80 A. L. R. 1142 (1932); Eagle, Star and British Dominions Ins. Co. v. Heller, 149 Va. 82 at 87, 140 S. E. 314 at 316, 57 A. L. R. 490 at 492 (1927); Interstate Dry Goods Stores v. Williamson, 91 W. Va. 156 at 159, 112 S. E. 301 at 303, 31 A. L. R. 258 at 260 (1922); Hollington v. F. Hewthorn & Co., [1943] 1 K. B. 587 at 596; 2 Freeman, Judgments (5th ed. 1925) § 654; Coutts, the Effect of a Criminal Judgment on a Civil Action (1955) 18 Mod. L. Rev. 231 at 238; Notes (1953) 39 Va. L. Rev. 995 at 999; (1927) 41 Harv. L. Rev. 241 at 243.

[10]United States v. Gramer, 191 F. (2d) 741 at 743 (C. A. 9th, 1951); Schindler v. Royal Ins. Co., 258 N. Y. 310, 179 N. E. 711, 80 A. L. R. 1142 (1932); Interstate Dry Goods Stores v. Williamson, 91 W. Va. 156, 112 S. E. 301 at 303, 31 A. L. R. 258 at 260 (1922); Coutts, The Effect of a Criminal Judgment on a Civil Action (1955) 18 Mod. L. Rev. 231 at 240; Note (1927) 41 Harv. L. Rev. 241 at 243.

[11]Interstate Dry Goods Stores v. Williamson, 91 W. Va. 156, 112 S. E. 301 at 303, 31 A. L. R. 258 at 260 (1922); 2 Freeman, Judgments (5th ed. 1925) § 656.

in the civil case on behalf of the defendant,[12] a conviction must not be admitted on behalf of the plaintiff, lest a lack of mutuality result.[13] This reasoning, however, overlooks the fact that there is a difference between the reliability of the conviction and the acquittal when admitted in the civil case. The conviction is highly reliable evidence of defendant's commission of the offense, because it demonstrates that that fact was proved beyond a reasonable doubt in the criminal case. But the acquittal merely indicates that the state failed to prove commission of the offense beyond a reasonable doubt; it does not indicate that plaintiff could not prove that fact by a mere preponderence of the evidence in the civil case. Thus, to admit a conviction but exclude an acquittal[14] would not be an unwarranted discrimination between plaintiff and defendant, but rather would be a recognition of the difference in the reliability of the evidence provided by the two results of a criminal case, even though this practice would not result in a strictly mutual rule.[15]

A fourth reason given for the traditional rule is that such evidence as is contained in the record of a criminal conviction is hearsay because the conclusions of the judge and jury in the criminal court are based on testimony heard in that court, and thus they do not have the personal knowledge necessary to permit their testimony to be admissible in the civil proceedings.[16] The fallacy here, however, appears

[12]This view is adhered to almost uniformily despite the divergent views on convictions. Eagle, Star and British Dominion Ins. Co. v. Heller, 149 Va. 82 at 88, 140 S. E. 314 at 316, 57 A. L. R. 490 at 492 (1927); Maybee v. Avery, 18 Johns. 352 at 354 (N. W. 1820); Notes (1953) 39 Va. L. Rev. 995; (1927) 41 Harv. L. Rev. 241; (1951) 18 A. L. R. (2d) 1289 at 1315; (1941) 130 A. L. R. 690 at 691.

[13]Schindler v. Royal Ins. Co., 258 N. Y. 310, 179 N. E. 711 at 712, 80 A. L. R. 1142 at 1144 (1932); 2 Freeman, Judgments (5th ed. 1925) § 654; Coutts, The Effect of a Criminal Judgment on a Civil Action (1955) 18 Mod. L. Rev. 231 at 239; Notes (1953) 39 Va. L. Rev. 995 at 996; (1927) 41 Harv. L. Rev. 241 at 243; (1924) 31 A. L. R. 261 at 266. This lack of mutuality is explained as follows: Since the criminal defendant could not introduce evidence of an acquittal because of the lesser degree of proof required in a civil suit, why let the civil plaintiff use evidence of a conviction against the criminal defendant?

[14]This is what the minority of courts have in fact done. See text at notes 22, 23, 25, and 26, infra. Also see text at note 12, supra, with reference to continued exclusion of acquittals.

[15]See note 13, supra.

[16]5 Wigmore, Evidence (3rd ed. 1940) §§ 1635, 1671(a); Coutts, The Effect of a Criminal Judgment on a Civil Action (1955) 18 Mod. L. Rev. 231 at 238; Note (1953) 39 Va. L. Rev. 995 at 996. Note that while Wigmore assigns hearsay as a reason for exclusion, he affirmatively discredits it, noting that other reports and inquisitions are admissible both at common law and by statute. 4 Wigmore, Evidence (3rd ed. 1940) § 1346(a); 5 Wigmore, Evidence (3rd ed. 1940) 688. According to one writer: "... to classify the deliberate verdict of a jury and judgment of a court as mere hearsay strikes a blow at the pillars of our judicial system." Note (1953) 39 Va. L. Rev. 995, 996.

to be that the conviction record is not presented in the civil suit as *testimony* of the criminal court's judge and jury acting as witnesses, but is rather offered as *proof* that the commission of the act charged has already been passed on by a prior valid judicial proceeding.

Closely connected with this fourth reason is the fifth: namely, that such evidence constitutes mere opinion.[17] According to the leading English case of *Hollington v. F. Hewthorn & Co.*,[18] the evidence is at best only an indication that some other court and jury thinks that the defendant is guilty, and the thinking of that other court should not control in subsequent litigation.[19] This view, however, seems to be an indictment of the Anglo-American judicial system and a refusal to accept the verdict of a duly constituted court and jury that the accused was guilty of the act with which he was charged after a full trial of the same issues.[20]

Perhaps recognizing these fallacies in the arguments supporting the traditional view, and not wishing any party to benefit by his own wrong,[21] some authorities, including the dissenting judge in the principal case,[22] have advocated a rule which goes to the opposite extreme and makes a copy of a criminal conviction not only admissible as evidence in a later civil case, but conclusive of the facts on which it is based.[23] A holding to this effect in the 1927 Virginia case of *Eagle, Star and British Dominions Insurance Co. v. Heller*[24] played an important role in the development of this view. There, the court, in admitting the evidence of the arson conviction of an insured party who was suing to recover insurance on the burned property said: "To permit a recovery under a policy of fire insurance by one who has been convicted of burning the property insured... would discredit the ad-

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[17]Hollington v. F. Hewthorn & Co., [1943] 1 K. B. 587 at 594 and 595; 5 Wigmore, Evidence (3rd ed. 1940) § 1671(a); Coutts, The Effect of a Criminal Judgment on a Civil Action (1955) 18 Mod. L. Rev. 231 at 240.

[18][1943] 1 K. B. 587.

[19][1943] 1 K. B. 587 at 594.

[20]See Smith v. Dean, 290 S. W. (2d) 439 at 441 (Ark. 1956).

[21]Note (1951) 18 A. L. R. (2d) 1289.

[22]Smith v. Dean, 290 S. W. (2d) 439 at 441 (Ark. 1956).

[23]Austin v. United States, 125 F. (2d) 816 (C. C. A. 7th, 1942); Eagle, Star and British Dominions Ins. Co. v. Heller, 149 Va. 82, 140 S. E. 314, 57 A. L. R. 490 (1927); Notes (1953) 39 Va. L. Rev. 995 at 998; (1941) 50 Yale L. J. 499. See Commarano v. Gimino, 234 Ill. App. 556 at 563 (1924); Poston v. Home Ins. Co., 191 S. C 314, 4 S. E. (2d) 261 at 262 (1939). Cf. Burt v. Union Central Life Ins. Co., 187 U. S. 362, 23 S. Ct. 139, 47 L. ed. 216 (1902); Diamond v. New York Life Ins. Co., 42 F. (2d) 910 (N. D. Ill. 1930).

[24]149 Va. 82, 140 S. E. 314, 57 A. L. R. 490 (1927). For a full discussion of this case, see Note (1953) 39 Va. L. Rev. 995 at 998.

ministration of justice, defy public policy and shock the most unenlightened conscience."[25]

Two intermediate views have also been advocated: (1) that criminal convictions are admissible as merely persuasive evidence;[26] and (2) that criminal convictions are admissible as prima facie evidence in a later civil proceeding, subject to the right of rebuttal by defendant.[27] This latter procedure is exemplified by the New York case of *Schindler v. Royal Insurance Co.*,[28] in which an insured had been convicted of making fraudulent representations in taking out an insurance policy but later sued to force the insurer to pay on the policy which had been fraudulently obtained. The court, referring to the former adherence to the traditional rule, recognized that "established precedents are not to be lightly set aside, even though they seem archaic,"[29] but admitted the evidence in the civil case as presumptive proof of the commission of the crime, noting that: "It would be an unedifying spectacle if the courts should now apply the strict rule which excluded all reference to the judgment of conviction in the civil action as evidence tending to establish the material facts."[30] These intermediate views have definite merit in that they lessen the likelihood of inconsistent results being reached on the question of a defendant's guilt[31] and yet guard against that defendant being "shut off from showing there was a miscarriage of justice in the criminal case."[32] The two views differ only in that the admission of the prima facie

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[25]149 Va. 82, 111, 140 S. E. 314, 323, 57 A. L. R. 490, 503 (1927).

[26]4 Wigmore, Evidence (3rd ed. 1940) § 1346(a); McCormick, Evidence (1954) § 295; Cowen, The Admissibility of Criminal Convictions in Subsequent Civil Proceedings (1952) 40 Calif. Law Rev. 225 at 248; Uniform Rules of Evidence (1954) Rule 63 (20); Model Code of Evidence (1942) Rule 521; Note (1951) 18 A. L. R. (2d) 1289. The comment by Wigmore cited above points out the analogy that other reports, returns, and certificates are receivable both at common law and by statute and that therefore the evidence of conviction has value as admissible persuasive evidence.

[27]North River Ins. Co. v. Militello, 100 Colo. 343, 67 P. (2d) 625 (1937) rehearing den. 104 Colo. 28, 88 P. (2d) 567 (1939); Geissler v. Accurate Brass Co., 271 App. Div. 980, 68 N. Y. S. (2d) 1 (1947); Schindler v. Royal Ins. Co., 258 N. Y. 310, 179 N. E. 711, 80 A. L. R. 1142 (1932); Maybee v. Avery, 18 Johns. 352 (N. Y. 1820); Notes (1953) 39 Va. L. Rev. 995; (1927) 41 Harv. L. Rev. 241 at 242. Section 5 of the Clayton Act provides that any final judgment in a criminal prosecution with reference to anti-trust legislation brought in behalf of the United States as prima facie evidence against the defendant in any suit brought by any other party. 38 Stat. 731 (1914), 15 U. S. C. A. § 16 (1951).

[28]258 N. Y. 310, 179 N. E. 711, 80 A. L. R. 1142 (1932).

[29]258 N. Y. 310, 179 N. E. 711, 712, 80 A. L. R. 1142, 1144 (1932).

[30]258 N. Y. 310, 179 N. E. 711, 712, 80 A. L. R. 1142, 1144 (1932).

[31]See text at notes 34 and 35 for an example of a possible inconsistent result.

[32]Sovereign Camp W. O. W. v. Gunn, 227 Ala. 400, 150 So. 491, 493 (1933).

evidence will bind the jury in the civil suit to find for plaintiff unless there is rebuttal by defendant, whereas evidence admitted merely persuasively has no such binding effect whether rebutted or not, and the jury in the civil case would be free to find for either party.[33]

The possible absurdities which could arise from the operation of the traditional rule are well illustrated by reference to *Diamond v. New York Life Insurance Co.*,[34] in which the court broke away from the exclusion rule. Inasmuch as the convicted defendant had already been electrocuted for murder, it would have been astonishing to have refused to admit a copy of the murder conviction in the subsequent civil suit and to have decided there that the deceased defendant was innocent after all. Such a result would, if reached, only serve to undermine public confidence in the judicial system and, in addition, waste the time of the court.[35] As was pointed out by the dissent in the principal case, "To require the [adverse claimants] to prove over again that the [wife] killed her husband, in the teeth of a jury verdict and the solemn decision of this [very court in a prior decision] that she did, would be little short of ridiculous."[36]

Logic and reason seem to stand in favor of allowing a copy of a criminal conviction to be admissible in a civil suit at least as prima facie, if not conclusive, evidence. Since the criminal conviction has been obtained by a finding of guilt beyond a reasonable doubt in a valid judicial proceeding, the convicted criminal has already "had his day in court . . . under conditions most favorable to himself;[37] and there is no apparent reason why such a judgment should not be civilly admissible as conclusive or as prima facie evidence of the same facts in a subsequent proceeding in which only a preponderance of the evidence is required. ". . . [I]f the Bench, whose constant complaint is that of overwork, ever determines to modify the present strict stand-

[33]Wigmore supports this view strongly. See 4 Wigmore, Evidence (3rd ed. 1940) § 1346(a): ". . . many kinds of returns, reports, and certificates made by an official who has investigated in the course of duty, are receivable, both at common law and by statutes. Is not the finding of a judge, or the verdict of a jury based on at least as thorough an inquiry as those other reports and certificates? Has it not some value as evidence, even though not conclusive?" This quotation shows how incompletely the Supreme Court of Arkansas quoted Wigmore by saying that such a prominent authority only favored the relaxation of the traditional rule in "exceptional situations." Smith v. Dean, 290 S. W. (2d) 439, 440 (Ark. 1956).

[34]42 F. (2d) 910 (N. D. Ill. 1930).

[35]Such logical reasoning was shared in Burt v. Union Central Life Ins. Co., 187 U. S. 362 at 368, 23 S. Ct. 139 at 141, 47 L. ed. 216 at 220 (1902).

[36]See Smith v. Dean, 290 S. W. (2d) 439, 441 (Ark. 1956).

[37]Eagle, Star and British Dominions Ins. Co. v. Heller, 149 Va. 82, 89, 140 S. E. 314, 316, 57 A. L. R. 490, 493 (1927).

ard of exclusion, with its inevitable repetitious proceedings and occasional injustice, a theoretical ground for the acceptance of convictions as evidence in civil proceedings is . . . ready at hand, it is [that which is done is presumed to have been done rightly]."[38]

GAVIN K. LETTS

FEDERAL JURISDICTION—EXHAUSTION OF STATE REMEDIES AS PREREQUISITE TO INVOKING JURISDICTION OF FEDERAL COURT UNDER CIVIL RIGHTS ACTS. [Federal]

The long-standing reluctance of the federal courts to take jurisdiction of equitable and declaratory judgment proceedings where a concomitant remedy is available in the state courts is the natural outgrowth of the judicial desire to retain the proper balance in the federal system by recognizing duality of federal and state control.[1] The federal courts' traditional discretionary refusal to act where state remedies are open proceeds from the basic premise that state officers acting in good faith and under color of law in performing their duties should not be enjoined from that action, in the absence of danger of immediate and great irreparable injury, until the state courts have ruled on the controversy.[2]

This doctrine of abstention has had perhaps its greatest force in the requirement which is now statutory law,[3] that the petitioner must have exhausted all available state remedies through which he might obtain relief sought before the federal judiciary can grant petitions for writs of habeas corpus, unless there is a showing of exceptional cir-

[38]Coutts, The Effect of a Criminal Judgment on a Civil Action (1955) 18 Mod L. Rev. 231, 243. Accord: Note (1926) 42 L. Q. Rev. 144.

[1]"It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." Pennsylvania v. Williams, 294 U. S. 176, 185, 55 S. Ct. 380, 385, 79 L. ed. 841, 847 (1935); Railroad Commission of Texas v. Pullman Co., 312 U. S. 496, 61 S. Ct. 643, 85 L. ed. 971 (1941).

[2]"Caution and reluctance there must be in special measure where [the federal courts interfere] with the activities of state officers discharging in good faith their supposed official duties." Hawks v. Hamill, 288 U. S. 52, 60, 53 S. Ct. 240, 243, 77 L. ed. 610, 618 (1933); "... no injunction ought to issue against officers of a State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury." Massachusetts State Grange v. Benton, 272 U. S. 525, 527, 47 S. Ct. 189, 190, 71 L. ed. 387, 391 (1926).

[3]62 Stat. 967 (1948), 28 U. S. C. A. § 2254 (1950).

cumstances that manifest the need for immediate federal action.[4] Attempts to circumvent this rule by the device of alleging a case for injunctive or declaratory relief under the federal Civil Rights Act have been frustrated by applying the exhaustion requirement to such cases, even though the enactment does not by its terms contain any such restriction.[5]

The recent case of *Williams v. Dalton*[6] indicates that the federal courts give particular force to their general policy against interceding in cases where a state remedy is available if taking jurisdiction would allow an evasion of the rule applicable to federal habeas corpus proceedings. Plaintiff had been committed to a state mental hospital in Michigan after a hearing in the state probate courts. After several years of confinement, she brought an action for declaratory and injunctive relief under the Civil Rights Act, alleging that the state hearing had been inadequate and had deprived her of her rights in contravention of the Fourteenth Amendment and asking the federal district court to compel her release. The court declined to take jurisdiction on the ground that the suit was an attempt to circumvent the exhaustion requirement applicable to federal habeas corpus proceedings. It was held that the plaintiff must first pursue the remedy available in the Michigan state courts. The Court of Appeals for the Sixth Circuit affirmed, agreeing that an adequate state remedy existed, and pointing out that "Federal Courts have been chary of granting declaratory or equitable relief in an area of possible friction between federal and state jurisdictions."[7] Referring to the statute applicable to habeas corpus proceedings, the court declared: "Congress has clearly expressed the policy that persons confined pursuant to a judgment of a state court shall first utilize available state corrective processes before resorting to a federal court to review the validity of the judgment. The statute evincing that policy . . . does not by its terms apply to this case; the policy itself does."[8]

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[4]Potter v. Dowd, 146 F. (2d) 244 (C. C. A. 7th, 1944); United States ex rel. Johnston v. Carey, 141 F. (2d) 967 (C. C. A. 7th, 1944), cert. den., 323 U. S. 717, 65 S. Ct. 45, 89 L. ed. 577 (1944); United States ex rel. Ray v. Martin, 141 F. (2d) 300 (C. C. A. 2nd, 1944). Such exceptional circumstances normally are found where there is a danger of irreparable injury which renders the technically available state remedy inadequate in view of the time element and other urgent considerations. E.g., Thomas v. Teets, 205 F. (2d) 236 (C. A. 9th, 1953).

[5]See 17 Stat. 13 (1871), 42 U. S. C. A. § 1983 (1955 Supp.).

[6]231 F. (2d) 646 (C. A. 6th, 1956).

[7]231 F. (2d) 646, 648 (C. A. 6th, 1956).

[8]231 F. (2d) 646, 649 (C. A. 6th, 1956). See In re Ryan, 47 F. Supp. 1023 (E. D. Pa. 1942).

The Civil Rights Act imposes liability on "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects ... any ... person ... to the deprivation of any rights, privileges or immunities secured by the Constitution and laws...."[9] Congress has provided that the federal district courts shall have original and removal jurisdiction over all cases arising under the Civil Rights Act.[10] The federal district courts are thus seemingly provided with the power to give relief that is broad in scope and in application, the injured party being authorized to seek redress "in an action at law, suit in equity, or other proper proceeding...."[11] However, the Supreme Court has pointed out that the Civil Rights Act was "not to be used to centralize power so as to upset the federal system."[12] In equitable and declaratory proceedings under the Act, the federal courts have adopted as a general rule the policy of discretionary refusal to take jurisdiction while there is yet a concurrent remedy available to the complainant in the state courts, unless there is danger of great and immediate injury. "It is well settled ... that accepted principles governing equitable and declaratory relief are no less applicable where such relief is sought under the Civil Rights Act."[13]

Closely paralleling the principal case is a group of decisions also arising under the Civil Rights Act involving interference with criminal prosecution, or the enjoining of state officials acting under state criminal statutes.[14] In *Stefanelli v. Minard*,[15] the Supreme Court held that a federal court should not enjoin state officials bringing criminal prosecution (especially where that prosecution was already pend-

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[9]17 Stat. 13 (1871), 42 U. S. C. A. § 1983 (1955 Supp.).

[10]62 Stat. 932, 938 (1948), 28 U. S. C. A. §§ 1343, 1443 (1950). See Moore, Commentary on the U. S. Judicial Code (1949) 257-259, for summary of the scope and coverage of the two sections as applied to Civil Right Act cases.

[11]17 Stat. 13 (1871), 42 U. S. C. A. § 1983 (1955 Supp.)

[12]Collins v. Hardyman, 341 U. S. 651, 658, 71 S. Ct. 937, 940, 95 L. ed. 1253, 1257 (1951). "This Act has given rise to differences of application here. Such differences inhere in the attempt to construe the remaining fragments of a comprehensive enactment, dismembered by partial repeal and invalidity, loosely and blindly drafted in the first instance, and drawing on the whole constitution itself for its scope and meaning. Regardless of differences in particular cases, however, the Court's lodestar of adjudication has been that the statute 'should be construed so as to respect the proper balance between the states and the federal government in law enforcement'." Stefanelli v. Minard, 342 U. S. 117, 121, 72 S. Ct 118, 120, 96. L. ed. 138, 143 (1951).

[13]Williams v. Dalton, 231 F. (2d) 646, 648 (C. A. 6th, 1956).

[14]E.g., Ackerman v. International Longshoremen's Union, 187 F. (2d) 860 (C. A. 9th, 1951); Cooper v. Hutchinson, 184 F. (2d) 119 (C. A. 3rd, 1950); City of Manchester v. Leiby, 117 F. (2d) 661 (C. C. A. 1st, 1941).

[15]342 U. S. 117, 72 S. Ct. 118, 96 L. ed. 138 (1951).

ing) in the absence of danger of great and irreparable injury.[16] It concluded that "The consequences of exercising the equitable power here invoked are not the concern of merely a doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum. . . ."[17] This deference has been apparent even in some cases in which the criminal statutes allegedly violate such fundamental liberties as freedom of speech and religion.[18] This is

[16]"The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law. It is impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are in issue." Stefanelli v. Minard, 342 U. S. 117, 120, 72 S. Ct. 118, 120, 96 L. ed. 138, 142 (1951). In reference to merely threatened prosecution, the Supreme Court has indicated that "courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent. . . ." Douglas v. City of Jeannette, 319 U. S. 157, 163, 63 S. Ct. 877, 881, 87 L. ed. 1324, 1329 (1943). This rule would seem to be more stringent when applied to *pending* criminal proceedings: "The rule that equity jurisdiction does not extend to enjoining pending criminal prosecutions, has no exceptions. No extraordinary circumstances will serve to create such jurisdiction." Ackerman v. International Longshoremen's Union, 187 F. (2d) 860, 868 (C. A. 9th, 1951). In spite of this particularly strong statement of the rule as it applies to *pending* state action, it would seem that there is still an area of discretion in the equity jurisdiction of the federal district courts under the broad scope of 62 Stat. 932 (1948), 28 U. S. C. A. § 1343 (1950). For example, in Alesna v. Rice, 74 F. Supp. 865 (D. C. Hawaii 1947) the court took jurisdiction of a controversy in which complainants were challenging a restraining order of a territorial judge which they had violated and for which they were being held in criminal contempt, on the grounds that the restraining order deprived them of freedom of speech and assembly.

[17]Stefanelli v. Minard, 342 U. S. 117, 123, 72 S. Ct. 118, 121, 96 L. ed. 138, 143 (1951)

[18]Douglas v. City of Jeannette, 319 U. S. 157, 63 S. Ct 877, 87 L. ed. 1324 (1943) (This case arose on petition by members of a religious sect to enjoin threatened criminal prosecution for failure to obtain licenses to vend religious literature in city streets. The Supreme Court refused to enjoin local officials even though the ordinance in issue had been found to be unconstitutional in a companion case, Murdock v. Pennsylvania, 319 U. S. 105, 63 S. Ct. 870, 87 L. ed. 1292 (1943), because there was no ground for the supposition that great harm would be done petitioners or that the state judiciary would construe the ordinance in contravention of the Supreme Court's ruling in the Murdock case.); Sellers v. Johnson, 163 F. (2d) 877 (C. C. A. 8th, 1947); Whisler v. City of West Plains, 137 F. (2d) 938 (C. C. A. 8th, 1943); Oney v. Oklahoma City, 120 F. (2d) 861 (C. C. A 10th, 1941); City of Manchester v. Leiby, 117 F. (2d) 661 (C. C. A. 1st, 1941). Cf. Hauge v. C. I. O., 307 U. S. 496, 59 S. Ct. 954, 83 L. ed. 1423 (1939), where it was found that state and city officials acting under color of law were absolutely prohibiting peaceable assembly of petitioners and others, and in some cases forcibly deporting com-

especially true where the constitutional issues are uncertain because the state courts have yet to place a definite interpretation on the exact scope and meaning of the statute under which the state officials are acting.[19]

This pattern of non-interference may be departed from, however, in situations in which the courts find special reason for doing so. In *Stapleton v. Mitchell*,[20] complainants brought an action for declaratory and injunctive relief from the enforcement of a Kansas labor enactment on the ground that it deprived them of freedom of speech. The federal district court declared a portion of the statute unconstitutional prior to any adjudication on the new law in the state judiciary, pointing out a distinction which has apparently become an approved departure from the general rule: "It is noteworthy, however, that the 'doctrine of abstention' ... was evolved in cases where property rights under the Fourteenth Amendment and not personal rights under the First were the subject of adjudication. Apparently the courts now make a distinction in the appropriate exercise of Federal jurisdiction where only the due process and equal protection clause of the Fourteenth Amendment are involved, and those cases where the legislation is challenged because it collides with the fundamental principles of the First."[21]

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plainant labor organizers from the state. There is some authority supporting exercise of the federal courts' discretion to grant relief where fundamental personal rights are involved. See Alesna v. Rice, 74 F. Supp. 865 (D. C. Hawaii 1947); Stapleton v. Mitchell, 60 F. Supp. 51 (D. C. Kan. 1945).

[19]Railroad Commission of Texas v. Pullman, 312 U. S. 496, 498, 61 S. Ct. 643, 644, 85 L. ed. 971, 973 (1941), in which the Court refused to adjudicate the controversy because it touched "a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open. Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy. A. F. L. v. Watson, 327 U. S. 582, 595, 66 S. Ct. 761, 767, 90 L. ed. 873, 881 (1946): "The merits involve substantial constitutional issues concerning the meaning of a new provision of the Florida constitution which, so far as we are advised, has never been construed by the Florida courts. These courts have the final say as to its meaning.... In absence of an authoritative interpretation, it is impossible to know with certainty what constitutional issues will finally emerge." C. I. O. v. Windsor, 116 F. Supp. 354 (N. D. Ala. 1953). Cf. Stapleton v. Mitchell, 60 F. Supp. 51 (D. C. Kan. 1945); Snypp v. Ohio, 70 F. (2d) 535 (C. C. A. 6th, 1934), cert. den., 293 U. S. 563, 55 S. Ct. 74, L. ed. 663 (1934).

[20]60 F. Supp. 51 (D. C. Kan. 1945).

[21]60 F. Supp. 51, 54 (D. C. Kan. 1945). The court qualified this distinction further: "The right of a state to regulate property rights as far as the due process clause is concerned includes the power to impose all the restrictions 'which a legislature may have a rational basis for adopting,' ... [while] freedom of speech, press and assembly 'may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect'." See Hogue v. C. I. O., 307 U. S. 496, 531, 59 S. Ct.

One area in which federal district courts have on occasion shown significant readiness to take jurisdiction and to rule on the merits regardless of whether the complainant has exhausted available state remedies has been in those controversies in which state officials have allegedly exceeded their authority under the laws of the state, and have made applications of apparently constitutional statutes in such a way as to bring about an alleged deprivation of equal protection under the laws.[22] The historical background of the Civil Rights Act, which was an important part of Reconstruction legislation, manifests that the Act was passed primarily to aid the Negro in attaining the rights and privileges secured to him through the adoption of the Fourteenth and Fifteenth Amendments.[23] Although the federal courts were somewhat reluctant in early cases to make use of the Act,[24] actions at law for damages were successfully maintained as a means of redress for the deprivation, solely on the basis of race or color, of the right to vote, even though a concurrent state remedy was in existence.[25] More recently in the field of equitable and declaratory relief, the federal

954, 971, 83 L. ed. 1423, 1445 (1939). Cf. Alesna v. Rice, 74 F. Supp. 865, 870 (D. C. Hawaii 1947): "... where the constitutional rights of individuals are at stake, a Federal Court has a peculiar duty to step in, in a proper case, and if need be protect the individual against a threatened unjustifiable exercise of the power of a state or Territory. The adequacy of an opportunity to become a defendant in a criminal case and [sic] to then raise the same question of law before a court also bound by the Constitution is questionable." The court refused relief in this case on the merits of the controversy, finding that the restraining order which was challenged by petitioners did not violate their rights to free speech and peaceable assembly.

In a few instances, federal courts have followed the practice of retaining the case pending adjudication in the state courts. Peay v. Cox, 190 F. (2d) 123 (C. A. 5th, 1951), cert. den., 342 U. S. 896; 72 S. Ct. 230; 96 L. ed. 671 (1951); Cooper v. Hutchinson, 184 F. (2d) 119 (C. A. 3rd, 1950); Cook v. Davis, 178 F. (2d) 595 (C. A. 5th, 1949), cert. den., 340 U. S. 811, 71 S. Ct. 38, 95 L. ed. 596 (1950); Tribune Review Publishing Co. v. Thomas, 120 F. Supp. 362 (W. D. Pa. 1954).

[22]Westminster School District v. Mendez, 161 F. (2d) 774 (C. C. A. 9th, 1947); Mitchell v. Wright, 154 F. (2d) 924 (C. C. A. 5th, 1946); Morris v. Williams, 149 F. (2d) 703 (C. C. A. 8th, 1945); Heard v. Ouachita Parish School Board, 94 F. Supp. 897 (W. D. La. 1951). Cf. City of Manchester v. Leiby, 117 F. (2d) 661, 665 (C. C. A. 1st, 1941).

[23]See Collins v. Hardyman, 341 U. S. 651 at 656, 71 S. Ct. 937 at 939, 95 L. ed. 1253 at 1257 (1951); Emerson & Haber, Political and Civil Rights in the United States (1952) 13-16.

[24]Giles v. Harris, 189 U. S. 475 at 486, 23 S. Ct. 639 at 642, 47 L. ed. 909 at 912 (1903). Cf. United States v. Mosley, 238 U. S. 383, 35 S. Ct. 904, 59 L. ed. 1355 (1915).

