



Fall 9-1-1949

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Recommended Citation

Domestic Relations-Liability Of Estate Of Deceased Husband For Support Of Children Under Divorce Decree, 6 Wash. & Lee L. Rev. 208 (1949).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol6/iss2/8>

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CASE COMMENTS

CONSTITUTIONAL LAW—ENFORCEABILITY OF RACIAL RESTRICTIVE COVENANTS BY COURT ACTION. [United States Supreme Court]

In the year that has passed since *Shelley v. Kraemer*¹ was decided, a flood of comment has evidenced the sharp reaction of the legal and business world to the decision that judicial enforcement of racial restrictive covenants violates the Constitution. With the better perspective gained through the passage of time, analysis of the decisions and evaluation of the comments become less speculative, though, of course, all the various ramifications of the controversy cannot yet be envisioned.

Though a lower federal court had held in 1892 that racial restrictive covenants were invalid as an attempt to achieve by contract a "result inhibited by the constitution,"² this decision has been regularly ignored or distinguished by later courts. By the time the *Shelley* case was decided, nineteen states and the District of Columbia had held such covenants valid and enforceable.³

Nevertheless, the ruling that "in granting judicial enforcement of

¹334 U. S. 1, 68 S. Ct. 836, 92 L. ed. 1161 (1948). The Supreme Court of Missouri upheld a covenant which imposed restrictions against ownership, or occupancy by Negroes or Mongolians. *Kraemer v. Shelley*, 355 Mo. 814, 198 S. W. (2d) 679 (1946). In the companion case of *McGhee v. Sipes*, 334 U. S. 1, 68 S. Ct. 836, 92 L. ed. 1161 (1948), the Supreme Court of Michigan had enforced a covenant providing that certain property should not be used or occupied by Non-Caucasians. *Sipes v. McGhee*, 316 Mich. 614, 25 N. W. (2d) 638 (1947).

²*Gandolfo v. Hartman*, 49 Fed. 181, 182 (C. C. S. D. Cal. 1892). The deed provided that the property was never to be rented to a Chinaman. The court did not rely upon discrimination expressed in the contract but on the judicial enforcement of the restriction. The covenants were held to be invalid on additional grounds of public policy and in violation of our treaty with China.

For an attack on the Supreme Court for not recognizing the United Nations Law in the *Shelley* case, see Sayre, *Shelley v. Kraemer and United Nations Law* (1948) 34 Iowa L. Rev. 1. For the international aspects of the principal case, see Kiang, *Judicial Enforcement of Restrictive Covenants in the United States* (1949) 24 Wash. L. Rev. 1, 18.

³Lowe, *Racial Restrictive Covenants* (1948) 1 Ala. L. Rev. 15, 24, n. 40; Note (1946) 40 Ill. L. Rev. 432, n. 3. For an excellent discussion of the problems involved in racial restrictive covenants and for the state of law prior to *Shelley v. Kraemer*, see McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional* (1945) 33 Calif. L. Rev. 5. These restrictive devices may be attributed in large part to the migration of colored people to urban centers. See, Nassau, *Racial Restrictions on the Alienation and Use of Land* (1947) 21 Conn. B. J. 123.

the restrictive agreements . . . the States have denied [the negro purchasers] the equal protection of the laws,"⁴ though it came with unexpected suddenness in *Shelley v. Kraemer*, was not a radical departure from earlier positions taken by the Supreme Court. In 1917, *Buchanan v. Warley* held that racial segregation or racial zoning by statute or city ordinance is unconstitutional because "The Fourteenth Amendment and . . . statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color."⁵ It has been observed that the *Shelley* case "adds nothing to *Buchanan v. Warley* as authority for a claim that all forms of segregation under state authority are unconstitutional."⁶

However this may be, the issue of whether enforcement of racial restrictive covenants by state courts is a violation of the Equal Protective Clause had never been squarely presented to the Supreme Court prior to 1948. *Corrigan v. Buckley*,⁷ decided in 1926, though often cited by state courts as settling this constitutional issue,⁸ "could not and did not settle anything about the application of the Fourteenth Amendment to the states, for the case came to the Supreme Court on appeal from a court in the District of Columbia and involved a question of the law of the District, to which the Fourteenth Amendment has no application."⁹ The Court dismissed the appeal for lack of jurisdiction, and indicated that it was not passing upon the merits of the case.¹⁰

⁴*Shelley v. Kraemer*, 334 U. S. 1, 20, 68 S. Ct. 836, 845, 92 L. ed. 1161, 1184 (1948).

⁵245 U. S. 60, 79, 38 S. Ct. 16, 19, 62 L. ed. 149, 162 (1917). The rapid growth of racial restrictive covenants is usually attributed to this decision. See McGovney, Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional (1945) 33 Calif. L. Rev. 5, and Kahan, Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem (1945) 12 U. of Chi. L. Rev. 198.

⁶Note (1948) 46 Mich. L. Rev. 978, 979.

⁷271 U. S. 323, 46 S. Ct. 521, 70 L. ed. 969 (1926).

⁸*United Cooperative Realty Co. v. Hawkins*, 269 Ky. 563, 108 S. W. (2d) 507, 508 (1937); *Meade v. Dennistone*, 173 Md. 295, 196 Atl. 330, 333 (1938); *Ridgway v. Cockburn*, 163 Misc. 511, 514, 296 N. Y. Supp. 936, 942 (1937); *Lyons v. Wallen*, 191 Olka. 567, 133 P. (2d) 555, 558 (1942); *Doherty v. Rice*, 240 Wis. 389, 3 N. W. (2d) 734, 737 (1942).

⁹McGovney, Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional (1945) 33 Calif. L. Rev. 5, 6. Cf. *Shelley v. Kraemer*, 334 U. S. 1, at 8-9, 68 S. Ct. 836, at 839-840, 92 L. ed. 1161, at 1178 (1948).

¹⁰271 U. S. 323, 332, 46 S. Ct. 521, 524, 70 L. ed. 969, 973 (1926). The United States Court of Appeals of the District of Columbia held, that by the land law of the District a restriction against sale to any member of a specified race is a lawful restraint on alienation. 299 Fed. 899 (1924).

But while the Court had never before given a direct answer to the exact question of *Shelley v. Kraemer*, it has long been recognized that "The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the State"¹¹ within the meaning of the Fourteenth Amendment. Chief Justice Vinson, writing for the Court in the *Shelley* case calls attention to the fact that "the examples of state judicial action which have been held by this Court to violate the Amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process."¹²

It was only a short further step for the Court to determine that though "the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed . . . by the Fourteenth Amendment,"¹³ yet when the states made available "the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights . . .,"¹⁴ then "the States have denied petitioners the equal protection of the laws . . ."¹⁵ But the query has been raised: ". . . in holding that state action is violative of the equal protective clause, must it not also be shown that state action is what wrought the discrimination? . . . In the cases relied upon by the Supreme Court as constituting state action by courts, . . . the action of the *court itself* was discriminatory. In the *Shelley* case, however, the only discrimination was that of the parties—and that was lawful."¹⁶ The ultimate result is said to be "a legitimate, constitutional contract which is unenforceable on constitutional grounds—literally a contradiction in terms—an anomalous situation!"¹⁷

¹¹*Twining v. New Jersey*, 211 U. S. 78, 90-91, 29 S. Ct. 14, 16, 53 L. ed. 97, 102 (1908).

¹²334 U. S. 1, 17, 68 S. Ct. 836, 844, 92 L. ed. 1161, 1182 (1948).

¹³*Shelley v. Kraemer*, 334 U. S. 1, 13, 68 S. Ct. 836, 842, 92 L. ed. 1161, 1180 (1948).

¹⁴334 U. S. 1, 19, 68 S. Ct. 836, 845, 92 L. ed. 1161, 1183 (1948).

¹⁵334 U. S. 1, 20, 68 S. Ct. 836, 845, 92 L. ed. 1161, 1184 (1948).

¹⁶Walker, *Judicial Enforcement of Racial Restrictive Covenants—The Spurious Expansion of "State Action"* (1948) 49 Va. B. A. Rep. 231, 242; Cf. Note (1947) 45 Mich. L. Rev. 733, 747.

¹⁷Walker, *Judicial Enforcement of Racial Restrictive Covenants—The Spurious Expansion of "State Action"* (1948) 49 Va. B. A. Rep. 231.

The importance of the *Restrictive Covenant* cases in their effect upon housing,¹⁸ segregation as a governmental policy,¹⁹ and the aforementioned concept of what constitutes state action²⁰ will be indisputably great, even though one authority has argued that the "... practical consequences in the immediately foreseeable future will be small."²¹ That the decisions may lead to repudiation of cases that have heretofore sustained legislation providing for segregation in transportation facilities, hotels, restaurants, parks, churches and theatres, is also possible.²²

¹⁸"The immediate effect of the decisions will be to prevent federal and state housing agencies from requiring or respecting judicial covenants in subsidized housing and will do much to open a potentially huge housing market." Note (1948) 22 Temple L. Q. 138, 139.

¹⁹"The significance of Racial covenants is said to be such that if these private restrictive agreements were not enforceable, segregation in the North would be nearly doomed and segregation in the South would be set back slightly." Clark and Perlman, *Prejudice and Property* (1948) 27. "It does mean, however, a possible end to last vestiges of legalized segregation in Northern states." Note (1948) 22 Temple L. Q. 138, 140.

²⁰The "tenuous distinction between direct and indirect state action" may be destroyed. Note (1948) 48 Col. L. Rev. 1241, 1245. "Until the recent pressure, partly exerted by the executive department, perhaps for political reasons for the sociological changes reflected in the Shelley case, but few persons, if any, had seriously entertained the idea that a state court enforcement of a valid private contract was 'state action' of the kind contemplated by the Fourteenth Amendment." Walker, *Judicial Enforcement of Racial Restrictive Covenants—The Spurious Expansion of "State Action"* (1948) 49 Va. B. A. Rep. 231, 243. But see McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional* (1945) 33 Calif. L. Rev. 5. Cf. Note (1947) 45 Mich. L. Rev. 733, 747.

²¹Frank, *The United States Supreme Court: 1947-48* (1948) 16 U. of Chi. L. Rev. 1, 22. However, many states have already refused to enforce racial restrictive covenants on the authority of *Shelley v. Kraemer*; *Claremont Improvement Club v. Buckingham*, 200 P. (2d) 47 (Cal. App. 1948); *Clayton v. Wilkins*, 197 P. (2d) 162 (Cal. 1948); *Cummings v. Hokr*, 193 P. (2d) 742 (Cal. 1948); *Tovey v. Levey*, 401 Ill. 393, 82 N. E. (2d) 441 (1948); *Goetz v. Smith*, 62 A. (2d) 602 (Md. 1948); *Malicke v. Milan*, 320 Mich. 65, 32 N. W. (2d) 353 (1948); *Woytus v. Winkler*, 212 S. W. (2d) 411 (Mo. 1948); *Rich v. Jones*, 142 N. J. Eq. 215, 59 A. (2d) 839 (1948); *Kemp v. Rubin*, 298 N. Y. 590, 81 N. E. (2d) 325 (1948); *Culver v. City of Warren*, 83 N. E. (2d) 82 (Ohio 1948); *Earley v. Baughman*, 199 P. (2d) 210 (Okla. 1948).