[25]Lane v. Wilson, 307 U. S. 268, 59 S. Ct. 872, 83 L. ed. 1281 (1939); Nixon v. Herndon, 273 U. S. 536, 47 S. Ct. 446, 71 L. ed. 759 (1927); Myers v. Anderson, 238 U. S. 368, 35 S. Ct. 932, 59 L. ed. 1349 (1915). The federal courts have distinguished between actions at law and proceedings in equity. In this connection, see discussion in the principal case: Williams v. Dalton, 231 F. (2d) 646 at 649 (C. A. 6th, 1956).

courts have taken jurisdiction in controversies brought by Negro school teachers to enjoin local school boards from maintaining discriminatory salary scales, although clear and adequate state remedies were apparently available.[26] Injunctive relief has also been granted where state election officials were allegedly depriving complainant of the right to vote because of his race, in spite of apparent state remedies which had not been exhausted.[27] However, even in this field relief does not seem to be forthcoming in those cases in which the *statute* under which the state officials are acting is also challenged as depriving complainants of equal protection of the laws, when the statutory authory is not well defined and its limits have never been drawn by the highest court of the state.[28] Also, when state remedies still untried are administrative in nature, it has been held that they must be exhausted,[29] unless they are clearly inadequate.[30]

From this review of the various segments of the law where the federal and state courts have concurrent jurisdiction of controversies arising under the Civil Rights Act and involving equitable and declaratory relief, it can be seen that there is some degree of uncertainty as to the limits of equitable discretion which the federal district courts exercise. While some of this uncertainty is attributable to the differing facts in individual cases, it nonetheless appears that the federal courts reach their results as to granting or refusing relief, and then pay tribute to the general policy of deference to the state judiciary only if they find that the case before them does not present a situation de-

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[26]Morris v. Williams, 149 F. (2d) 703 (C. C. A. 8th, 1945); Mills v. Board of Education, 30 F. Supp. 245 (D. C. Md. 1939).

[27]Mitchell v. Wright, 154 F. (2d) 924 (C. C. A. 5th, 1956), cert. den., 329 U. S. 733, 67 S. Ct. 96, 91 L. ed. 633 (1946).

[28]Railroad Commission of Texas v. Pullman, 312 U. S. 496 at 499, 61 S. Ct. 643 at 644, 85 L. ed. 971 at 974 (1941).

[29]Peay v. Cox, 190 F. (2d) 123 (C. A. 5th, 1951) (different test for registering to vote used by state registrar in examining Negroes); Cook v. Davis, 178 F. (2d) 595 (C. A. 5th, 1949) (alleged salary discrimination against Negro school teacher); Davis v. Arn, 199 F. (2d) 424 (C. A. 5th, 1952) (complainant was refused right to take police examination, allegedly on grounds of race). Cf. Trudeau v. Barnes, 65 F. (2d) 563 (C. C. A. 5th, 1933) (plaintiff in action at law for damages for being denied right to register to vote was required to exhaust state remedy afforded by state constitution which was administrative in nature).

[30]Bruce v. Stilwell, 206 F. (2d) 554 (C. A. 5th, 1953) (remaining administrative bodies set up by state could not determine constitutional issues because of limits on their authority; thus petitioner need not apply to those agencies as they were inadequate to settle controversy.

Of course the exhaustion-of-administrative-remedies requirement is satisfied when the only untried state remedies have all the indicia of judicial proceedings. E.g., see Mitchell v. Wright, 154 F. (2d) 924 (C. C. A. 5th, 1946).

manding, in the eyes of the court, the relief sought. It would seem that this relief is generally forthcoming only in those cases in which the constitutional issue concerns fundamental personal rights or alleged racial discrimination. As to the latter, the federal district courts can look to the historical background of the Civil Rights Act to derive singular justification for passing over the doctrine of abstaining from interference with state action. This treatment of such controversies seems to amount to an admission that the federal courts consider the state judiciaries involved either incapable or unwilling to take any action to remedy the alleged deprivation of rights, and that it is useless to force the complainant to wait out his state remedies. While as a practical matter this may in some cases be true,[31] it seems far better, in the light of careful regard for the federal-state relationship under the Constitution, to preserve the concept of state preference in all adjudications of an equitable nature arising under the Civil Rights Act, and to reserve the original jurisdiction of the federal district courts for cases in which the state manifestly provides no remedy.

ROBERT H. MANN, JR.

MORTGAGES—OPEN-END MORTGAGE PROVIDING SECURITY FOR DEBT OF MORTGAGOR TO THIRD PARTY ASSIGNEE OF MORTGAGE. [Georgia]

Under a recent ruling of the Georgia Court of Appeals, it becomes possible in certain situations for an unsecured creditor to transform his claim into a security interest superior to interests of prior secured creditors. This result was obtained in *Vidalia Production Credit Association v. Durrence*[1] by means of a rather unorthodox use of a mortgage securing future advances, the so-called open-end mortgage. The mortgagor in 1952 executed a mortgage to Overstreet, "his successors, heirs, executors, administrators and assigns." It was provided in the instrument that "this conveyance is made to secure a debt of $920 ... and any other present or future indebtedness or liability of mine to second party."[2] In 1954, the mortgagor gave a second mortgage on the

[31]E.g., Westminster School District v. Mendez, 161 F. (2d) 774 at 781 (C. C. A. 9th, 1947),where the state remedy was held inadequate "since the practice complained of [segregation of Mexican school children] has continued for several consecutive years, apparent to California executive and peace officers. . . ."

[1]94 Ga. App. 368, 94 S. E. (2d) 609 (1956).
[2]94 Ga. App. 368, 94 S. E. (2d) 609, 610 (1956).

same realty to plaintiff. In 1955, defendant became a judgment creditor of the mortgagor and a month thereafter purchased the 1952 open-end mortgage and the debt secured by it from the mortgagee. This instrument being in default, defendant commenced foreclosure proceedings for both the amount of the original mortgage debt and the amount of his own independent claim which he had acquired against the mortgagor prior to the mortgage assignment. Plaintiff, the junior mortgagee, brought this action for declaratory judgment and injunctive relief, seeking to establish its right to redeem the senior mortgage by paying the defendant the amount of the original mortgage debt only. The trial court sustained a general demurrer to plaintiff's petition on the ground that it stated no cause of action, and the Court of Appeals affirmed that judgment, relying on a 1950 decision by the Georgia Supreme Court in *Rose City Foods v. Bank of Thomas County*.[3]

The state of the law with regard to the mortgage for future advances is characterized by varied and sometimes inconsistent judicial reaction. However, all authorities who have considered the question agree that an instrument securing future advances as well as present indebtedness may be valid according to its terms as between the parties to it.[4] Generally the only problem *inter partes* is one of construction to determine what debts the parties intended that the mortgage secure. In answering this question, the courts in a number of cases have demonstrated a notable reluctance to extend the scope of the so-called "dragnet" clause to any debts which are deemed not likely to have

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[3]207 Ga. 477, 62 S. E. (2d) 145 (1950), noted (1951) 5 Miami L. Q. 608. See discussion in text at note 22, infra.

[4]See generally, 3 Glenn, Mortgages (1943) §§ 392-408; Jones, Mortgages Securing Future Advances (1930) 8 Tex. L. Rev. 371; Notes (1956) 25 U. of Cin. L. Rev. 82; (1919) 1 A. L. R. 1586; (1932) 81 A. L. R. 631; (1942) 138 A. L. R. 566; (1948) 172 A. L. R. 1079.

There are several different types of mortgages by which future indebtedness is secured. The instrument may on its face appear to secure only a stated amount of present indebtedness whereas in fact some portion of that amount may not be advanced to the mortgagor until a future time. Such mortgages are generally valid as to any advances made up to the face amount. 3 Glenn, Mortgages (1943) § 397. At least this is so between the parties. Matz v. Arick, 76 Conn. 388, 56 Atl. 630 (1904). Cf. First Nat. Bank v. National Grain Corp, 103 Conn. 657, 131 Atl. 404 (1925). The instrument may provide that it is to secure certain future advances which the mortgagee is contractually obligated to make, or it may provide that the mortgagee is entitled to make certain payments without the consent of the mortgagor to protect his security interest. See Blackburn, Mortgages To Secure Future Advances (1956) 21 Mo. L. Rev. 209, for a discussion of the various types and cases upholding the validity of each. See Note 21, par. 2, infra. However, this comment is primarily concerned with the so-called open-end mortgage, such as that in the principal case, which purports to secure optional and unlimited future advances.

been specifically contemplated by the parties.[5] Thus, it has been held that an advance to one of the two co-mortgagors was not intended to be included;[6] and the Georgia court itself, applying the doctrine of ejusdem generis, has refused to include within the scope of such a clause a subsequent claim arising out of damages for the breach of an unrelated contract.[7] In this connection, the exact language of the instrument may be decisive. For example, where the mortgage was to secure, in addition to a specified named indebtedness, any "amounts *furnished me,*" it was held by the Alabama court not to include a subsequent advance to one other than the mortgagor for which he became liable only as a surety.[8] And similarly the Georgia court has held that a provision that the instrument was "to secure whatever indebtedness I may owe said bank" does not cover an obligation as surety which became fixed subsequent to the execution of the mortgage.[9]

Where the debt which is sought to be brought under the "dragnet" clause is one which originated as an obligation owed by the mortgagor to someone other than the original mortgagee—as was the situation in the principal case—the few courts which have considered the question have, as a matter of contract construction, generally refused to permit its inclusion.[10] In what was perhaps the first American case on the point, the Michigan court held that this "very unusual clause" does not ex-

[5]"A court of equity should be reluctant to adopt the first construction suggested above [a broad construction]. 'Dragnet' clauses are not highly regarded in equity. They should be 'carefully scrutinized and strictly construed'." First v. Byrne, 238 Iowa 712, 28 N. W. (2d) 509, 511 (1947). "Mortgages of this character have been denominated 'Anaconda mortgages' and are well named thus, as by their broad and general terms they enwrap the unsuspecting debtor in the folds of indebtedness, embraced and secured in the mortgage which he did not contemplate, and to extend them further than has already been done would, in our opinion, be dangerous and unwise...." Berger v. Fuller, 180 Ark. 372, 21 S. W. (2d) 419, 421 (1929). Cases construing the scope of "dragnet" clauses are collected in Note (1948) 172 A. L. R. 1079.

[6]Monroe County Bank v. Qualls, 220 Ala. 499, 125 So. 615 (1929). Cf. Walters v. Merchants & Mftrs. Bank, 218 Miss. 777, 67 S. (2d) 714, 718 (1953), where the clause read "any and all debts that the said grantors or either of them may incur," with Americus Finance Co. v. Wilson, 189 Ga. 635, 7 S. E. (2d) 259 (1940), and Bank of La Fayette v. Giles, 208 Ga. 674, 69 S. E. (2d) 78 (1952).

[7]Beavers v. Le Sueur, 188 Ga. 393, 3 S. E. (2d) 667 (1939). For another application of ejusdem generis to limit the scope of a "dragnet" clause, see Dempsey v. Portis Mercantile Co., 196 Ark. 751, 119 S. W. (2d) 915 (1938).

[8]Cotton v. First Nat. Bank, 228 Ala. 311, 153 So. 225, 228 (1934). Italics supplied.

[9]Citizens First Nat. Bank v. Jones, 161 Ga. 655, 131 S. E. 529, 533 (1926).

[10]Berger v. Fuller, 180 Ark. 372, 21 S. W. (2d) 419 (1929); First Nat. Bank v. Combs, 208 Ky. 763, 271 S. W. 1077 (1925); Campbell Bros. v. Bigham, 149 Miss. 214, 115 So. 395 (1928); Belton v. Farmers' & Merchants' Bank & Trust Co., 186 N. C. 614, 120 S. E. 220 (1923); Republic Nat. Bank v. Zesmer, 187 S. W. (2d) 227 (Tex. Civ. App. 1945); National Fin. Co. v. Fregia, 78 S. W. (2d) 1081 (Tex. Civ. App. 1935).

tend beyond dealings between the mortgagor and mortgagee unless it clearly so specifies.[11] And it has been held in Vermont that a clause which read "all other indebtedness ... to the said mortgagees, their heirs and assigns, heretofore or hereafter contracted" was not sufficiently broad to include an obligation which the mortgagor owed to a third party who subsequently became assignee of the mortgage.[12] It seems relatively safe to assume, in the light of what little authority exists on the subject, that most courts would agree that the usual wording of a "dragnet" clause does not justify the conclusion that the parties intended it to secure claims against the mortgagor which originated with third parties and which are related to the mortgage only by a subsequent assignment of the claim to the mortgagee or of the mortgage to the third party creditor.

The situation become more complex when the property covered by a recorded open-end mortgage subsequently becomes subject to the interest of an intervening lienor or purchaser. The issue, of course, is the extent to which the subsequent interest holder is subordinate to the claims of a mortgagee who has acquired later additional claims against the mortgagor under a mortgage for future advances. An early English case has been interpreted as having decided that the lien of any such later additional claim, regardless of when it arises, has priority equivalent to that of the original mortgage.[13] Since the mortgagee was then regarded as the true owner of the mortgaged property, it is not particularly surprising that he was permitted to retain title as long as any claim under the mortgage remained unsatisfied.[14] In 1876 a state court in this country reached the same conclusion.[15] However, this view had by then been expressly rejected in England[16] and since has received only limited acceptance in American courts.[17]

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[11]Lashbrooks v. Hatheway, 52 Mich. 124, 17 N. W. 723 (1883).

[12]Strong Hardware Co. v. Conyow, 105 Vt. 415, 168 Atl. 547 (1933). But as to claims acquired by the assignee *after* the assignment of this mortgage to him, it was held that the assignee had all of the rights of the mortgagee. The court indicated its disapproval of the earlier case of Lamoille County Savings Bank & Trust Co. v. Belden, 90 Vt. 535, 98 Atl. 1002 (1916), in which the mortgagee under an open-end mortgage had been permitted to include a note of the mortgagor's to a third party which had been assigned to the mortgagee. See also Clifford v. West Hartford Creamery Co., 103 Vt. 229, 153 Atl. 205, 211 (1931).

[13]Gordon v. Graham, 2 Eq. Ga. Abr. 598, 22 Eng. Rep. 502 (1716).

[14]3 Glenn, Mortgages (1943) 1602.

[15]Witczinski v. Everman, 51 Miss. 841 (1876). But see note 17, infra.

[16]Hopkinson v. Relt, 9 H. L. C. 514, 11 Eng. Rep. 829 (1861).

[17]It is doubtful if even Mississippi, assuming it still follows the Witczinski case, note 15, supra, would agree with the holding in the principal case. In Campbell Bros. v. Bingham, 149 Miss. 214, 115 So. 395 (1928), the court refused as a matter of public policy and contract construction to permit the assignee of an open-end mortgage to

It seems clear that modern courts, with few exceptions, will hold that debts which arise from advances made by the mortgagee *prior* to the time when the junior interest attaches are superior to it—assuming of course that the debts involved are found to be within the contemplated scope of the "dragnet" clause.[18] It may be reasoned that, under the recording acts, the holder of the junior interest cannot justifiably contend that he has been misled, since he should have been forewarned by the record of the existence of a prior open-end mortgage and presumably could have inquired to determine the exact extent of the mortgagee's security interest.[19]

But where the additional claims of the mortgagee arise *after* a properly recorded junior interest has attached, it becomes necessary to determine whether they are to be regarded as swelling the original lien of the mortgage or as creating new liens effective only from the date the claims arose. A few courts have analyzed the "dragnet" clause

include under it a debt owed him by the mortgagor prior to the assignment, even though no intervening interests were involved. In any event, it seems certain that where there are intervening interests, the Witczinski case is no longer law in Mississippi. In North v. J. W. McClintock, Inc., 208 Miss. 289, 44 S. (2d) 412, 414 (1950), the court explicitly adopted the rule that advances made by the holder of an open-end mortgage are subordinate to any intervening interest of which he had actual knowledge. The majority opinion made reference to the Witczinski case as follows: "It is uncertain from the report of the case ... whether it announces a different rule from the one here adopted. We have not been able to find the original record." The dissent felt that there "should be a forthright overruling of the Witczinski case," and pointed out that it had been "cited several times in Jones on Mortgages, 8th Edition, as an example of the minority rule...." 208 Miss. 289, 44 S. (2d) 412, 415 (1950).

[18]Price v. Williams, 179 Ark. 12, 13 S. W. (2d) 822 (1929); Oaks v. Wengartner, 105 Cal. App. (2d) 598, 234 P. (2d) 194 (1951); Decatur Lumber and Supply Co. v. Baker, 210 Ga. 184, 78 S. E. (2d) 417 (1953); Monticello State Bank v. Schatz, 222 Iowa 335, 268 N. W. 602 (1936); 3 Glenn, Mortgages (1943) § 400.

In Maryland and New Hampshire the validity of a mortgage securing future advances has been curtailed by statute. In the former, the instrument must indicate the amount and time of future advances. 2 Md. Code Ann. (Flack 1947 Supp.) Art. 66 § 2. In the latter, the mortgagee must contractually bind himself to make future advances of a certain sum. 2 N. H. Rev. Laws (1942) c. 261, §§ 3 & 4.

In Connecticut the courts have by decision limited the effectiveness of mortgages securing future advances. Apparently, in order for future advances to be secured against any other encumbrancer of the property, it is essential that the record give a clear indication of the amount of indebtedness intended to be secured. Pettibone v. Griswold, 4 Conn. 158, 10 Am. Dec. 106 (1822); Blach v. Chafee, 73 Conn. 318, 47 Atl. 327 (1900). Also it has been held in that state that where the amount intended to be secured is stated, it must be indicated what if any portion of the amount is to be advanced in the future. Matz v. Arick, 76 Conn. 388, 56 Atl. 630 (1904). Cf. Andrews v. Connecticut Properties, Inc., 137 Conn. 170, 75 A. (2d) 402 (1950).

[19]E.g., Oaks v. Weingartner, 105 Cal. App. (2d) 598, 234 P. (2d) 194 (1951); Freiberg v. Magale, 70 Tex. 116, 7 S. W. 684 (1888).

in a mortgage for future advances as merely an offer by the mortgagor *to provide* security for subsequent indebtedness; this reasoning leads to the conclusion that new liens arise and take effect only from the time new debts are incurred and are therefore inferior to intervening liens acquired by third parties.[20]

Usually, however, it appears that the courts proceed from the basic premise that the mortgagee has a right to be protected fully as to all his claims acquired in reliance on the mortgage provisions for future indebtedness, but that this right is qualified by a duty not to impair the interest of others unnecessarily and intentionally. Thus, it is generally held, in this country and in England, that if the mortgagee has knowledge of the existence of an intervening interest in the mortgaged property when he extends new credit, such intervening interest will be superior to the mortgagee's subsequently acquired claims unless those claims arise pursuant to a binding obligation on the mortgagee to extend further credit to the mortgagor.[21] In this way most courts which have considered the problem have sought to strike a kind of equitable balance.

Prior to the decision in *Rose City Foods v. Bank of Thomas*

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[20]Ladue v. Detroit & M. Rd. Co., 13 Mich. 380, 87 Am. Dec. 759 (1865), cited and quoted with approval in Ginsberg v. Capitol City Wrecking Co., 300 Mich. 712, 2 N. W. (2d) 892 at 894 (1942). See Second Nat. Bank v. Boyle, 155 Ohio St. 482, 99 N. E. (2d) 474, 476 (1951): "Obviously, where there is no obligation to make future advances, a mortgage, purporting to secure such future advances, cannot secure such advances until the advances have been made.... At most, those provisions [to secure future advances] represent an offer by the mortgagor to provide the security of the mortgage for such advances if and when they are made.... If such offer is accepted by the mortgagee in making a subsequent advance, then the necessity of executing and recording a new mortgage to secure such advances may be avoided." See Note (1956) 25 U. of Cin. L. Rev. 82 where the Ohio view and pending legislation designed to change it are discussed.

[21]Axel Newman Heating and Plumbing Co. v. Sauers, 234 Minn. 140, 47 N. W. (2d) 769 at 772 (1951); North v. McClintock, 208 Miss. 289, 44 S. (2d) 412 (1950) (changing the rule in Mississippi to accord with the prevailing view). For a full discussion, see leading case: Hopkinson v. Rolt, 9 H. L. C. 514, 11 Eng. Rep. 829 (1861). The courts adopting this view are almost unanimously agreed that actual notice, not mere record notice, is necessary in order to subordinate advances made under a senior open-end mortgage. See cases cited, Note (1942) 138 A. L. R. 566 at 585. But see 3 Glenn, Mortgages (1943) 1610.

Where the mortgagee is obligated to make future advances, he will prevail regardless of actual notice. Willard v. National Supply Co., 51 Cal. App. (2d) 555, 125 P. (2d) 519 (1942). Cf. Hyman v. Hauff, 138 N. Y. 48, 33 N. E. 735 (1893). Also it has been held that the general rule does not apply to advances which the mortgagee was entitled to make for the protection of his security interest. Auburn Ins. Agency v. First Nat. Bank, 263 Ala. 30, 81 S. (2d) 600 (1955). For other cases and discussion applying the general rule and its exceptions, see authorities cited in note 4, supra.

County,[22] the position of the Georgia courts on this issue was perhaps not completely clear.[23] However, it now seems certain that Georgia has aligned itself with the vanishing minority[24] which has adopted the view that all claims within the scope of the "dragnet" clause become liens on the mortgaged property as of the date of the original instrument, regardless of whether they were acquired with actual knowledge of intervening interests and even though they did not arise pursuant to an obligation on the part of the mortgagee to extend further credit. In the *Rose City Foods* case, a junior mortgagee, who had also become purchaser of the mortgaged property, attempted to redeem from the mortgagee of a senior open-end mortgage by paying the full amount of all indebtedness then secured by the senior instrument.[25] The senior mortgagee declined the offer to redeem, saying that he must first confer with his attorney, and immediately thereafter took an assignment of a debt which the mortgagor owed to a third party. In an action by the junior mortgagee for injunctive relief, the Georgia Supreme Court held that the claim obtained by the assignment was entitled to priority over the interest of the junior mortgagee and purchaser, "and this is true notwithstanding the fact that the account was purchased by the [senior mortgagee] after it had actual knowledge of the [junior mortgagee's] purchase and possession of the property in question."[26]

In the principal case, the Georgia Court of Appeals felt that by analogy the rule laid down by the *Rose City Foods* case should apply with equal force where the third party creditor of the mortgagor, instead of assigning his claim to the mortgagee, takes from the mortgagee an assignment of the mortgage, and under it claims all indebtedness then oweing him by the mortgagor. Thus, an unsecured creditor

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[22]207 Ga. 477, 62 S. E. (2d) 145 (1950).

[23]Cf. Moultrie Banking Co. v. Mobley, 170 Ga. 402, 152 S. E. 903 (1930); Hurst v. Flynn-Harris-Bullard Co., 166 Ga. 480, 143 S. E. 503 (1928); A. Leffler Co. v. Lane, 146 Ga. 741, 92 S. E. 214 (1917); Note (1951) 5 Miami L. Q. 608.

[24]Some textwriters assert that such a minority still exists. E.g., 1 Jones, Mortgages (8th ed. 1928) § 452. But no modern cases have been found which would support this view. For discussion of the case most cited in support of the "minority," see note 17, supra.

[25]It is perhaps worth noting that the instruments used in this case and in the principal case were not technically mortgages, but rather were bills of sale (in the case of personalty) and deeds (in the case of realty) to secure debts, which under Georgia statute pass legal title to the grantee—mortgagee. 2 Ga. Code (1933) § 67-1301. Although the Georgia courts have treated the distinction as purely a technical one, Merchants' & Mechanics Bank v. Beard, 162 Ga. 446, 134 S. E. 107 at 108 (1926), it may be that the unique holding in these two cases is partly attributable to it. See 3 Glenn, Mortgages (1943) § 399.

[26]207 Ga. 477, 62 S. E. (2d) 145, 148 (1950).

may, by purchasing an open-end mortgage outstanding against his debtor, secure his claim by a lien which is legally effective from the date of the purchased mortgage and which will be superior to any interest which attached to the mortgaged property subsequent to that date. The court, having stated its position indicated that it was well aware of its significance: "The rule ... has ... been a thorn in the side of title attorneys and title companies, giving rise to the contention that ... [it] places the junior lien holder in the unfortunate position of not knowing what obligations and priorities are his. This adversely affects the opportunity of a debtor obtaining junior loans from another than the first lien holder and places him at the mercy of the holder of the first lien where additional credit is necessary. It also places at a disadvantage an investor in the junior liens. Nevertheless the principle is well established in the state."[27]

It seems likely that the conclusion reached in these two Georgia cases would in most courts be summarily rejected, either because the scope of the usual "dragnet" clause cannot as a matter of contract construction be extended to include unrelated third party claims, or because claims acquired by the holder of an open-end mortgage after he has actual knowledge of intervening interests cannot justifiably be given priority over such interests.

ROBERT R. HUNTLEY

PATENTS—APPLICATION OF LITERAL TERMS OF MISUSE SECTION OF PATENT ACT TO DEFEAT MISUSE DEFENSE. [Federal]

Because a patent gives its owner a limited monopoly, the question has often arisen in regard to combination patents[1] as to whether a patentee exceeds the scope of his monopoly if he insists that, as a condition to obtaining a license to use his patent combination, the licensee purchase unpatented components from him.[2] For example,

[27]94 Ga. App. 368, 94 S. E. (2d) 609, 611 (1956).

[1]"A combination is a composition of elements, some of which may be old and others new, or all old or all new. It is, however, the combination that is the invention, and is as much a unit in contemplation of law as a single or noncomposite instrument." Leeds & Catlin v. Victor Talking Mach. Co., 213 U. S. 325, 332, 29 S. Ct. 503, 505, 53 L. ed. 816, 819 (1909). Although this decision was later overruled, the definition here quoted was not questioned.

[2]This comment is not specifically concerned with the broader field of antitrust violations. It is limited to a consideration of the application of the doctrine of patent misuse with regard to a patent owner's rights to use the courts to protect his monopoly. It is not necessary to "... deny the existence, in certain respects, of a

if the owner of a patent for a method of making fountain pens insists that the unpatented metal used in all pens made under patent be secured through his sales office, does he still have standing in the courts to enjoin another from infringing his patent? The same question arises if the owner of a patent claiming a product, a fountain pen, insists that all metal points used in his pen be purchased from his representative, even though the points themselves are unpatented. While the answer to the question seems to have been provided by Congress in Section 271 of the Patent Act of 1952,[3] it is believed that the answer has not been properly applied by a court until the recent case of *Sola Electric Co. v. General Electric Co.*[4]

This decision is the latest of a series of cases involving the doctrines of patent misuse and contributory infringement. The doctrine of patent misuse is a specific application to patent law of the equity maxim that he who comes into court must come with clean hands.[5] The defendant's conduct is immaterial; aid is withheld from the plaintiff because of the wrong the *plaintiff* has done. The doctrine is applied to prevent an unwarranted expansion of the patent right beyond a strict wording of the claims.[6] Contributory infringement is an application to patent law of the common law doctrine of joint tortfeasors.[7] A sup-

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division—with patent law as one branch and antitrust as the other.... [P]atent misuse is not invaribly per se an antitrust violation." Oppenheim, Patents and Antitrust: Peaceful Coexistence (1955) 54 Mich. L. Rev. 199, 200.

[3]66 Stat. 811 (1952), 35 U. S. C. A. § 271 (1954).

[4]146 F. Supp. 625 (N. D. Ill. 1956).

[5]"... the equitable maxim that a party seeking the aid of a court of equity must come into court with clean hands applies ... [w]here the patent is used as a means of restricting competition with the patentee's sale of an unpatented product.... Equity may rightly withhold its assistance from such a use of the patent by declining to entertain a suit for infringement, and should do so at least until it is made to appear that the improper practice has been abandoned and that the consequences of the misuse of the patent have been dissipated." Morton Salt Co. v. G. S. Suppiger Co., 314 U. S. 488, 492, 62 S. Ct. 402, 405, 86 L. ed. 363, 366 (1942). Accord: B. B. Chemical Co. v. Ellis, 314 U. S. 495, 62 S. Ct. 406, 86 L. ed. 367 (1942); Rich, Infringement Under Section 271 of the Patent Act of 1952 (1953) 21 Geo. Wash. L. Rev. 521, 525.

[6]"A patent operates to create and grant to the patentee an exclusive right to make, use and vend the particular device described and claimed in the patent. But a patent affords no immunity for a monopoly not within the grant ... and the use of it to suppress competition in the sale of an unpatented article may deprive the patentee of the aid of a court of equity...." Morton Salt Co. v. G. S. Suppiger Co., 314 U. S. 488, 491, 62 S. Ct. 402, 404, 86 L. ed. 363, 365 (1942).

[7]"It cannot be, that, where a useful machine is patented as a combination of parts, two or more can engage in its construction and sale, and protect themselves by showing ... [that] each makes and sells one part only, which is useless without the others, and still another person ... puts them together for use.... In such case, all are tortfeasors...." Wallace v. Holmes, 29 Fed. Cas. 74, 80 (C. C. D.

plier who furnishes a component to another for that other to use in an infringing manner is considered to be a joint wrongdoer with the user.[8] Liability is imposed on the defendant supplier because of the wrong *he* has done. This doctrine prevents multiplicity of suits, as under it a patentee may obtain relief by enjoining a few component suppliers (contributory infringers) from selling the components rather than by bringing a multitude of suits against those who purchased the components and actually put them to use in the invention (direct infringers).

The misuse doctrine evolved in 1931 in *Carbice Corp. of America v. American Patents Dev. Corp.* wherein the Supreme Court denied relief "because the [plaintiff] is attempting, without sanction of the law, to employ the patent to secure a limited monopoly of unpatented material used in applying the invention."[9] Plaintiff had required purchase from his exclusive licensee of an unpatented staple[10] (dry ice) which was a necessary constituent of the refrigerated package (product) claimed in the combination patent involved. The *Carbice* rule was later extended to apply where the patentee gave an implied license to all who purchased from him the staple, unpatented, necessary constituent for his patented process and sued all other suppliers for contributory infringement;[11] where the patentee tried to monopolize the sale of a staple, unpatented, necessary constituent by suits for *direct*

Conn. 1871). Significant cases in the development of the contributory infringement doctrine include: Heaton-Pennisular Button Fastner Co. v. Eureka Specialty Co., 77 Fed. 288, 35 L. R. A. 728, (C. C. A. 6th, 1896); Henry v. A. B. Dick Co., 224 U. S. 1, 32 S. Ct. 364, 56 L. ed. 645 (1912); Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U. S. 502, 37 S. Ct. 416, 61 L. ed. 871 (1917).

[8]66 Stat. 811 (1952), 35 U. S. C. A. § 271(c) (1954). Applied in Southern States Equipment Corp. v. USCO Power Equipment Corp., 209 F. (2d) 111 (C. A. 5th, 1953).

[9]283 U. S. 27, 33, 51 S. Ct. 334, 336, 75 L. ed. 819, 823 (1931). For another view to the effect that the Supreme Court's decision in Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U. S. 502, 37 S. Ct. 416, 61 L. ed. 871 (1917), laid the basis for misuse, see Note (1953) 66 Harv. L. Rev. 909 at 911. The term "misuse" was first used by the Supreme Court in the Morton Salt Co. v. G. S. Suppiger Co., 314 U. S. 488, 62 S. Ct. 402, 86 L. ed. 363 (1942). "...another quirk on the edges of misuse is the notion that every patent is a dynamo for generating market power requisite to antitrust illegality. This has been given credence and authority in the tying clause cases." Oppenheim, Patents and Antitrust: Peaceful Coexistence? (1955) 54 Mich. L. Rev. 199, 213. Oppenheim lists tying clause cases at p. 213, n. 79.

[10]Staple is defined as: "Established in commerce; occupying the markets...." Webster's New International Dict. (2nd ed. 1950) 2457. Accordingly, a non-staple is an article which is not established in commerce; it would have no substantial use were it not for the patented invention.