In *Perez v. Lippold*, 198 P. (2d) 17 (Cal. 1948), the court cited *Shelley v. Kramer* in declaring unconstitutional a statute providing that all marriage, of white persons to Negroes or Mongolians are illegal and void.

In *Seawell v. MacWithey*, 63 A. (2d) 542 (N. J. 1949), the City of East Orange was restrained from taking any action in furtherance of its policy of segregation in emergency housing projects.

²²Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases* (1949) 16 U. of Chi. L. Rev. 203, 230-238; Barnett, *Race-Restrictive Covenants Restricted* (1948) 28 Ore. L. Rev. 1, 11. The latter article includes a most thorough citing of articles dealing with racial restrictive covenants.

In view of such far-reaching considerations, it is not surprising that numerous proposals have been suggested as means of avoiding the effect of the decision. These plans range from mere voluntary adherence to covenants to creation of estates on special limitation, and those more prominently mentioned include posting of a penalty bond, trust devices, occupancy standards agreements, and conditions subsequent.²³ Fortunately, these proposals are either impractical or would require state court enforcement, now illegal. "When the various proposals are considered, the conclusion seems warranted that the *Restrictive Covenant* decisions render ineffective any device for maintaining residential segregation whose usefulness depends on utilization of governmental authority to achieve its end."²⁴ However, effective ways of maintaining segregation in housing still exist. Economic factors operative in the allocation of housing, such as the power of lending institutions to refuse loans on property not now occupied by whites, and the present practice of real estate boards not to sell to negroes property which is located in white neighborhoods, will, in conjunction with the pressure of social attitudes, substantially continue racial segregation.²⁵

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²³Lowe, *Racial Restrictive Covenants* (1948) 1 Ala. L. Rev. 15, 32-34; Walker, *Judicial Enforcement of Racial Restrictive Covenants—The Spurious Expansion of "State Action"* (1948) 49 Va. B. A. Rep. 231, 244-246; Notes (1948) 46 Mich. L. Rev. 978; (1948) 2 Vanderbilt L. Rev. 119. See Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land* (1940) 54 Harv. L. Rev. 248.

Voluntary adherence amounts to a mere "Gentlemen's Agreement." An estate on special limitation is an estate that is to last only so long as no transfer or lease is made to persons of a specified race. In the event of such transfer or lease, title would revert to the original grantor. In a condition subsequent, the grantor or his heir could defeat the estate, in the event of a breach, before the ordinary termination of the estate, but an actual entry would be necessary. By the trust device, all property owners would be required to deed the property to a trustee at the time they acquired title. The trustee, representing all the owners in the community, would not pass title until assured of the race of the grantee. Adjoining land owners, or real estate concern, would have the power of a veto over prospective purchasers. Because of their obvious impracticability, additional methods, such as options to repurchase and the use of personal deposits, need not be discussed.

²⁴Ming, *Racial Restrictions and The Fourteenth Amendment: The Restrictive Covenant Cases* (1949) 16 U. of Chi. L. Rev. 203, 224.

²⁵Ming, *Racial Restrictions and The Fourteenth Amendment: The Restrictive Covenant Cases* (1949) 16 U. of Chi. L. Rev. 203, 225-228.

CONTRACTS—PARTIAL ENFORCEABILITY OF UNREASONABLY BROAD COVENANT OF VENDOR NOT TO COMPETE WITH PURCHASER OF BUSINESS.
[Connecticut]

Though it is well settled that contracts not to compete are enforceable if they are ancillary to the sale of a business and reasonably limited as to space and time,¹ the courts are in disagreement on the question of whether, when such a restraint is found to be unreasonable, it must be deemed completely void or may still be enforceable in part.²

The position taken by the majority of the American courts is exemplified by the recent Connecticut case of *Beit et al. v. Beit*.³ Plaintiffs owned and operated three grocery stores in New London County, Connecticut, two in Norwich and one in New London, with customers from Norwich, New London, and the towns contiguous thereto. Plaintiffs sold their entire business to defendant, the bills of sale containing the following clause: "I further expressly covenant and agree with this vendee, . . . not to engage in the meat market or grocery business within the limits of New London County, Connecticut, for a period of thirty years, from this day."⁴ A few months later one of the plaintiffs started to purchase a grocery business in a town located in New London County but not contiguous to either New London or Norwich. Upon being advised the operation of this business would violate his contract with defendants, he sought a declaratory judgment to determine the legality of the covenant not to compete. The defendant contended that if the court found the restraint to be unreasonable, it should still be enforced to the extent that it was reasonably needed as a protection for the business he had purchased—that is, in the towns of New London, Norwich, and the adjoining towns.

The Supreme Court of Errors of Connecticut held that the restraint was unreasonable as to space, and refused to declare the covenant enforceable in any part. In spite of the fact that this decision would allow the plaintiff deliberately to repudiate a covenant for which he had received due consideration,⁵ the court reasoned that

¹Hall Mfg. Co. v. Western Steel & Iron Works, 227 Fed. 588, (C. C. A. 7th, 1915); United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (C. C. A. 6th, 1898); Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419 (1887); Mitchel v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711); Restatement, Contracts (1932) § 515.

²5 Williston, Contracts (Rev. ed. 1937) § 1659; Note (1935) 15 B. U. L. Rev. 834.

³63 A. (2d) 161 (Conn. 1948).

⁴63 A. (2d) 161, 162 (Conn. 1948).

⁵Two justices dissented from the decision on the ground that plaintiff was not entitled to bring a declaratory judgment action, because the record showed that

since the covenant was not divisible by its terms, to enforce it partially *would be making a new contract for the parties* by substituting the intent of the court for the intent of the parties.⁶

Where the limits of the restraint are stated disjunctively in the contract and the unreasonable parts may be crossed out, the courts are unanimous in decreeing enforcement of those parts that are left.⁷ But where the limitations are not disjunctively stated, relief is refused in the English courts, and in most American jurisdictions.⁸ "Severance is permissible only in the case of a covenant which is in effect a combination of several distinct covenants."⁹ The basis of this

plaintiffs' case was based solely on the hardship which the covenant would impose on themselves, without any indication of any adverse effect on the public. The significant moral and policy considerations involved in the court's action in this case, though ignored by the majority, were succinctly expressed by the dissent. "A decision which establishes the right of a person, who today has executed such a restrictive contract as here for a substantial consideration paid, to procure tomorrow a decree of court which effectively determines that no liability rests upon him under this contract and that he can keep the consideration he has received may well constitute a potent temptation to fraud and place a premium upon dishonesty. Accordingly, the decision of this case involves not only the question whether the terms of the contract itself were contrary to public policy but the further question whether to aid the plaintiffs by granting the relief sought violates the sound public policy of fostering rectitude and integrity and discouraging fraud and dishonesty in business dealings. It can hardly be maintained that honesty in business is any less the concern of public policy than is restraint against competition." *Beit et al v. Beit*, 63 A. (2d) 161, 166, 167 (Conn. 1948).

"The difficulty with [defendant's] position is that it gives effect to the conclusion of a court as to the extent to which a covenant unreasonably broad in its terms can in fairness and equity be enforced rather than to the intent of the parties, who, had they desired a narrower provision, should have agreed upon it." *Beit et al v. Beit*, 63 (2d) 161, 166 (Conn. 1948).

This was formerly done by the "blue pencilling" method, which consisted of running a mark through the part of the contract which was unreasonable. *Price v. Green*, 16 M. & W. 346 (Ex. 1847). The modern practice is to simply look at the contract, and if the court finds the covenants disjunctively stated, it enforces those that are reasonable. *General Bronze Corp. v. Schmeling*, 208 Wis. 565, 243 N. W. 469 (1932); 5 Williston, *Contracts* (Rev. ed. 1937) § 1659; Note (1935) 22 Va. L. Rev. 94.

⁶As for example, in *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 560, 41 N. E. 1048 (1895) where the unreasonable area was the entire state of Indiana, and the court refused to enforce any part, even though enforcement was requested only in the city of Hammond. Accord: *Interstate Finance Corp. v. Wood*, 69 F. Supp. 278 (E. D. Ill. 1946); *Trenton Potteries Co. v. Olyphant*, 58 N. J. Eq. 507, 43 Atl. 723 (1899); *Suesskind v. Wilson*, 124 Ohio St. 54, 176 N. E. 889 (1931); *Kex Mfg. Co. v. Plu-Gum Co.*, 28 Ohio App. 514, 162 N. E. 816 (1928); *Smith's Appeal*, 113 Pa. 579, 6 Atl. 251 (1886); *General Bronze Corp. v. Schmeling*, 208 Wis. 565, 243 N. W. 469 (1932); *Attwood v. Lamont*, [1920] 3 Ch. 571, 90 L. J. Ch. 121; 5 Williston, *Contracts* (Rev. ed. 1937) § 1660; *Restatement, Contracts* (1932) § 518. For a general discussion of the problem, see *John T. Stanley Co. v. Lagomarsino*, 53 F. (2d) 112 (S. D. N. Y. 1931).

⁷*Pollock, Contracts* (12th ed. 1946) 327.

view is that of the principal case, great emphasis being placed on the doubtful reasoning that a new contract would be made by the court,¹⁰ and on the question-begging logic that "had [the parties] desired a narrower provision, [they] should have agreed upon it."¹¹

On the other hand, there is respectable authority to the effect that such a contract may be enforced to the extent it is reasonable, even in the absence of disjunctive terms.¹² This view emphasizes the interests of the purchaser, recognizing that the intention of the parties to the covenant was to protect the purchaser, who, without that protection would have on his hands an empty bargain.¹³ In a few jurisdictions, courts following this view have been aided by statutes which have been construed to authorize the court to enforce such covenants by making the necessary division of the valid and invalid parts, even though no divisibility inheres within the form of the contract.¹⁴

Perhaps the boldest of the courts which admittedly engage in "paring down" the contract is the Supreme Judicial Court of Massachusetts, which has had little trouble in providing relief for the purchaser.¹⁵ Enforcement of a vendor's covenant not to compete is granted where

¹⁰*Interstate Finance Corp. v. Wood*, 69 F. Supp. 278 (E. D. Ill. 1946); *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 560, 41 N. E. 1048 (1895).

¹¹*Beit et al v. Beit*, 63 A. (2d) 161, 166 (Conn. 1948).

¹²*Hill v. Central West Public Service Co.*, 37 F. (2d) 451 (C. C. A. 5th, 1930); *Ackelbein v. Davey Tree Expert Co.*, 233 Ky. 115 25 S. W. (2d) 62 (1930); *Metropolitan Ice. Co. v. Ducas*, 291 Mass. 403, 196 N. E. 856 (1935); *Fleckenstein Bros. Co. v. Fleckenstein*, 76 N. J. L. 613, 71 Atl. 265 (1908).

¹³*Ackelbein v. Davey Tree Expert Co.*, 233 Ky. 115, 25 S. W. (2d) 62 (1930); *Fleckenstein Bros. Co. v. Fleckenstein*, 76 N. J. L. 613, 71 Atl. 265 (1908).