[11]Leitch Mfg. Co. v. Barber Co., 302 U. S. 548, 58 S. Ct. 288, 82 L. ed. 371 (1938).

infringement;[12] and where the patentee discriminated in royalty rates between those who purchased the staple, unpatented, necessary constituent from him and those who purchased it from a competitor.[13] However, in an earlier decision in which the patentee was monopolizing the sale of a *non-staple,* unpatented, necessary constitutent usable only in the invention, the Court granted the patentee relief.[14]

Thus, although there was some conflict of authority,[15] it appears that the law resulting from these decisions was that a patentee had standing to enjoin a direct or contributory infringement if he was not guilty of misuse, and further, that a patentee was not guilty of misuse merely because he monopolized the sale of a *non-staple,* unpatented component, or merely because he sought an injunction against another who was selling the non-staple knowing that it was to be used in the patented system; but if a plaintiff tried to monopolize *staples,* he was barred by misuse even if he taught his customers his system in addition to selling them its constituents.[16]

However, it is possible that in 1944 the law was radically changed when the Supreme Court handed down its decision in *Mercoid Corp. v. Mid-Continent Investment Co.,*[17] involving a patentee who was trying

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[12]Morton Salt Co. v. G. S. Suppiger Co., 314 U. S. 488, 62 S. Ct. 402, 86 L. ed. 363 (1942).

[13]Dehydrator's Ltd. v. Petrolite Corp., 117 F. (2d) 183 (C. C. A. 9th, 1941); Barber Asphalt Co. v. La Fera Greco Contracting Co., 116 F. (2d) 211 (C. C. A. 3rd, 1940). See note 42, infra. A group of cases touching on the border of misuse involves price fixing, primarily an antitrust consideration. However, there is language to the effect that a patentee cannot control the resale price of patented articles, either by resort to an infringement suit or by stipulating for price maintenance by his vendees. See, e.g., United States v. Univis Lens Co., Inc., 316 U. S. 241, 62 S. Ct. 1088, 86 L. ed. 1408 (1942). Cf. United States v. General Electric Co., 272 U. S. 476, 47 S. Ct. 192, 71 L. ed. 362 (1926).

[14]Leeds & Catlin Co. v. Victor Talking Mach. Co., 213 U. S. 325, 29 S. Ct. 503, 53 L. ed. 816 (1909), see note 18, infra. For a definition of the term non-staple, see note 10, supra.

[15]See note 18, infra.

[16]B. B. Chemical Co. v. Ellis, 314 U. S. 495, 62 S. Ct. 406, 86 L. ed. 367 (1942). Even if the supplier's infringement extended beyond mere sale, he cannot be enjoined if the patentee's acts constitute misuse, and it is misuse to monopolize staples even where a patentee also teaches his customers his process. For a complete discussion of the patentee's conduct, see B. B. Chemical Co. v. Ellis, 117 F. (2d) 829 (C. C. A. 1st, 1941). Many writers have considered the Supreme Court's decision in this case to pertain only to staples; however, it is likely that the Supreme Court considered the case as pertaining to non-staples, because the product was originally a staple (canvas sole) but had been coated in a particular way for use in the invention.

[17]320 U. S. 661, 64 S. Ct. 268, 88 L. ed. 376 (1944). Mercoid Corp. v. Minneapolis-Honeywell Regulator Co., 320 U. S. 680, 64 S. Ct. 278, 88 L. ed. 396 (1944), was a companion case which applied the same doctrine but did not expound it.

to monopolize the sale of non-staple switches and who brought suit for contributory infringement. Relief was denied on the ground that the patentee had misused his patent by his attempt to monopolize unpatented wares. This meant, at least, that the misuse doctrine was definitely expanded to apply to a patentee who had sought to monopolize non-staples.[18] Some authorities interpreted the decision more broadly as meaning that the bringing of a contributory infringement suit involved an attempt to monopolize an unpatented item, and, therefore, that any patentee who brought a contributory infringement suit was guilty of misuse.[19] Such an expansion of the misuse concept nullified for all practical purposes, the patentee's contributory infringement remedy, but the broad interpretation was supported by language in the *Mercoid* opinion: "The result of this decision, together with those that have preceded it, is to limit substantially the doctrine of contributory infringement. What residuum may be left we need not stop to consider. It is sufficient to say that in whatever posture the issue may be tendered courts of equity will withhold relief when the patentee and those claiming under him are using the patent privilege contrary to the public interest."[20]

As a result of the *Mercoid* decision, the courts were uncertain as to whether the mere bringing of a suit for contributory infringement constituted misuse. In one decision of this period, Judge Learned Hand stated: "Indeed, it appears from the discussion in the opinions [in

[18]There appears to have been a legitimate basis for distinguishing between staples and non-staples prior to the Mercoid decision. In Leeds & Catlin v. Victor Talking Mach. Co., 213 U. S. 325, 29 S. Ct. 503, 53 L. ed. 816 (1909), the Court allowed plaintiff recovery even though he was monopolizing non-staples. In later cases, involving monopolization of staples, the Court distinguished the Leads & Catlin decision, but made no reference to a distinction between staples and non-staples. Carbice Corp. of America v. American Patents Dev. Corp., 283 U. S. 27, 51 S. Ct. 334, 75 L. ed. 819 (1931); Leitch Mfg. Co. v. Barber Co., 302 U. S. 458, 58 S. Ct. 288, 82 L. ed. 371 (1938). Subsequent to these later decisions, some lower courts accepted the non-staple exception to the misuse doctrine, Johnson Co. v. Philadelphia Co., 96 F. (2d) 442 at 447 (C. C. A. 9th, 1938), while others rejected the distinction, Philadelphia Co. v. Lechner Laboratories, Inc., 107 F. (2d) 747 at 748 (C. C. A. 2nd, 1939). B. B. Chemical Co. v. Ellis, 314 U. S. 495, 62 S. Ct. 406, 86 L. ed. 367 (1942), which was decided subsequent to the conflicting decisions discussed above, may have made the distinction between staples and non-staples academic. See note 16, supra. However, the Mercoid decision was the first to spell out that result clearly. In the Mercoid case, the Court apparently recognized that such a distinction previously existed, but rejected it. Mercoid Corp. v. Mid-Continent Inv. Co., 320 U. S. 661 at 668, 64 S. Ct. 268 at 272, 88 L. ed. 376 at 382 (1944).

[19]Rich, Infringement Under Section 271 of the Patent Act of 1952 (1953) 21 Geo. Wash. L. Rev. 521 at 536; Note (1953) 66 Harv. L. Rev. 909 at 913.

[20]Mercoid Corp. v. Mid-Continent Inv. Co., 320 U. S. 661, 669, 64 S. Ct. 268, 273, 88 L. ed. 376, 383 (1944).

Mercoid] that the doctrine of contributory infringement is itself not wholly free from doubt."[21] However, many courts preferred to believe that the contributory infringement remedy was still available.[22]

In 1952, Congress adopted Section 271 (d) of the present Patent Act, which declares: "No patent owner otherwise entitled to relief for infringement or contributory infringement shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: (1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent; (2) licensed or authorized others to perform acts which if performed by another without his consent would constitute contributory infringement of the patent; (3)sought to enforce his patent rights against infringement or contributory infringement."[23]

There is no doubt that subsection (d)(3) makes it clear that bringing suit for contributory infringement is not misuse per se.[24] However, subsections (d) (1) and (2) are not, in themselves, complete. They define misuse by a patentee in terms of conduct which, in another, would be contributory infringement, and because of this phraseology, subsection (d) must be interpreted with reference to subsections (b) and (c) of Section 271.[25] Subsection (b) states that one who *actively induces* infringement is liable as an infringer, and subsection (c) states that one who sells a *non-staple,* unpatented, necessary constituent is not. Because subsection (d) incorporates subsections (b) and (c), it appears that a patentee is not guilty of misuse either when he monopolizes the sale of non-staples or when he monopolizes the sale of staples

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[21]Stokes & Smith Co. v. Transparent-Wrap Mach. Corp., 156 F. (2d) 198, 201 (C. C. A. 2nd, 1946). For other cases illustrative of the confusion of the courts, see Landis Mach. Co. v. Chaso Tool Co., 141 F. (2d) 800 at 801 (C. C. A. 6th, 1944); Stroco Products v. Mullenback, 67 U. S. P. Q. 168 (S. D. Cal. 1944).

[22]Detroit Lubricator Co. v. Toussaint, 57 F. Supp. 837 (N. D. Ill. 1944); Hall v. Montgomery Ward & Co., 57 F. Supp. 430 (N. D. W. Va. 1944); Conmar Products Corp. v. Tibony, 63 F. Supp. 372 (E. D. N. Y. 1945); Metallizing Engineering Co. v. Metalling Co. of America, 62 F. Supp. 274 (S. D. N. Y. 1945). For a discussion of cases immediately following the Mercoid decision, see Note (1947) 15 Geo. Wash. L. Rev. 463.

[23]66 Stat. 811 (1952), 35 U. S. C. A. § 271 (1954).

[24]Cole v. Hughes Tool Co., 215 F. (2d) 924 (C. A. 10th, 1954); Electric Pipe Line v. Fluid Systems, Inc., 231 F. (2d) 370 at 372 (C. A. 2nd, 1956); Dr. Salsbury's Labs. v. I. D. Russell Co. Labs., 212 F. (2d) 414 at 417 (C. A. 8th, 1954), cert. den., 348 U. S. 837 (1954); Sola Electric Co. v. General Electric Co., 146 F. Supp. 625 (N. D. Ill. 1956). See Freedman v. Friedman, 142 F. Supp. 426, 431 (D. C. Md. 1956).

[25]From the legislative history, it appears that subsection (d) was intended to include subsection (b). See 2 U. S. Code Cong. & Adm. News (1952) 2394 at 2402.

provided, in the latter case, that he at the same time actively induces use of his patent.

Three cases have arisen involving subsections 271 (d) (1) and (2) specifically.[26] The first two of the cases involved the patentee's attempt to monopolize staples and avoid the bar of misuse by actively inducing use of the patented process. The third case involved a patentee's attempt to monopolize the sale of non-staples.

In the first of these three cases,[27] the patent covered a solution for poultry treatment. Patentee sold a pill composed of two staple, unpatented chemicals with instructions that the consumer mix the pill with a certain amount of water to obtain the proper solution. He sought to enjoin defendant, another supplier of a like pill, from selling the pill with instructions on how to mix it with water. In sustaining a defense of misuse because the patentee was monopolizing staples, the court, realizing that under Section 271 (d) plaintiff's conduct must be judged in terms of an alleged infringer's conduct,[28] considered what acts by a hypothetical alleged infringer constitute contributory infringement. In reference to that consideration, the court stated: "Though subsection (c) ... defines a contributory infringer to be anyone who sells a component of a patented machine or composition knowing it to be especially adapted for infringing use, it specifically provides that said component *not* be 'a staple article or commodity of commerce suitable for substantial noninfringing use.' Whatever the significance of other provisions of the Act, we believe the excepting clause is controlling here.... In the respect noted Section 271 (d) is readily harmonized with prior case authority...."[29]

But the court did not consider subsection (b) of Section 271 which seems to be most significant in this case, because a supplier who sells with instructions on how to infringe the patent would logically be an

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[26]There have been cases in which §271 (d) was applicable but not considered—e.g. Technical Tape Corp. v. Minnesota Mining and Mfg. Co., 143 F. Supp. 429 (S. D. N. Y. 1956). See note 35, infra.

[27]Dr. Salsbury's Labs v. I. D. Russell Co., Labs, 212 F. (2d) 414, 415 (C. A. 8th, 1954): "In I. D. Russell Co. v. Dr. Salsbury's Laboratories, 8 Cir., 1952, 198 F. (2d) 473, we held under identical facts that the plaintiff's own patent misuse effectively barred recovery. It is plaintiff's instant contention that, as a result of legislation enacted subsequent to the earlier litigation, the law of misuse has been changed, thereby creating this, a *new* cause of action for continuing infringement."

[28]Sec. 271 (d): "No patent owner otherwise entitled to relief for ... contributory infringement of a patent shall be ... deemed guilty of misuse ... by reason of his having ... (1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent.... 66 Stat. 811 (1952), 35 U. S. C. A. §271 (d) (1954).

[29]Dr. Salsbury's Labs. v. I. D. Russell Co. Labs., 212 F. (2d) 414, 417 (C. A. 8th, 1954).

active inducer of infringement.[30] Thus, the court appeared to treat Section 271 (d) as no more than an expression of the expanded misuse doctrine which had developed in the pre-Act era, and to believe that courts are under a duty to apply that section in such a way as to obtain results consistent with prior case authority. In this case, this interpretation of the Act resulted in the patentee being denied possibly the only reasonable means of exploiting his patent,[31] because, under the decision, in order to obtain a monopoly he must sell only the patented product as a whole, which means that he must ship gallons of water instead of a box of pills with instructions on the label for mixing.[32]

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[30]Possibly the only authority prior to the passage of the Act relating to what constitutes active inducement appears in Judge Magruder's concurring opinion in B. B. Chemical Co. v. Ellis, 117 F. (2d) 829, 836 (C. C. A. 1st, 1941): "Here the defendants are engaged in actively inducing unlicensed shoe manufacturers to practice the process. They furnish to such manufacturers the machines [and the materials] all especially designed and prepared for the particular use, and, in addition they furnish 'instruction ... and advice ... and assistance'...." For support of the view that defendant's acts in the Dr. Salsbury's Labs case constitute active inducement, see Note (1954) 28 Temp. L. Q. 148 at 152. For cases concerning active inducement subsequent to the passage of the Act, see, e.g., Marks v. Polaroid Corp., 237 F. (2d) 428, 435 (C. A. 1st, 1956) (infringer supervised and directed the infringement: "he, individually, was the moving, active, conscious force behind [the] infringement. This is clearly enough to make him personally liable under general principles ... as well as under 35 U. S. C. A. §271 (b)."); Freedman v. Friedman, 142 F. Supp. 426 (D. C. Md. 1956); Carter Products, Inc. v. Colgate-Palmolive Co., 130 F., Supp. 557 (D. C. Md. 1955), aff'd, 236 F. (2d) 855 (C. A. 4th, 1956); Jones v. Radio Corp of America, 131 F. Supp. 82, 83 (S. D. N. Y. 1955) ("The complaint charges that [defendant], intending to bring about infringement of plaintiff's patent, secured from plaintiff and passed on to other defendants, confidential information making infringement possible.... The claim ... comes within subsection (b) [of Section 271]. This subdivision included in its definition of 'infringer' one who does that which the courts had previously held [?] to be contributory infringement wherein there was intent to infringe, but not necessarily the sale of a component part of a combination patent. It protects against one who aids and abets the direct infringer.")

[31]See I. D. Russell Co. Labs. v. Dr. Salsbury's Labs., 198 F. (2d) 473, 476 (C. A. 8th, 1952): "It further seems obvious to me that, if the poultry industry is to be able to get the benefit of the discovery, the only way in which this can be made to occur is through the method of sale which the patentee has used.... I am unable to see here any engaging by the patentee in some tangential exploitation or any producing by it of some collateral monopoly. To me, all that the patentee is doing is vending its poultry medicine.... The patentee is not trying to sell the [unpatented component]...."

[32]For the view that the unpatented article is possibly a non-staple and therefore that the Act sanctions the patentee's activities in the Dr. Salsbury's case, see Note (1952) 41 Geo. L. J. 112 at 114.

It has been suggested that Section 271 (d) is capable of a very narrow interpretation. "This narrower interpretation would limit the exploitation of combination patents primarily to the collection of royalties on freely available licenses; the contributory infringement action would serve largely as an indirect device to en-

In the second case,[33] the court based its decision on the fact that the patentee did more than sell the unpatented, staple components, inasmuch as it designed and inspected the patented system in which the unpatented components were used; but the court did not apply the Act. To the patentee's allegation of contributory infringement, the purported infringer pleaded misuse, and the patentee answered that his acts were not misuse by virtue of Section 271 (d). The court said: "Although this argument has some merit, we need not here determine its validity, since we have decided that [patentee's] method of doing business is not proscribed by Mercoid."[34] This court distinguished the case before it from the *Mercoid* case and avoided an application of the Act, apparently on the unexpressed assumption that the Act could not have expanded the misuse doctrine beyond the limits suggested by the *Mercoid* case. Apparently, since the court felt that there was uncertainty as to the effect of the Act, the safer procedure was to distinguish the *Mercoid* case rather than to apply the Act. However, the result was the same as would have been reached had the Act been applied—that is, that the patentee has not misused his patent if he does not merely sell staples but also performs services which, if performed by another, would amount to active inducement of infringement.[35]

Considered together, the two cases appear to have indicated that misuse still was to be governed by the narrow interpretation of the *Mercoid* decision—that the misuse doctrine does not completely nullify contributory infringement, though in most instances it has that effect.

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courage application for licenses by deterring parts suppliers from selling to non-licensed users." Note (1953) 66 Harv. L. Rev. 909 at 917. This narrower interpretation would be consistent with the decision in the Dr. Salsbury's Labs case. However, by requiring the patentee either to refrain from supplying unpatented components or, should he enter the market, by denying him a contributory infringement remedy, the narrow interpretation would prevent a patentee such as the plaintiff in the Dr. Salsbury's Labs. case from protecting his monopoly, unless he himself stayed out of the market, for he could not afford to sue, for example, the individual farmers who use the medicine.

[33]Electric Pipe Line, Inc. v. Fluid Systems, Inc., 231 F. (2d) 370 (C. A. 2nd, 1956).

[34]Electric Pipe Line, Inc. v. Fluid Systems, Inc., 231 F. (2d) 370, 372 (C. A. 2nd, 1956).

[35]The result is also consistent with the decision reached, without citation of authority on the misuse point, in Great Lakes Equip. Co. v. Fluid Systems, Inc., 217 F. (2d) 613 (C. A. 6th, 1954). Section 271 (b), as incorporated by Section 271 (d) (1), was applicable in that case, and, accordingly proper application would have yielded the same result, but the court made no reference to Section 271. However, the result is inconsistent with prior Supreme Court case law. See note 16, supra. It seems doubtful that the Supreme Court would have distinguished a patentee who designs and sells from one who couples his sales with instructions, advice and assistance. See Note (1956) 104 U. of Pa. L. Rev. 1123.

However, when a court felt that the monopoly did not have a serious adverse effect on the public, it could allow recovery against a contributory infringer and distinguish its decision from the *Mercoid* case.

The *Sola* case[36] suggests a contrary approach. There, a patent covering an electrical circuit for igniting cold cathode fluorescent tubes was involved. The claims of the patent covered a system sold by neither plaintiff nor other manufactures it had licensed; both plaintiff and its licensees sold unpatented, non-staple, necessary constituents, and coupled with such sales an implied license to use the patented system without charge. Plaintiff alleged infringement, to which defendant pleaded, *inter alia,* misuse.[37] Defendant's contention was that the suppression of competition in the unpatented, non-staple component constituted misuse and disqualified the patentee from suing for infringement, but the court, although it denied plaintiff relief in this case, did not accept defendant's contention with regard to misuse. This conclusion was stated in terms of the Patent Act of 1952: "It seems to the court that the defendant's thesis . . . merely shows that the plaintiff has derived revenue from acts which, if performed by another without plaintiff's consent, would constitute contributory infringement of the patent, that the plaintiff has licensed or authorized others to perform acts which if performed without the plaintiff's consent would constitute contributory infringement of the patent, and that the plaintiff has sought to enforce its patent rights against infringement and contributory infringement. These acts are by paragraph (d) of Section 271 . . . declared not to be misuse of the patent right. . . . The . . . Act of 1952 makes proper and lawful that which under the doctrine of the *Mercoid* cases . . . would have been a misuse of the patent."[38] To the court which handed down the *Sola* decision, the patent law has undergone reconstruction,[39] and cases are to be decided, where possible, on the literal terms of the Act without reference to pre-existing law.

From the legislative history, it is apparent that the purpose of the Act was to enable a patentee to derive profit from his own manufacture and sale without being subject to the restrictive view of patent

[36]Sola Electric Co. v. General Electric Co., 146 F. Supp. 625 (N. D. Ill. 1956).

[37]Defendant also pleaded invalidity and non-infringement in defense. On both of these defenses he prevailed, and consequently the court's language regarding misuse would be considered dictum by some authorities.

[38]Sola Electric Co. v. General Electric Co., 146 F. Supp. 625, 647 (N. D. Ill. 1956).

[39]"Subparagraph (d) of Section 271 is the paragraph with which we are particularly concerned at this time. It certainly makes substantial changes in the law as announced in the Mercoid cases." Sola Electric Co. v. General Electric Co., 146 F. Supp. 625, 647 (N. D. Ill. 1956).

monopoly advanced in the *Mercoid* cases.[40] In the words of one authority, "There is no reason why a patent owner should not be encouraged to himself remain active in the industry.... The small manufacturer particulary needs this right. It is only where the patent owner engages in activities not reasonably necessary to enjoy his patent rights that he should be held... to have misused his patents."[41] Since the Act defines what in the eyes of Congress is reasonably necessary to this enjoyment, it seems that the example set by the court in the *Sola* case should be adopted and followed, and that the attempt to follow pre-existing law, found in other recent cases, is the wrong approach.[42] If the *Sola* approach is adopted, the public policy, as expressed in the Patent Act of 1952, will serve to restore to the patent system the necessary element of incentive.[43]

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[40]See 2 U. S. Code Cong. & Adm. News (1952) 2394 at 2402.

[41]Malley, Patent Antitrust Problems and the Attorney General's Report (1955) 24 Geo. Wash. L. Rev. 20, 27.

[42]"It is hoped that the Dr. Salsbury's Laboratories decision, in its confusing interpretations of section 271, will not set off a nullification of the congressional objective of making contributory infringement a meaningful remedy." Oppenheim, Patents and Antitrusts: Peaceful Coexistence? (1955) 54 Mich. L. Rev. 199, 213.

In National Foam System v. Urquhart, 202 F. (2d) 659, 662 (C. A. 3rd, 1953), the patent owner, in view of the Barber Asphalt and Petrolite decisions, note 13, supra, printed a patent notice on its "invoices to the effect that 'consumer licenses to use the process of the... patents upon payment of fair royalities with apparatus and chemicals, *however obtained,* are available upon application to us'." A form known as a consumer license was printed and placed in the company files. It was conceded that no such licenses were ever issued, but there was no evidence that they were ever applied for. The court looked to surrounding circumstances and found that a higher rate would be paid for the unpatented, necessary constituent bought from others, than would be paid if such constitutents were purchased from the patent owner. It was argued that the higher royalty rate to be paid under the consumer licenses was justified because the patent owners would supply services to direct licensees in the form of technical "know how," sales engineering, and advice. The court said: "This is not borne out by the evidence. If such services were to have been included in the license, it would have been a simple task to mention this in that form.... [I]n instances where a license can be obtained only by purchasing the unpatented materials from the person granting the license,... or, where given a choice of purchasing from that source or another, the royalty to be paid in the latter situation is so much higher that the would-be-licensee is given Hobson's choice... [patentee's] have unlawfully enlarged their patent monopoly...." National Foam System v. Urquhart, 202 F. (2d) 659, 663 (C. A. 3rd, 1953).

The case was argued before the effective date of the Patent Act of 1952. Would the result have been different under the Act? If the unpatented product was a staple, would a mention of supplying services with the sale make Section 271(b) applicable under a consideration of Section 271(d)? The Act does not supply an answer to the latter question; however, it could serve as a basis for courts' decisions of the ultimate question in such a case.

[43]Cf. Notes (1956) 25 U. of Cin. L. Rev. 521; (1956) 42 Va. L. Rev. 1140.

PROPERTY—TENANCY BY ENTIRETY CREATED BY CONVEYANCE FROM ONE SPOUSE TO HIMSELF AND OTHER SPOUSE. [North Carolina]

The tenancy by the entirety, in a sense a surviving remnant of an ancient fiction of the common law, is a modification of the joint tenancy estate. The principal feature of both is the right of survivorship by which the last surviving tenant takes the whole.[1] However, tenancy by the entirety differs from joint tenancy in that the former can exist only between husband and wife, and in legal contemplation each spouse owns the whole.[2] Absent statutory modification, the interest of each is inalienable except by joint conveyance with the other, and is not subject to the claims of creditors of either spouse.[3] Thus, from the point of view of the husband and wife, it is a desirable way to hold property. Although the tenancy by the entirety has never been recognized or has been abolished in some jurisdictions,[4] it still is recognized under the property law of almost half of the states.[5]

An especially controversial aspect of this estate is the problem of its creation by a conveyance from one spouse to himself and his spouse, the deed expressing the intention to create a tenancy by the entirety. Such a problem was recently presented to the Supreme Court of North Carolina in the case of *Woolard v. Smith*.[6] There the husband, owning the land in fee, executed a deed from himself as party of the first part to himself and his wife, parties of the second part. The deed stated that "party of the first part is desirous of having the title vested in parties of the second part and known as an estate by the entirety...."[7] After the death of the husband, plaintiffs, as his heirs at

[1]2 American Law of Property (1952) § 6.6(b); 2 Blackstone, Commentaries (1807) 183; 2 Coke on Littleton (17th ed. 1817) § 181(b); 4 Kent, Commentaries (11th ed. 1866) 397; 2 Tiffany, Real Property (3rd ed. 1939) § 430; 26 Am. Jur., Husband and Wife § 82.

[2]2 American Law of Property (1952) § 6.6(a); 2 Blackstone, Commentaries (1807) 181; 2 Coke on Littleton (17th ed. 1817) § 187(b); 4 Kent, Commentaries (11th ed. 1866) 397; 2 Tiffany, Real Property (3rd ed. 1929) §430; 26 Am. Jur., Husband and Wife § 66.

[3]Freestone v. Parratt, 5 T. R. 652, 101 Eng. Rep. 363 (1794); 2 American Law of Property (1952) § 6.6(b); 2 Tiffany, Real Property (3rd ed. 1939) § 430; 26 Am. Jur., Husband and Wife §§ 81, 84.

[4]Phipps, Tenancy by Entireties (1951) 25 Temp. L. Q. 24, 32 lists 29 states in which the tenancy does not exist.

[5]Phipps, Tenancy by Entireties (1951) 25 Tem. L. Q. 24, 33 lists the following jurisdictions in which the tenancy exists in varying forms: Arkansas, Delaware, District of Columbia, Florida, Indiana, Kentuck, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Wyoming.

[6]244 N. C. 489, 94 S. E. (2d) 466 (1956).

[7]244 N. C. 489, 94 S. E. (2d) 466, 467 (1956).

law, brought this suit for partition against the widow contending that a tenancy in common was created. Plaintiffs based their claim on two closely related grounds: first, that since one cannot be grantor and grantee in the same deed, the grant to the husband was void; and second, that a tenancy by the entirety could not have been created because the common law unities of time and title were not satisfied in that the husband received his interest at one time and the wife received her interest at another—the husband by a prior deed and the wife by the deed from her husband. The court held that a tenancy by entirety was created, answering plaintiff's first contention by ruling that the grantee was not the husband and wife as individuals, but was the marital unit, an entity separate and distinct from either individual spouse. This ruling was also the basis of the answer given to the plaintiff's second contention: the common law unities of time and title were satisfied in that each spouse, as a component part of the entity which was the grantee, took his interest at the same time. Finally, it was concluded that "the unity of husband and wife suffices to effectuate the express and declared intention of the grantor."[8]

Varying results have been reached by different courts in adjudicating the effect of this type of conveyance. This diversity of holdings is generally attributed to the effect of one or more of three common law rules of property: first, one cannot be grantor and grantee in the same deed;[9] second, there must be unity of time, title, interest, possession and person for the creation of a tenancy by the entirety;[10] third, a husband cannot convey to his wife.[11]

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[8]244 N. C. 489, 94 S. E. (2d) 466, 471 (1956).

[9]Deslauries v. Senesac, 331 Ill. 437, 163 N. E. 327, 62 A. L. R. 511 (1928). See Pope v. Brandon, 2 Stew. 401, 407, 20 Am. Dec. 49, 53 (Ala. 1830); Dupree v. Dupree, 45 N. C. 149, 150 (1852).

An exception to this generally accepted rule occurs in the case of a deed which is executed by the Statute of Uses. In Thatcher v. Omans, 3 Pick. 521 (Mass. 1792), W and H owned land in fee in W's right, and in consideration of marriage and twenty shillings deeded the land to J. S. in fee to hold to the use of H and W, their heirs and assigns, and the heirs and assigns of the longest lived of them. Held: the deed was not a bargain and sale, nor a covenant to stand seised to uses whereby there would be a use on a use (and void), but it was a feoffment to uses. Therefore, J. S. stood seised to the use limited in the deed, and then the Statute of Uses executed the use, thereby making the H and W complete owners of the land as joint tenants in fee.

[10]Hiles v. Fisher, 144 N. Y. 306, 39 N. E. 337 (1895); Moore v. Greenville Banking & Trust Co., 178 N. C. 118, 100 S. E. 269 (1919); Freeman v. Belfer, 173 N. C. 581, 92 S. E. 486, L. R. A. 1917E 886 (1917); 2 Blackstone, Commentaries (1807) 179-181.

[11]Erickson v. White, 288 Mass. 451, 193 N. E. 25 (1934); Ames v. Chandler, 265 Mass. 428, 164 N. E. 616 (1929). (This disability has been removed by the married women's property acts.)

The North Carolina court, in considering and overcoming the obstacles created by the first two of these rules, joined the group of states which followed the New York or "modern" view.[12] The case which has become the landmark authority for this result is *In re Klatzl's Estate*.[13] There, four of seven judges agreed that a conveyance from the husband to himself and his wife can create a tenancy by the entirety, holding that the grantor reserved to himself the same rights he would have been granted under a deed from a third person to himself and his wife. It was indicated that the unity of title was satisfied, since the husband and wife were "the legal unity of persons receiving the indivisible, inseverable title to the property conveyed."[14] The unity of time is achieved under the New York view on the theory that the spouses' interest in the *jointly held* estate is created at the same time—by the conveyance between themselves—and any interest either spouse may have had in the property prior to this conveyance is disregarded.[15]

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[12]Ebrite v. Brookhyser, 219 Ark. 676, 244 S. W. (2d) 625, 44 A. L. R. (2d) 587 (1951); Johnson v. Landefeld, 138 Fla. 511, 189 So. 666 (1939); Cadgene v. Cadgene, 17 N. J. Misc. 332, 8 A. (2d) 858 (1939); In re Klatzl's Estate, 216 N. Y. 83, 110 N. E. 181 (1915); In re Vandergrift's Estate, 105 Pa. Super. 293, 161 Atl. 898 (1932). Cf. Creek v. Union Nat. Bank, 266 S. W. (2d) 737 (Mo. 1954); Therrien v. Therrien, 94 N. H. 66, 46 A. (2d) 538, 166 A. L. R. 1023 (1946), adopting the same principle in allowing creation of a joint tenancy.

[13]216 N. Y. 83, 110 N. E. 181 (1915). It should be noted that the case was not decided on this precise point. The facts were that H deeded land to H and W, expressing in the deed his intention to create a tenancy by the entirety. The issue was whether any interest in this property passed to W by H's will, which named W the devisee. Held: a one half interest in the property passed by H's will, upon which the transfer tax may be assessed. Judges Seabury, Cuddeback and Hogan were of the opinion that the deed created a tenancy in common, which created a half interest in W, leaving a half interest in H which passed by his will. Chief Judge Bartlett concurred in this result, deciding that the deed created a tenancy by the entirety, but that W became entitled to the use of only half of the property by virtue of the deed, and that the undivided half of which H had the use and enjoyment during his lifetime did not pass to W until H's death and therefore was subject to the transfer tax. Judges Collin, Hiscock and Cardozo dissented on the ground that the deed created a tenancy by the entirety and W took no new interest at H's death, since she (and H) was seised of the whole upon the vesting of the estate by the deed. This case has since been construed to stand for the proposition that such a deed does create a tenancy by the entirety, in that Chief Judge Bartlett and Judges Collin, Hiscock and Cardozo were of that opinion. Boehringer v. Schmid, 254 N. Y. 355, 173 N. E. 220 (1930).