¹⁴"One who sells the good will of a business may agree with the buyer, and one who is employed as an agent, servant or employee may agree with his employer, to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a specified county, city, or part thereof, so long as the buyer or any person deriving title to the good will from him, and so long as such employer carries on a like business therein." Ala. Code (1940) Tit. 9, § 23. The courts have construed such statutes as giving them the power to cut down the restrictions to "a specified county, city, or part thereof" without regard to the form of the covenant. *Yost v. Patrick*, 245 Ala. 275, 17 S. (2d) 240 (1944); *Edwards v. Mullin*, 220 Cal. 379, 30 P. (2d) 997 (1934); *Herrington v. Hackler*, 181 Okla. 396, 74 P. (2d) 388 (1937).

¹⁵Thus, where the unreasonable restraint was where the seller was then doing business, the court enforced the contract to a lesser area which was necessary to protect purchaser's business. *Metropolitan Ice. Co. v. Ducas*, 291 Mass. 403, 196 N. E. 856 (1935). Where restraint was "Commonwealth of Massachusetts," it was enforced in Boston only. *Edgcomb v. Edmonston*, 257 Mass. 12, 153 N. E. 99 (1926). "Any of New England States" was enforced to "territory intensely covered by plaintiff," which was considerably less than New England. *New England Tree Expert Co. v. Russell*, 306 Mass. 504, 28 N. E. (2d) 997 (1940). "Within four miles radius" was

"reasonably necessary to enable the buyer to secure fully the good will of his purchase;" and to the extent such protection for the buyer is shown to be needed, it will be granted, "whether or not the agreement is by its own terms divisible."¹⁶ This position is further bolstered by Professor Williston, who asserts that "Questions involving legality of contracts should not depend on form."¹⁷ Further, he points out the weakness of the argument, sometimes advanced to support the majority view, that the courts should not be called upon to create a remedy for a vendee who has attempted to saddle his vendor with an oppressive restraint. Logically, if this policy argument were to be considered valid, it should also defeat the enforcement of the reasonable parts of a "divisible" covenant,¹⁸ but it is not, in fact, so applied.¹⁹

In most of the cases in which relief is refused, the courts appear to follow the inflexible procedure of looking over the contract to see whether disjunctive words are used specifically, refusing partial enforcement on the ground that the contract is indivisible if no such express terms are included.²⁰ While this practice offers an easy, automatic means of deciding the case, it ignores the fact that a contract may be divisible even though no disjunctive words are used in defining the limitations of the agreement. The reports abound with cases holding that the divisibility of contracts depends upon the intention of the parties and the surrounding circumstances.²¹ It seems obvious that the basic intent of the parties is to protect the purchaser's investment, and that the terms of the contract implementing this intent should be

cut down to "territory necessary to protect the plaintiff." *Brannen v. Bouley*, 272 Mass. 67, 172 N. E. 104 (1930). "All former customers" cut down to customers of city where business located. *Whiting Milk Co. v. O'Connell*, 277 Mass. 570, 169 N. E. 19 (1931). See *Sherman v. Pfefferkorn*, 241 Mass. 468, 135 N. E. 568, 570 (1922).

¹⁶*Metropolitan Ice Co. v. Ducas*, 291 Mass. 403, 196 N. E. 856, 857, 858 (1935).

¹⁷5 Williston, *Contracts* (Rev. ed. 1937) § 1660. "Public policy surely is not concerned to distinguish differences of wording in agreements of identical meaning."

The superficiality of the majority view can be demonstrated by a simple hypothetical case: X county contains only two towns, A. and B. The business sold is in town A and protection from competition is needed only there. If the covenant against engaging in business is phrased so as to cover "X county," or "all the towns in X county," it would be completely invalid; but if it read "towns A and B. in X county," or "town A and the rest of the towns in X county," it would be enforceable as to town A.

¹⁸5 Williston, *Contracts* (Rev. ed. 1937) § 1660. See *Wesley v. Chandler*, 152 Okla. 22, 3 P. (2d) 720, at 727 (1931).

¹⁹See text at note 7, *supra*.

²⁰*Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 560, 41 N. E. 1048 (1895).

²¹*Byers v. Fuller* 58 F. Supp. 570 (E. D. Ky. 1945); *Waddell v. White*, 51 Ariz. 526, 78 P. (2d) 490 (1938); *Will B. Miller Co. v. Laval*, 283 Ky. 55, 140 S. W. (2d) 376 (1940); 13 C. J. 562.

construed so as to effectuate it, if fairly possible. It would further seem impossible for the parties to have an intent not to compete within a certain area without having intent not to compete within each subdivision of that area.

The significance of the use of disjunctive words seems to pale in the face of the argument that contracts should not be said to lack validity merely because of the form in which they are written. The failure of most courts to recognize this principle is especially regrettable in view of the fact that an examination of the circumstances surrounding the making of such contracts usually indicates that the purchaser would not have bought but for the protective covenant, or would have paid considerably less for the business.

The contention that, by "paring down" the covenant the court would be making a new contract for the parties, is not convincing when tested against the powers equity courts have assumed in other situations. Equity, when specific performance is impossible, will often decree the performance which is as near to the contract terms as can be accomplished under the circumstances.²² This is evidently not considered making a new contract for the parties, but rather is a justifiable effort to reach an equitable result by placing the parties as near as possible to the object for which they contracted.²³ When a wife refuses to join in a conveyance of property which the husband has contracted to sell,²⁴ or where a tract of land is represented as containing a certain acreage but is found to be smaller than as specified in the contract,²⁵ equity readily decrees a conveyance of the land to the extent the grantor is able to give good title, with an abatement of the original purchase price to compensate for the discrepancy. The courts seem to have no fear of being guilty of making a new contract for the parties in such cases.²⁶ It would appear that so far as the divisibility factor

²²Restatement, Contracts (1932) § 359; *McClintock*, Equity (2d ed. 1948) § 54; *Walsh*, Equity (1930) § 76.

²³*Chesapeake & Ohio R. Co. v. City of Dayton*, 177 Ky. 502, 197 S. W. 969 (1917); *Rector of St. David's Church v. Wood*, 24 Ore. 396, 34 Pac. 18 (1893).

²⁴*Melamed v. Donabedian*, 238 Mass. 133, 130 N. E. 110 (1921); *Feldman v. Lisansky*, 239 N. Y. 81, 145 N. E. 746 (1924); Restatement, Contracts (1932) § 365.

²⁵*Binder v. Hejhal*, 347 Ill. 11, 178 N. E. 901 (1931); *Pickens v. Pickens*, 72 W. Va. 50, 77 S. E. 365 (1913); Restatement, Contracts (1932) § 365.

²⁶It is to be noted that in the mistake of area cases, it is said that the discrepancy must not be so great as to go to the essence of the contract. 4 *Pomeroy*, Equity Jurisprudence (5th ed. 1941) § 1407. But the analogous limitation in the cases of covenants not to compete would merely be that the partial enforcement of the restraint must achieve the essential purpose of giving the buyer reasonable freedom from competition.

is concerned, these two situations confront the courts with problems which are analogous to those arising in cases for the partial enforcement of contracts not to compete which contain covenants unreasonable as to space or time.

A contract partially enforced in such a manner would still have the essential elements of the original contract as executed by the parties. The vendee would receive the essence of the consideration for which he entered the contract—i.e., the ownership of the business plus freedom from competition by the vendor within the area and time in which such competition would likely be injurious to the business. The fundamental intent would survive, as the smaller (reasonable) area or time would naturally be included in the larger (unreasonable) area or time originally agreed upon.

In refusing to grant partial enforcement, the principal decision not only endorses a questionable line of reasoning, but also produces an inequitable result in that it places a distinct hardship on the purchaser and allows unjust enrichment to the seller. Courts would better observe the traditional role of equity by looking beyond the mere form of the contract to determine to what extent enforcement can be granted as a means of carrying out the substance of the agreement.

JOHN G. FOX

DEBTORS' ESTATES—RIGHT OF DEBTOR TO CLAIM HOMESTEAD EXEMPTION
IN INSURANCE PROCEEDS FROM NON-EXEMPT PROPERTY DESTROYED BY
FIRE. [Virginia]

The recent Virginia decision of *Goldburg Co., Inc. v. Salyer*¹ presents a problem unique in the law of debtors' homestead exemptions: whether the insurance proceeds on non-exempt property that has been destroyed by fire become exempt under a statutory provision allowing an exemption to be declared in "money and debts due."² The defendant debtor had insurance on a shifting stock of merchandise, which by statute is specifically excluded from the property that a debtor may claim as a homestead exemption.³ After fire had destroyed the stock of

¹188 Va. 573, 50 S. E. (2d) 272 (1948).

²Va. Code Ann. (Michie, 1942) § 6531: "Every householder or head of a family . . . shall be entitled, . . . to hold exempt from levy, . . . his real and personal property, or either, to be selected by him, including money and debts due him, to the value of not exceeding two thousand dollars; . . ."

³Va. Code Ann (Michie, 1942) § 6531: ". . . provided, that such exemption shall not extend to any execution order or other process issued on any demand in the

goods, plaintiff sought to garnish the debts that two insurance companies owed defendant, but defendant claimed \$2,000 of the proceeds as an exemption, which he had duly asserted and recorded. The Virginia Supreme Court of Appeals upheld the trial court in permitting defendant to claim his exemption, basing its decision primarily on the view that "The claim was not to a shifting stock of merchandise; it was specifically for 'money and debts due,' a classification of property entitled to be claimed as exempt."⁴

Since the statute allows an exemption in "money and debts due" to the debtor, and since the proceeds of insurance which are validly owing constitute a debt from company to the insured-debtor, the decision seems clearly justifiable as a literal application of the words of the statute.⁵ However, further analysis of the purpose and policy of the exemption statutes suggests several questions which the court's opinion leaves unanswered.

The purpose of homestead exemptions is well stated in the principal case as being "to insure the unfortunate debtor and his equally unfortunate, but more helpless family, a means of shelter and a measure of existence."⁶ Nonetheless, the protection afforded by such laws has its limits. They are not intended to be used to avoid payment of honest debts unless the peculiar need for family preservation is present.⁷ The fundamental policy behind exemptions, then, is to provide

following cases: . . . Seventh. Said exemption shall not be claimed or held in a shifting stock of merchandise . . ."

⁴188 Va. 573, 580, 50 S. E. (2d) 272, 276 (1948).

⁵For a similar conclusion, see Note (1949) 35 Va. L. Rev. 125.

⁶188 Va. 573, 577, 50 S. E. (2d) 272, 274 (1948).