[14]216 N. Y. 83, 92, 110 N. E. 181, 184 (1915).

[15]Cadgene v. Cadgene, 17 N. J. Misc. 332, 8 A. (2d) 858 (1939); In re Horler's Estate, 180 App. Div. 608, 168 N. Y. Supp. 221 (1917). Cf. Boehringer v. Schmid, 133 Misc. 236, 237, 232 N. Y. Supp. 360, 361 (1928) where, in answer to the contention that the necessary unities were lacking, the court held: "This contention rests upon the erroneous premise that the original title or interest of the husband remained in him after the giving of his own deed, while the wife's title, coming to her by that deed, created a situation in which there did not exist a unity of time

The rule prohibiting the grantor from also being a grantee is not violated, since "The husband did not convey to himself, but to a legal unity or entity which was the consolidation of himself and another."[16]

The reasoning of the New York court that the grantor reserves to himself the same rights he would have been granted by a deed from a third person to himself and his wife is subject to criticism in at least one respect. Each tenant by the entirety holds *per tout et non per my*—each owns the whole.[17] Therefore, in a deed from a third person, each spouse is granted the whole estate. If the grantor spouse reserves this interest in his deed to his spouse and himself, he grants nothing. However, any divergence from orthodox property doctrine seems to be justified by the result reached. Courts which have adopted this "modern" view emphasize the intention of the grantor[18] and construe the deed in the light of present day legal relations of the husband and wife[19] rather than in the light of the vastly different relations that existed at the time these rules of property were formulated.[20]

Jurisdictions which hold that the husband and wife, as grantees,

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and title at least. On the contrary, the ownership, title and interest devolved upon both husband and wife as one person at the same time by virtue of his deed. The husband's original estate was lost in the newly created estate. Each was seised of a whole and not a separate part, and there was, therefore, unity of title, interest, time, and possession."

[16]In re Klatzl's Estate, 216 N. Y. 83, 94, 110 N. E. 181, 185 (1915).

[17]2 Blackstone, Commentaries (1807) 181.

[18]"The right to contract and to convey property ought not to be limited or circumscribed unless prohibited by sound public policy or valid statute.... To hold that the deed created a tenancy in common would not be a construction of the deed. It would be a creation by the courts of a new and entirely different deed from the one the grantor signed. It would create an estate we have no right to think the grantor ever contemplated." Woolard v. Smith, 244 N. C. 489, 94 S. E. (2d) 466, 467 (1956).

[19]Coon v. Campbell, 138 Misc. 567, 569, 240 N. Y. Supp. 772, 775 (1930): "It seems to me that the drift of present legislation is towards the elimination of the archaic. That the present day decisions of the courts are in accord with this spirit, to use and interpret language in accordance with the understanding of the average man with the view to clarify rather than to obscure. This is especially true, in view of the changed legal relations during the last hundred years between husband and wife." The New York decisions present a paradox in that they utilize the common law fiction of unity of husband and wife, which is repugnant to the present legal status of the spouses, to arrive at a result in accord with the present status—i.e., allowing a direct conveyance between the spouses to create this estate.

[20]E.g., Therrien v. Therrien, 94 N. H. 66, 46 A. (2d) 538, 166 A. L. R. 1023 (1946), wherein the court, in avoiding the effect of the unities requirement in order to effectuate the intention of the grantor, quoted Holmes, Collected Legal Papers (1920) 187: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past."

are distinct personalities rather than an entity do not construe a deed such as was involved in the principal case as creating a tenancy by the entirety. Either the rule prohibiting one from being both grantor and grantee in the same deed, or the rule which requires the unities of time and title is sufficient to prevent creation of a tenancy by the entirety.

Those courts which have based their decisions on the unity factor look to the time each spouse was first granted his interest and find that both spouses do not acquire an interest by the deed which purports to create the jointly held estate.[21] Although the courts state that the reason for finding that a tenancy by the entirety is not created is the lack of the requisite unities, it seems that the underlying reason is that the grantor cannot also be grantee. Because of this latter rule the deed is valid only to the extent of transfering an interest to the non-grantor spouse, and therefore her interest is acquired at a time and by a deed which is not the same as the time and deed by which the grantor spouse acquired his interest. Thus, the unities of time and title are not satisfied, and it is on this ground that the decisions are based.[22] The effect of the deed is to transfer to the non-grantor spouse an undivided half interest, creating a tenancy in common.[23] In such a jurisdiction, if one spouse owns the property and wishes to create in himself and his wife a tenancy by the entirety, there are two essential steps. First he must completely divest himself of his title, and second the new owner of the title must convey to both spouses by the same deed[24]—i.e., conveyance to and reconveyance from a "straw man."[25]

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[21]Stone v. Culver, 286 Mich. 263, 282 N. W. 142, 119 A. L. R. 512 (1938); Union Guardian Trust Co. v. Vogt, 263 Mich. 330, 248 N. W. 639 (1933); Michigan State Bank v. Kern, 189 Mich. 467, 155 N. W. 502 (1915); Wright v. Knapp, 183 Mich. 656, 150 N. W. 315 (1915). The Arkansas court departed from its former holdings, which were in accord with the view of the Michigan court, in Ebrite v. Brookhyser, 219 Ark. 676, 244 S. W. (2d) 625, 44 A. L. R. (2d) 587 (1951), in which the court adopted the reasoning of the Klatzl case.

[22]Union Guardian Trust Co. v. Vogt, 263 Mich. 330, 248 N. W. 639, 640 (1933): "Thus, although the intention could not be doubted, by reason of express declaration in a deed, that an estate by the entireties or survivorship is meant to be created by it, a deed from husband to the wife or both does not create an estate by the entireties because of lack of unity of time and title, the estate not being created by one and the same act and at one and the same time, *as the husband still retains part of his original title.*" (Italics supplied.)

[23]Stone v. Culver, 286 Mich. 263, 282 N. W. 142, 119 A. L. R. 512 (1938); Michigan State Bank v. Kern, 189 Mich. 467, 155 N. W. 502 (1915); Wright v. Knapp, 183 Mich. 656, 150 N. W. 315 (1915).

[24]Union Guardian Trust Co. v. Vogt, 263 Mich. 330, 248 N. W. 639, 640 (1933).

[25]Cf. Therrien v. Therrien, 94 N. H. 66, 46 A. (2d) 538, 539, 166 A. L. R. 1023, 1024 (1946): "The necessity of requiring an extra deed makes a fetish out of form

Proceeding from the premise that the husband and wife, as grantees, are not an entity, it seems that the logic of the holding that a tenancy by the entirety is not created is unassailable. However, this result disregards the intention of the grantor by failing to construe the deed in the light of the fact that in modern times a husband can convey land to his wife. At the time of the crystallization of the unities requirement, the spouses could not convey between themselves, and therefore a conveyance such as is here under consideration was not then contemplated. Under the earlier conditions the requirement was quite reasonable and in accordance with the status of the spouses in the marital relationship. In fact, it seems that at the time the unities of time and title were not so much prerequisites to creation of a tenancy by the entirety as mere descriptions of how the property necessarily must be held. Courts which require a conveyance through a "straw man" are disregarding this change in the legal status of the spouses, and are failing to adapt their rules of conveyancing to modern conditions.

Other courts which hold that the type of conveyance in question does not create an estate by the entirety because the spouses, as grantees, are not regarded as an entity, base their view on the rule that one cannot be grantor and grantee in the same deed.[26] It is apparent that, if the grantor spouse is considered a distinct personality in his role as grantee, this rule of conveyancing prevents the intended tenancy by the entirety from being created. In determining what interest such a deed does establish, these courts have reached three different results.

The first is that the non-grantor spouse takes the entire estate.[27] This conclusion follows logically from the rule of property that if a deed names both capable and incapable grantees, only those who are capable will take an interest, and the incapable grantees will be regarded as surplusage.[28] Since the husband, being grantor, is incapable

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and compels the parties to the instruments to employ an indirect manoeuvre of the eighteenth century merely to satisfy the outmoded unities rule."

[26]Two historical reasons are given for this rule. The first is that one could not make livery of seisin to himself; and secondly, that one could not take as purchaser from himself, thereby acquiring a new title and breaking the line of descent of the property. Note (1948) 1 Fla. L. Rev. 433 at 436, n. 18.

[27]Hicks v. Sprankle, 149 Tenn. 310, 257 S. W. 1044 (1924); Cameron v. Steves, 9 New Bruns. 141 (1858). The result in Tennessee would be otherwise today due to statutory changes. See note 35, infra.

[28]McCord v. Bright, 44 Ind. App. 275, 87 N. E. 654 (1909); Cameron v. Steves, 9 New Bruns. 141 (1858); Humphrey v. Tayleur, 1 Ambler's Eng. Ch. Rep. 136, 27 Eng. Rep. 89 (1752). See Wright v. Knapp, 183 Mich 656, 150 N. W. 315, 316 (1915).

of being grantee, the wife, the sole capable grantee, takes the whole interest. This result is obsolete today, primarily because of statutory changes.[29] The second view is that a tenancy in common is created, the reasoning being that the part of the deed which purports to grant an interest to the grantor spouse is void, and thus the deed is effective only to grant an undivided half interest to the other spouse.[30] In one instance, a third (and rather strange) result was reached in order to effectuate the intention of the grantor-husband that the surviving spouse should take the whole estate. The deed was held to be void as to the husband, as grantee, so that he retained a half interest in the property, but to be effective to the extent of creating a half interest in the wife with remainder in fee in the other half if she survived her husband.[31]

Since the husband and wife are considered as individuals in their roles as grantees rather than as an entity, the conclusion that a tenancy by the entirety cannot be created is inescapable. Manifestly, the grantor is conveying to himself. Adoption of the theory, for conveyancing purposes, that the husband and wife are a legal entity apart from their individual personalities would eliminate the obstacle created by the rule that one cannot be grantor and grantee in the same deed and would thus effectuate the intention of the grantor.

The third common law rule of property which has prevented creation of the tenancy by the entirety in this situation is that a husband

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[29]E.g., 8 Va. Code Ann. (Michie, 1950) § 55-9: "Any person having an estate or interest in land may, by deed, convey the same to himself and another or others, and the fact that one or more persons are both grantors and grantees in the same deed shall be no objection to the deed. The grantees in any such deed shall take title in like manner and the estate vested in them shall be the same as if the deed had been made by one or more persons who are not also grantees therein." This statute seems to be broad enough in scope to dispel all the conveyancing problems here discussed, and to render the subject academic in Virginia.

[30]This seems to be the underlying rule of the Michigan courts. Although these decisions are based on the unities requirement, the lack of the unities is occasioned by the failure of the deed to operate except as to the non-grantor spouse. According to this view, the non-grantor spouse would take the whole "if the estate conveyed was an estate in entirety or joint tenancy, because in both tenancies each party is seised of the entire estate and both have the incident of survivorship, but it would not be true if it were an estate in common." Wright v. Knapp, 183 Mich. 656, 150 N. W. 315, 316 (1915). Thus, this court recognized the validity of the rule that only capable grantees take an interest, but holds that it does not apply in this conveyancing situation.

[31]Dutton v. Buckley, 166 Ore. 661, 242 Pac. 626 (1926). An Oregon statute enacted subsequent to this case, which permits creation of the tenancy by the entirety by a direct conveyance between the spouses, renders such a strained interpretation unnecessary. See Legler v. Legler, 187 Ore. 273, 211 P. (2d) 233, 243 (1949).

cannot convey to his wife. This rule is no longer significant, but prior to recent statutory change, it was a conveyancing obstacle in Massachusetts. Difficulty arose when the court construed strictly that portion of the married women's property act which allows a husband to convey to his wife *as if she were sole.* The reasoning of the court was that it is inherent in the concept of a tenancy by the entirety that the husband and wife are one person, and if the husband can only convey property to the wife as if she were sole, the conveyance to himself and his wife cannot create an interest held by husband and wife as if they were one person.[32] Massachusetts has since eliminated this problem by passage of a statute which permits creation of a tenancy by the entirety by a direct conveyance between the spouses.[33]

It is apparent that the courts which are willing to strain the common law rules of property to hold that a tenancy by entirety, or some similar estate is created, do so because they think the estate is socially desirable, or because their prime consideration is to effectuate the intention of the grantor. Perhaps the tenancy is recognized as socially desirable in some courts for the same reason that the homestead laws are desirable—as providing the family with an exemption against creditor claims. On the other hand, many states have abolished this estate, and there are some good reasons for doing so. It has been said that the estate is "an anachronism in that the married women's property acts have almost completely obliterated the hypothesis which was the common law basis for the creation of the estate."[34] In addition, the tenancy tends to restrict the alienability of property, and can serve to create a false appearance of ownership and thus frustrate the reasonable expectations of creditors.

It seems that the best solution is legislation, since legislatures are the proper bodies to set policy. If it be determined that the estate is socially desirable, then statutes should be enacted to abolish those common law property rules which unnecessarily hinder the creation of the estate, and definite rules of conveyancing should be formulated which are not repugnant to present-day conditions.[35] In the absence

[32]See Ames v. Chandler, 265 Mass. 428, 164 N. E. 616 at 617 (1929), for a complete discussion of this approach.

[33]6 Mass. Laws Ann. (1955) c. 184 § 8: "... a conveyance of real estate by a person to himself and his spouse as tenants by the entirety shall, when recorded ... create a tenancy by the entirety."

[34]2 American Law of Property (1952) 32.

[35]11 Tenn. Code Ann. (1955) § 64-109. "Any married person owning property or any interest therein in his or her own name, desiring to convert his or her interest in such property into an estate by the entireties with his or her spouse, may do so by direct conveyance to such spouse by an instrument of conveyance which

of legislation, it seems that the best alternative is the course taken by the principal case—i.e., the "modern" view, which effectuates the intention of the grantor. However, considering the confused state of the law at this time, the only safe method of creating the tenancy by the entirety in this situation is by a conveyance through a "straw man."

ROBERT G. MCCULLOUGH

SALES—VALIDITY OF CONDITIONAL SALE LIEN AS AGAINST CREDITOR OF VENDEE AFTER GOODS WERE REMOVED FROM STATE OF SALE. [Vermont]

The conditional sales contract, in order to constitute a useful commercial instrument, must provide adequate protection of the vendor's security interest; but at the same time some means must be employed whereby the general public is protected from possible fraud by the beneficial owner. To serve this dual aim, the majority of states have enacted conditional sales recording and refiling statutes,[1] as a means of giving publicity to the transaction.[2] Since such statutes do not have extra-territorial effect,[3] even the perfection of the lien by recording in the state of the sale does not necessarily protect the vendor's interest when the vendee removes the goods to another state in which the vendor does not record the conditional sales contract. If, in such a situation, a third party in good faith purchases those goods or levies

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shall provide that it is the grantor's intention by such instrument to create an estate by the entireties in and to the entire interest in the said property previously held by the grantor."

[1]The term "refiling statute" in this comment refers to the type of statute which requires recordation of the conditional sale when the property is removed from one political unit which requires filing into another filing district. See 2 U. L. A. (1922) § 14. It is necessary to refer to the statutes of the specific state which the court decides to be applicable to the given situation to determine to what persons the refiling is intended to give notice. The majority of the statutes give notice to purchasers and levying creditors. For a summary of the statutes, see: 3 Jones, Chattel Mortgages and Conditional Sales (6th ed. 1933) § 1008 et seq.; 2 U. L. A. (1922) § 5.

The refiling statutes apply only if the removal of the property into another state was made with a specific intent to make a permanent change of situs of the property. Flora v. Julesburg Motor Co., 69 Colo. 238, 193 Pac. 545 (1920); Hare & Chase, Inc. v. Tompkinson, 129 Atl. 396 at 397 (N. J. 1925); Lilliard v. Yellow Mfg. Acceptance Corp., 196 Tenn. 686, 263 S. W. (2d) 520 at 523 (1953); Forgan v. Smedal, 203 Wis. 564, 234 N. W. 896 at 898 (1931).

[2]3 Jones, Chattel Mortgages and Conditional Sales (6th ed. 1933) § 1004.

[3]In re Gray, 170 Fed. 638 at 640 (E. D. Okla. 1908); Hampton v. Universal Credit Co., 59 Ga. App. 568, 1 S. E. (2d) 753 at 754 (1939); Davis v. Osgood, 69 N. H. 427, 44 Atl. 432 (1899).

on them as property of the vendee, the courts must decide whether the third party or the conditional vendor shall lose his interest in the goods.[4]

Two classes of fact situations may present this problem: first, those in which at the time of the sale the vendor knows the property is to acquire a situs in another state; and second, those in which the contract provides, or the parties contemplate, that the goods are to remain in the state of sale but the vendee later removes them, with or without the knowledge of the vendor.

In the first situation, where the property is removed to another state at the time of the sale, the courts hold that the applicable law is the law of the state where the goods are to be held under the conditional sale.[5] This result is reached on the theory that the vendor, by consenting to the removal of the goods or by immediately transferring them to the vendee in a foreign state at the time of the sale, has evidenced an implied intent that the law of the new situs shall control.[6]

The recent case of *Boston Law Book Co. v. Hathorn*[7] presents the problem in a typical fact situation and demonstrates the result reached by a majority of the courts. Plaintiff, Boston Law Book Co., a Delaware corporation with its office in Boston, sought a declaration of title paramount to that of defendants in certain law books sold under a conditional sales contract to Hathorn, a resident of Vermont. Defendant Hathorn failed to appear and plaintiff's bill was taken as confessed as to him. Defendants Boudro and Dodge, creditors of Hathorn, appeared and answered the complaint, contending that they

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[4]Hervey v. Rhode Island Locomotive Works, 93 U. S. 664, 23 L. ed. 1003 (1876) (levying creditors); Commercial Credit v. Higbee, 92 Colo. 346, 20 P. (2d) 543 (1933) (levying creditors); Johnson v. Sauerman Bros. Inc., 243 Ky. 587, 49 S. W. (2d) 331 (1932) (levying creditors); Fry Bros. v. Theobold, 205 Ky. 146, 265 S. W. 498 (1924) (purchaser); Land v. J. E. Roach's Banda Mexicana Co., 78 N. J. Eq. 439, 79 Atl. 365 (1911) (purchaser); First Nat. Bank v. Sheldon, 161 Pa. Super, 265, 54 A. (2d) 61 (1947) (chattel mortgages—purchaser).

[5]Maguire v. Gorbaty Bros. 133 F. (2d) 675 (C. C. A. 2nd 1943) (trustee in bankruptcy); Enterprise Optical Mfg. Co. v. Timmer, 71 F. (2d) 295 (C. C. A. 6th, 1934) (trustee in bankruptcy); Summers v. Carbondale Mach. Co., 116 Ark. 246, 173 S. W. 194 (1915) (levying creditor); Ford Motor Co. v. National Bond & Inv. Co., 294 Ill. App. 585, 14 N. E. (2d) 306 (1938) (levying creditor); Denkins Motor Co. v. Humphreys 310 Ky. 344, 220 S. W. (2d) 847 (1949) (purchaser); Johnson v. Sauerman Bros., Inc., 43 Ky. 587, 49 S. W. (2d) 331 (1932) (levying creditor); Finance Security Co., Inc. v. Mexic, 188 So. 657 (La. App. 1939) (purchaser); Restatement, Conflict of Laws (1934) § 276.

[6]Denkins Motor Co. v. Humphreys, 310 Ky. 344, 220 S. W. (2d) 847 at 849 (1949) (purchaser); Memphis Bank & Trust Co. v. West, 260 S. W. (2d) 866 at 876 (Mo. App. 1953) (purchaser); 3 Jones, Chattel Mortgages and Conditional Sales (6th ed. 1933) § 1160.

[7]127 A. (2d) 120 (Vt. 1956).

were attaching creditors without notice of the conditional sale because it was not recorded as required by Vermont law.[8] Plaintiff contended that Massachusetts law, which does not require recordation, controlled because the sale was made there. The lower court adjudged title to the books to be in plaintiff and enjoined these creditors from levying execution or interfering with plaintiff's property; but the Supreme Court of Vermont, in reversing, held that the question is essentially one of property law and that it is a settled Conflict of Laws rule that the validity of a transfer of property is governed by the law of the situs to which the property is removed. That court further stated that if plaintiff's conditional sales lien were to be given effect in Vermont, it would be solely by the doctrine of comity,[9] which the court declared would not be applied in the instant case because the statutes of Massachusetts, in not requiring recording to protect the conditional vendor's lien, are contrary to the law of Vermont.

In reaching this conclusion, the court found it necessary to deal with a contention that the principal case was controlled by *Barrett v. Kelley*,[10] a precedent of 62 years standing. In that case, on facts quite similar to those of the principal case,[11] the Vermont court held that, since the contract of sale had to be approved by the conditional vendor's home office in Massachusetts, it was a Massachusetts contract rather than a contract of Vermont where the goods were delivered. Having made this determination, the Vermont court then announced that the principle of comity of law required the application of the law of Massachusetts, the place of the contract.[12] In the princpal case, the

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[8]Vt. Rev. Stat. (1947) § 2775.

[9]"The term 'comity' is frequently used in a loose sense in cases involving Conflict of Laws problems. . . . [I]t is misleading because it involves an inference that a rule of the foreign law is applied as a matter of courtesy to the state whose law is referred to." Goodrich, Conflict of Laws (3rd ed. 1949) 11. "The rules of Conflict of Laws of a state are not affected by the attitude of another state toward rights or other interests created in the former state." Restatement, Conflict of Laws (1934) § 6.

[10]66 Vt. 515, 29 Atl. 809 (1894).

[11]The third party in the Barrett case was an assignee for the benefit of creditors, but the court recognized that he stood in the shoes of an attaching creditor. 66 Vt. 515, 29 Atl. 809 (1894). The court in the principal case correctly noted that the contract in the Barrett case provided that the law of Massachusetts should govern questions arising under the contract. Boston Law Book Co. v. Hathorn, 127 A. (2d) 120 at 124 (Vt. 1956). In the Barrett case, the chattel itself had been taken out of the jurisdiction of the Vermont court prior to commencement of the action, but the action for conversion, of course, turned on the property rights in the conditionally sold chattel. 66 Vt. 515, 29 Alt. 809 (1894).

[12]The Barrett case, note 10, supra, also relied upon Cobb v. Buswell, 37 Vt. 377 (1864), but the court in the principal case properly distinguished the Cobb case from both the Barrett case and the principal case. Boston Law Book Co v. Hathorn, 127 A. (2d) 120 at 124 (Vt. 1956).

court, although apparently concluding that the contract in question was a Vermont contract,[13] held that even if it were a Massachusetts contract the law of Massachusetts would not control.[14] Thus, the principal decision apparently overruled *Barrett v. Kelley* by implication. In determining what law is applicable in the second situation postulated above, where property is sold on the assumption that it will remain in the state of the sale but where it is nevertheless later removed to another state, the courts, in the absence of a statute expressly covering the situation, reach different results depending upon whether the vendor had knowledge of, or consented to, the removal of the chattel.[15]

Where the vendor had knowledge of the later transfer, a few courts have held that the vendor's lien is not lost even though he did not record in the state of the transfer.[16] Those decisions turn on the reasoning that since the lien has been perfected in the state where the contract was completed, the state of the forum will recognize the lien as valid unless the state of the forum has legislation specifically providing otherwise. However, such a rule seems undesirable because it provides no protection for a third party. The majority of the courts, recognizing that this situation is closely comparable to that in which the vendor sold the property for immediate removal to another state, hold that the law of the new situs of the property will govern.[17] If

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[13]The court, in determining the place of the contract, applied the center of gravity rule. Boston Law Book Co. v. Hathorn, 127 A. (2d) 120 at 126 (Vt. 1956). Under this rule the courts "examine all the points of contact which the transaction has with the two or more jurisdictions involved, with the view to determine the 'center of gravity' of the contract, or of that aspect of the contract immediately before the court; and when they have identified the jurisdiction with which the matter at hand is predominantly or most intimately concerned, they conclude that this is the proper law of the contract which the parties presumably had in view at the time of contracting." Jansson v. Swedish American Line, 185 F. (2d) 212, 218 (C. A. 1st, 1950).

[14]Boston Law Book Co. v. Hathorn, 127 A. (2d) 120 at 126 (Vt. 1956).

[15]Spencer v. General Motors Acceptance Corp., 287 S. W. (2d) 143 at 144 (Ky. 1955); Goodrich, Conflict of Laws (3rd ed. 1949) § 157; Lee, Conflict of Laws Relating to Installment Sales (1942) 41 Mich. L. Rev. 445.

[16]Shapard v. Hynes, 104 Fed. 449, 52 L. R. A. 675 (C. C. A. 8th, 1900) (chattel mortgage—attaching creditor); Handley v. Harris, 48 Kan. 606, 29 Pac. 1145 (1892) (chattel mortgage—purchaser); United States Fid. & Guar. Co. v. Northwest Engineering Co., 146 Miss. 476, 112 So. 580 (1927) (levying creditor). See Lee, Conflict of Laws Relating to Installment Sales (1942) 41 Mich. L. Rev. 445 at 452.

[17]E.g., Johnson v. Sauerman Bros., 243 Ky. 587, 49 S. W. (2d) 331 (1932) (levying creditor); C. I. T. Corp. v. Guy, 170 Va. 16, 195 S. E. 659 (1938) (levying creditor); 2A U. L. A. (1924) § 96: "In the great majority of the cases where this question has been raised the answer has been given that the law of the state to which the goods are to be moved . . . should control."

the state to which the property is transferred requires recordation by the vendor, the vendor's lien is lost unless he records the conditional sales contract. "It may be a hardship; but, where one of two innocent persons must suffer, the rule is that the misfortune must rest on the person in whose business, and under whose control, it happened, and who had it in his power to avert it."[18] In this situation, as in the analytically similar situation of immediate removal, it is reasoned that the conditional vendor has impliedly intended that the law of the situs shall govern.[19] Complications arise, however, where the statute is not complied with in the state of the new situs of the property but the intervening third party had *actual* notice or knowledge of the conditional sales contract.[20] On the ground that the purpose of the conditional sales recording act is only to provide notice of the lien, it was held in *Frontier Motors, Inc. v. Chick Norton Buick Co.*[21] that failure to make literal compliance with the statute did not defeat the vendor's lien because the purchaser from the vendee had been placed on actual notice of the lien. Under the other statutes at least two courts have held, however, that the vendor's security interest, unless recorded in the state of the situs is void as against third parties even though they had actual notice of the security interest.[22] The difference in the decisions is apparently caused by differing views as to the intended purpose of the recording statutes, but it is difficult to understand what purpose they could serve other than to insure that notice is given. For this reason it is believed that those states which have disregarded the factor of actual notice are in error.

Where the vendor has no knowledge of the transfer or of the new

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[18]Ritchie v. Griffiths, 1 Wash. 429, 434, 25 Pac. 341, 342 (1890). Accord: First Nat. Bank v. Sheldon, 161 Pa. Super. 265, 54 A. (2d) 61 at 63 (1947); Chambers v. Consolidated Garage Co., 210 S. W. 565 at 567 (Tex. Civ. App. 1919).

[19]Hervey v. Rhode Island Locomotive Works, 93 U. S. 664 at 671, 23 L. ed. 1003 at 1004 (1876); Smith's Transfer and Storage Co., Inc. v. Reliable Stores Corp., 58 F. (2d) 511 (C. A. D. C., 1932); Spencer v. General Motors Acceptance Corp., 287 S. W. (2d) 143 at 144 (Ky. 1955); 3 Jones, Chattel Mortgages and Conditional Sales (6th ed. 1933) § 1160.

[20]Frontier Motors, Inc v. Chick Norton Buick Co., 78 Ariz. 341, 279 P. (2d) 1032 (1955); 3 Jones, Chattel Mortgages and Conditional Sales (6th ed. 1933) § 1076. Where the courts have held that actual notice is sufficient to supply the effect of the constructive notice supplied by recordation, this actual notice must exist at the time the rights of the third parties accrue. 3 Jones, Chattel Mortgages and Conditional Sales (6th ed. 1933) § 1078.

[21]78 Ariz. 341, 279 P. (2d) 1032 (1955) (purchaser). See Banks-Miller Supply Co. v. Bank of Marlinton, 106 W. Va. 583, 146 S. E. 521, 522 (1929) (creditor).

[22]Thayer Mercantile Co. v. First Nat. Bank, 98 N. J. L. 29, 119 Atl. 94 (1922) (levying creditor); Universal Credit Co. v. Finn, 212 Wis. 601, 250 N. W. 391 (1933) (levying creditor).

location of the property, and accordingly cannot be considered to have consented either expressly or impliedly to the removal, the better rule protects the conditional seller's reserved title.[23] This view is exemplified by *C.I.T. Corporation v. Guy*,[24] wherein an automobile sold in South Carolina, with title reserved to secure payment of the purchase price, was removed without the knowledge of the seller, wrecked in Virginia, and sold by judicial sale to satisfy a tort judgment against the vendee growing out of the accident. The Virginia court held that the vendor's interest would be enforced as against third parties even though the contract upon which his rights were founded was not recorded in the state in accordance with local statute. Though the subsequent purchaser or attaching creditor is innocent, it is said that he will not be permitted to claim through the conditional vendee who has become a wrongdoer by removing the property from the state of sale without the vendor's knowledge.[25] At least one state follows an opposing view, holding that the vendor has lost his lien as against the third persons even though the vendor had no knowledge of the removal.[26] It is argued that to hold otherwise would prejudice the state's own rights or the rights of its citizens, and that the spirit of comity does not require a forum to recognize another state's law where it is contrary to the public policy of the state of the forum.[27] This is a harsh rule since it is impossible for the vendor to protect his lien, and the general acceptance of the rule would greatly decrease the use of such a security instrument.[28]

Two types of statutes have been suggested to provide the conditional vendor with a means of protecting his interest as against a third party acquiring an interest in the goods in the state of removal. The

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[23]Tennessee Auto Corp. v. American Nat. Bank, 205 Ky. 541, 266 S. W. 54 (1924) (levying creditor); Memphis Bank and Trust Co. v. West, 260 S. W. (2d) 866 (Mo. App. 1953) (purchaser); Goetschius v. Brightman, 245 N. Y. 186, 156 N. E. 660 (1927) (purchaser); West v. Associate Discount Corp., 206 Okla. 44, 240 P. (2d) 1077 (1952) (purchaser); 11 Am. Jur., Conflict of Laws § 78; Restatement, Conflict of Laws, (1934) § 275.

[24]170 Va. 16, 195 S. E. 659 (1938).

[25]West v. Associate Discount Corp., 206 Okla. 44, 240 P. (2d) 1077 at 1081 (1952), quoting Strumberg, Conflict of Laws (1937) 366.

[26]Commercial Credit v. Higbee, 92 Colo. 339, 20 P. (2d) 543 (1933) (levying creditor); American Equitable Assurance Co. v. Hall Cadillac Co., 98 Colo. 186, 24 P. (2d) 980 (1933) (purchaser). See Lee, Conflict of Laws Relating to Installment Sales (1942) 41 Mich. L. Rev. 445 at 457. Texas, which formerly adhered to this minority view, joined the majority in 1950. Bank of Atlanta v. Fretz, 226 S. W. (2d) 843 (Tex. 1950).

[27]Commercial Credit v. Higbee, 92 Colo. 339, 20 P. (2d) 543 (1933).