⁷For instance, the general rule is that the marriage of a debtor subsequent to a levy on his property for a debt owing does not entitle him to the property exemption ordinarily enjoyed by the head of a family. *Stevens v. Carey*, 112 W. Va. 1, 2, 163 S. E. 772 (1932): "The statute [on personal property exemptions] should receive a liberal construction in favor of the debtor in order to effectuate the humanitarian purpose; but it should not be construed so as to disturb vested rights, and arm the debtor with a weapon to impose hardships on his neighbor." For similar holdings, see *Richardson v. Adler*, 46 Ark. 43 (1885); *Pasco v. Harley*, 73 Fla. 819, 75 So. 30 (1917); *Rock v. Haas*, 110 Ill. 528 (1884); *Selders v. Lane*, 40 Ohio 345 (1883); *Pender v. Lancaster*, 14 S. C. 25, 37 Am. Rep. 720 (1880); 22 Am. Jur., Exemptions § 2. There are decisions to the contrary, however. See *Robinson v. Hughes*, 117 Ind. 293, 20 N. E. 220 (1889); *Trotter v. Dobbs*, 38 Miss. 198 (1859).

The present rule in Virginia, established by *Oppenheim v. Ayers*, 99 Va. 582, 39 S. E. 218 (1901) after the court had adopted the contrary view in *Kennerly v. Swartz*, 83 Va. 704, 3 S. E. 348 (1887), is that the homestead may be claimed by a householder against a judgment obtained against him before he became a householder. This rule is now codified in Va. Code Ann. (Michie, Supp. 1948) § 6543: "The real or personal estate, which a householder, his widow, or minor children

some unassailable assets which particular creditors cannot reach, so that society in general will not be charged with the burden of providing for the improvident debtor and his hapless family.

The generally accepted rule that the insurance proceeds on exempt property are themselves exempt is founded on the proposition that, for purposes of debtors' exemptions, the insurance takes the place of the property destroyed, so that the debtor can restore his originally exempt property and thereby effectuate the intent of the legislature that that property be free from the claims of creditors.⁸ A corollary which may seem naturally to follow is that insurance proceeds on non-exempt property are themselves non-exempt.⁹ And it has, in fact, been

are entitled to hold as exempt, may be set apart at any time before the same is subjected by sale or otherwise under judgment, decree, order, execution, or other legal process, . . ." See also *Smith v. Holland*, 124 Va. 663, 98 S. E. 676 (1919).

⁸In the statutes of some of the states, notably Arizona, Minnesota and Washington, it is expressly provided that the proceeds of insurance on property which is itself exempt from the claims of creditors shall also be exempt. *Ariz. Rev. Stat. Par. 3302, Subsec. 16*; *Minn. Stat. (Mason, 1927) § 9447, Subsec. 13*; *Wash. Rev. Stat. Ann. (1932) § 563*.

Even aside from statute, the great weight of authority is that an exemption of certain property from execution extends to the insurance due for the destruction thereof. *Probst & Hilb v. Scott*, 31 Ark. 652, 657 (1877). "The property being exempt. it is but reasonable that the compensation for the loss, which represents the property, should also be exempt."

"The reason for the rule is found in the fact, that the property has been exempted by law for the use of the exemptor and his family, and he may insure it to protect himself and them from loss. It is intended by the insurance, to secure the means, in case of loss, for the restoration of the property after its destruction by fire. Not to allow the insurance money after loss, to take the place of the property destroyed, and be exempt from liability to the debts of the exemptor, would, by a mere technical evasion, pervert the object and spirit of the statutes of exemptions, always to be liberally construed in favor of the exemptor." *Ellis v. Pratt City*, 111 Ala. 629, 20 So. 649, 650 (1896). See also *Miller v. First Nat. Bank*, 194 Ala 477, 69 So. 916 (1915); *Reynolds v. Haines*, 83 Iowa 342, 49 N. W. 851 (1891); *Thompson-Ritchie & Co. v. Graves*, 167 La. 1024, 120 S. E. 634 (1929). In *Puget Sound Dressed-Beef & Packing Co. v. Jeffs*, 11 Wash. 466, 39 Pac. 962 (1895), the court said: "If the householder is to be protected in the use and enjoyment of his household furniture, he should be protected in taking such steps as will enable him to replace it if lost or destroyed; and common prudence would require that he should make some provision which would enable him to replace it in case it was destroyed by fire, . . . And when such policy [of insurance] is procured, and money paid on account of the destruction of the property, the object of the legislature can only be subserved by holding that such money takes the place of the property insured, and, until a reasonable time has elapsed for its being used in replacing the destroyed property, is exempt from execution, the same as the property would have been."

⁹*Simmang v. Pennsylvania Fire Insurance Co.*, 102 Tex. 39, 112 S. W. 1044, 132 Am. St. Rep. 846 (1908); *Cities Service Oil Co. v. North River Insurance Co.*, 130 Tex. 186, 107 S. W. (2d) 994 (1937). The present case recognized these decisions but

stated that, as a general rule, for the insurance proceeds to be held exempt the "property must be exempt, and it must have been exempt at the time it was burned."¹⁰ This rule obviously results from the reasoning that the money stands in place of the destroyed non-exempt property as assets from which creditors may satisfy their claims.

The court in the principal decision, confronted with the words "money or debts due" in the Virginia statute, has felt itself impelled to break away from this corollary and regard the insurance proceeds as a chose in action rather than as a form of replacement of the goods.¹¹ The destroyed goods were in an expressly non-exempt form but the insurance proceeds were held to be free from the claims of creditors. If the purpose of the statute to protect the debtor's exemptions is served by having insurance proceeds stand in the place of the exempt property destroyed, it is arguable that protection of creditors' rights requires that insurance proceeds on non-exempt property should be non-exempt.

In consideration of the precise issue of the principal case, however, this contention must be tested by an inquiry as to why the legislature made a shifting stock of goods expressly non-exempt in the first place. There are two possible reasons. The provision may have been adopted in order to give creditors a manifest assurance of tangible assets upon which to levy in case of default. If this was the intent, then allowing an exemption in the insurance proceeds defeats that interest which the legislature desired to create for the benefit of creditors. But if, on the other hand, the non-exemption was established merely to avoid the administrative difficulty of ascertaining which goods the debtor's decla-

held them inapplicable, because Texas had no statute allowing an exemption in money and debts due. In *Peerless Pacific Co. v. Burckhard*, 90 Wash. 221, 155 Pac. 1037 (1916), the court held that notwithstanding a statute allowing an exemption in insurance proceeds on exempt property destroyed by fire, the insurance money on property not exempt as a homestead which had been burned to the ground does not become exempt by the subsequent marriage of the owner making him an eligible head of a family. See also *Fletcher v. Staples*, 62 Minn. 471, 64 N. W. 1150 (1895) where under a statute exempting from execution "all moneys arising from insurance of any property exempted from sale on execution, when such property has been destroyed by fire," the court denied the exemption because the debtor had failed to prove that the property itself was exempt.

¹⁰35 C. J. S., Exemptions § 61.

¹¹It is to be noted that insurance proceeds are commonly treated as a chose in action rather than a replacement of the goods in other branches of insurance law. For instance, upon the death of the insured, the proceeds of insurance on destroyed property generally pass to his personal representative as a chose in action rather than to the heir or devisee who would have been entitled to the property itself. *Vance, Insurance* (2d ed. 1930) 667.

ration would cover, then the legislative purpose is not to protect the claims of creditors to those assets; and as soon as the uncertain identity of shifting stock is transferred into a sum certain of money, the reason for the non-exemption ceases to exist.

The statute itself is silent as to the specific purpose of this clause, but if the legislature had meant to favor creditors, it seems doubtful that the assets selected for non-exemption would be those consisting of a changing supply of merchandise. Because such assets would be expected to vary widely in value and appearance from week to week, and often would be subject to liens in favor of wholesalers supplying the goods to the debtor, they would not furnish a satisfactory fund upon which execution creditors could rely. On the other hand, the changing identity of the goods would inevitably raise difficulties in determining exactly what property should be saved from levy after a declaration of exemption had been made in the stock of merchandise.¹²

That the latter consideration affords the true explanation for the shifting stock of goods clause is substantiated by some case authority. In *Edgewood Distilling Co., Inc. v. Rosser's Adm'r et al.*¹³ it was held that the death of the owner terminated the shifting-stock inhibition of the exemption statute. The court there observed that "the business absolutely terminated with the death of Rosser, and the stock ceased to be shifting and became fixed and stable, and so remained intact until, as remarked, it was converted into money by the administrator by a sale at public auction and in bulk."¹⁴

It would appear, therefore, that the purpose of the statute in making shifting stocks of merchandise non-exempt is to avoid administrative difficulty, and when that consideration is removed, as by destruction of the stock by fire, then the exemption in the insurance proceeds which take its place should be allowed.

A further inquiry is warranted as to the policy supporting such a

¹²In *Wray v. Davenport*, 79 Va. 19, 25 (1884) the court observed: "...from the very nature of the case, it was difficult to claim a homestead in a shifting stock in active trade." See also *In re Tobias*, 103 Fed. 68 (W. D. Va. 1900).

¹³116 Va. 624, 82 S. E. 716 (1914).

¹⁴116 Va. 624, 626, 627, 82 S. E. 716, 717 (1914). See *in re Tobias*, 103 Fed. 68 (W. D. Va. 1900), decided before the Virginia statutory prohibition against claiming an exemption in a shifting stock of merchandise was enacted. The question was considered whether a bankrupt householder should be entitled to have a homestead exemption in a shifting stock of goods. The court held that where the debtor has surrendered to the trustee in bankruptcy his stock of goods in bulk, the shifting character of such property will not prevent the bankrupt from claiming his exemption therein, since by the surrender to the trustee, the property loses its shifting character and the exemption claimed may be identified with certainty.

statutory purpose. If the debtor, by virtue of the current interpretation of the statutes, can convert non-exempt property into exempt insurance proceeds, the way is open for deliberately insuring non-exempt goods, with the view of bringing about their "accidental" destruction and then successfully claiming an exemption in the proceeds.¹⁵ Quite obviously, if the destruction of the non-exempt property were proved to be intentional, the insurance company would not recognize the claim, and no question of exemption would arise. Yet, fire accidents are so easily staged that it may be unwise to permit a scheming debtor to seize upon the benevolent spirit of the legislators and the overly-kind disposition of their interpreters to milk not only the insurance companies but also the honest and innocent creditors. The spirit of exemption laws is "to give protection to the unfortunate . . . , not to fortify the crafty and designing"¹⁶

It is to be noted that Section 6531 of the Virginia Code stipulates, among other things, that there will be no exemption recognized "in any property the conveyance of which by the homestead claimant has been set aside on the ground of fraud or want of consideration."¹⁷ In view of the principal decision, it is necessary to ask whether, if such property is insured and then destroyed by fire, the non-exempt status of the property will be terminated so as to allow an exemption in the proceeds as "money and debts due." Such would naturally result if the rule of the *Goldburg* case is to be literally applied. But the policy prohibiting exemptions in property set aside because fraudulently conveyed, which must be one of penalty rather than expediency, would seem to carry beyond the mere destruction of the property.¹⁸ As the reason supporting the non-exemption is the fraudulent disposition of the debtor, and as this disposition is not cured by the transfer of interest from the property to the proceeds of insurance, the debtor should not be rewarded fortuitously with an exemption by the ill stroke, or ex-

¹⁵It was held in *Lederburg v. Miller*, 210 Fed. 614 (C. C. A. 4th, 1913) that a failing debtor in contemplation of bankruptcy could not transmute a shifting stock of merchandise which was not exempt into exempt property by withdrawing it from sale for the purpose of claiming it as an exemption.

¹⁶*Burton & Co. v. Mill and als.*, 78 Va. 468, 481 (1884).

¹⁷Va. Code Ann. (Michie, 1942) § 6531.

¹⁸In *Dickinson and others v. Patton and others*, 110 Va. 5, 65 S. E. 529 (1909), the husband conveyed his property to his wife without consideration, in fraud of his creditors. The court indicated that the wife after her husband's death could not claim a homestead exemption in the property which had been set aside as a fraudulent conveyance. However, the wife was held to be entitled to be repaid the purchase money lien she had paid off.

perly conceived stroke, of fortune. One's punishment, if such be the purpose of this non-exemption, should not be switched to favoritism because of ashes. Yet the statute, as applied by the instant decision, might be regarded as permitting the exemption, since a right is recognized in the debtor to declare his exemption from the insurance money due him, regardless of the exemption status of the insured property which the fire has destroyed.

Upon a literal application of the statute and on the specific facts involved, the principal case is correctly decided. The intent of the legislature should be controlling. Though not investigated by the decision, that intent can be construed to support the present case, since it appears that shifting stocks of merchandise were made non-exempt because of the impracticability of administration of such an exemption, and not because of any solicitude for creditors in maintaining such stock as a leviable asset. And when the *reason* for the non-exemption perished in the flames, the non-exemption status was consumed also. The reasoning employed in the opinion is, however, open to some criticism because it may be thought to enunciate a blanket proposition that the character of property insured is lost when the property is destroyed, and that the proceeds of insurance thereon are exempt, if so claimed, because they are "money and debts due."

JACK B. COULTER

DOMESTIC RELATIONS—LIABILITY OF ESTATE OF DECEASED HUSBAND FOR SUPPORT OF CHILDREN UNDER DIVORCE DECREE. [West Virginia]

The especial interest of society in assuring that adequate support is provided for children makes the duty of parents to care for their offspring a matter of more than merely private parental concern. The fact that the state itself has much at stake may well justify the subordination of other valid claims against the assets of the head of a family when these claims conflict with the needs of the wife or children for support. This principle has long been recognized in the field of creditors' rights,¹ but the West Virginia Supreme Court of Appeals has, in a divided decision, recently refused to apply it in a controversy re-

¹Homestead exemption statutes giving the debtor the right to remove certain property from the reach of creditors' claims are based on the policy of protection of the dependents of the debtor from destitution. See *Goldburg Co., Inc., v. Salyer*, 188 Va. 573, at 577, 50 S. E. (2d) 272, at 274 (1948), noted (1949) 6 Wash. and Lee L. Rev. 202. Similarly, the Federal Bankruptcy Act § 17 (a) (2) exempts from the effect of a discharge in bankruptcy, debts for alimony and support of wife or child.

garding the divorced husband's duty to provide support for his children after his death. In *Robinson v. Robinson et al.*,² it was held that where, by a divorce decree awarded against a husband, custody of the children is granted to the wife, and the husband is required to pay a fixed sum monthly for the support of such children, the decree becomes a lien upon the real estate of the husband, enforceable as the payments accrue during his lifetime but not valid against his estate, real or personal, after his death.

The West Virginia court and other tribunals with whose holdings it is in accord³ seem to base their decisions principally upon the ground that a father's common law duty to support his minor children ceases at his death. It is said that "A decree against a father for maintenance and support, adds nothing to his obligation to support his children during their minority; it only provides for the enforcement of such duty."⁴ This contention loses its persuasiveness when it is recognized that, after the bonds of matrimony have been severed by a court, the power of that tribunal to provide for the support of the children derives, not from the common law, but from the statute which confers authority to enter the support provision in the decree.⁵

The majority opinion in the *Robinson* case sets forth, as an additional consideration, the fact that to allow the support provision to be enforced against the husband's estate would make possible changes in the course of descent and distribution where the owner of property dies intestate or where he dies testate and attempts to divide his property among his children. It is said that minor children of the first marriage would find themselves in a more favored position than other offspring of that or a subsequent marriage. Further, the court points out, the survival of the decree would "in many cases, place the entire estate of a decedent beyond the reach of his creditors, and apply it to the support and maintenance of his children during their minority."⁶

²50 S. E. (2d) 455 (W. Va. 1948).

³The courts of Florida, Kentucky, Maryland and New York adopt the view that a father's liability under the decree terminates with his death. *Guinta v. Lo Re*, 31 S. (2d) 704 (Fla. 1947); *Sandlin's Admx. v. Allen*, 262 Ky. 355, 90 S. W. (2d) 350 (1936); *Blades v. Szatai*, 151 Md. 644, 135 Atl. 841, 50 A. L. R. 232 (1927); *In re Johnson's Estate*, 185 Misc. 352, 56 N. Y. S. (2d) 771 (1945). In the Massachusetts case of *Barry v. Sparks*, 306 Mass. 80, 27 N. E. (2d) 728 (1940), there is dictum to the effect that death terminates the father's liability, although the precise point was not before the court in that case.

⁴*Robinson v. Robinson et al.*, 50 S. E. (2d) 455, 460 (W. Va. 1948).

⁵*Avila v. Leonardo*, 53 Cal. App. (2d) 602, 128 P. (2d) 43 (1942); *White v. Shalit*, 136 Me. 65, 1 A. (2d) 765 (1938). Also see dissent in *Blades v. Szatai*, 151 Md. 644, 135 Atl. 841, at 845, 50 A. L. R. 232, at 239 (1927).

⁶*Robinson v. Robinson et al.*, 50 S. E. (2d) 455, 460 (W. Va. 1948). That such

However, as indicated by Judge Haymond in his dissent, employment of these arguments suggests a fundamental misconception of the nature and effect of the decree handed down by the divorce court. It is settled law that "One effect of a judgment is to merge therein the cause of action on which the action is brought, from the date of the judgment."⁷ This is true regardless of the nature of the original cause of action. It seems therefore, that the proper determinant of whether the decree is to be enforceable against the deceased husband's estate would be the effect given to it by statute. The West Virginia Code provides that "Every judgment for money rendered in this State . . . shall be a lien on all the real estate of or to which the defendant in such judgment is or becomes possessed or entitled . . ."⁹ A judgment lien should continue to be enforceable until satisfied in a legal manner.¹⁰ Thus, the infant beneficiary of the support provision in the decree of divorce stands in the relation of judgment creditor to his father's estate, and the arguments set forth by the majority of the court regarding the favored position of the minor child are no more valid in respect to his claim than they would be to that of any other judgment creditor.¹¹

A preponderance of the decided cases¹² seems to be in conflict with

an eventuality would not be inconsistent with social policy as reflected in established law is demonstrated by the exemption provisions of the Federal Bankruptcy Act and by State homestead exemption statutes, which may operate to withdraw all of the assets of the debtor's estate from reach of his creditors in order to provide maintenance for his family. See *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 S. Ct. 751, 47 L. ed. 1061 (1903).

⁷30 Am. Jur., Judgments § 150.

⁹30 Am Jur., Judgments § 154; 2 Freeman, Judgments (5th ed., Tuttle, 1925) § 579.

¹⁰W. Va. Code Ann. (Michie, 1943) § 3766.

¹¹*Laidley et al. v. Reynolds et al.*, 58 W. Va. 418, 52 S. E. 405 (1905); *Renic v. Ludington*, 14 W. Va. 367 (1878); 2 Freeman, Judgments (5th ed., Tuttle, 1925) § 997: "Payment is the only act by which the defendant can discharge or avoid the lien of a judgment, except where the statute creates a lien on chattels and contemplates that the destruction, removal or sale may, under certain circumstances, extinguish the lien."

"Generally . . . an existing lien is not destroyed by the debtor's subsequent death, though this may affect the time and manner of its enforcement." 2 Freeman § 1009.

¹²The fact that the judgment requires installments to be paid in the future does not prevent the creation of a lien, enforceable after the debtor's death. *Isaacs v. Isaacs' Guardian*, 117 Va. 730, 86 S. E. 105 (1915); *Goff v. Goff*, 60 W. Va. 9, 53 S. E. 769 (1906).

¹³*Newman v. Burwell*, 216 Cal. 608, 15 P. (2d) 511 (1932); *Myers v. Harrington*, 70 Cal. App. 680, 234 Pac. 412 (1925); *Miller v. Miller*, 64 Me. 484 (1874); *West v.*

the *Robinson* case. In some of the decisions the support provision was, by the decree, expressly made a lien on the husband's property, but in a greater number of these cases applicable statutes were deemed sufficient to give the same effect to the provision for the children. In neither situation did the courts find any difficulty in adjudging that the liens should be enforceable against the husband's estate after his death. The West Virginia court, however, purports to find in some of these opposite holdings a factor which, it is said, renders them distinguishable from the *Robinson* case. This factor is exemplified in the Oklahoma case of *Smith v. Funk*.¹³ There the divorce court, decreeing that the defendant-husband pay a stipulated sum monthly for the support of the minor children, ratified and confirmed a separation agreement which contained conditions respecting the support of the children similar to those found in the decree. Although the appellate court intimates that it would have made a like decision even in absence of the separation agreement, it did decide on the basis of the agreement that the support provision of the decree constituted a continuing claim against the deceased father's estate. It is to be noted that the decree in the *Robinson* case similarly recited that "... it appearing to the court that the defendant has voluntarily agreed to pay the sum of \$45.00 per month for the support and maintenance of said children..., it is adjudged, ordered and decreed..." that he be required to pay that amount.¹⁴ Yet, even if it be conceded that the West Virginia court is correct in its apparent assumption that the trial judge's decree did not contemplate ratification of a separation agreement as was done in *Smith v. Funk*, it does not follow that the effect of a judgment could be impaired by the absence of a contract or agreement, or bolstered by its presence. The decree, which by its terms was to continue "until further order of the Court,"¹⁵ should be given the effect for which its words call.

The courts of New York reach a result similar to that attained by

West, 241 Mich. 679, 217 N. W. 924 (1928); *Creyts v. Creyts*, 143 Mich. 375, 106 N. W. 1111, 114 Am. St. Rep. 656 (1906); *Garber v. Robitshek*, 226 Minn. 398, 33 N. W. (2d) 30 (1948); *Silberman v. Brown*, 72 N. E. (2d) 267 (Ohio 1946); *Smith v. Funk*, 141 Okla. 188, 284 Pac. 638 (1930); *Mansfield v. Hill*, 56 Ore. 400, 107 Pac. 471 (1910), modified on rehearing 56 Ore. 400, 108 Pac. 1007 (1910); *Murphy v. Moyle*, 17 Utah 113, 53 Pac. 1010, 70 Am. St. Rep. 767 (1898); *Gainsburg v. Garbarsky*, 157 Wash. 537, 289 Pac. 1000 (1930); *Stone v. Bayley*, 75 Wash. 184, 134 Pac. 820, 48 L. R. A. (N.S.) 429 (1913).

¹³141 Okla. 188, 284 Pac. 638 (1930).

¹⁴50 S. E. (2d) 455, 462 (W. Va. 1948).