[28]See Bank of Atlanta v. Fretz, 226 S. W. (2d) 843 (Tex. 1950); 3 Jones, Chattel Mortgages and Conditional Sales (6th ed. 1933) 245.

Uniform Conditional Sales Act provides for filing of the contract in the state of removal within ten days after the security holder receives notice of the new situs of the property.[29] Though this legislation meets the vendor's needs, there is some question as to whether it gives a third person sufficient protection, because a longer period of time may pass, due sometimes to the vendor's negligence, before notice is obtained by the vendor.[30] During that period third parties act at their peril, and interests acquired during the period are subject to being cut off if the vendor records within the ten days allowed him.

The solution proposed in the Uniform Commercial Code is perhaps more acceptable.[31] For a period of four months after removal, the conditional vendor's interest is determined in the state of the situs of the property by the law of the jurisdiction where it arose; but thereafter his interest continues to be protected only if he either has recorded in the state of the transfer within the four months period or has recorded after the four months period but prior to the time that any interest arises in a third party.[32] Even under this provision a third party may be defrauded by the conditional vendee during the four month period; but it is an improvement over the Uniform Conditional Sales Act in that the vendor's unrecorded interests are cut off at the end of the four month period if he does not record prior to the time that a third party obtains an interest in the subject matter, whereas under the Uniform Conditional Sales Act the vendor's lien remains perfected until he obtains knowledge, after which he is allowed ten days to record in order to extend the protection of his lien. It seems that the Uniform Commercial Code provisions do not place an undue burden on the conditional vendor because since one of two innocent persons must suffer, the misfortune should rest upon the person whose method of doing business made it possible for the conditional vendee to per-

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[29]2 U. L. A. (1922) § 14 (railroad rolling stock excluded from operation of section). This legislation has been adopted by ten states. 2 U. L. A. (1956 Supp.) 6.

[30]E.g., Bradshaw v. Kleiber Motor Truck Co., 29 Ariz. 293, 241 Pac. 305 (1925).

[31]Uniform Commercial Code (1952) § 9-103 (adopted only in Pa.).

[32]"If the security interest was already perfected under the law of the jurisdiction where the property was kept before being brought into this state, the security interest continues perfected here for four months and also thereafter if within the four months period it is perfected here. The security interest may also be perfected here after expiraton of four months period; in such cases perfection dates from the time of perfection in this state. If the security interest was not perfected under the law of the jurisdiction where the property was kept before being brought into this state it may be perfected here; in such case perfection dates from the time of perfection in this state." Uniform Commercial Code (1952) § 9-103(3). For a case construing a statute believed to be similar to the Uniform Commercial Code, see Henry v. Harris, 206 Okla. 348, 243 P. (2d) 663 (1952).

petrate a fraud. Under the Uniform Commercial Code, the third party is, of course, not fully protected, but the legislation would appear to be the best reconciliation of necessarily opposed interests.

THOMAS C. BROYLES

TAXATION—VOLUNTARY PAYMENTS BY CORPORATION TO FORMER EMPLOYEE OR HIS ESTATE OR WIDOW AS TAXABLE INCOME OR GIFTS. [Federal]

Since the inception of the federal income tax in 1913 the courts have been faced with the necessity of determining the tax consequences of payments claimed to be gifts made by business firms to three related types of recipients: an employee, his estate, and his widow or family.

In the years immediately following passage of the income tax act, corporations sometimes attempted to pay the top company officers their salaries in tax-free form by making additional payments to such officers of amounts sufficient to cover the income tax which the officers had to pay on their salaries. This maneuver was frustrated when the Supreme Court held that such payment was compensation for services rendered and, therefore, was taxable income to the employee[1] In an effort to avoid the effect of that ruling, one company attempted to provide relief from the income tax burden to its five top officers by specifically calling the payments "gifts" and by not deducting the payments on its own income tax returns. However, that payment was also held to be taxable compensation to the employee.[2]

A variation of this approach involved *former employees.* In one instance, a company, upon sale of its assets to another corporation, set up a fund from the profits for distribution to the old employees. This fund was to be distributed by a committee, and the amounts distributed were, for tax purposes, treated by the corporation as salary deductions. Upon test by the taxing authorities, the court decided that, even if the stockholders had ratified such a distribution, the payments must have been either compensation for services rendered or a part of the profits of the transaction, and, in either event, they were taxable to the employees as income.[3] However, where the stockholders voted an "honorarium" to employees because of a large financial gain made

[1]Old Colony Trust Co. v. Com'r, 279 U. S. 716, 49 S. Ct. 499, 73 L. ed. 918 (1929).
[2]Levey v. Helvering, 68 F. (2d) 401 (C. A. D. C., 1933).
[3]Noel v. Parrott, 15 F. (2d) 669 at 672 (C. C. A. 4th, 1926).

by their corporation in its sale to another company, the Supreme Court, reasoning that the intent of the payor was controlling, declared the payments to be gifts.[4] In that case, however, the Court relied on the fact that the recipients of the payments evidently had been otherwise fully compensated for their services, and it emphasized that the corporation was under no legal or moral duty to make the payments.[5] The Court also may well have been influenced by the further facts that the stockholders voted the payments and that the corporation did not deduct the payments on its own tax returns. The one type of payment to a former employee that consistently has been held by the Courts of Appeals to be a gift is an honorarium paid to a retired clergyman by his church congregation.[6] From these cases it may be supposed that in order for a payment by an employer to a living former employee to be considered a gift, it must be made to one who has been fully compensated for past services and who will not render any further services to the employer. An absence of even a moral duty of payment may also be a requisite.[7]

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[4]Bogardus v. Com'r, 302 U. S. 34, 58 S. Ct. 61, 82 L. ed. 32 (1937). The decision was by a 5 to 4 majority, with the dissenting Justices expressing the opinion that the evidence would support either finding and that, therefore, the decision of the Board of Tax Appeals should not be disturbed. In keeping with the idea of the dissenting Justices is Peters v. Smith, 221 F. (2d) 721 (C. A. 3rd, 1955), where, in a situation in which an employer had given the taxpayer both an annuity at retirement and a check to cover the tax thereon, a jury in the District Court found both to be gifts. The jury's verdict, which had been set aside by the District Court, was reinstated by the Court of Appeals.

[5]302 U. S. 34 at 42, 58 S. Ct. 61 at 65, 82 L. ed. 32 at 38 (1937).

[6]The Tax Court had consistently held this type of payment to be income because of past services of the employee, but in Schall v. Com'r, 174 F. (2d) 893 (C. A. 5th, 1949), the court reversed 11 T. C. 111 (1948) and decided that since the honorarium was not solicited by the minister, and since there were no further services to be performed by him, the circumstances clearly showed that a gift was made. Then in Mutch v. Com'r, 209 F. (2d) 390, 392 (C. A. 3rd, 1954), the Tax Court was again reversed and an honorarium to a retired minister was declared a gift because it "was motivated solely and sincerely by the congregation's love and affection for Dr. Mutch." Accord: Kavanagh v. Hershman, 210 F. (2d) 654 (C. A. 6th, 1954); Abernethy v. Com'r, 211 F. (2d) 651 (C. A. D. C., 1954). Rev. Rul. 55-422 announced that the Internal Revenue Service plans to follow the Schall case in future matters involving payments to retired cleregymen.

Such leniency by the court was not evident in a payment by a distiller to a retired officer "in appreciation of services rendered"; it was held taxable. Willkie v. Com'r, 127 F. (2d) 953 (C. C. A. 6th, 1942).

[7]Bogardus v. Com'r, 302 U. S. 34 at 42, 58 S. Ct. 61 at 65, 82 L. ed. 32 at 38 (1937).

Even if an agreement may not have been legally enforceable, the moral obligation of payor may cause the payment to be taxable income to the payee, rather than a gift. Acme Land & Fur Co., Inc. v. Com'r, 84 F. (2d) 441 (C. C. A. 5th, 1936). Although moral obligations and past consideration may not constitute legal obligations, their presence tends to negative the concept of a gift, and the absence

When a firm has made a payment to the *estate* of a deceased employee or officer, at least one case indicates that the courts, in deciding whether the payments were gifts or taxable income, have been reluctant to consider the intent of the payor[8] and have not been persuaded that the payments were gifts by the fact that the company was under no legal duty to make the payments. That court made its own determination that the payment was for past services.[9] Other courts, in reaching a similar result, have relied on (1) the fact that only stockholders can give away the corporation's money, whereas the cases typically involve a payment ordered by officers or directors of a company, and (2) the fact that the payment was made to the estate of the employee rather than to the widow who would be the normal object of the corporation's benefactions in such circumstances.[10]

When a *widow* of an employee is the recipient of the payment, there may be observed a disposition on the part of the courts to declare such payments to be gifts.[11] The matter of the tax consequences of such payments to the widow seemed to have been settled following the issuance in 1939 of I. T. 3329,[12] which permitted payments to an employee's widow to be treated by the widow as gifts but, nevertheless, to be deductible by the company on its own income tax returns, provided that they were not made as the result of contractual obligations to the employee for services rendered by the recipient. Reliance upon this Income Tax Ruling, in cases in which no services had been rendered to the payor by the recipient, led the Tax Court to hold payments to widows to be nontaxable in two important tax decisions.[13] However, in 1946 a somewhat cryptic statement regarding this situation was made by the Court of Appeals for the Fifth Circuit in *Varnedoe v. Allen:* "[To make the payments taxable] . . . it is not necessary that the services should have been rendered by the payee. The payor is the

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of a legal duty to pay does not demonstrate that the payment was a gift. United States v. McCormick, 67 F. (2d) 867 (C. C. A. 2nd, 1933); Fisher v. Com'r, 59 F. (2d) 192 (C. C. A. 2nd, 1932); Binger v. Com'r, 22 B. T. A. 111 (1931).

[8]O'Daniel's Estate v. Com'r, 173 F. (2d) 966 (C. A. 2nd, 1949); cf. Brayton v. Welch, 39 F. Supp. 537 (D. C. Mass. 1941).

[9]O'Daniel's Estate v. Com'r, 173 F. (2d) 966 (C. A. 2nd, 1949). Accord: Bausch v. Com'r, 14 T. C. 1433 (1950).

[10]Brayton v. Welch, 39 F. Supp. 537 (D. C. Mass. 1941); Bausch v. Com'r, 14 T. C. 1433 (1950).

[11]This disposition may be seen more clearly by distinctions drawn in cases involving payments to estates rather than to widows. See Brayton v. Welch, 39 F. Supp. 537, 539 (D. C. Mass. 1941); Bausch v. Com'r, 14 T. C. 1433, 1439 (1950).

[12](1939) 2 Cum. Bull. 153, 1939 C. C. H. par. 6538.

[13]Macfarlane v. Com'r, 19 T. C. 9 (1952); Aprill v. Com'r, 13 T. C. 707 (1949).

one to whom the services must have been rendered."[14] Relying on this assertion, the Commissioner of Internal Revenue issued I. T. 4027, effective January 1, 1951.[15] This Ruling modified I. T. 3329 by requiring the widow to include, in the computation of her gross income, payments made to her by her deceased husband's employer if the payments could be found to have been in consideration of services rendered by the deceased. However, the idea of the court in the *Varnedoe* case appears to be indefensible, as it ignores the intent of the employer and bases the determination of tax consequences exclusively upon whether the reason for the widow's receiving payments can be found to be that her husband previously performed services for the payor. I. T. 4027 has been followed in a district court decision[16] and was noted in a court of appeals case.[17] But the Tax Court first ignored the ruling,[18] and then virtually abolished it by the decision in *Hellstrom v. Commissioner*[19] which denied that I. T. 4027 is controlling in the face of clear intent to make a gift.[20] The court in the *Hellstrom* case disposed of the Commissioner's contention that the words of the payor that payment was made "in recognition of the services [of deceased]" were within the meaning of the term "in consideration" in I. T. 4027: "We think this argument is nothing more than an argument in semantics. Obviously, where a voluntary payment is made by a corporation to the widow of a deceased employee, the basic reason for the payment is . . . the deceased employee's past association with the

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[14]158 F. (2d) 467, 468 (C. C. A. 5th, 1946) (one judge dissenting), cert den., 330 U. S. 821 (1947). Case criticized or questioned in Notes (1948) 42 Ill. L. Rev. 804; (1947) 21 Tul. L. Rev. 686; (1947) 33 Va. L. Rev. 527.

[15](1950) 2 Cum. Bull. 9, 1950 C. C. H. par. 6208.

[16]Fisher v. United States, 129 F. Supp. 759 (D. C. Mass. 1955).

[17]Bausch's Estate v. Com'r, 186 F. (2d) 313 at 314 (C. A. 2nd, 1951), aff'g Bausch v. Com'r, 14 T. C. 1433 (1950). I. T. 4027 became effective prior to the decision of the court of appeals; however, the payments in issue were made prior to the effective date.

[18]A corporation's board of directors voted to pay to the widow the salary her deceased husband would have received through the end of the year in which he died. The court ignored I. T. 4027, cited Aprill v. Com'r, 13 T. C. 707 (1949), and looked to the intent of the employer in holding the payments to be a gift. Hahn v. Com'r, 13 T. C. M. 308, 1954 C. C. H. par. 7349 (1954).

Payments to a managing partner's widow of the partner's salary for two years after his death were held to be non-taxable gifts from the other partners. Black v. Davis, C. C. H. 55-1 U. S. T. C. par. 9361 (N. D. Ala. 1955).

[19]24 T. C. 916 (1955). The Board of Directors voted to pay the salary of the decedent, the president of the corporation, to his widow for the remainder of the year. The court felt the principal motive was the board's "desire to do an act of kindness for [the widow]." Hellstrom v. Com'r, 24 T. C. 916, 920 (1955).

[20]"[The Commissioner], obviously, cannot by administrative ruling tax as ordinary income a payment which the payor made and intended as a gift." Hellstrom v. Com'r, 24 T. C. 916, 919 (1955).

corporation. We think it makes little difference how the corporation formally expresses its motives for the payment. Where such payment is a gift, as the whole record here establishes that the payments in question were, it remains a gift regardless of the fact that the corporation may state its reasons for making the payment were 'because of' or 'in recognition of' or 'in consideration of' the services of the deceased employee."[21]

There is a recent indication that at least one district court is also strongly inclined to treat payments to a widow of a deceased corporation officer as gifts. In *Slater v. Riddell*[22] a widow sought an income tax refund on the ground that payments made to her after her husband's death by the corporation of which he was an officer, were gifts to her. Her husband had died in April, 1953, and, shortly thereafter, the corporation had recorded a memorandum which "recommended" payment of three months' salary (totaling $7,500) to plaintiff "as further consideration for the past services of the deceased."[23] Although the corporation deducted this payment as a salary expense on its income tax return, and although neither it nor plaintiff filed a gift tax return, and although this payment had not been approved by the shareholders, the court held the payment to be a gift and, therefore, not taxable to plaintiff as income.[24]

Since the court wrote no opinion setting out its reasoning, the basis of the holding is left to conjecture. However, in the type of situation out of which the *Slater* case arose, there are usually a number of factors indicating that the intent of the employer was to make a gift: (1) the employer is under no duty to provide additional compensation; (2) the employer has not received nor does he anticipate any benefit in return for his payment; (3) payment is made directly to the widow and not to the estate; and (4) the occasion for payment is the death of the husband.[25] As against those considerations, indications that a gift was not intended normally include the fact that: (1) the stockholders, who have sole authority to give away the corporation's assets, did not approve the payments; and (2) payments were deducted from the corporation's income tax return as compensation paid by the

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[21]24 T. C. 916, 919 (1955).

[22]C. C. H. 56-2 U. S. T. C. par. 9892 (S. D. Cal. 1956).

[23]C. C. H. 56-2 U. S. T. C. par. 9892 at 56,361 (S. D. Cal. 1956).

[24]Since under the 1939 and the 1954 codes only an individual is liable for a gift tax, corporations are not taxed on the amount of such payments. 53 Stat. 144 (1939), 26 U. S. C. A. § 1000 (1948); 68A Stat. 403 (1954), 26 U. S. C. A. § 2501 (1955).

[25]Hellstrom v. Com'r, 24 T. C. 916 at 920 (1955); Hahn v. Com'r, 13 T. C. M. 308, 1954 C. C. H. par. 7349 (1954).

employer.[26] In the presence of such opposing factors, there is probably general agreement with Justice Brandeis' opinion that "What controls is not the presence or absence of consideration ... [but] the intention with which payment, however voluntary, has been made."[27] However, the problem still remains as to how the payor's intention shall be determined in the face of conflicting implications arising from the facts surrounding the payment.

Prior to the issuance of I. T. 4027 the problem was fairly well settled. If the recipient of the payment performed no services and the payor was under no contractual obligation to pay any benefits, then I. T. 3329 applied. Under the 1939 Code, if there was a contractural obligation to pay death benefits, the proceeds of such payment were taxable to the recipient; but a $5000 exclusion was permitted.[28] Perhaps the confusion that has resulted since the issuance of I. T. 4027 will be dispelled when the courts apply the provisions of Section 101(b) of the 1954 code.[29] This section impliedly, though not specifically, grants a deduction to the employer, and explicitly permits the recipient or recipients of a death benefit payment to claim a total exclusion of $5000.[30] It makes no difference under the section whether the recipient is an estate or a widow. Presumably, the exclusion exists whether there is a contractual obligation to pay the benefit or not. There is, however,

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[26]Brayton v. Welch, 39 F. Supp. 537 at 539 (D. C. Mass. 1941). See Fisher v. United States, 129 F. Supp. 759, 761 (D. C. Mass. 1955).

[27]See dissenting opinion in Bogardus v. Com'r, 302 U. S. 34, 45, 58 S. Ct. 61, 66, 82 L. ed. 32, 39 (1937).

[28]65 Stat. 483 (1952), 26 U. S. C. A. § 22 (b) 1 (B) (1954 Supp.).

[29]68A Stat. 27 (1954), 26 U. S. C. A. § 101 (b) (1955).

[30]Prior to the 1954 code, the $5000 exclusion, if the payments qualified as a contractual obligation, was permitted for payments from each employer of decedent. 65 Stat. 483 (1952), 26 U. S. C. A. § 22 (b) 1 (B) (1954 Supp.). Under the 1954 code $5000 is the maximum exclusion per employee, regardless of the number of employers who make payments. 68A Stat. 27 (1954), 26 U. S. C. A. § 101 (b) 2 (A) (1955).

Evidently, the limitation does not apply to deductions for the employer, and, if payments of more than $5000 are made, the entire amount may be deductible, if the test of reasonableness is met. See 1957 C. C. H. § 1370.01298. The desirability of encouraging such death benefits is illustrated by the Report of the Tax Study Commission of the State of North Carolina which recommended that the state pattern its code after the federal income tax and allow a $5000 exclusion by recipients and that the payments by employers be deductible. Report of the Tax Study Commission of North Carolina (1956) 23.

[31]See 1957 C. C. H. par. 908. Perhaps there was no valid reason for the courts to have made the distinction between payments to estates and payments to widows. See Note (1953) 28 N. Y. U. L. Rev. 896 criticizing Macfarlane v. Com'r, 19 T. C. 9 (1952). See also the unsuccessful contention of petitioner's counsel that the court was making "a distinction without a difference." Bausch v. Com'r, 14 T. C. 1433, 1439 (1950).

a problem as to how Section 101(b) will be applied to a payment that is purportedly a gift and is in an amount in excess of $5000. The courts may approach such a case in either of two ways: (1) by finding that Congress did not intend Section 101(b) to preclude employers from making gifts to widows of employees and, therefore, that it is necessary to look to the circumstances in order to ascertain the intent of the employer in making the payments;[32] or (2) by finding, on the basis of Congress' grant of an exclusion to the recipient of a payment of less than $5000, that Congress did intend all payments over $5000 to be taxable to the recipient.[33] Although the *Slater* case was decided under the 1939 Code, its conclusion that a payment of $7,500 is a gift to the recipient may indicate that the former interpretation will be favored. This view seems preferable to the latter interpretation since, absent contractual obligation, it appears quite clear that such a payment is purely a gift—an act of kindness—and one to which is attached considerable social utility.

NORMAN C. ROETTGER, JR.

TORTS—DEBTORS' REMEDIES AGAINST CREDITORS RESORTING TO UNREASONABLE TACTICS TO EXTORT PAYMENT OF DEBTS. [Ohio]

When unscrupulous or overzealous creditors or their collectors eschew judicial collection procedures of judgment or garnishment in favor of harassing tactics designed to extort payment, debtors are faced with some uncertainty in determining what legal remedies are available to them. Though debtors have on several occasions attempted to impose liability on badgering collectors for violation of the right of privacy, with the recent case of *Housh v. Peth*[1] Ohio became only the second jurisdiction to allow recovery on that theory. In this case defendant collection agent initiated a pressure campaign to coerce payment of a $197 debt owed by plaintiff school teacher. Over a period of two weeks, defendant telephoned plaintiff six or eight times daily, both at school and at home, sometimes as late as 11:45 p.m., and publi-

[32]See Research Institute of America, 1954 Revenue Act Coordinator 3306 at 3307. However, the same authority suggests that, for practical reasons, the question will not often be litigated.

[33]See (1957) 6 Jour. of Taxation 288.

[1]165 Ohio St. 35, 133 N. E. (2d) 340 (1956), noted (1956) 32 Notre Dame Law. 168; (1956) 17 Ohio St. L. J. 346; (1956) 10 Vand. L. Rev. 149. The state Supreme Court affirmed the decision reached in 99 Ohio App. 485, 135 N. E. (2d) 440 (1955), noted (1956) Ill. L. Forum 522.

cized the debt by calling her landlord and supervisors. Finally, he had plaintiff called away from her classroom to the telephone three times within fifteen minutes, with the result that her employer threatened to discharge her unless the matter was settled. Plaintiff alleged an invasion of her right of privacy causing her nervousness, worry, humiliation, mental anguish, and loss of sleep. A $2,000 judgment for plaintiff was upheld by a 4 to 3 decision of the Supreme Court of Ohio, which approved the intermediate court's conclusion that "The calls... were all part of the pattern to harass and humiliate the plaintiff and cause her mental pain and anguish and cause her emotional disturbance for the purpose of coercing her to pay the debt.... As a result of the conduct of the defendant the plaintiff became ill. In our opinion the conduct of the defendant falls outside the bounds of reasonable methods which may be pursued in an effort to collect a debt, and is actionable as an invasion of plaintiff's right of privacy."[2]

While the offense in the instant case was designated an invasion of privacy, defendant's willful and intentional purpose to inflict mental suffering and thereby coerce payment was emphasized both by instructions to the jury and by the opinions of the Ohio courts. Similar concern over the collector's intent was expressed in the two other decisions which have allowed recovery to the debtor on the privacy theory. In the first of those cases, defendant had placed a sign 8 feet by 5 feet in his show window announcing the debt and implying that plaintiff had made false promises to pay. The Court of Appeals of Kentucky, applying the privacy theory to these facts, instructed the jury that if defendant erected the sign "for the purpose of coercing the payment of a debt then due plaintiff by the defendant, or for the purpose of exposing the plaintiff to public contempt, ridicule, aversion, or disgrace," plaintiff would be entitled to recover "for any mental pain, humiliation, or mortification caused to him."[3] Fourteen years later the same court, relying heavily upon its former decision, held that a publication regarding a debt in the local newspaper "for the purpose of exposing the debtor to contempt, ridicule or disgrace, and so to coerce payment of the debt," was an actionable invasion of the debtor's right of privacy.[4]

Possibly encouraged because recovery was allowed for a single pub-

[2]165 Ohio St. 35, 133 N. E. (2d) 340, 344 (1956).

[3]Brents v. Morgan, 221 Ky. 765, 299 S. W. 967, 971, 55 A. L. R. 964, 970 (1927).

[4]Trammel v. Citizens News Co., Inc., 285 Ky. 529, 148 S. W. (2d) 708, 710 (1941). While coercion and intent in the passage quoted from the Brents case may appear to be disjunctive, it is believed a conjunctive interpretation was intended, as exemplified by the later Trammel case.

lication in both Kentucky cases, other debtors have since sought to recover on the privacy theory where the only publication was by courteous letter or telephone call to plaintiff's employer, apprising him of the debt and of an intention in some instances to garnishee plaintiff's wages. However, in each of these cases, including several in Kentucky, recovery was denied.[5] As indicated by the Indiana court, "an employee has no right of privacy as against his employer in the matter of the debts he owes and a creditor who gives such information to the employer, unaccompanied by slanderous, libelous, defamatory or coercive matter, incurs no liability in so doing."[6] But it is to be noted that in none of these decisions denying recovery was defendant's design to inflict mental anguish a serious contention.

Since the privacy theory has not often been found to be applicable to collection cases, the harassed debtor must turn to other theories on which to base action against oppressive collectors. Where, as in the collection cases, the only substantial harm to plaintiff is emotional, the courts have apparently been more willing to grant recovery if some traditional peg such as defamation or a technical battery or trespass can be found on which to hang it.[7] If the collection attempts include defamatory utterances, recovery may be had in a libel or slander action for special damages and accompanying mental suffering. The cautious collector, however, adheres to truth, since truth is generally a complete defense to an action for defamation, and in such an action the intent or purpose behind a truthful publication is usually immaterial.[8] Prior to the turn of the century some courts stretched the tort

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[5]Patton v. Jacobs, 118 Ind. App. 358, 78 N. E. (2d) 789 (1948) (courteous letters to debtor's employer); Lucas v. Moskins Stores, Inc., 262 S. W. (2d) 679 (Ky. 1953) (courteous letter to debtor's employer); Voneye v. Turner, 240 S. W. (2d) 588 (Ky. 1951) (courteous letter to debtor's employer); Hawley v. Professional Credit Bureau, Inc., 345 Mich. 500, 76 N. W. (2d) 835 (1956) (courteous letter to debtor's employer; but see dissent); Lewis v. Physicians & Dentists Credit Bureau, Inc., 27 Wash. (2d) 267, 177 P. (2d) 896 (1947) (telephone call to debtor's employer). Accord: Davis v. General Finance & Thrift Corp., 80 Ga. App. 708, 57 S. E. (2d) 225 (1950) (two telegrams to debtor).

Where defendant distributed colored hand bills throughout the community advertising unpaid accounts for sale and listing name, address, and amount due, and the plaintiff's name was among those listed, the court refused to allow recovery on the privacy theory, but the jurisdiction is one which does not recognize the right of privacy as an independent tort. Judevine v. Benzies-Montanye Fuel & Warehouse Co., 222 Wis. 512, 269 N. W. 295, 106 A. L. R. 1443 (1936).

[6]Patton v. Jacobs, 118 Ind. App. 358, 78 N. E. (2d) 789, 792 (1948).

[7]1 Harper & James, Torts (1956) 666; Prosser, Torts (2nd ed. 1955) 43, and cases cited in both texts.

[8]Statements implying that plaintiff does not pay his just debts, or a resort to name-calling by the collector may result in an action for defamation, but the many

of libel to allow recovery in situations in which there was seemingly no other available remedy—e.g., where defendant advertised in the newspaper under the "Wanted" column that plaintiff was wanted to pay his debt;[9] or where defendant sent collection letters to plaintiff in red envelopes marked "for collection of bad debts."[10] But this subterfuge, as well as that of attaching substantial damages to a technical trespass or battery, has been discarded in a growing number of cases in favor of the imposition of liability on the theory that defendant intentionally inflicted mental suffering, which was, in fact, the harm done to plaintiff.[11]

Early American decisions basing recovery on this theory involved public carriers whose agents had insulted their passengers, and subsequently liability was extended on the same basis to innkeepers, theater operators, and proprietors of similar places of public utility, and to a variety of other situations.[12] The tort of intentional infliction of mental

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and varied rules of defamation must be researched for the individual case as there is no pattern for defamation peculiar to collection cases. For defamation generally, see Prosser, Torts (2nd ed. 1955) § 92 et seq.; 1 Harper & James, Torts (1956) § 5.1 et seq.

[9]Zier v. Hofflin, 33 Minn. 66, 21 N. W. 862, 53 Am. Rep. 9 (1885).

[10]Muetze v. Tuteur, 77 Wis. 236, 46 N. W. 123, 9 A. L. R. 86 (1890). Accord: Burton v. O'Neil, 6 Tex. Civ. App. 613, 25 S. W. 1013 (1894).

More recently, but still prior to the first collection-privacy case, the Supreme Court of Kentucky found to be libelous the placarding of debtor's residence with notices that the collector had been there seeking payment of accounts due. Thompson v. Adelberg & Berman, Inc., 181 Ky. 487, 205 S. W. 558, 3 A. L. R. 1594 (1918).

[11]Prosser, Torts (2nd ed. 1955) 43, and cases cited in note 60; Restatement, Torts (Supp. 1948) § 46.

[12]Chamberlain v. Chandler, 5 Fed. Cas. 413, 415, No. 2,575 (C. C. D. Mass. 1823) (allowing recovery where ship's captain by his tyrannical conduct subjected plaintiff passenger to severe mental suffering, Justice Story said, "It [the law] gives compensation for mental sufferings occasioned by acts of wanton injustice, equally whether they operate by way of direct, or of consequential, injuries."); Cole v. Atlanta & W. P. R. Co., 102 Ga. 474, 31 S. E. 107 (1897) (conductor used abusive language on plaintiff passenger); Emmke v. De Silva, 293 Fed. 17 (C. C. A. 8th, 1923) (manager of hotel wrongfully accused plaintiff patron of unchastity); Saenger Theatres Corp. v. Herndon, 180 Miss. 791, 178 So. 86 (1938) (ticket taker at theater insulted patron); Dunn v. Western Union Telegraph Co., 2 Ga. App. 845, 59 S. E. 189 (1907) (agent in charge of office insulted plaintiff patron); O'Connor v. Dallas Cotton Exchange, 153 S. W. (2d) 266 (Tex. Civ. App. 1941) (plaintiff, white woman, compelled to ride with Negroes in an elevator set aside for their use.)

For history and application of the tort generally, see Smith & Prosser, Intentional Infliction of Mental Disturbance, Cases and Materials on Torts (1952) Chapter II, § 3; Magruder, Mental and Emotional Disturbance in the Law of Torts (1936) 49 Harv. L. Rev. 1933; Prosser, Intentional Infliction of Mental Suffering; A New Tort (1939) 37 Mich. L. Rev. 874; Smith, Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli (1944) 30 Va. L. Rev. 193; Wade, Tort Liability for Abusive and Insulting Language (1950) 4 Vand. L. Rev. 63.

suffering is peculiarly adaptable to the collection cases, [13] for it often appears that the collector's sole purpose in badgering his debtor is to torment him into paying where resort to legal proceedings of garnishment or judgment is either unprofitable[14] or impossible.[15] Thus, the collector may come within the formulation of the rule contained in the Restatement of Torts that "One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it."[16] A number of decisions have based recovery against the badgering collector on this theory, even in the absence of physical manifestation of injury;[17] but other courts, ostensibly to keep down false claims and to enable juries to determine when "severe" mental injury has been caused, require some physical effect to be shown.[18] This requirement is

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[13]For a dynamic approach to the collection case problem and complete review of the authorities, see Green, "Mental Suffering" Inflicted By Loan Sharks No Wrong (1953) 31 Tex. L. Rev. 471.

[14]E.g., because of the small amount of the debt, prior outstanding judgments against the debtor, or lack of available assets.

[15]E.g., the collector may in truth be seeking payment of usurious interest or of a claim barred by the statute of limitations which cannot be enforced in court.