¹⁵*Robinson v. Robinson et al.*, 50 S. E. (2d) 455, 462 (W. Va. 1948).

the West Virginia case, but on different reasoning.¹⁶ New York follows the majority rule that an award of *alimony* does not survive the death of either party,¹⁷ and in that state the word "alimony" is held to include awards made for the support of children.¹⁸ Therefore, the support provisions in the decree do not continue to be enforceable after the husband's death. Since awards of alimony are grounded on widely different considerations from those for support of children,¹⁹ it is doubtful that the analogy between the two is justifiable. The controlling factor should be the statutory effect of the judgment. If by its terms the support provision of the decree is made a lien on the husband's property, or if by statute it is given such an effect, the deceased father's estate should be liable under it.

The necessity for support of minor children remains the same no matter whether the father is living or dead.²⁰ If, for reasons appearing sufficient to the court which hands down the divorce decree, the father is required to contribute to the support of the children, the mere fact of his death does not render the children less deserving of support. Though a father enjoys a common law right to disinherit his children, such action should be countenanced only where family relations remain intact and the danger of the unreasonable exercise of that arbitrary right is negligible.²¹ But when the father is responsible for the break-up of his family, and his children become in a sense wards of the court, sound social policy dictates that this power be taken from him. There is little doubt, therefore, that from the standpoint of policy as well as from that of adherence to settled principles of law, the dissent in the *Robinson* case presents the more desirable view.

JACK A. CROWDER

¹⁶In *re Johnson's Estate*, 185 Misc. 352, 56 N. Y. S. (2d) 771 (1945).

¹⁷*Roberts v. Higgins*, 122 Cal. App. 170, 9 P. (2d) 517 (1932); *Allen v. Allen*, 111 Fla. 733, 150 So. 237 (1933); 17 Am. Jur., *Divorce and Separation* § 608.

¹⁸*Schafer v. Schafer*, 118 Misc. 254, 193 N. Y. Supp. 43 (1922).

¹⁹"Maintenance of a child is in no sense alimony, for alimony is a matter between husband and wife, while maintenance of a child rests upon the paternal relation." *West v. West*, 241 Mich. 679, 217 N. W. 924, 925 (1928).

²⁰In *re Estate of Smith*, 200 Cal. 654, 254 Pac. 567, at 569 (1927).

²¹*Miller v. Miller*, 64 Me. 484 (1874): "If, from hostility to the mother, or other cause, there is danger that the father will disinherit his children, and leave them to be supported by their mother without any aid from his estate, a decree may very properly be made for their support, that shall continue in force after his decease, or until they are of sufficient age to provide for themselves; or, at least, till the further order of the court."

DOMESTIC RELATIONS—LIABILITY OF HUSBAND, AFTER ANNULMENT OF MARRIAGE, FOR PERSONAL INJURIES INFLICTED ON WIFE DURING COVERTURE. [Massachusetts]

The common law prohibition against liability between husband and wife for their torts,¹ having arisen from the classical idea of the unity of husband and wife,² has been severely criticised in modern times as being outmoded and impractical of application.³ Nevertheless, the courts have doggedly adhered to the rule, justifying it as a means of preserving "domestic tranquility."⁴ If preservation of the peace and harmony of the home is the basis of the rule of non-liability of the spouse, then logically, where the home is already broken by legal dissolution of the marriage, that rule should no longer be a bar to recovery for torts committed during coverture. This point appears to be conceded in the cases of completely void marriages wherein no husband and wife relationship ever existed.⁵ However, in the cases of voidable marriages, the courts usually reject the argument, relying on the antiquated doctrine of unity of husband and wife. This theoretical unity is supposed to have prevented a cause of action from ever having arisen from the tort,⁶ and so divorce does not affect the situation.⁷ Even

¹Thompson v. Thompson, 218 U. S. 611, 31 S. Ct. 111, 54 L. ed. 1180 (1910); Abbott v. Abbott, 67 Me. 304, 24 Am. Rep. 27 (1877); Phillips v. Barnet, 1 Q. B. D. 436 (1876).

²Thompson v. Thompson, 218 U. S. 611, 31 S. Ct. 111, 54 L. ed. 1180 (1910); Phillips v. Barnet, 1 Q. B. D. 436 (1876).

³See Judge Pound's dissent in Allen v. Allen, 246 N. Y. 571, 159 N. E. 656 (1927); Note (1925) 38 Harv. L. Rev. 383.

⁴Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924); Lilliankamp v. Rippetoe, 133 Tenn. 57, 179 S. W. 628 (1915); McCurdy, Torts between Persons in Domestic Relations (1930) 43 Harv. L. Rev. 1030.

⁵See Callow v. Thomas, 322 Mass. 550, 78 N. E. (2d) 637, 2 A. L. R. (2d) 632 (1948).

A completely void marriage is one that is prohibited by law, such as a bigamous marriage, or one prohibited because of the consanguinity or affinity between the parties. Johnson v. Johnson, 245 Ala. 145, 16 S. (2d) 401 (1944); Osoinach v. Watkins, 235 Ala. 564, 180 So. 577 (1938); Ragan v. Cox, 208 Ark. 809, 187 S. W. (2d) 874 (1945); Whitney v. Whitney, 192 Okla. 174, 134 P. (2d) 357 (1942). See Steerman v. Snow, 94 N. J. Eq. 9, 118 Atl. 696, 698 (1922); 1 Bishop, Marriage, Divorce and Separation (1891) § 258.

⁶Leonardi v. Leonardi, 21 Ohio App. 110, 153 N. E. 93 (1925); Courtney v. Courtney, 184 Okla. 395, 87 P. (2d) 660 (1939).

⁷Henneger v. Lomas, 145 Ind. 287, 44 N. E. 462 (1896); Lindley v. Cusson, 22 N. Y. S. (2d) 516 (1940). See Spector v. Weisman, 40 F. (2d) 792, 793 (App. D. C. 1930).

A few jurisdictions hold that coverture merely bars the remedy and does not wipe out the cause of action. Broddus v. Wilkenson, 281 Ky. 601, 136 S. W. (2d)

that questionable logic is not available to defend the rule in case the marriage is *annulled*, if it is true, as many courts have said, that annulment renders the marriage void ab initio, leaving the parties as if no marriage had ever existed.⁸

But the recent case of *Callow v. Thomas*⁹ indicates again that courts may ignore legal logic as well as practical considerations in upholding the non-liability of the former spouse after annulment. In this case, the wife, during the existence of a voidable marriage, was a "gratuitous passenger" in the husband's car and was injured due to his grossly negligent operation of the car. Later she had the marriage annulled because of the husband's fraud, and shortly thereafter sued the husband for the injuries sustained in the automobile accident. The Supreme Court of Massachusetts, in denying the wife's recovery, held that annulment does not make a voidable marriage void ab initio for all purposes, pointing out that the doctrine of relation back is a legal fiction not to be pressed too far, and that it has limits prescribed by public policy. In its conclusion the court adopted the rather flimsy "rule" that transactions which have been concluded and things which have been done during a voidable marriage ought not to be reopened or undone after the decree of annulment. In arriving at this result the Massachusetts court relied primarily upon five English cases¹⁰—none of

1052 (1940); *McLaurin v. McLaurin Furniture Co.*, 166 Miss. 180, 146 So. 877 (1933). Thus, the court that decided the principal case (see note 9, *infra*) had previously held that, divorce removing the bar, suit could then be brought on a contract action. *Giles v. Giles*, 293 Mass. 495, 200 N. E. 378 (1936). The Massachusetts court seems to be drawing a rather fine distinction between actions *ex contractu* and *ex delicto*.

⁸*U. S. ex rel. Lubbers v. Reimer*, 22 F. Supp. 573 (D. C. N. Y. 1938) (retroactive and renders marriage utterly void ad initio); *Steerman v. Snow*, 94 N. J. Eq. 9, 118 Atl. 696 (1922) (null and void from the beginning); *In re Moncrief's Will*, 235 N. Y. 390, 139 N. E. 550 (1923) (void ad initio, even to making illegitimate a child born during supposed marriage); *Leventhal v. Liberman*, 262 N. Y. 209, 186 N. E. 675 (1933) (destroys from beginning as source of rights and duties); *Southern Ry. Co. v. Baskett*, 175 Tenn. 253, 133 S. W. (2d) 498 (1939) (renders it a nullity—judicially declares it never a legal and lawful marriage); 1 *Bishop, Marriage, Divorce and Separation* (1891) §§ 636, 640.

⁹322 Mass. 550, 78 N. E. (2d) 637, 2 A. L. R. (2d) 632 (1948).

¹⁰*Antsey v. Manners, Gow* 10. 171 Eng. Rep. 821 (1818) (H was held not liable for debts contracted by W after decree of nullity, from which it is inferred he would be liable for those contracted before the decree); *P v. P*, [1916] 2 Ir. R. 400 (after annulment of a voidable marriage, W sued H to recover her dowry and was allowed to recover all but a small part spent by H for their joint benefit); *Dunbar v. Dunbar*, [1909] 2 Ch. 639 (an annulment of a voidable marriage was not allowed to disturb a completed transaction, namely, the purchasing of a house by H and having it conveyed to H and W as joint tenants); *Dodworth v. Dale*, [1936] 2 K. B. 503 (inspector of taxes was not allowed to assess H for additional taxes because of

which were for torts for personal injury and some of which were not even between husband and wife—and a quotation from Chief Judge Cardozo's opinion in *American Surety Company v. Conner*.¹¹

The courts, in saying that all annulments do not render the marriage void ab initio for purposes of actions ex delicto between the spouses, commonly refer to "public policy" as the reason. Actually, the idea behind this public policy is apparently the general common law concept of not allowing suits between husband and wife. Several theories are advanced to substantiate this idea today, those most commonly used being: (a) unity of husband and wife;¹² (b) preservation of the peace and harmony of the home;¹³ (c) failure of a cause of action to arise, due to the nature of the relationship;¹⁴ (d) transformation of the wife's causes of action into those of the husband upon marriage;¹⁵ and (e) adequacy of the wife's remedy in the criminal and divorce courts.¹⁶

These theories will hardly stand up under close analysis in the light of present-day social standards and the Married Women's Statutes. It is rather pointless to argue that suits for personal torts between husband and wife must be prohibited in the interests of preserving the peace and harmony of the home when suits between those parties are uniformly permitted in other fields.¹⁷ To say that there is an adequate remedy in the criminal or divorce courts is to ignore the facts. There

allowances taken by H during the period of a marriage later annulled; what has been done during a de facto marriage cannot be undone); *Fowke v. Fowke*, [1938] Ch. 774, 2 All Eng. 638 (annulment of a marriage because of W's impotency was not allowed to defeat a separation agreement made by H and W during the voidable marriage).

¹¹251 N. Y. 1, 9, 166 N. E. 783, 786, 65 A. L. R. 244, 249 (1929): "The decree of annulment destroyed the marriage from the beginning as a source of rights and duties... but it could not obliterate the past and make events unreal." Query, whether it is not obliterating the past to deny W the right to sue for injuries committed upon her by H, and whether ruling that W has no cause of action for the tort committed against her by H is not making events unreal.