[16]Restatement, Torts (Supp. 1948) § 46. Explaining this change from the text as it appeared in the 1934 Restatement, the American Law Institute at page 616 states: "The change in Section 46 is necessary in order to give an accurate Restatement of the present American law. There is a definite trend today in the United States to give an increasing amount of protection to the interest in freedom from emotional distress." The currently proposed revision of this section is found in Restatement of the Law (Second), Torts, Tentative Draft No. 1, April 5, 1957, § 46 (1): "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from it."

See generally 1 Harper & James, Torts (1956) § 9.1 et seq.; Prosser, Torts (2nd ed. 1955) § 11.

[17]Barnett v. Collection Service Co., 214 Iowa 1303, 242 N. W. 25 (1932) (series of coarse and vindictive letters threatening to annoy debtor's employer "until he is so disgusted ... that he will throw you out the back door"); Quina v. Roberts, 16 S. (2d) 558 (La. App. 1944) (simulated legal forms inclosed in letter threatening suit sent to debtor's employer); LaSalle Extension University v. Fogarty, 126 Neb. 457, 253 N. W. 424, 91 A. L. R. 1491 (1934) (series of 37 letters varying from moderate reminders to accusations of dishonesty and moral turpitude, some in lurid envelopes, sent to plaintiff who did not owe the debt, and letters sent also to his neighbors and employer); Gadbury v. Bleitz, 133 Wash. 134, 233 Pac. 299 (1925) (defendant undertaker threatened to delay cremation of body of plaintiff's child until plaintiff paid for a previous funeral, and severe illness ensued).

[18]Cf. Harned v. E-Z Finance Co., 151 Tex. 641, 264 S. W. (2d) 81 (1953) (recovery denied because no physical injury ensued), with Duty v. General Finance Co., 154 Tex. 16, 273 S. W. (2d) 64 (1954) (recovery allowed where physical illness was shown). Clark v. Associated Retail Credit Men of Washington, 105 F. (2d) 62 (C. C. A. D. C., 1939) (defendant knowingly badgered already ill debtor resulting in aggravation of illness); Bowden v. Spiegel, Inc., 96 Cal. App. (2d) 793, 216 P. (2d) 571 (1950) (under pretense of emergency defendant had plaintiff summoned to neighbor's telephone

of questionable value since the determination of whether mental suffering actually occurred can be more reliabily based on the nature of the defendant's conduct intended to cause such suffering than on the mere presence of a physical injury which may or may not have resulted therefrom.[19]

Professor Prosser has pointed out that aside from that group of privacy cases involving a commercial appropriation of plaintiff's personality, the great majority of privacy cases "are primarily concerned with the protection of a mental interest, and... are only a phase of the larger problem of the protection of peace of mind against unreasonable disturbance"; therefore, these cases may very possibly be absorbed by the "new tort" of intentional infliction of mental suffering.[20] The protection afforded in the *Housh* case was said to be against "wrongful intrusion into one's private activities in such manner as to outrage or to cause mental suffering, shame or humiliation to a person of ordinary sensibilities," which, the jury was instructed, constituted an invasion of the right of privacy.[21] However, in the final paragraph of this charge on privacy, the jury was further instructed: "If you find from the evidence that... defendants... threatened to sue the plaintiff and threatened to appeal, or did appeal, to her employer willfully or

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then berated her for not paying her bill when in fact she did not owe defendant, and serious illness ensued); Kirby v. Jules Chain Stores Corp., 210 N. C. 808, 188 S. E. 625 (1936) (defendant cursed plaintiff on public street and threatened to bring the sheriff to make her pay, and plaintiff had a miscarriage).

[19]State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. (2d) 330, 240 P. (2d) 282 at 286 (1952) (recovery allowed where threat of physical violence caused extreme fright).

[20]Prosser, Torts (2nd ed. 1955) 639. Since resulting physical illness may be essential to a recovery for intentional infliction of mental suffering but not a recognized prerequisite to recovery in the more common right of privacy case, the privacy remedy might be presumed to be more adaptable to the collection situation than is the tort of intentional infliction of mental suffering. But such a presumption is probably not merited, since the Ohio court, one of the two courts thus far permitting recovery to a harassed debtor on the privacy theory, carefully pointed out that plaintiff had in fact suffered a resulting physical illness; the strong emphasis given to this effect of defendant's conduct suggests that it may have been regarded as a determining factor in the imposition of liability.

A right of privacy has been recognized in Ala., Alaska, Ariz., Cal., Colo., D. C., Fla., Ga., Ill., Ind., Kan., Ky., La., Mich., Mo., Mont., Nev., N. J., N. C., Ohio, Ore., Pa., and S. C.; but the tort is not recognized at all in R. I., Tex., and Wis., and is limited by statute to cover only commercial appropriation of plaintiff's personality in N. Y., Utah, and Va. Prosser, Torts (2nd ed. 1955) 636; 1 Harper & James, Torts (1956) 682-683, n. 13, 14, and 15.

[21]165 Ohio St. 35, 133 N. E. (2d) 340, 343 (1956). However, no mention was made of a limitation placed on the tort by its progenitors: that oral publication, absent special damages, would not merit redress as an actionable invasion of privacy. See Warren and Brandeis, The Right To Privacy (1890) 4 Harv. L. Rev. 193 at 217.

intentionally for the purpose of producing mental pain and anguish in attempting to collect a debt, or by such coercion collect such debt, it will be your duty to return a verdict for the plaintiff. . . ."[22] Intentional infliction of mental anguish was recognized as a separate tort even before invasion of the right of privacy was so acknowledged,[23] and it appears that in the principal case the trial court, perhaps unintentionally, instructed the jury on two separate torts in one charge, which was approved by the Ohio Supreme Court.

Regardless of the legal theory on which a debtor may seek remedy against a collector, the widely divergent methods employed in debt collection make it difficult to formulate a general rule differentiating permissible collection practices from those which will create liability. For example, in a recent Texas case,[24] defendant's campaign against the debtor included nearly every type of pressure tactic in a collection agent's repertoire. Condemning his entire course of conduct, the court held defendant liable for such infliction of mental suffering, but of course avoided designating what collection practices it would condone in the future.[25] Each case must necessarily stand alone, for it is only when the collector's conduct outrages common decency and goes beyond that which the debtor must reasonably expect to endure as a

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[22]Housh v. Peth, 165 Ohio St. 35, 133 N. E. (2d) 340, 343 (1956).

[23]Wilkinson v. Downton, [1897] 2 Q. B. 57 (where defendant as a practical joke misrepresented to plaintiff that her husband had been seriously injured, plaintiff was allowed to recover for accompanying shock and mental suffering).

The right of privacy cause of action was probably first alleged but rejected in Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442 (1902), where plaintiff's photograph was used without her consent to advertise flour.

[24]Duty v. General Finance Co., 154 Tex. 16, 273 S. W. (2d) 64 (1954).

[25]Duty v. General Finance Co., 154 Tex. 16, 273 S. W. (2d) 64 (1954) (collection campaign directed against plaintiffs, husband and wife, included numerous telephone calls at home and places of employment, threatening loss of credit and job; calling plaintiffs "deadbeats" before neighbors and fellow employees; flooding plaintiffs with special delivery letters and telegrams designed to arrive late at night; sending dun cards through the mail; calling plaintiffs on neighbor's telephone pretending to be relatives on emergency calls; calling plaintiffs' relatives long distance collect to inform and harass them about the debt; leaving red cards in plaintiffs' door with insulting notes and thinly-veiled threats on the back; and other similar acts).

An amazing compilation of methods employed by illegal lenders is found in Birkhead, Collection Tactics of Illegal Lenders (1941) 8 Law and Contemp. Prob. 78. E.g.: where collector gets a wage assignment and makes debtor his agent for collection, collector can threaten criminal prosecution should debtor fail to turn over his pay check each month; collector may pursuade debtor to sign a check on a bank in which he has no funds and if debtor defaults collector takes check to the bank where it is marked not payable, then collector threatens criminal prosecution for passing bad checks unless debtor pays up; collector may send a pretty girl to debtor's place of employment to whisper in low tones about the debt, thus arousing suspicions among fellow employees; a "goon squad" may be sent out to collect.

consequence of his delinquency that the courts have granted redress on one theory or another. A debtor must submit to some inconvenience and notoriety from attempted collection, all of which could be avoided if he would pay his debts as they fall due; and reasonable requests for payment or notice of intended legal action given to the debtor or his employer at reasonable intervals will not likely result in the imposition of liability on the collector. Few persons wish to employ those who do not meet their obligations promptly, even though the nature of the job precludes temptation to embezzle, for the mental attitude of a delinquent debtor is not conducive to maximum efficiency. Thus, the courteous contact with the debtor's employer, devoid of defamatory utterance but reminding him that an employer, as garnishee defendant, must suffer the inconvenience of appearing in court when his employee's wages are garnished, appears to be both a powerful and justifiable collection procedure.

EUGENE B. FORTSON

TORTS—LIABILITY FOR PERSONAL INJURIES CAUSED BY UNINTENTIONAL AND NON-NEGLIGENT TRESPASS TO LAND. [Kentucky]

After having adhered for more than forty years to an anomalous and much criticized doctrine imposing absolute liability for personal injuries caused by an unintentional and non-negligent trespass to land, the Court of Appeals of Kentucky in deciding *Randall v. Shelton*[1] has recently brought that state into agreement with the majority view in this field of the law.

It is generally agreed that liability for trespass was absolute at the early common law. Broad statements such as "a man acts at his peril"[2] and "he that is damaged ought to be recompensed" are often cited as evidencing the existence of that view.[4] However, these statements have been questioned, and the contention has been advanced that, although at common law strict liability was imposed for trespasses, the rule was subject to an exception when there was no intent to commit the act which resulted in the trespass.[5] Whether or not it is true that

[1]293 S. W. (2d) 559 (Ky. 1956).

[2]3 Holdsworth, History of English Law (3rd ed. 1927) 375.

[3]Lambert & Olliot v. Bessey, T. Raym. 421, 423, 83 Eng. Rep. 220, 221 (K. B. 1679).

[4]For further statements of the common law rule: Ames, Law and Morals (1908) 22 Harv. L. Rev. 97 at 98; Bohlen, The Rule in Rylands v. Fletcher(1911) 59 U. of Pa. L. Rev. 298 at 309; Smith, Tort and Absolute Liability—Suggested Changes in Classification (1917) 30 Harv. L. Rev. 319 at 322.

[5]Winfield, The Myth of Absolute Liability (1926) 42 Law Q. Rev. 37.

the common law imposed absolute liability, that assumption has continued and has been followed in a few American jurisdictions.[6]

In the meantime, the English courts have revised their original view. As far back as 1607 a decision suggested by way of dictum that an injurious trespass to persons might be the result of an inevitable accident and therefore not actionable.[7] Thus, the concept of liability based on the trespasser's fault, rather than on the injured party's need for compensation, entered the English law.[8] But not until 1951 did the English court definitely rule that no liability would be imposed for an unintentional and non-negligent trespass to land.[9]

In America, imposition of liability without fault was early rejected in a case of trespass to the person,[10] and this view has been extended, subject always to the "ultrahazardous activity" exception,[11] to cases of trespass to realty. The view that accidental trespasses—i.e., those which are neither intentional nor negligent—are not actionable has become the law in a majority of the jurisdictions which have passed on the

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[6]Louisville Ry. Co. v. Sweeney, 157 Ky. 620, 163 S. W. 739 (1914), overruled by Randall v. Shelton, 293 S. W. (2d) 559 (Ky. 1956); Newsom v. Anderson, 24 N. C. 33, 2 Ired. L. 42, 37 Am. Dec. 406 (1841); Van Alstyne v. Rochester Tel. Corp., 163 Misc. 258, 296 N. Y. Supp. 726 (1937). See West Virginia Cent. & P. Ry. Co. v. Fuller, 96 Md. 652, 54 Atl. 669, 672 (1903), for dictum that trespass may be actionable without showing negligence.

[7]Weaver v. Ward, Hob. 134, 80 Eng. Rep. 284 (K. B. 1607).

[8]That trespass to *persons* must be either negligent or intentional to be actionable was decided in the last century: Stanley v. Powell, [1891] 1 Q. B. 86; Holmes v. Mather, 10 Law Rep. 261 (Ex. 1875). Accord as to trespass to goods: Manton v. Brocklebank, [1923] 2 K. B. 212. But tresspass to land was actionable even if unintentional and non-negligent: Boyle v. Rodgers, [Can. 1921] 2 W. W. R. 704, 31 Man. L. R. 263, aff'd, 31 Man. L. R. 421.

[9]National Coal Board v. Evans & Co., [1951] 2 K. B. 861, 2 All Eng. Rep. 310.

[10]Brown v. Kendall, 60 Mass. 292 (1850).

[11]For discussions of the ultrahazardous activity exception see: Harper, Liability Without Fault and Proximate Cause (1932) 30 Mich. L. Rev. 1001 at 1005; Prosser, Nuisance Without Fault (1942) 20 Tex. L. Rev. 399 at 405; Smith, Tort and Absolute Liability—Suggested Changes in Classification (1917) 30 Harv. L. Rev. 319 at 323.

The following are examples of activities which have been classed as ultrahazardous, or the same result has been reached by allowing recovery on a theory of nuisance, even absent fault: keeping explosives, Exner v. Sherman Power Const. Co., 54 F. (2d) 510 (C. C. A. 2nd, 1931); operating aircraft in formation, Parcell v. United States, 104 F. Supp. 110 (S. D. W. Va. 1951); knowingly selling dangerous chemicals, Chapman Chemical Co. v. Taylor, 215 Ark. 630, 222 S. W. (2d) 820 (1949); drilling oil wells, Green v. General Petroleum Corp., 205 Cal. 328, 270 Pac. 952 (1928); use of exterminating gas, Luthringer v. Moore, 181 P. (2d) 89 (Cal. App. 1947); blasting, Brown v. L. S. Lunder Const. Co., 240 Wis. 122, 2 N. W. (2d) 859 (1942). Restatement, Torts (1938) § 520, defines an ultrahazardous activity as one which: "(a) necessarily involves a risk of serious harm to the person, land, or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage."

point,[12] has been adopted by the Restatement,[13] and has received virtually unanimous support from legal writers.[14]

Among the jurisdictions adhering to the original common law concept of liability in trespass, with its strict emphasis on the sanctity of property rights, Kentucky has occupied a prominent place since 1914 when the decision in *Louisville Ry. Co. v. Sweeney*[15] was handed down. In that case plaintiff was injured while standing in her front yard when defendant's streetcar left the track and ran into a telephone pole, which struck plaintiff's gate and knocked it against her. The case probably could have been decided on a negligence theory, since there was evidence tending to show that the car was being operated too rapidly over track from which defendant's workmen had removed the ties in order to effect repairs. Nevertheless, the Kentucky Court of Appeals, in affirming a judgment for the plaintiff, declared: "The plaintiff as the owner of her property was entitled to the undisputed possession of it. The entry of the defendant upon it either by its street car or by the pole which it set in motion was a trespass. *One who trespasses upon another and inflicts an injury is liable for the injury unless caused by the Act of God or produced by causes beyond his control....* The defendant... had no right to... throw things out of the street on [plaintiff's] property."[16] This case though strongly criticized,[17] was subsequently followed in a series of decisions in Kentucky.[18]

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[12]Parrott v. Wells Fargo Co., 15 Wall. 524, 21 L. ed. 206 (U. S. 1872); Brown v. Collins, 53 N. H. 442, 16 Am. Rep. 372 (1873); Phillips v. Sun Oil Co., 307 N. Y. 328, 121 N. E. (2d) 249 (1954); Rightmire v. Shepard, 59 Hun. 620, 12 N. Y. Supp. 800 (1891); Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S. W. (2d) 221 (1936); Feiges v. Racine Dry Goods Co., 231 Wis. 270, 285 N. W. 799 (1939) (involuntary holdover tenant). Plaintiff's accidental trespass has been held not a defense in: Edgarton v. H. P. Welch Co., 321 Mass. 603, 74 N. E. (2d) 674 (1947); Puchlopek v. Portsmouth Power Co., 82 N. J. 440, 136 Atl. 259 (1926).

[13]Restatement, Torts (1934) § 166: "Except where the actor is engaged in an extra-hazardous activity, an unintentional and non-negligent entry on land in the possession of another or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest."

[14]Harper, Torts (1933) 69; Pollock, Torts (14th ed. 1939) 107; Prosser, Torts (2nd ed. 1955) § 13; Winfield, Restatement of the Law of Torts—Volume III (1939) 17 N. Y. U. L. Q. Rev. 1 at 2; Note (1942) 21 Tex. L. Rev. 78 at 81.

[15]157 Ky. 620, 163 S. W. 739 (1914).

[16]157 Ky. 620, 621, 163 S. W. 739, 740 (1914). Italics supplied.

[17]"There is no great triumph of reason in a rule which makes a street railway, whose car jumps the track, liable only for negligence to a pedestrian on the sidewalk, but absolutely liable to the owner of the plate-glass window behind him." Prosser, Torts (2nd ed. 1955) 55.

[18]Kentucky Traction and Terminal Co. v. Bain, 174 Ky. 679, 192 S. W. 656 (1917) (streetcar struck plaintiff's home; finding of negligence not necessary because

However, a change was foreshadowed in 1955, when the Kentucky Court of Appeals in *Jewell v. Dell*[19] recognized the existence of the modern trend away from absolute liability for trespass and, in dictum, cast some doubt on the continued validity of the *Sweeney* doctrine. All doubts have now been resolved in *Randall v. Shelton*,[20] which expressly overruled the *Sweeney* case.

In the *Randall* case, plaintiff's leg was broken by a stone allegedly thrown from the road by the wheels of defendant's truck. Plaintiff contended that she was standing in her front yard at the time. Over defendant's objection the case was submitted to the jury on grounds of negligence and also of trespass, and a verdict of $6,000 was returned for plaintiff. However, on appeal this judgment was reversed and a verdict was directed for defendant. The Court of Appeals first considered the possibility of sustaining the verdict on the negligence theory, but held that there was no basis beyond mere conjecture for finding the injury to have been caused by any negligence on the part of defendant.[21] Considering the case on a trespass theory, the court eliminated extra-hazardous activity and intentional trespass as bases for recovery in the situation at bar; then, referring to the streetcar cases, it conceded that, "By some strange course of the law, in Kentucky we seem to have created a third class of cases which recognize an absolute liability...."[22] In repudiating the *Sweeney* doctrine and those cases

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of Sweeney case); Kentucky Traction and Terminal Co. v. Grimes, 175 Ky. 694, 194 S. W. 1048 (1917) (streetcar struck house where plaintiff was working); Consolidated Fuel Co. v. Stevens, 223 Ky. 192, 3 S. W. (2d) 203 (1927) (slate car struck plaintiff's house); Happy Coal Co. v. Smith, 229 Ky. 716, 17 S. W. (2d) 1008 (1929) (spool of wire got away from defendant's employees and rolled down a hill, injuring plaintiff; recovery allowed on grounds of trespass; finding of negligence not required, although case probably could have been decided on negligence).

[19]Defendant's driver continued to drive defendant's truck with knowledge of the truck's bad brakes. Verdict for plaintiff upheld on grounds of negligence, especially in view of a prohibitory statute. After recognizing the Sweeney rule, the court declined to apply it, saying: "The trend of modern authority is that an unintended entry or intrusion upon the property in possession of another does not constitute actionable trespass." But the question of the continued validity of the Sweeney case, in view of the above development was left for a later decision. 284 S. W. (2d) 92, 94 (Ky. 1955).

[20]293 S. W. (2d) 559 (Ky. 1956).

[21]On appeal, plaintiff argued that it was possible for reasonable men to find that the stone was wedged between the dual wheels of the truck and that driving a truck in such condition, of which the driver must have been aware, constituted negligence. The court dismissed this contention as pure speculation, especially since plaintiff could offer no susbstantiating evidence. The court also decided that no application of the doctrine of res ipsa loquitur could result in a finding of negligence on the defendant's part, since the throwing of a stone by a vehicle moving along the highway "would not in the ordinary course of events indicate negligence in the operation of the vehicle." 293 S. W. (2d) 559, 562 (Ky. 1956).

[22]293 S. W. (2d) 559, 561 (Ky. 1956).

which followed it, the court reasoned that liability should depend on the nature of defendant's act, not on the name given to that act because it took place on plaintiff's property. "Plaintiff is entitled to protection from wrongful injury wherever she may lawfully be, and the true question presented is whether or not the defendant committed a culpable act, not plaintiff's geographical location."[23]

This case was correctly distinguished from those in which the so-called extra-hazardous duty exception is applied to impose liability regardless of negligence upon those who engage in activities so dangerous as to be inherently threatening of injury.[24] The operation of motor vehicles is overwhelmingly recognized as not such an activity,[25] although at least one jurist has advocated that it be so regarded, as a deterrent to reckless driving.[26] The Kentucky court is to be commended for repudiating the *Sweeney* doctrine in a straightforward manner, rather than evading that action by finding other grounds upon which to decide the case. As to the whole line of streetcar cases, it was pointed out that the decisions should have turned on the question of negligence, perhaps with the application of the doctrine of res ipsa loquitur to raise a presumption of negligence.[27] By adopting the modern rule, Kentucky has virtually destroyed the last remaining vestiges of the concept that every unauthorized entry upon the land of another is an actionable trespass, regardless of any fault on the part of the enterer. In only one other jurisdiction has an unimpeached holding to this effect been found, and that case was decided over a century ago.[28]

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[23]Randall v. Shelton, 293 S. W. (2d) 559, 562 (Ky. 1956). The court further observed: "To say that she could recover for injuries if she was in her yard but could not recover if she was one step outside of it is a patent absurdity.... To further point up the absurdity of the situation, suppose the plaintiff had been in her front yard talking to a neighbor and the stone had struck both. Assuming no negligence, would there be any logic in ruling that the plaintiff could recover and the neighbor could not?" 293 S. W. (2d) 559, 562 (Ky. 1956).

[24]See note 11, supra.

[25]"...automobiles have come into such general use that their operation is a matter of common usage. This together with the fact that the risk involved in the careful operation of a carefully maintained automobile is slight, is sufficient to prevent their operation from being an ultrahazardous activity." Restatement, Torts (1938) § 520, comment (e). Accord: Parker v. Wilson, 179 Ala. 361, 60 So. 150 (1912); Martin v. Lilly, 188 Ind. 139, 121 N. E. 443 (1919); Roberts v. Lundy, 301 Mich. 726, 4 N. W. (2d) 74 (1942); Wineman v. Carter, 212 Minn. 298, 4 N. W. (2d) 83 (1942); Kirk v. Birkenbach, 32 N. E. (2d) 76 (Ohio App. 1941); Nichols v. Smith, 21 Tenn. App. 478, 111 S. W. (2d) 911 (1937).

[26]See Judge Clark's opinion in Behaney v. Travelers Ins. Co., 121 F. (2d) 838 at 839 (C. C. A. 3rd, 1941).

[27]Randall v. Shelton, 293 S. W. (2d) 559 at 562 (Ky. 1956).

[28]Newsom v. Anderson, 24 N. C. 33, 2 Ired. L. 42, 37 Am. Dec. 406 (1841). This case has not been followed in a case decided solely on trespass. It was cited with ap-

One other court has approved the absolute liability rule in dicta, but that case was actually decided on the ground of negligence,[29] and the same court later decided that in such a case it is more proper to give a negligence instruction based on res ipsa loquitur.[30]

ERNEST H. CLARKE

TORTS—WIFE'S RIGHT TO RECOVER FOR LOSS OF CONSORTIUM RESULTING FROM NEGLIGENTLY INFLICTED INJURIES TO HUSBAND. [Iowa]

With its recent decision in *Acuff v. Schmit*,[1] the Supreme Court of Iowa has become the only state court of last resort now repudiating the ancient established rule that a wife cannot recover damages for loss of consortium against one whose negligent wrongdoing has incapacitated her husband. In this case, plaintiff's husband had been injured by defendant's negligent operation of an automobile and had been thereby rendered permanently disabled and incapable of carrying on marital relations. The husband's cause of action for personal injuries having been dismissed with prejudice, presumably on the basis of a settlement satisfactory to the husband, the wife sued the tort-feasor to recover damages for loss of the aid, service, society, companionship and consortium of her husband. The trial court sustained a motion to dismiss on the ground that the plaintiff failed to state a cause of action, but the Iowa Supreme Court, in a 5 to 4 decision, held that a wife does have a cause of action for the loss of consortium against one who has negligently and permanently incapacitated her husband.

While recognizing that the overwhelming weight of authority is against allowing plaintiff's cause of action, the majority declared: "... we deem precedent to be worthy of support only when it can stand the scrutiny of logic and sound reasoning in the light of present day standards and ideals."[2] The traditional rule denying a wife recovery for loss of consortium was said to have grown out of the common law restrictions of coverture under which a married woman lacked the capacity to bring suit in her own name or to hold a property right (which consortium was found to be) independently of her husband. The Iowa Married Women's Acts having long since empowered a wife to sue

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proval, however, in a recent case in which damages were sought for dust being thrown from a mica mine onto another's property. The court discussed both trespass and nuisance. Hall v. DeWelch Mica Co., 244 N. C. 182, 93 S. E. (2d) 56 (1956).

[29]See West Virginia Cent. & P. Ry. Co. v. State, to use of Fuller, 96 Md. 652, 54 Atl. 669, 672 (1903).

[30]Potomac Edison Co. v. Johnson, 160 Md. 33, 152 Atl. 633 (1930).

[1]78 N. W. (2d) 480 (Iowa 1956), noted (1957) 55 Mich. L. Rev. 721.

[2]78 N. W. (2d) 480, 485 (Iowa 1956).

and to own property in her own right, the majority of the court concluded that the reason for the rule invoked against the wife in the trial court had been obviated and so the rule itself should be repudiated. While the majority opinion implies that the Iowa Married Women's Acts may be different from the Acts of other states still adhering to the general rule, the significance of the difference in regard to the issue at bar was not explained; and clearly the Iowa statute does not expressly purport to create any new cause of action in favor of the wife. The weakness in the majority's reasoning was pointed out by the dissent, which argued that the Iowa statutes give the wife the right to sue only if she has a cause of action. The dissenting judges found the traditional reasons for denying the existence of a cause of action to be sound, and contended that the majority's ruling would open "a new door for endless, and . . . unsound, litigation."[3]

Prior to this decision in the principal case, there were only three unimpeached decisions recognizing a wife's cause of action for loss of consortium in negligence cases, while very strong authority existed to the contrary. Leading the way in sustaining the cause of action was *Hitaffer v. Argonne Co.*,[4] decided by the United States Court of Appeals for the District of Columbia in 1950. Subsequently it was relied on by a federal district court[5] and a Georgia intermediate court in reaching a similar conclusion.[6] At least twenty-two different states[7]

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[3]78 N. W. (2d) 480, 491 (Iowa 1956).

[4]183 F. (2d) 811, 23 A. L. R. (2d) 1366 (C. A. D. C., 1950), cert. den., 430 U. S. 852, 71 S. Ct. 80, 95 L. ed. 624 (1950) (Smither & Co., Inc. v. Coles, 242 F. (2d) 220 (C. A. D. C., 1957) overruled the Hitaffer case on a workmen's compensation point, but the ruling on recovery for consortium was not disturbed). Hipp. v. E. I. Dupont de Nemours & Co., 182 N. C. 9, 108 S. E. 318, 18 A. L. R. 873 (1921) recognized the wife's right of action, but was overruled by Hinnant v. Tide Water Power Co., 189 N. C. 120, 120 S. E. 307 (1925). Passalaequa v. Draper, 199 Misc. 827, 104 N. Y. S. (2d) 973 (1951), sustained the wife's cause of action, following the Hitaffer case, but this decision was reversed without opinion by the Appellate Division in 279 App. Div. 660, 107 N. Y. S. (2d) 812 (1951). In Best v. Samuel Fox & Co., [1951] 2 K. B. 639, the court held that no action could be maintained unless plaintiff could show that *all* of the elements which make up consortium were destroyed. Two judges expressed doubt as to whether a wife could maintain an action even for the total loss of consortium. One judge was of the opinion that the wife was as much entitled to recover for the total loss of consortium as the husband.

[5]Cooney v. Moomaw, 109 F. Supp. 448 (N. D. Neb. 1953), held that under Nebraska law an action could be maintained by the wife for the loss of consortium of her husband, as long as consideration is given to what the husband recovers, to prevent a double recovery.

[6]Brown v. Georgia-Tennessee Coaches, Inc., 88 Ga. App. 519, 77 S. E. (2d) 24 (1953), quoted in full the opinion of the Hitaffer case on the consortium issue. In McDade v. West, 80 Ga. App. 481, 56 S. E. (2d) 299 (1949), an evenly divided court upheld the lower court's denial of the wife's cause of action.

[7]Jeune v. Del. E. Webb Const. Co., 77 Ariz. 226, 269 P. (2d) 723 (1954); Giggey

and five federal courts[8] have denied the cause of action.

The reasoning contained in the various decisions in support of the general rule is quite uniform, as is the refutation advanced by the courts and text authorities advocating the right of a wife to recover. Both sides recognize that the disabilities of coverture prevented the wife from suing in her own name at common law, but that this incapacity has largely been removed by the Married Women's Acts. The general view is that the effect of the statutes in this regard is merely procedural in that they allow the wife to sue in her own right to enforce any cause of action which existed in her favor; but since the wife at common law could not own property independently of her husband, she had no property right to her husband's consortium, and therefore, has no cause of action for the loss of consortium.[9] In response, advocates of the minority view argue that in the Married Women's

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v. Gallagher Transp. Co., 101 Colo. 258, 72 P. (2d) 1100 (1937); Sobolewski v. German, 32 Del. 540, 127 Atl. 49 (1942); Ripley v. Ewell, 61 S. (2d) 420 (Fla. 1952); McDade v. West, 80 Ga. App. 481, 56 S. E. (2d) 299 (1949); Patelski v. Snyder, 179 Ill. App. 24 (1913); Brown v. Kistleman, 177 Ind. 692, 98 N. E. 631, 40 L. R. A.(N. S.) 236 (1912); Cravens v. Louisville & N. R., 195 Ky. 257, 242 S. W. 628 (1922); Emerson v. Taylor, 133 Md. 192, 104 Atl. 538, 5 A. L. R. 1045 (1918); Feneff v. New York Cent. & H. R. R., 203 Mass. 278, 89 N. E. 436, 24 L. R. A. (N. S.) 1024 (1909); Eschenbach v. Benjamin, 195 Minn. 378, 263 N. W. 154 (1935); Nash v. Mobile & O. R., 149 Miss. 823, 116 So. 100, 59 A. L. R. 576 (1928); Bernhardt v. Perry, 276 Mo. 612, 208 S. W. 462, 13 A. L. R. 1320 (1918), writ dism'd, 254 U. S. 662, 41 S. Ct. 63, 65 L. ed. 464 (1920); Tobiassen v. Polley, 96 N. J. L. 66, 144 Atl. 153 (1921); Landwehr v. Barbas, 241 App. Div. 769, 270 N. Y. Supp. 534 (1934), aff'd, 270 N. Y. 537, 200 N. E. 306 (1936); Hinnant v. Tide Water Power Co., 189 N. C. 120, 126 S. E. 307, 37 A. L. R. 889 (1925); Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N. E. 204, L. R. A. 1916E, 700 (1915); Howard v. Verdrigis Valley Electric Co-op, 201 Okla. 504, 207 P. (2d) 784 (1949); Sheard v. Oregon Electric R., 137 Ore. 341, 2 P. (2d) 916 (1931); Garrett v. Reno Oil Co., 271 S. W. (2d) 764 (Tex. Civ. App. 1954); Ash v. S. S. Mullen, Inc., 43 Wash. 345, 261 P. (2d) 118 (1953); Nickel v. Hardware Mutual Casualty Co., 269 Wis. 647, 70 N. W. (2d) 205 (1955).

[8]Filice v. United States, 217 F. (2d) 515 (C. A. 9th, 1954); Seymour v. Union News Co., 217 F. (2d) 168 (C. A. 7th, 1954); Werthan Bag Corp. v. Agnew, 202 F. (2d) 119 (C. A. 6th, 1953); Josewski v. Midland Constructors, Inc., 117 F. Supp. 681 (D. C. S. D. 1953); Fuller v. American Tel. & Tel. Co., 21 F. Supp. 741 (D. C. Mass. 1937), aff'd, 99 F. (2d) 620 (C. C. A. 1st, 1938).

[9]Patelski v. Snyder, 179 Ill. App. 24 (1913); Cravens v. Louisville & N. R., 195 Ky. 257, 242 S. W. 628 (1922); Bernhardt v. Perry, 276 Mo. 612, 208 S. W. 462, 13 A. L. R. 1320 (1918) (theory that right to sue for loss of consortium belongs to wife at common law, but that her remedy was barred, was rejected); Howard v. Verdigris Valley Electric Co-op., 201 Okla. 504, 207 P. (2d) 784, 787 (1949) (despite plaintiff's argument that action could be maintained under Married Women's Acts, court held that "whatever additional rights may have been extended to married women generally under the so-called emancipation statutes, or married women's acts, such statutes do not confer a new right upon the wife which permits recovery for loss allegedly resulting from negligent injuries to her husband since no new cause of action was created thereby.").

Acts the legislatures intended to reflect the established changes in the marital relationship in modern times by giving wives legal rights equal to those of husbands in respect to their ability to sue and be sued, to contract, and to own property. Therefore, they contend that both the capacity to have a property right in the husband's consortium and to sue for damages for its loss is recognized in the wife by the statues.[10] The *Hitaffer* case expressed the view that the wife had had a right of consortium even prior to the passage of the Married Women's Acts which, however, she had been unable to protect merely because of her marital disability to bring suit. Thus, since this disability was precedural only and was removed by the enactment of the Married Women's Acts, a wife may now maintain an action for the loss of consortium.[11]

Authorities supporting the general rule declare that the loss to the wife is too "remote" or "consequential"[12] to be recoverable. In employing these ambiguous terms, the courts purport to be referring to the absence of proximate causation,[13] but there seems to be no intervening factor between the injury to the husband and the loss to the wife, and the wife's loss is a foreseeable consequence of the infliction of the injury on the husband. It seems probable that in branding the loss as remote or consequential the courts are referring either to the

[10]Hitaffer v. Argonne Co., 183 F. (2d) 811, 23 A. L. R. (2d) 1366 (C. A. D. C., 1950); Cooney v. Moomaw, 109 F. Supp. 448 (N. D. Neb. 1953); dissent in Bernhardt v. Perry, 276 Mo. 612, 208 S. W. 462, 470, 13 A. L. R. 1320, 1333 (1918) ("By the expressed terms of the statute this is a property right, and belongs to her as such and becomes her sole and separate property. It is therefore a right which is 'affected' by a negligent injury.")

[11]Hitaffer v. Argonne Co., 183 F. (2d) 811 at 816, 23 A. L. R. (2d) 1366 at 1372 (C. A. D. C., 1950).

[12]Feneff v. New York Cent. & H. R. R., 203 Mass. 278, 89 N. E. 436, 24 L. R. A. (N. S.) 1024 (1909); Gambino v. Manufacturers' Coal and Coke Co., 175 Mo. App. 654, 158 S. W. 77 (1913); Hinnant v. Tide Water Power Co., 189 N. C. 120, 126 S. E. 307, 310 (1925) [In overruling Hipp v. E. I. Dupont de Nemours & Co., 182 N. C. 9, 108 S. E. 318, 18 A. L. R. 873 (1921), the first case allowing the wife to recover for the loss of consortium resulting from negligent injury to the husband, the court declared: "Whatever the rights of the husband may have been the wife could not maintain an action at common law for the loss of consortium; and the prevailing opinion is that for indirect, remote, or consequential loss she cannot maintain such action since her emancipation from the former disabilities of married women."].

[13]Feneff v. New York Cent. & H. R. R., 203 Mass. 278, 89 N. E. 436, 24 L. R. A. (N. S.) 1024 (1909) (where there is no intentional wrong, the ordinary rule of damages only goes so far as to compensate the person directly injured); Stout v. Kansas City Terminal Ry., 172 Mo. App. 133, 157 S. W. 1019, 1021 (1913) (losses to the wife were "not of such nature as to be laid hold of as having its cause in the negligence which resulted in his injury.").

danger of double recovery being obtained for the same wrong[14] or to the difficulties of evaluating the wife's loss in terms of money damages.[15] Unquestionably, the amount of the loss is extremely uncertain, and fixing an award to compensate the wife must necessarily be a speculative process—but the same objection does not prevent the awarding of damages for pain and suffering or mental anguish in a personal injury case. The force of the argument that the wife's loss is too remote and consequential to be compensable is weakened by the fact that even jurisdictions following the general rule allow a husband to recover for the loss of consortium resulting from injury to his wife.[16] Further, the adherents to the general rule allow the wife to recover for loss of the husband's consortium resulting from an intentional wrong.[17] In both of these situations the recovery seems as remote and consequential as that denied by the general rule.

Many courts reason that the wife may not recover because services are the dominant factor in consortium,[18] and she is not entitled to her husband's services.[19] Authorities favoring the wife's cause of action consider consortium to include not only services but also comfort, society, and conjugal affection, and therefore recovery may be had by the

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[14]E.g., Feneff v. New York Cent. & H. R. R., 203 Mass. 278, 89 N. E. 436 at 437, 24 L. R. A. (N. S.) 1024 at 1026 (1909). For a discussion of the double recovery argument against allowing a wife's cause of action for loss of consortium, see text at notes 24 and 25, infra.

[15]Landwehr v. Barbas, 241 App. Div. 769, 270 N. Y. Supp. 534, 535 (1934) (wife had no cause of action against a third party for the loss of opportunity of childbearing due to physical injuries of a husband because "There are so many elements of doubt and conjecture in connection with the birth of children that it cannot be said that the wrong is the proximate cause of the loss."). See Marri v. Stamford St. R., 84 Conn. 9, 78 Atl. 582, 587 (1911) (denying recovery to a husband for loss of consortium resulting from injury to wife: "... the law ... has never countenanced any attempt to measure pecuniarily such a loss...."). See Pound, Individual Interests in the Domestic Relations (1916) 14 Mich. L. Rev. 177, 194.

[16]Prosser, Torts (2nd ed. 1955) 698 and 701; 27 Am. Jur. 101 and 102. A few courts, impressed with the fact that the wife is consistently denied a right of action, have also denied recovery to the husband. Taylor v. S. H. Kress & Co., 136 Kan. 155, 12 P. (2d) 808 (1932); Helmstetler v. Duke Power Co., 224 N. C. 821, 32 S. E. (2d) 611 (1945).

[17]Root v. Root, 31 F. Supp. 562 (N. D. Cal. 1940) (alienation of affections); Haynes v. Nowlin, 129 Ind. 581, 29 N. E. 389 (1891) (enticement); Clark v. Hill, 69 Mo. App. 541 (1897) (husband driven insane by defendant's wilful threats); Oppenheim v. Kridel, 236 N. Y. 156, 140 N. E. 227, 25 A. L. R. 320 (1923) (criminal conversation); Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N. E. 102 (1912) (sale of morphine to plaintiff's husband).

[18]E.g., Stout v. Kansas City Terminal Ry., 172 Mo. App. 113, 157 S. W. 1019 (1913); Hinnant v. Tide Water Power Co., 189 N. C. 120, 126 S. E. 307, 37 A. L. R. 889 (1925); Smith v. Nichols Bldg. Co., 93 Ohio St. 101, 112 N. E. 204 (1915).

[19]Prosser, Torts (2nd ed. 1955) 691, 703.

wife for impairment of these rights without showing loss of services.[20] Since the rights of consortium spring from the marriage contract and are mutual in character, the wife's right to the conjugal affection of her husband is just as strong as his right to her conjugal affection. Any interference with these rights of either the husband or the wife is a violation of a legal right. Since the wrong to the wife is of the same nature as the wrong to the husband, the remedy should be the same.[21]

Even in the majority of states denying the wife her right to sue for loss of consortium resulting from negligent injury to her husband, she is allowed to recover for intentional interference with consortium.[22] This seeming inconsistency is explained on the ground that since the husband is a party to the intentional wrongdoing, he has no cause of action and so there could be no recovery for the wrong of the third party unless the wife is allowed to enforce a cause of action.[23] In negligence cases, on the other hand, the husband may sue for injuries to himself and to his family, and so there is said to be no justification for allowing the wife to recover. The answer given to this argument is that since consortium is a legally protected interest, there should be no distinction between the right to recover for an intentional and a negligent invasion of consortium.[24]

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[20]Hitaffer v. Argonne Co., 183 F. (2d) 811, 814, 23 A. L. R. (2d) 1366, 1370 (C. A. D. C., 1950): "*Consortium*, although it embraces within its ambit of meaning the wife's material services, also includes love, affection, companionship, sexual relations, etc., all welded into a conceptualistic unity. And, although loss of one or the other of these elements may be greater in the case of any one of the several types of invasion from which *consortium* may be injured, there can be no rational basis for holding that in negligent invasions suability depends on whether there is a loss of service. It is not the fact that one or the other of the elements of *consortium* is injured in a particular invasion that controls the type of action which may be brought but rather that the *consortium* as such has been injured at all." Acuff v. Schmidt, 78 N. W. (2d) 480, 482 (Iowa 1956), was decided on the basis of the "sentimental version" of consortium, which was defined as: "conjugal fellowship of husband and wife; and the right of each to the company, cooperation, affection and aid of the other in every conjugal relation." This is also the definition of consortium as set out in Black's Law Dictionary (4th ed. 1951) 382. Prosser, Torts (2nd ed. 1955) 704: "The loss of 'services' is an outworn fiction, and the wife's interest in the undisturbed relation with her consort is no less worthy of protection than that of the husband."

[21]Bennett v. Bennett, 116 N. Y. 584 at 590, 23 N. E. 17 at 18; 6 L. R. A. 553 at 556 (1889).

[22]See note 17, supra.

[23]Foot v. Card, 58 Conn. 1, 18 Atl. 1027 (1889); Turner v. Heavrin, 182 Ky. 65, 206 S. W. 23 (1918); dissenting opinion, Acuff v. Schmit, 78 N. W. (2d) 480 at 487 (Iowa 1956); Holbrook, The Change in the Meaning of Consortium (1923) 22 Mich. L. Rev. 1, 6; Kinnaird, Domestic Relations—Right of Wife to Sue for Loss of Consortium Due to a Negligent Injury to Her Husband (1947) 35 Ky. L. J. 220, 221.

[24]Hitaffer v. Argonne Co., 183 F. (2d) 811, 817, 23 A. L. R. (2d) 1363, 1373

The reason most frequently given for denying the action to the wife is that to allow her damages for loss of the husband's consortium would result in double recovery for the same wrong.[25] "In the first place, her husband would recover full compensation for all injuries he sustained, which includes the physical injury done to his person and the pain and mental anguish suffered, the loss of earning capacity, doctor's bills, etc., and in addition he would recover for all injuries to his 'vital organs' and for being incapacitated to care for, associate with, and protect her, as well as being deprived of his right to consort with her.... But, notwithstanding this full compensation he is supposed to have recovered and which he must expend upon her for her proper care, support, maintenance, etc., yet, if she is authorized... to recover from the defendant in this action, then she would recover from the same wrongdoer the damages she had sustained for the same injuries her husband had recovered for, and out of which, as before stated, he is legally bound to support, maintain, and care for her. This would be double compensation, which... the legislature never intended."[26] The answer to this contention is that although the husband may have been compensated for loss of consortium, the wife is not suing for the same wrong for which the husband was compensated, but rather for a separate and distinct wrong to her, which is not included in the husband's cause of action.[27]

(C. A. D. C., 1950): "There can be no doubt, therefore, that if a cause of action in the wife for the loss of *consortium* from alienation of affections or criminal conversation is to be recognized it must be predicated on a legally protected interest. Now then, may we say that she has a legally protected and hence actionable interest in her *consortium* when it is injured from one of these so-called intentional invasions, and yet, when the very same interest is injured by a negligent defendant, deny her a right of action? It does not seem so to us. Such a result would be neither legal nor logical."

[25]Giggey v. Gallagher Transp. Co., 101 Colo. 258, 72 P. (2d) 1100 (1937); Bernhardt v. Perry, 276 Mo. 612, 208 S. W. 462, 13 A. L. R. 1320 (1918); Stout v. Kansas City Terminal Ry., 172 Mo. App. 113, 157 S. W. 1019 (1913); Tobiassen v. Polley, 96 N. J. L. 66, 114 Atl. 153 (1921); Goldman v. Cohen, 30 Misc. 336, 63 N. Y. Supp. 459 (1900); Nickel v. Hardware Mutual Casualty Co., 269 Wis. 647, 70 N. W. (2d) 205 (1955); Pound, Individual Interests in the Domestic Relations (1916) 14 Mich. L. Rev. 177, 194: "The reason for not securing the interest of wife or child in these cases seems to be that our modes of trial are such and our mode of assessment of damages by the verdict of a jury is necessarily so crude that if husband and wife were each allowed to sue, instead of each recovering an exact reparation, each would be pretty sure to recover what would repair the injury to both."

[26]Bernhardt v. Perry, 276 Mo. 612, 208 S. W. 462, 466, 13 A. L. R. 1320, 1326 (1918).

[27]Kinnaird, Domestic Relations—Right of Wife to Sue For Loss of Consortium Due to a Negligent Injury to Her Husband (1947) 35 Ky. L. J. 220, 233: "... there are two separate and distinct injuries to two different people. Each is substantial. The person who negligently injures one spouse cannot avoid the result of a loss of

Perhaps the fundamental reason for the persistent adherence to the general rule long after the Married Women's Acts have destroyed its original basis is that the courts doubt that juries are competent to pass intelligently on such a speculative ground for recovery of damages.[28] To recognize a wife's cause of action for loss of consortium may be to open another avenue to fictitious claims and exorbitant awards. Juries may be swayed too greatly by sympathy for the wife and by vengeful feelings against the tort-feasor, and the courts could do little to control the size of the awards because there could be no definite rules for evaluating losses of this nature. The frequent characterization of the wife's loss of consortium as too remote and consequential and the repeated emphasis on the danger of double recovery both suggest the apprehension with which the courts view this claim.

Since these are policy considerations, it may be that the answer should come from legislation which would set maximum recovery limits, as in wongful death statutes, and revise personal injury litigation procedures to enable and require a wife to assert her claim for loss of consortium in the same suit with the husband's personal injury claims.

MERRILL C. TRADER

TRUSTS—EFFECT OF RESERVATION OF CONTROL BY DONOR ON VALIDITY AS INTER VIVOS DISPOSITION. [Illinois]

When a property owner dies, his capacity to hold his property necessarily terminates. Prior to death, he may exercise an affirmative choice as to his successor by making a will,[1] but the will is ambulatory and thus is of little value if he wishes his disposition to commence to operate at once.[2] In addition, the owner's fear of making a

consortium to the other spouse, this being an injury of prime importance, as consortium is the very essence of marriage. Such an injury should not go without redress of pecuniary reparation to the person so injured."

[28]Pound, Individual Interests in the Domestic Relations (1916) 14 Mich. L. Rev. 177, 194.

[1]The personal property of one who for any reason does not exercise an affirmative choice as to his successor passes under the statute of descent and distribution of the jurisdiction in which decedent is domiciled at the date of his death; realty passes under the similar statute of the jurisdiction of the situs of the property. Goodrich, Conflict of Laws (3rd ed. 1949) §§ 164-165. All American states have such statutes, but there is great diversity among their provisions. Atkinson, Wills (2nd ed. 1953) § 14.

[2]"A will is a revocable unilateral instrument creating no interest whatever until the death of the testator." 3 Am. Law of Property (1952) § 12.35.

will, his simple neglect to do so, or a distaste for the publicity and expense incident to probate and administration may operate to discourage or prevent the passing of property by this means. These problems may be largely solved, however, through the use of an inter vivos trust in which there is reserved to the donor the income for life, a power to revoke the instrument, and a measure of control over the trustee.[3] Although various reservations to the donor of the trust may contribute to the ease with which relations between the donor and the trustee may be adjusted, no reservation has any greater significance than a power to revoke since, so long as the power to revoke is reserved, any lesser power is perforce included.[4]

When such attempted disposition of property by inter vivos trust is made, it is sometimes attacked after the death of the donor by those who would benefit were it set aside—e.g., heirs at law, next of kin, residuary legatees or devisees under a will. The usual ground of attack is that the disposition was testamentary in nature, that there was no passage of a present interest (or that such a thin interest passed as to amount to the same thing), and that because the instrument lacks the requisite testamentary formalities it is inoperative. Such an attack was considered by the Illinois Appellate Court in the recent case of *Merchants National Bank of Aurora v. Weinold.*[5] In that case, the deceased had made a conveyance in trust to the bank, by the terms of which she had reserved to herself the income for life, the right to revoke, the right to amend the instrument, and the right to withdraw all or a part of the corpus. The deceased had also provided that during her lifetime and legal competency "the trustee should not exercise any of the powers granted without first obtaining the written consent of the settlor."[6] Although the trust instrument was not executed with the formalities required by the statute of wills,[7] it was a formal, typewritten

[3]An owner may of course achieve immediate operative effect by passing his property by deed, but as the post-conveyancing difficulties of Shakespeare's Lear convincingly illustrate, men do not often find it comfortable to be stripped of their property during life.

[4]It would always be open to the donor of a revocable trust, dissatisfied with the terms of the instrument or the management of the trustee, to revoke his trust and to execute another upon the desired terms or with a more compliant trustee.

[5]138 N. E. (2d) 840 (Ill. App. 1956).

[6]138 N. E. (2d) 840, 846 (Ill. App. 1956).

[7]"It is conceded that the trust agreement was not executed . . . in such a way as to satisfy the requirements of the statute on wills. . . ." 138 N. E. (2d) 840, 843 (Ill. App. 1956). The Illinois statute requires every will to be in writing, signed, and attested in the presence of the testator by two or more credible witnesses. Ill. Stat. Ann. (Smith-Hurd 1941) c. 3, § 194. The English Statute of Wills, 32 Henry VIII

document executed by both donor and trustee, giving to the trustee "the usual powers" and providing that powers reserved to the donor could be exercised only in writing. Upon acceptance by the bank, it was assigned a number and was administered by the bank for a number of years prior to the donor's death.

In an action brought by the bank to obtain a construction of the trust agreement, subsequent to the death of the donor, the residuary legatee under the will contended that the trust agreement was testamentary in character and therefore of no effect after the donor's death. The trial court, accepting this contention, ordered the bank as trustee to turn over to itself as executor the corpus of the trust to be administered as part of the estate of the donor.[8] But the Illinois Appellate Court reversed, holding that the trust instrument was a valid inter vivos disposition on the ground that the trust instrument did operate to pass an interest in praesenti, that the donor did not retain so much ownership as to make the trustee merely her agent, and that, in any event, "the formality of the transaction here, by which the settlor's intentions were manifested by a written, rather lengthy, trust agreement, under seal, in a solemn and formal manner... thus accomplishing the substance of the historical purpose of the statute on wills,—to prevent fraud,—is persuasive as to its validity as an inter vivos trust...."[9]

This conclusion of the Illinois court was undoubtedly in accord with the law of Illinois,[10] and with the great preponderance of recent judicial pronouncements upon the point.[11] It has long been settled that

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testation is traceable to the provisions of the statute of frauds, 29 Car. II (1677) c. 3, § V, passed 137 years later. Atkinson, Wills (2nd ed. 1953) § 3. However, American statutes on wills have, almost from the first, had provisions quite similar to that of Illinois. 1 Page, Wills (3rd ed. 1941) §235.

[8]138 N. E. (2d) 840, 842 (Ill. App. 1956).

[9]138 N. E. (2d) 840, 847 (Ill. App. 1956).

[10]Farkas v. Williams, 5 Ill. (2d) 417, 125 N. E. (2d) 600 (1955); Bear v. Millikin Trust Co., 336 Ill. 366, 168 N. E. 349 (1929); People v. Northern Trust Co., 289 Ill. 475, 124 N. E. 662, 7 A. L. R. 709 (1919); Kelly v. Parker, 181 Ill. 49, 54 N. E. 615 (1899); Massey v. Huntington, 118 Ill. 80, 7 N. E. 269 (1886). Cf. Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N. E. (2d) 75 (1944) (involving "illusory" trust doctrine).

[11]United Bldg. & Loan Ass'n v. Garrett, 64 F. Supp. 460 (W. D. Ark. 1946); Keck v. McKinstry, 206 Iowa 1121, 221 N. W. 851 (1928); Stouse v. First National Bank, 245 S. W. (2d) 914, 32 A. L. R. (2d) 1261 (Ky. 1951); Rose v. Rose, 300 Mich. 73, 1 N. W. (2d) 458 (1942); Savings Investment & Trust Co. v. Little, 135 N. J. Eq. 546, 39 A. (2d) 392 (1944); In re Ford's Estate, 279 App. Div. 152, 108 N. Y. S. (2d) 122 (1951), aff'd, 304 N. Y. 598, 107 N. E. (2d) 87 (1952); Ridge v. Bright, 244 N. C. 345, 93 S. E. (2d) 607 (1956); In re Sheasley's Trust, 366 Pa. 316, 77 A. (2d) 448 (1951); Talbot v. Talbot, 32 R. I. 72, 78 Atl. 355 (1911). Contra: Dunham v. Armitage, 97 Colo. 216, 48 P. (2d) 797 (1935). As evidencing the development in this

neither reservation of a life interest nor reservation of a power of revocation makes a trust testamentary and that reservation of both together has no greater effect in that regard.[12] It is likewise of no avail to one who would attack such an inter vivos trust as testamentary to show that the trust was made in lieu of a will or for the purpose of evading the statute of wills, or that the trust is to be terminated and distribution to be made at the death of the donor.[13] Nor will the courts find, in the ordinary case, that no interest passed, or that the interest which passed was too attenuated, merely because the donor was one of the trustees,[14] or because the donor retained the right to withdraw portions or all of the principal.[15]

Statements by respected authorities in the field of trusts and much dicta in the cases may be found, however, to the effect that the reservation of too much control in the donor will make the trustee merely the agent of the donor[16] and that such agency will, in accordance with the law of agency, terminate at the death of the donor.[17] The two

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field, cf. McEvoy v. Boston Five Cents Saving Bank, 201 Mass. 50, 87 N. E. 465 (1909), with National Shawmut Bank v. Joy, 315 Mass. 457, 53 N. E. (2d) 113 (1944). Cf. Cleveland Trust Co. v. White, 134 Ohio St. 1, 15 N. E. (2d) 627 (1938), with Central Trust Co. v. Watt, 139 Ohio St. 50, 38 N. E. (2d) 185 (1941), and Krueger v. Central Trust Co., 136 N. E. (2d) 121 (Ohio App. 1956). Cf. 1 Perry, Trusts (7th ed. 1929) 120, with 1 Scott, Trusts (2nd ed. 1956) § 57.1. But although recent years have witnessed increasing acceptance of trusts with substantial reservations of powers, there are also earlier recognitions of the validity of this method of disposition. E.g., Van Cott v. Prentice, 104 N. Y. 45, 10 N. E. 257 (1887); 1 Perry, Trusts (7th ed. 1929) §97.

[12]1 Scott, Trusts (2nd ed. 1956) 443; 1 Bogert, Trusts and Trustees (1951) 483; Note (1953) 32 A. L. R. (2d) 1270 at 1279.

[13]United Bldg. & Loan Ass'n v. Garrett, 64 F. Supp. 460 (W. D. Ark. 1946); Young v. Payne, 283 Ill. 649, 119 N. E. 612 (1918). See cases cited in Note (1953) 32 A. L. R. (2d) 1270 at 1273, n. 10.

[14]United Bldg. & Loan Ass'n v. Garrett, 64 F. Supp. 460 (W. D. Ark. 1946); Farkas v. Williams, 5 Ill. (2d) 417, 125 N. E. (2d) 600 (1955); Savings Investment & Trust Co. v. Little, 135 N. J. Eq. 546, 39 A. (2d) 392 (1944); In re Ford's Estate, 279 App. Div. 152, 108 N. Y. S. (2d) 122 (1951), aff'd 304 N. Y. 598, 107 N. E. (2d) 87 (1952).

[15]Massey v. Huntington, 118 Ill. 80, 7 N. E. 269 (1886); Stouse v. First National Bank, 245 S. W. (2d) 914, 32 A. L. R. (2d) 1261 (Ky. 1951); Krueger v. Central Trust Co., 136 N. E. (2d) 121 (Ohio App. 1956). See United Bldg. & Loan Ass'n v. Garrett, 64 F. Supp. 460, 464 (W. D. Ark. 1956). There must be a definite corpus or subject matter of the trust, but the right to withdraw principal does not preclude the existence of a definite subject matter as of any one point in time. Scott, Trusts and the Statute of Wills (1930) 43 Harv. L. Rev. 521.

[16]See Savings Investment & Trust Co. v. Little, 135 N. J. Eq. 546, 39 A. (2d) 392, 395 (1944); In re Ford's Estate, 279 App. Div. 152, 108 N. Y. S. (2d) 122, 125 (1951); 1 Bogert, Trusts and Trustees (1951) 489; 1 Scott, Trusts (2nd ed. 1956) 449 et seq. Cf. Niles, Trusts and Administration (1957) 32 N. Y. U. L. Rev. 433; Note (1956) 51 Nw. U. L. Rev. 113.

[17]Restatement, Agency (1933) §120.

relations, trust and agency, apparently grew from the same source[18] but one developed in equity and the other in law. As a result there are, today, differences in the legal incidents which attend the two relationships[19] but no determinant, save perhaps the intent of the parties,[20] by which a particular arrangement may be recognized as one or the other. When there is an attempted disposition by inter vivos trust, the intent of the parties clearly is to create a trust rather than an agency, and thus it would seem that the factor of intent would require the court to apply the label "trust." Therefore, since no other determinant may be found which requires the courts to hold that an attempted disposition by inter vivos trust is in reality an agency and accordingly fails upon the death of the donor,[21] there must be some basis for the caution of the authorities which is not to be found in abstract comparison of the two relations.

The rather typical statement that "While the courts have been extremely liberal in construing instruments inter vivos to be valid deeds and not invalid attempted wills, it is believed that they should draw a line somewhere,"[22] seems less a reason for drawing a distinction than simply a statement of a feeling that one exists and must be respected. Examination of the cases in the field suggests that *policy considerations* mark out definite classifications of trusts which fail and of trusts which will be considered valid inter vivos dispositions and will operate beyond the death of the maker of the disposition. Thus, when the effect of the inter vivos trust, if upheld, would be to deprive

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[18]"The germ of agency is hardly to be distinguished from the germ of another institution which in our English law has an eventful future before it, the 'use, trust or confidence'." 2 Pollock and Maitland, History of English Law (1895) 226.

[19]Bogert, Trusts (3rd ed. 1952) 36. Restatement, Trusts (1935) §8, comments a. to e., lists five distinctions between agency and trust: (1) a trustee has title; an agent does not; (2) an agent is subject to control; a trustee is not; (3) an agent may subject his principal to liabilities; a trustee may not; (4) agency is consensual; trust need not be; (5) agency is terminable at will or by death of a party; a trust is not. Accord, 1 Bogert, Trusts and Trustees (1951) §15; 1 Scott, Trusts (2nd ed. 1956) §8. But an agent may have title. 1 Bogert, Trusts and Trustees (1951) 69; 1 Scott, Trusts (2nd ed. 1956) 77.

[20]Hanson v. Wilmington Trust Co., 119 A. (2d) 901 at 909 (Del. Ch. 1955). "Whether a relationship of trust or of agency is created depends upon the intention of the parties." 1 Scott, Trusts (2nd ed. 1956) 77.

[21]See note 19, supra. The distinctions listed by the Restatement would seem to be consequences rather than determinants.

[22]1 Bogert, Trusts and Trustees (1951) 490. The text treatment given the subject by both Scott and Bogert gives the impression that each writer is reluctant to acknowledge that there is not a point at which a transfer in trust becomes too thin to be permitted to operate after the death of the transferor, but this writer was able to find in neither work any specific grounds for this reluctance. Cf. quotation from Scott, note 27, infra.

the spouse of her marital share, there are a number of cases which find that the whole transaction was "illusory"—that is, that it was a sham transaction which created merely an agency in the supposed trustee and that death terminated the relation and brought the property back into the estate of the donor.[23] On the other hand, few cases[24] may be found in which the trust arrangement has not been upheld when the party attacking the disposition would, if successful, be merely a volunteer—e.g., a residuary legatee.[25] The decisions also indicate, as does the instant case,[26] that the formality of the transaction is to be considered,[27] presumably for the reason that a requirement of formal-

[23]Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N. E. (2d) 75 (1944); Newman v. Dore, 275 N. Y. 371, 9 N. E. (2d) 966, 112 A. L. R. 643 (1937); In re Pengelly's Estate, 374 Pa. 358, 97 A. (2d) 844 (1953); Bickers v. Shenandoah Valley Nat. Bank, 197 Va. 145, 88 S. E. (2d) 889 (1955). Cf. Ascher v. Cohen, 131 N. E. (2d) 198 (Mass. 1956) (husband sought to break the trust). See In re Ford's Estate, 279 App. Div. 152, 108 N. Y. S. (2d) 122, 126 (1951). See Notes (1956) 13 Wash. & Lee L. Rev. 117; (1945) 157 A. L. R. 1184; (1929) 64 A. L. R. 466. "The law relating to inter vivos trusts with substantial powers retained by the settlors would probably have been settled before now if it had not been for the native American solicitude for the surviving spouse...." Niles, Trusts and Administration (1957) 32 N. Y. U. L. Rev. 433, 434. In Ohio, it has been held that the entire trust does not fail, but that the trust will be inoperative insofar as it deprives the surviving spouse of her marital share. Harris v. Harris, 147 Ohio St. 437, 72 N. E. (2d) 378 (1947); Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N. E. (2d) 381 (1944). Pennsylvania has a statute to the same effect. Pa. Stat. Ann. (Purdon 1956 Supp.) tit. 20, §301.11.

Dispositions by inter vivos trust do not necessarily avoid the burden of estate or inheritance taxes, or statutes restricting charitable devises or bequests. However, they may be of some use in accomplishing these purposes. See 1 Scott, Trusts (2nd ed. 1956) 473- 475; Note (1956) 10 Ark. L. Rev. 234.

[24]For such cases see Note (1953) 32 A. L. R. (2d) 1270, 1298. But see cases cited, notes 10 and 11, supra. See Hanson v. Wilmington Trust Co., 119 A. (2d) 901, 911 (Del. Ch. 1955); In re Ford's Estate, 279 App. Div. 152, 108 N. Y. S. (2d) 122, 127 (1951).