¹²*Maine v. S. Maine and Sons*, 198 Iowa 1278, 201 N. W. 20, 37 A. L. R. 161 (1924); *Scales v. Scales*, 168 Miss. 439, 151 So. 551 (1934); *Courtney v. Courtney*, 184 Okla. 395, 87 P. (2d) 660 (1939).

¹³*Broadus v. Wilkenson*, 281 Ky. 601, 136 S. W. (2d) 1052 (1940); *Austin v. Austin*, 136 Miss. 61, 100 So. 591 (1924); *Lindley v. Cusson*, 22 N. Y. S. (2d) 516 (1940).

¹⁴*Leonardi v. Leonardi*, 21 Ohio App. 110, 153 N. E. 93 (1925); *Courtney v. Courtney*, 184 Okla. 395, 87 P. (2d) 660 (1939).

¹⁵2 Bishop, Law of Married Women (1875) § 331.

¹⁶*Thompson v. Thompson*, 218 U. S. 611, 31 S. Ct. 111, 54 L. ed. 1180 (1910); *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27 (1877).

¹⁷*Farage, Recovery for Torts between Spouses* (1934) 10 Ind. L. J. 290; *Montgomery v. Montgomery*, 142 Mo. App. 481, 127 S. W. 118 (1910) (contract); *Copp v.*

are many torts which neither criminal nor divorce courts recognize as the basis for an action;¹⁸ and even if successful in a criminal or divorce action, the injured party gets no recompense for the injuries suffered. This is particularly true in cases of annulment where, except by statute in a few states,¹⁹ alimony is not granted.²⁰ Thus, the injured party is truly without remedy.

The Married Women's Statutes, enacted in practically all states, have wiped out the archaic principle of the unity of husband and wife in all fields except that of personal torts.²¹ The wife having been given the right to own property and enforce her own causes of action, the rule of the common law that her causes of action became her husband's upon marriage no longer applies; and by the very fact that the unity of husband and wife is gone, the nature of the relationship is no longer such as to prevent the arising of a cause of action between them. It would seem that reliance upon this factor as preventing the allowance of recovery by one spouse for the injuries inflicted by the other is blind adherence to a principle of the common law which has long since become outmoded.

Some courts have, in fact,² begun to accept the force of the Married Women's Statutes as allowing suits between husband and wife for personal torts.²² In regard to this question, the statutes in effect in the various states are of four general types: (1) those granting the wife a separate estate in property and the right to sue thereon, (2) those expressly denying husband and wife the right to sue each other, (3) those permitting wife to sue and be sued as if a femme sole, and (4) those expressly permitting suits between husband and wife for any causes. No great problem is presented under the first, second and

Copp, 103 Me. 51, 68 Atl. 458 (1907) (debt); Jones v. Jones, 19 Iowa 236 (1865) (replevin); Smith v. Smith, 20 R. I. 556, 40 Atl. 417 (1898) (trover).

It should be noticed here that all of these states are in the majority group to allow H and W suits for personal tort. For states in this group see Notes (1920) 6 A. L. R. 1038; (1924) 29 A. L. R. 1482; (1934) 89 A. L. R. 118; (1946) 160 A. L. R. 1406; Note (1936) 4 Wis. L. Rev. 37.

¹⁸Note (1925) 38 Harv. L. Rev. 383, 387.

¹⁹Conn. Gen State. (1930) § 5188; Iowa Code (1946) § 598.24; N. H. Rev. Laws (1942) c. 339, §§ 16, 19.

²⁰2 Bishop, Marriage, Divorce and Separation (1891) § 855.

²¹Some states by statute expressly permit suits between H and W for personal torts, and a minority of others construe their statutes to permit such. See text at note 22 and following. For states in the minority group see A. L. R. annotations cited in note 17, *supra*.

²²Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1914); Note (1925) 38 Harv. L. Rev. 383, 389.

fourth types as to personal torts, such suits being impliedly or expressly denied in the first and second, and expressly permitted in the fourth. The biggest problem arises under the third, and very common, type of statute. In construing these statutes, a majority of the courts still insist, whether the action was brought during coverture or after divorce, that suits are not permitted between husband and wife for personal torts²³—this, in spite of the fact that the same courts almost uniformly permit suits between those parties for torts to property and on contract rights.²⁴ An increasing minority permits suits between husband and wife for personal torts,²⁵ construing the statutes as simply preventing marriage from changing the woman's rights.²⁶ Under this view, the application of the statute is not a matter of granting a new cause of action, but merely of preserving any cause which would exist for an unmarried woman.

The cases involving suits brought after the marriage has been dissolved by divorce or annulment obviously present no problem under the minority interpretation, since suits are allowed between husband and wife even during coverture.²⁷ But, under the majority interpretation of the statutes, the courts read into the statutes an exception that is not otherwise discernible, in holding that the disability of coverture is removed in all respects except for personal torts suits.²⁸ This construction ignores the apparent intent of the legislatures as ex-

²³See A. L. R. annotations cited in note 17, *supra*.

²⁴Note (1926) 4 Wis. L. Rev. 37.

²⁵See A. L. R. annotations cited in note 17, *supra*.

²⁶*Brown v. Brown*, 88 Conn. 42, 89 Atl. 889 (1914); *Gilman v. Gilman*, 78 N. H. 4, 95 Atl. 657 (1915); *Wait v. Pierce*, 191 Wis. 202, 209 N. W. 475 (1926).

²⁷Even in these minority jurisdictions, the effect of a guest statute is to bar recovery by the injured spouse for injuries received as a result of the negligent operation of an automobile by the other spouse. *Roberson v. Roberson*, 193 Ark. 669, 101 S. W. (2d) 961 (1937). This will, a fortiori, apply in cases of annulment of the marriage, and there will be no recovery regardless of the type of Married Women's Statute.

²⁸In view of the almost universal use or requirement of liability insurance by the owners of automobiles, it would seem that the majority of the courts are basing their denial of liability in these cases on the disability of coverture and are refusing to give any weight to the right of indemnification of the insured.

However, one court in an incidental dictum said, "We can conceive of circumstances where liability insurance, carried by the husband, might prove the moving factor and not at all disrupt the connubial bliss in collecting from an insurance company." *Harvey v. Harvey*, 239 Mich. 142, 214 N. W. 305, 306 (1927).

In *Coster v. Coster*, 239 N. Y. 438, 46 N. E. (2d) 509 (1943), the court said that the mere fact that the husband will be indemnified does not give the injured wife any right of action. In this particular field there is a strong underlying policy against allowing husband and wife suits because of the strong possibility of and opportunity

pressed in the statutes,²⁹ and falls back on the old doctrine of unity of the spouses to uphold what is considered to be wise public policy.³⁰ Since the courts have seen fit to abandon logical reasoning and go to such extremes to avoid the intent of the statutes in cases of divorce, they will in all probability continue this practice in cases of annulment.

The solutions to the problem of whether to permit husband-and-wife suits for personal torts run all the way from the suggestion of abolishing all suits between husband and wife—which would be highly impractical since the states almost uniformly allow such suits in protection of property and contract rights—to the very logical solution of allowing suits between spouses for all types of torts, while freely imposing the theories of “license,” “voluntary assumption of risk,” “implied consent,” and “joint purpose” to bar unwarranted recoveries.³¹ The imposition of these theories would eliminate the deluge of trivial suits between disgruntled spouses, and at the same time permit greater justice to married women with bona fide claims for damages.

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EQUITY—AVAILABILITY OF SPECIFIC PERFORMANCE REMEDY TO ENFORCE CONTRACT TO SELL NEW AUTOMOBILE. [Kansas]

Postwar scarcities of consumer goods which are normally readily available on the open market have produced legal consequences in the form of a new challenge to the restrictive rule against granting specific performance of a contract to sell chattels. It is “well-settled” law that

for collusion against the insurance companies. *Gen. Accid. Fire & Life Assur. Corp. v. Morgan*, 33 F. Supp. 190 (W. D. N. Y. 1940); McCurdy, *Torts between Persons in Domestic Relations* (1930) 43 *Harv. L. Rev.* 1030. This is demonstrated by the fact that the legislature of New York passed a statute excluding the wife from the coverage of the husband's liability insurance policy unless specifically included, at the same time it passed the statute permitting husband and wife suits for personal torts. *Fuchs v. London & Lancashire Indem. Co.*, 258 App. Div. 603 (1940); 2 *N. Y. Consolidated Laws* (Baldwin, 1938), *Domestic Relations Law*, art. 4, § 57, and Vol. 3, *Insurance Law*, art. 2, § 109, subd. 3-a.

²⁹See Justice Harlan's dissent concurred in by Justices Holmes and Hughes in *Thompson v. Thompson*, 218 U. S. 611, 619, 31 S. Ct. 111, 113, 54 L. ed. 1180, 1183 (1910).

³⁰It is difficult to deduce the facts upon which this wise public policy is supposedly based, since in the states allowing such suits, there has not been any great deluge of suits between husbands and wives, as it has been prophesied there would be, nor has any greater amount of domestic animosity been observed. McCurdy, *Torts between Persons in Domestic Relations* (1930) 43 *Harv. L. Rev.* 1030.

³¹3 *Vernier, American Family Law* (1935) § 180; McCurdy, *Torts between Persons in Domestic Relations* (1930) 43 *Harv. L. Rev.* 1030.

the vendee cannot generally obtain specific performance of a promise to sell personalty, because the damages at law for breach of such a contract are ordinarily adequate, inasmuch as an award of money damages puts the plaintiff in position to purchase the same kind of chattels to take the place of those the defendant failed to deliver.¹ However, exceptions to the general rule are recognized where damages are inadequate because the chattel has some special value to the plaintiff over and above its intrinsic value,² or the chattel is rare or unique,³ or another article of the same type is not conveniently available elsewhere.⁴

During the past three years, a number of suits for specific performance of contracts to sell new automobiles have required the courts to adapt these familiar principles to unfamiliar circumstances. As was to be expected, the results have not been uniform.⁵ In *Heidner v. Hewitt Chevrolet Co.*,⁶ the Supreme Court of Kansas recently adopted a progressive, though definitely a minority view, and granted the vendee specific enforcement of a contract to sell a new automobile. Plaintiff had deposited \$100 with the defendant company, had received a receipt stating that the deposit was on a new car, and had been given a number to designate his position of priority in relation to other prospective purchasers of cars. About 19 months later the defendant informed the plaintiff that a car had arrived which he might have. After plaintiff accepted it in fulfillment of the contract, and offered to pay the balance of the purchase price, he was told that in addition to the payment of the purchase price, he would be required to deliver a used car or "trade-in" to the defendant before he could secure delivery of the new car. No such condition having been agreed upon, plaintiff refused to comply, and rejected defendant's offer to return the deposit.

¹"So, courts of equity will not generally decree performance of a contract for the sale of stock or goods; not because of their personal nature, but because the damages at law...are as complete a remedy for the purchaser, as the delivery of the stock or goods contracted for; inasmuch as with the damages he may ordinarily purchase the same quantity of the like stock or goods." 1 Story, *Equity Jurisprudence* (12th ed. 1877) 704.