[25]"Volunteer.... One who holds a title under a voluntary conveyance, i.e. one made without consideration, good or valuable, to support it." Black's Law Dict. (3rd ed. 1933) 1823, 1824. "There was no attempt made by the settlor to deprive his brother and sisters, of any part of his estate, for no one of them was entitled by statute to any portion of it...." In re Ford's Estate, 279 App. Div. 152, 108 N. Y. S. (2d) 122, 127 (1951). In the principal case, a volunteer, the residuary legatee under the will of the deceased donor, was attacking the trust. Merchants Nat. Bank of Aurora v. Weinold, 138 N. E. (2d) 840 (Ill. App. 1956).

[26]See text at note 9, supra.

[27]United Bldg. & Loan Ass'n v. Garrett, 64 F. Supp. 460 (W. D. Ark. 1946); Stouse v. First National Bank, 245 S. W. (2d) 914, 32 A. L. R. (2d) 1261 (Ky. 1951); In re Sheasley's Trust, 366 Pa. 316, 77 A. (2d) 448 (1951). "In as much as the purpose of the Statute of Wills is to insure the carrying out of the considered wishes of the testator and to prevent fraudulent claims, it is believed that the decision [National Shawmut Bank v. Joy, 315 Mass. 457, 53 N. E. (2d) 113 (1944)] is sound in emphasizing the definiteness in the expression of those wishes rather than making the validity of the disposition depend upon the mere question of the extent of the powers conferred upon the trustee." 1 Scott, Trusts (2nd ed. 1956) 453.

ity protects the donor himself from an inadvertent disposition or a forgery.[28] This being the state of the law, it seems that the writers would more accurately describe the situation were they to note that the reservation of control will not avoid a transaction of this sort unless it otherwise contravenes an established public policy. An alteration to the Restatement of Trusts is even more liberal in that it provides that this type of disposition is not invalid as being testamentary, even though there be reserved to the donor "a power to control the trustee as to the administration of the trust,"[29] and even though the marital share of the spouse of the donor be thereby defeated.[30]

It may be thought that creditors of the donor of an inter vivos trust in which some incidents of ownership are reserved are prejudiced because the trust operates as a device whereby the property of their debtor is placed out of their reach. But the creditors may protect themselves in a number of ways.[31] If such a transfer be made within one year of bankruptcy, it may be set aside in bankruptcy proceedings.[32] Under the Uniform Fraudulent Conveyances Act and similar legislation, any such transfer made with intent to defraud may be set aside apart from bankruptcy.[33] The trustee in bankruptcy may exercise the donor's power to revoke or any other power which the donor might have exercised for himself.[34] Many states have statutes which may be applied when the donor is not in bankruptcy,[35] and creditors of the donor may be able to reach the corpus even at common law.[36]

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[28]St. Louis Union Trust Co. v. Dudley, 162 S. W. (2d) 290 (Mo. App. 1942); Note (1956) 51 Nw. U. L. Rev. 113. The instrument in the instant case specifically provided that revocation or other exercise of reserved rights should be in writing. Merchants Nat. Bank of Aurora v. Weinold, 138 N. E. (2d) 840 at 842-843 (1956).

[29]Restatement (2nd), Trusts, Tentative Draft No. 4 (1957) §57.

[30]Restatement (2nd), Trusts, Tentative Draft No. 4 (1957) §57, comment c.

[31]See, generally, 3 Scott, Trusts (2nd ed. 1956) §330.12. For consideration of the position of creditors of the donor of an inter vivos trust, see also, Gurnett v. Mutual Life Ins. Co., 356 Ill. 612, 191 N. E. 250 (1934); Rose v. Rose, 300 Mich. 73, 1 N. W. (2d) 458 (1942); Van Cott v. Prentice, 104 N. Y. 45, 10 N. E. 257 (1887).

[32]30 Stat. 564 (1898) (as amended), 11 U. S. C. A. §107 (d) (2) (1953).

[33]9A U. L. A. (1951) 45, et seq.

[34]30 Stat. 566 (1898) (as amended), 11 U. S. C. A. §110 (a) (3) (1953).

[35]"Where the grantor in a conveyance reserves to himself for his own benefit, an absolute power of revocation, he is still deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned." 9 N. Y. Consol. Law Serv., Real Property Law (Baker, Voorhis 1951) § 145. See 2 Scott, Trusts (2nd ed. 1956) 2411-2412, for other similar statutes.

[36]2 Scott, Trusts (2nd ed. 1956) § 58.5. Although such holdings have heretofore been confined to Totten trusts, it seems that any trust with control reserved might be similarly treated. "Even though the trust is considered as arising when the deposit [deed] is made, the depositor [donor] has such complete control over it that the situation is distinguishable from the ordinary situation where a settlor merely re-

Thus, it would seem that an inter vivos trust containing the reservations of the instrument of the principal case is not open to any serious objection for which provision has not been made in the law—creditors are adequately protected; those to whom the policy of the law gives a preferred status have been protected by the courts; the donor is protected by the formality of the trust agreement; volunteers who may indeed have been hurt are not in a position to complain. When this type of instrument is encountered in connection with a decedent's estate, the courts have not been slow to recognize that only by upholding the trust can the intent of the donor be effectuated.[37]

Although disposition by inter vivos trust may not meet fully all of the suggested requirements of the property owner,[38] it is steadily growing in popularity.[39] Apace with that growth has come judicial recognition of an instrument which meets the desires of the property owner by providing him advantages over more time-honored but less flexible modes of disposition. In upholding the trust in the principal case, the Illinois court has contributed to this healthy growth of the law.

JOHN S. STUMP

WILLS—VALIDITY AND SCOPE OF OPERATION OF "NO CONTEST" CLAUSE. [Virginia]

The law sets up various safeguards to avoid a disposition of a decedent's estate under the terms of a purported will which in fact does not truly reflect the disposing intent of the decedent. But though these

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serves a power of revocation. In substance the deposit [corpus] belongs to him as long as he lives, and it is only just to permit his creditors to reach it." 1 Scott, Trusts (2nd ed. 1956) 497.

[37]"We ought not to put the creator of the trust in the attitude of deliberately nullifying his own evident purpose. That he meant to create an effective trust is beyond all question; and a construction which makes him destroy in the very effort to create, should not prevail if there be any other rational interpretation." Van Cott v. Prentice, 104 N. Y. 45, 10 N. E. 257, 260 (1887).

[38]For an excellent study of the various methods for meeting the requirements of the donor, see Stephenson, Drafting Wills and Trust Agreements—Administrative Provisions (1952) §15.

[39]It has been noted that trust assets of national banks grew from $19.4 billion in 1947 to $43.1 billion in 1953 to $47.9 billion in 1954. Note (1956) 51 Nw. U. L. Rev. 113, citing Comptroller of Currency annual reports. The same source notes that Illinois, the jurisdiction of the instant case, "has long sustained trusts where the settlor reserves use and control" and that "It may be of signifigance that . .. the number and value of living trusts in Illinois far exceed those of any other state." In 1953, Illinois had 29,705 living trusts "worth $1.2 billion, whereas New York had 4,199 "worth" $.89 billion. Note (1956) 51 Nw. U. L. Rev. 113, 122.

provisions are designed to prevent fraud, imposition, and mistake, a testator occasionally tries to neutralize their effect by providing that any beneficiary of the will who attempts to contest its validity shall lose his benefits. The courts, recognizing the anomaly of permitting a testator to discourage his legatees and devisees from asserting the rights which the law provides for them, have sometimes imposed restrictions on the operation of these "no contest" clauses.[1]

Traces of the uncertainty as to the scope of these restrictions were evidenced in the recent Virginia case of *Womble v. Gunter*.[2] The testator had left all his property to his ten living children and numerous grandchildren, with the proviso that any of the legatees or devisees who contested the will should forfeit all benefits under the will, and that if all the legatees or devisees should join in a contest, the testator's entire estate should go to the Christ Episcopal Church of Eastville. In violation of this "no contest" clause, all of the legatees and devisees attacked the will on grounds of the testator's mental incompetency, but the validity of the will was sustained. Subsequently, the executors brought the present action for a determination of the rights of all of the interested parties named in the will. Facing a case of first impression in the state, the Supreme Court of Appeals followed the generally accepted view that "no contest" clauses are valid, and therefore held that the contesting legatees and devisees had fortified their benefits under the will. The controlling principle was stated to be: "The normal freedom of the owner to dispose of his property as he sees fit should not be curtailed unless the disposition violates some rule of law or is against public policy. Where the language is clear and unambiguous, it is the duty of the court to give force and effect to the intention expressed by the testator and carry out the objects desired by him in disposing of his property."[3] While no ground was

[1]Moran v. Moran, 144 Iowa 451, 123 N. W. 202, 206 (1909): "In this country, however, we find no authority going to the extent of holding that a testator may not under any circumstances impose upon the acceptance of his bounty a valid condition against attack upon his will by the legatee.... [S]ome courts incline to the view that such conditions are valid only in cases where the testator names some third person to receive the legacy in event of a breach of the condition by the legatee first named. Others sustain all such conditions attached to devises of real estate, but hold there must be a gift over upon its breach in order to make valid a condition of the same kind attached to a bequest of personalty. A few courts have held the condition inoperative where the beneficiary has probable cause for the contest of the will, while still others reject all these distinctions as arbitrary, and hold the condition valid and enforceable in all cases, whether the gift be of realty or personalty, and without regard to the cause or ground of contest."

[2]198 Va. 522, 95 S. E. (2d) 213 (1956).

[3]Womble v. Gunter, 198 Va. 522, 532, 95 S. E. (2d) 213, 220 (1956).

found for denying the testator's right to provide for the forfeiture, this case may be more notable for its dicta than for its actual holding. The court found it unnecessary to pass on two issues on which substantial difference of judicial opinion exists: Whether a "no contest" clause is valid where no gift over is provided for in the event of a forfeiture resulting from an unsuccessful contest, and whether the clause should be held inoperative as against a beneficiary who contests the will in good faith and on probable cause. The existence of a gift over in the will under consideration made the first question irrelevant, and the failure of the beneficiaries to raise the second issue in the trial court rendered it an improper point for decision on appeal, although the court did indulge in a lengthy dictum on the subject.[4]

In the large majority of decisions passing on the validity of "no contest" provisions in wills, the clauses are upheld.[5] They are given the effect of conditions subsequent[6]—that is, if one unsuccessfully contests a will in violation of the condition not to contest, there is a forfeiture of the interest which was vested in the attacker by operation of the will.[7] Of course, if the will is successfully contested, the condition falls with the will, and the testator's property passes as though he had died intestate.[8]

In the principal case, the Virginia court sanctioned the enforceability of "no contest" clauses, even to the extent of making the forfeiture effective against the infant beneficiaries. The argument that the "no contest" provision should not be enforced against infant bene-

[4]See Womble v. Gunter, 198 Va. 522, 525-528, 95 S. E. (2d) 213, 216-218 (1956). These problems are discussed at a later point in this comment.

[5]Smithsonian Institution v. Meech, 169 U. S. 398, 18 S. Ct. 396, 42 L. ed. 793 (1898); In re Miller, 156 Cal. 119, 103 Pac. 842, 23 L. R. A. (N.S.) 868 (1909); South Norwalk Trust Co. v. St. John, 92 Conn. 168, 101 Atl. 961 (1917); Rudd v. Searles, 236 Mass. 490, 160 N. E. 882, 58 A. L. R. 1548 (1928); Whitehurst v. Gotwalt, 189 N. C. 577, 127 S. E. 582 (1925); In re Friend's Estate, 209 Pa. 442, 58 Atl. 853, 78 L. R. A. 447 (1904); Tate v. Camp, 147 Tenn. 137, 245 S. W. 839, 26 A. L. R. 755 (1922).

[6]Schiffer v. Brenton, 257 Mich. 512, 226 N. W. 253, 254 (1929): "... in the main the discussions are well nigh unanimous that such conditions in wills are valid and that they are conditions subsequent and enforceable."

[7]If there is a gift over, the property which was the subject of the bequest or devise would naturally go to the person or persons named in the gift over provision; but if there is no gift over, in those jurisdictions holding a "no contest" provision enforceable, the property would go into the general residuum of the estate. Bradford v. Bradford, 19 Ohio St. 546, 548, 2 Am. Rep. 419, 421 (1869): "We think, then, that the court below did not err in holding this condition to be valid, and that upon its breach the plaintiff's legacy would pass to the general residuary legatees named in the will, without express words to that effect."

[8]Atkinson, Wills (1937) 357.

ficiaries has been accepted by a New York court, on the ground that it would be against public policy to bind an infant because the courts are under a duty to act for infants, and the state should not permit this duty to be frustrated by a "testamentary paper" imposing a forfeiture on wards of the courts.[9] However, since, as even the New York Court recognized, a suit brought by a guardian in the name of and for the benefit of his ward binds the ward as though he were of full age, the principal case ruling, based on that premise, may be more sound.[10] These views cannot be reconciled, as they approach the problem from divergent angles; however, following logically the law of infancy, the Virginia court's reasoning seems preferable. A Kentucky probate court hit upon an effective means of forestalling a forfeiture against an infant beneficiary by the simple expedient of refusing to allow a contest to be made by the infant's next friend. This preventive ruling was held not to be an abuse of the court's discretionary power to control guardians acting for their wards.[11]

One factor which may result in qualification of the general rule is the testator's failure to provide for a gift over upon the breach of the condition. The basis for this qualification seems to be entirely historical.[12] In early English law legacies were enforced in the ecclesiastical courts and devises in the law courts. Unfortunately, two separate rules grew up. The ecclesiastical courts followed the civil law rule that a condition in a will, unless it was accompained by a gift over, was *in terrorem* and acted merely as a threat, not as an expression of the intention of the testator to cut off the legatee.[13] The common law courts, however, established their own rule that these conditional devises were valid without regard to the presence of a gift over provision. This distinction between the law as applied to personalty and realty

[9]Bryant v. Thompson, 59 Hun. 545, 14 N. Y. Supp. 28, appeal dismissed, 128 N. Y. 426, 28 N. E. 522 (1891).

[10]Womble v. Gunter, 198 Va. 522 at 530-532, 95 S. E. (2d) 213 at 219-220 (1956).

[11]Moorman v. Louisville Trust Co., 181 Ky. 30, 203 S. W. 856 (1918).

[12]Note (1930) 67 A. L. R. 52 at 60.

[13]Morris v. Burroughs, 1 Atk. 399, 26 Eng. Rep. 253 at 256 (1937). The *in terrorem* doctrine states that when there is no gift over specified in the event of violation of a "no-contest" provision, the forfeiture provision has the effect only of a threat and does not work to divest the grantee of his bounty granted under the will, as it was not the intention of the testator to deprive the legatee of his interest, but merely to discourage contests. In Rouse v. Branch, 91 S. C. 111, 74 S. E. 133 at 134 (1912), it is stated that various reasons are given for requiring a gift over. One reason is that it manifests a clear intention that the "no contest" provision is not a mere threat. Another is that the naming of a devisee over creates a real interest in that devisee to which the gift attaches.

is still alive today in some jurisdictions,[14] although the majority of the courts have repudiated it and apply the common law rule to testamentary dispositions of both realty and personalty.[15] There appears to be no reason for the continuance of this distinction, and the courts still adhering to it are merely clinging to outdated precedent.[16]

The principal case, while not passing on this issue, seems to have rendered the law of Virginia even more uncertain than it had been previously. The only decision which has been found in point was the 1897 case of *Fifield v. Van Wyck's Ex'r,* in which the court declared, seemingly as part of its holding: "It must, therefore, be regarded as settled that such conditions ["no contest" provisions] are merely *in terrorem,* and inoperative, when annexed to bequests of personal estate, where there is no gift over upon breach of the condition."[17] However, in the principal case this statement was rather summarily classified as mere dictum, and the question was said still to be an open one in Virginia.[18] Thereafter, the court noted, with apparent approval, that

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[14]In re Fox, 114 Misc. 368, 186 N. Y. Supp. 257 (1921): In re Arrowsmith, 162 App. Div. 623, 147 N. Y. Supp. 1016 (1914), aff'd, 213 N. Y. 204, 108 N. E. 1088 (1915); Rouse v. Branch, 91 S. C. 111, 74 S. E. 133 (1912); Fifield v. Van Wyck's Ex'r, 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745 (1897). For general discussion see Note (1930) 67 A. L. R. 59-64.

[15]Smithsonian Institution v. Meech, 169 U. S. 398, 18 S. Ct. 396, 42 L. ed. 793 (1898); In re Hite's Estate, 155 Cal. 436, 101 Pac. 443, 21 L. R. A. (N. S.) 953 (1909); South Norwalk Trust Co. v. St. John, 92 Conn. 168, 101 Atl. 961 (1917); Moran v. Moran, 144 Iowa 451, 123 N. W. 202 (1909); Bradford v. Bradford, 19 Ohio St. 546, 2 Am. Rep. 419 (1869); Atkinson, Wills (1937) 357; 3 Page, Wills (1941) §819.

[16]Note (1930) 67 A. L. R. 52 at 59.

[17]94 Va. 557, 563, 27 S. E. 446, 448, 64 Am. St. Rep. 745, 749 (1897).

[18]Womble v. Gunter, 198 Va. 522, 524, 95 S. E. (2d) 213, 216 (1956). It is believed that the court in the principal case erred in considering the Fifield statement to be mere dictum. The case of Fifield v. Van Wyck's Ex'r, 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745 (1897), arose when Old, the executor of L. M. Van Wyck, deceased, asked for construction of various clauses in the will and for determination of the validity of the residuary bequest. The lower court decreed the residuary bequest valid. Apparently E. E. Van Wyck, together with other heirs and legatees, took under the will what was bequeathed to them by its terms, and then Van Wyck appealed the lower court's decision construing the will. Appellees contended that the beneficiaries had no right to appeal. One argument made by appellees was that the beneficiaries, having accepted payment of their gifts under the specific bequests of the will, were estopped from contesting the residuary clause—i.e., that they could not take advantage of the beneficial provisions and repudiate the disadvantageous provision. The court here ruled that there was no inconsistency in the actions of appellants, since the residuary clause could be held invalid without affecting the validity of the specific bequests. Appellees also argued that there being a "no contest" clause, the beneficiaries were estopped from questioning the validity of the will because they could not first accept the bequests and then later bring a suit which would make the "no contest" clause operate to cause a forfeiture of those bequests. The court ruled in answer to this contention that "no contest" clauses are merely in terrorem and inoperative when annexed to bequests of personalty when

"In most jurisdictions the distinction between such a conditional gift of realty and personalty with no gift over and one with gift over has been disregarded."[19]

A number of courts impose a much more significant restriction on the effect of the "no contest" clause by refusing to allow a forfeiture under the clause as against one who has contested the will in good faith and on probable cause.[20] The majority of the courts, refusing to make this concession,[21] have reasoned that a will, being the expression of the intention of the testator, should be construed so as to reflect that intent.[22] Since he is under no obligation to make any gifts, it is said that anyone accepting his bounty should be required to receive it subject to any reasonable condition attached. Further, it is argued that recognition of this restriction on the effect of the "no

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there is no sufficient gift over as in this case. Thus, the "no contest" clause here did not cause a forfeiture of the bequests and payment of the bequests did not violate any term of the will. If appellees had only raised the first argument, the court would not have had to rule on the second, and statements concerning the second argument would have been mere dictum; but since appellees did raise the scond argument against the right of appellants to appeal, the court's ruling on it cannot be considered dictum.

[19]Womble v. Gunter, 198 Va. 522, 525, 95 S. E. (2d) 213, 216 (1956).

[20]In re Cocklin's Estate, 236 Iowa 98, 17 N. W. (2d) 129, 157 A. L. R. 584 (1945); In re Estate of Hartz v. Cade, 247 Minn. 362, 77 N. W. (2d) 169 (1956); In re Kirkholder's Estate, 171 App. Div. 153, 157 N. Y. Supp. 37 (1916); Ryan v. Wachovia Bank & Trust Co., 235 N. C. 585, 70 S. E. (2d) 853 (1952); Wadsworth v. Brigham, 125 Ore. 428, 259 Pac. 299 (1927); In re Friend's Estate, 209 Pa. 442, 58 Atl. 853 (1904); Rouse v. Branch, 91 S. C. 111; 74 S. E. 133 (1912); Tate v. Camp, 147 Tenn. 137, 245 S. W. 839, 26 A. L. R. 755 (1922); In re Chappell's Estate, 127 Wash. 638, 221 Pac. 336 (1923); Dutterer v. Logan, 103 W. Va. 216, 137 S. E. 1, 52 A. L. R. 83 (1927); In re Keenan's Will, 188 Wis. 163, 205 N. W. 1001, 42 A. L. R. 836 (1925).

[21]Smithsonian Instutition v. Meech, 169 U. S. 398, 18 S. Ct. 396, 42 L. ed. 793 (1898); Donegan v. Wade, 70 Ala. 501 (1881); In re Kitchen, 192 Cal. 384, 220 Pac. 301, 30 A. L. R. 1008 (1923); In re Miller's Estate, 156 Cal. 119, 103 Pac. 842, 23 L. R. A. (N. S.) 868 (1909); Moran v. Moran, 144 Iowa 451, 123 N. W. 220 (1909) [overruled by In re Cocklin's Estate, 236 Iowa 98, 17 N. W. (2d) 129, 157 A. L. R. 584 (1945)]; Rudd v. Searles, 262 Mass. 490, 160 N. E. 882, 58 A. L. R. 1548 (1928); Schiffer v. Brenton, 247 Mich. 512, 226 N. W. 253 (1929); Rossi v. Davis, 345 Mo. 362, 133 S. W. (2d) 363, 125 A. L. R. 1111 (1939); Provident Trust Co. v. Osborne, 133 N. J. Eq. 518, 33 A. (2d) 103 (1943); In re Cronin's Will, 143 Misc. 559, 257 N. Y. Supp. 496 (1932); Bender v. Bateman, 33 Ohio App. 66, 168 N. E. 574 (1929). It is to be noted that the lower courts of New York have seemingly resolved this question differently at different times. With the Cronin case, supra, compare In re Kirkholder's Estate, 171 App. Div. 153, 157 N. Y. Supp. 37 (1916).

[22]Smithsonian Institution v. Meech, 169 U. S. 398, 415, 18 S. Ct. 396, 402, 42 L. ed. 793, 800 (1898): "Experience has shown that often after the death of a testator unexpected difficulties arise, technical rules of law are found to have been trespassed upon, contests are commenced wherein not infrequently are brought to light matters of private life that ought never to be made public, and in respect to which the voice of the testator cannot be heard either in explanation or denial, and as a result the manifest intention of the testator is thwarted."

contest" clause encourages will contests which frequently engender family animosities and split family ties asunder.[23] The courts have also reasoned that since the state is not interested in who receives the benefits under a will, there is no public policy which supports the recognition of a duty upon an heir to contest a will.[24] Finally, any rule which increases the likelihood of will contests is said to be inconsistent with the law's abhorrence of litigation.[25]

As appealing as these reasons may be at first glance, they have the common fault of ignoring the import of the statutes adopted in all states governing how, by whom, and by what method a will may be made. The courts should be open to those who have reasonable grounds for investigating the circumstances surrounding the making of a will to determine whether it was executed in conformance with these various statutes. These circumstances must be discovered, if at all, from those who are closest to the testator and who would be in the best position to know them.[26] Thus, in the interest of enforcing the public policy as established by the wills statutes, one contesting a will in good faith and for probable cause should not be penalized by having his legacy forfeited in the event his claim is not allowed.[27] While the state

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[23]Rudd v. Searles, 262 Mass. 490, 160 N. E. 882 at 886, 58 A. L. R. 1548 at 1555 (1928).

[24]Cooke v. Turner, 14 Sim. 493, 502, 60 Eng. Rep. 449, 453 (1845): "There is no duty, either perfect or imperfect, on the part of an heir to contest his ancestor's sanity. It matters not to the State whether the land is enjoyed by the heir or by the devisee...." Also, Rudd v. Searles, 262 Mass. 490, 160 N. E. 882 at 886 (1928); Rossi v. Davis, 345 Mo. 362, 133 S. W. (2d) 363 at 372 (1939).

[25]In re Hite's Estate, 155 Cal. 436, 101 Pac. 443 at 444, 21 L. R. A. (N. S.) 953 at 956 (1909); Schiffer v. Brenton, 247 Mich. 512, 226 N. W. 253 at 255 (1929); 57 Am. Jur., Wills §1512.

[26]Note (1920) 7 Va. L. Rev. 64 at 65.

[27]Note (1920) 7 Va. L. Rev. 64, 66: "The tendency of this [virtual compelling to silence those who could bring before the court matters vital to the validity of a will] would be to suppress material facts, and thus impede the administration of the law according to its true spirit.... The law guarantees that no instrument shall be deemed the will of the purported testator until a judicial investigation and determination of such fact be first had. This is the protection of the law to the dead and to his estate, as well as to the living. From the very nature of the case, the testator cannot waive or forbid it, or make it the basis for a penalty or forfeiture. Why, then, should he be allowed to speak through an instrument that cannot be investigated, for the investigation before a court is virtually forbidden?" In re Cocklin's Estate, 236 Iowa 98, 17 N. W. (2d) 129, 157 A. L. R. 584 (1949); Rouse v. Branch, 91 S. C. 111, 74 S. E. 133, 134 (1912): "It is in the interest of the state that every legal owner should enjoy his estate, and that no citizen should be obstructed, by the risk of forfeiture, from ascertaining his rights by the law of the land.... [I]t is against the fundamental principles of justice and policy to inhibit a party from ascertaining his rights by appeal to the tribunals established by the state to settle and determine conflicting claims." 57 Am. Jur., Wills § 1512.

may not care who receives the benefits of a will, it is interested in preventing wills from taking effect unless they were executed in accordance with the safeguards set up by the legislature to insure that a will truly expresses the testator's wishes as to the disposition of his estate. Though the law abhors litigation, the courts should be as readily available to a will contestant as to anyone else who, with substantial reason, honestly believes that his rights are being infringed.[28] Moreover, refusal to recognize the good faith and probable cause restriction on the validity of "no contest" provisions affords a cover to persons of evil design who seek to make themselves beneficiaries of a will by fraud, undue influence, forgery or other criminal means.[29] By including a "no contest" clause in an apparently valid will produced by such illegal means, the wrongdoer may be able to coerce the legitimate beneficaries not to attack a will which they suspect to be invalid.[30]

An intermediate view has been espoused by a few authorities who favor a more limited qualification to the strict enforcement of forfeitures under "no contest" clauses. This view enforces the forfeiture unless the grounds for contest are those which may be said to be peculiarly within the ambit of public policy—forgery and the claim of subsequent revocation by a later will.[31] It is said that the public has an

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[28]Ryan v. Wachovia Bank & Trust Co., 235 N. C. 585, 70 S. E. (2d) 853, 856 (1952): "In our opinion, a bonafide inquiry whether a will was procured through fraud or undue influence, should not be stifled by any prohibition contained in the instrument itself. In fact, our courts should be as accessible for those who in good faith and upon probable cause seek to have the genuineness of a purported will determined, as they are to those who seek to find out the intent of a testator in a will whose genuineness is not questioned."

[29]South Norwalk Trust Co. v. St. John, 92 Conn. 168, 101 Atl. 961 at 963 (1917).

[30]In Chief Justice Evans' dissenting opinion in Moran v. Moran, 144 Iowa 451, 123 N. W. 202, 208 (1909), the suppression of facts from the court by the coercive effect of the "no contest" clause was likened to a lion in the highway of justice. See dissent in Barry v. American Security & Trust Co., 77 U. S. App. D. C. 351, 135 F. (2d) 470, 473, 146 A. L. R. 1204, 1208 (1943): "However, I doubt the wisdom of closing the door completely to contests calculated to reveal the use of fraud, coercion and undue influence in procuring the execution of wills. It seems to me that public policy may be well served by keeping the door a little open for some extreme situations, as where one person or a group of heirs conspire to shut out another; or, perhaps, to prevent the probate of an earlier will containing a bequest for charitable purposes. The object of an *in terrorem* clause may be to protect the family reputation, but it may be to silence a legatee who, otherwise, would be a material witness."

[31]Restatement, Property (1944) § 428 provides that "no contest" provisions are valid and enforceable except where the contest is "based upon a claim of forgery or upon a claim of subsequent revocation by a later will or codicil, provided there was probable cause for the making of such contest." See Barry v. American Security & Trust Co., 77 U. S. App. D. C. 351, 135 F. (2d) 470, 472, 146 A. L. R. 1204, 1207

interest in discovering whether the particular will represents the decedent's intention, and more specifically, his last intention, as to the disposition of his property.[32] However, the proper basis for this distinction seems not to be that these two grounds for contest are more within the realm of public policy, but rather that the question of good faith and probable cause of one contesting on these grounds can be resolved with greater assurance, since forgery and revocation are matters more susceptible of definite and tangible proof than are such grounds as lack of testamentary capacity, fraud, or undue influence, which often turn on more uncertain evidence. Although this view does not accept the probable cause qualification in its full effect, its advocates nevertheless do recognize the injustice of the strict rule requiring a forfeiture of any violation of the "no contest" clause.

It must be conceded that adoption of the good faith and probable cause qualification creates difficult problems of determining whether the contestants acted in good faith and with probable cause. However, the difficulty of application of a rule is not a proper ground for rejecting one rule in favor of another which is, though easier to apply, more likely to produce injustice. The Pennsylvania court has provided a reasonable formula for the determination of close cases: "If it is not clear, or it is doubtful whether there was probable cause, the will of the testator should be regarded as supreme, and his direction to forfeit carried out. A disappointed beneficiary under a will is to be encouraged to make a contest to set it aside, and when he does so, in the face of notice from the testator that he shall have nothing if he attempts to strike down his provisions, he must understand the imminent risk he runs."[33]

The principal case, while not passing on the problem of good faith and probable cause as an exception to holding "no contest" clauses valid, seems to favor the absolute validity rule. While the probable cause view and the intermediate view were merely stated in the opinion, the absolute validity rule was discussed at length and a long list of supporting authority was cited.[34] Also, the court quoted

(1943): "A contest on the ground of forgery or subsequent revocation neither of which is here involved, would seem to stand on a different footing from the ordinary contest based on defective execution, mental incapacity or undue influence." See also In re Bergland's Estate, 180 Cal. 629, 182 Pac. 277, 279, 5 A. L. R. 1363, 1367 (1919); In re Kirkholder's Estate, 171 App. Div. 153, 157 N. Y. Supp. 37, 39 (1916); Rouse v. Branch, 91 S. C. 111, 74 S. E. 133, 135 (1912).

[32]Restatement, Property (1944) § 428, comment (a).

[33]In re Friend's Estate, 209 Pa. 442, 58 Atl. 853, 855 (1904).

[34]Womble v. Gunter, 198 Va. 522 at 527, 95 S. E. (2d) 213 at 217 (1956).

with apparent approval a portion of a Massachusetts decision applying the absolute validity rule and especially emphasizing as a proper reason for such a rule the family animosities sometimes engendered by will contests.[35] No other Virginia Court of Appeals case has been found relating to this specific issue, but a Virginia trial court in a 1955 case declared that the better reasoned decisions hold a "no contest" clause in a will unenforceable where the contest has been made with good faith and upon probable cause.[36]

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[35]Womble v. Gunter, 198 Va. 522 at 527, 95 S. E. (2d) 213 at 217 (1956). It was noted that in the situation giving rise to the principal case, family ties had been strained to the breaking point.

[36]Parsons v. Beach, Hustings Court of the City of Petersburg, Va., Pollard, J., April 1955, reported in 3 Va. Bar News No. 7, p. 5, Aug. 1955. The judge asserted: "I am firmly of the opinion that this rule will be adopted by the Supreme Court of Appeals of Virgina when and if the question is presented to the court."