²*Adams v. Messinger*, 147 Mass. 185, 17 N. E. 491 (1888); *Beasley v. Allyn*, 15 Phila. 97 (Pa. 1882). Also see *Restatement, Contracts* (1932) § 351.

³*Chamber of Commerce v. Barton*, 195 Ark. 274, 112 S. W. (2d) 619 (1937); *Elliott v. Jones*, 11 Del. Ch. 283, 101 Atl. 872 (1917); *Summers v. Bean*, 13 Gratt. 404 (Va. 1856).

⁴*American Smelting & Ref. Co. v. Bunker Hill & S. Min. & Concentrating Co.*, 248 Fed. 172 (D. C. Ore. 1918); *Curtice Bros. Co. v. Catts*, 72 N. J. Eq. 831, 66 Atl. 935 (1907); *Strause v. Berger*, 220 Pa. 367, 69 Atl. 818 (1908).

⁵See text at notes 7 and 8, *infra*.

⁶199 P. (2d) 481 (Kan. 1948).

The Kansas court, decreeing specific performance of the contract, went against the clear weight of recent authority on this point. Ten decisions have denied the vendee's right to specific performance,⁷ while only two reported cases have allowed equitable relief.⁸

A number of the courts which have denied the vendee the benefit of the equitable remedy refused to recognize any inadequacy in the remedy at law consisting of damages.⁹ Thus, in *Welch v. Chippewa Sales Co.*, the Wisconsin court was satisfied to observe that, "In spite of the failure of production fully to meet the demands of customers, automobiles, and indeed, the very make and type of automobile ordered by plaintiff in this case, are being produced by the thousands."¹⁰ Thereby the court felt it had clearly shown that an automobile, though difficult to purchase on the open market, was not the type of unique chattel required to allow a decree of specific performance. In one instance, a court, while denying specific performance, conceded that the plaintiff might have been given relief if he had shown that, due to the condition of the market he would be unable to obtain a comparable article elsewhere, or would incur serious inconvenience in procuring it elsewhere.¹¹

In other cases specific performance has been denied on the ground that the contract entered into between the parties was too indefinite.¹²

⁷*McCallister v. Patton*, 215 S. W. (2d) 701 (Ark. 1948); *Kelly v. Creston Buick Sales Co.*, 34 N. W. (2d) 598 (Iowa 1948); *Poltorak v. Jackson Chevrolet Co.*, 322 Mass. 669, 79 N. E. (2d) 285 (1948); *Kirsch v. Zubalsky*, 139 N. J. Eq. 22, 49 A. (2d) 773 (1946); *Gellis v. Falcon Buick Co.*, 76 N. Y. S. (2d) 94 (1947); *Daub v. Henry Caplan, Inc.*, 70 N. Y. S. (2d) 837 (1946); *Kaliski v. Grole Motors, Inc.*, 69 N. Y. S. (2d) 645 (1946); *Goodman v. Henry Caplan, Inc.*, 188 Misc. 242, 65 N. Y. S. (2d) 576 (1946); *Cohen v. Rosenstock Motors, Inc.*, 65 N. Y. S. (2d) 481 (1946); *Welch v. Chippewa Sales Co.*, 252 Wis. 166, 31 N. W. (2d) 170 (1948).

⁸*Heidner v. Hewitt Chevrolet Co.*, 199 P. (2d) 481 (Kan. 1948); *DeMoss v. Conart Motor Sales, Inc.*, 72 N. E. (2d) 158 (Ohio 1947).

⁹*McCallister v. Patton*, 215 S. W. (2d) 701 (Ark. 1948); *Poltorak v. Jackson Chevrolet Co.*, 322 Mass. 669, 79 N. E. (2d) 285 (1948); *Kirsch v. Zubalsky*, 139 N. J. Eq. 22, 49 A. (2d) 773 (1946); *Welch v. Chippewa Sales Co.*, 252 Wis. 166, 31 N. W. (2d) 170 (1948).

¹⁰252 Wis. 166, 31 N. W. (2d) 170, 171 (1948).

¹¹*Poltorak v. Jackson Chevrolet Co.*, 322 Mass. 669, 79 N. E. (2d) 285 (1948). In view of this statement by the court, it is interesting to note the facts of the case. The plaintiff had traded in his old car as a down payment on the new one and therefore was deprived of its use while awaiting delivery of the new automobile. Also it appeared that the plaintiff was employed in a neighboring town, so that he had to commute to work each day. Yet, the court evidently felt this was not the type of "serious inconvenience" the plaintiff must show in order to be entitled to specific performance.

¹²*Kelly v. Creston Buick Sales Co.*, 34 N. W. (2d) 598 (Iowa 1948); *Daub v.*

In *Kelly v. Creston Buick Sales Co.*,¹³ the contract was typical, in that it consisted of a printed order-form wherein the delivery date was stated to be "as soon as possible," and the price was to be "the price effective on the day of delivery." The Supreme Court of Iowa, in a 6-3 decision, ruled that these terms were too indefinite to allow specific performance, citing in support of this proposition a case in which indefiniteness appears to have been only an incidental ground for the decision.¹⁴ Lack of mutuality of contract was another reason given in the *Kelly* case to support the denial of a specific enforcement decree. By the terms of the agreement, the plaintiff could cancel the order and receive his deposit back if the price was changed to an unsatisfactory figure.¹⁵

In the principal case, rather than approaching the problem from the standpoint of the uniqueness of a specified make of automobile, the court preferred to ascertain whether damages were in any sense inadequate. This approach led to the conclusion that it was highly improbable that such a car could be obtained on the open market for cash, and that though the chattel was not unique in the sense that there was a dearth of such articles, it was unique in the sense that there was a dearth of such articles reasonably available to the plaintiff.¹⁶ Indeed, the court felt constrained to take judicial notice of the

Henry Caplan, Inc., 70 N. Y. S. (2d) 837 (1946); *Goodman v. Henry Caplan, Inc.*, 188 Misc. 242, 65 N. Y. S. (2d) 576 (1946).

¹³34 N. W. (2d) 598 (Iowa 1948).

¹⁴*Kirsch v. Zubalsky*, 139 N. J. Eq. 22, 49 A. (2d) 773 (1946). The New Jersey court's principal ground for denying specific performance seems clearly to have been the adequacy of damages. To substantiate this reasoning, the court referred to the contract term regarding the price of the new automobile, which stated that the "O.P.A." price on the date of delivery was to govern. This, the court felt, was the proper measure of the plaintiff's damages and showed that the plaintiff had, in effect, agreed on this figure as the monetary value of the automobile to him. In the last paragraph of the opinion the court then asserted that the contract was too indefinite because the price could not be ascertained since the "O.P.A.," the criterion set out in the contract, had now been dissolved. It would seem from this apparent inconsistency that the "indefiniteness" argument is of the "make-weight" variety and not an integral part of an otherwise well-considered opinion.

¹⁵The clause giving the power of cancellation to the vendee states that "... the price ... is subject to change without notice, ... I, however, have the privilege of cancelling this order, provided the changed price is not satisfactory" The dissenting opinion points out that the defendant admitted in argument that this clause implied the existence of an agreed-upon original price and that since here there was no such price, this provision could never become operative. *Kelly v. Creston Buick Sales Co.*, 34 N. W. (2d) 598, 601 (Iowa 1948).

¹⁶The court reasoned that "If ... it is made to appear to the court that like chattels cannot be readily purchased on the market at the time specified in the con-

scarcity, which was a fact of common knowledge in virtually all communities in 1948.

The contract in the principal case was open to the same objection of indefiniteness raised successfully in several of the cases denying specific performance, yet the court here refused to withhold equitable relief on that ground. It was felt that although there was some indefiniteness as to model, price, and date of delivery, these facts were easily ascertainable, and that at the time the plaintiff was shown the car and accepted it, all uncertainty had been resolved. It was reasoned that, "If the contract is certain, complete and has mutuality on the day remedy is invoked or suit is filed, specific performance will not be refused because of a lack of completeness, certainly and mutuality at a prior date."¹⁷

The fact that a specific automobile had been agreed upon in the *Heidner* case seems insufficient to distinguish it from the cases denying specific performance because of indefiniteness. The language in those latter cases indicates that the courts regarded the contracts under consideration to be so indefinite as to be unenforceable in any event.¹⁸

In the case of *DeMoss v. Conant Motor Sales*,¹⁹ the only other reported case found allowing specific performance, the contract date of delivery was "as soon as possible." The court held that this provision was tantamount to postponing delivery a "reasonable time" under the circumstances, and then ruled that this "reasonable time" had elapsed. Further, the court in the *DeMoss* case ruled adversely to the claim of the defendant that the contract lacked mutuality because of the provision that the buyer could cancel the purchasing agreement at his

tract for delivery of the chattel, specific performance will generally be granted if the other necessary elements are present." *Heidner v. Hewitt Chevrolet Co.*, 199 P. (2d) 481, 483 (Kan. 1948).

¹⁷*Heidner v. Hewitt Chevrolet Co.*, 199 P. (2d) 481, 483 (Kan. 1948).

¹⁸It does not appear from the opinions in the cases denying specific performance because of indefiniteness whether or not there was at the time suit was instituted a car meeting the specifications of the contract in the possession of the defendant, although in most of these cases it was so alleged by the plaintiff; and if in fact there was no such car in defendant's possession, the futility of the remedy sought is clear, and the denial of relief should have been based on that ground. The true inquiry in this regard seems to be as to what point of time definiteness is required. The principal case indorses the "time for performance" view, whereas in the cases denying equitable relief, a definite contract is required from the very outset. Therefore, whether the parties ever agreed upon a specific automobile or not would seem immaterial, since the contracts fail to meet the more fundamental requirement of enforceability.

¹⁹72 N. E. (2d) 158 (Ohio 1947).

pleasure, the seller in this event retaining the down payment. The decision in this respect seems to be beyond attack, inasmuch as this agreement, in effect, constituted an option of a type which is almost universally recognized as valid where specific performance is requested of a contract, created by the timely exercise of the option, to transfer legal title to realty.²⁰ Therefore, this feature of the agreement, assuming the existence of the other factors necessary to allow specific performance, should in no way be destructive of the otherwise enforceable contract.

A contention unsuccessfully raised by the plaintiffs in a number of the cases denying the right to specific performance was that under Section 68 of the Uniform Sales Act,²¹ courts of equity are given the discretionary power to compel specific performance of contracts to sell "specific or ascertained" goods, and that therefore it was within the power of the court to allow specific performance of the automobile sales contracts. The holdings of the several courts on this point have resolved themselves into two stock answers: (1) a contract for the sale of such an item as a "Studebaker 2 or 4 door sedan" is not a contract for the sale of a "specified or ascertained" automobile and is too indefinite for enforcement;²² (2) this provision of the Sales Act relates to equity's power in a jurisdictional sense to grant specific performance, and so the remedy at law must still be inadequate, whereas here it is not.²³ The first line of reasoning above appears to require the dealer and purchaser to contract in reference to a specific automobile, which is virtually impossible in this type of transaction. The extreme similarity of all cars of the same model, which has been noticed by one court as a reason for denying specific performance because automobiles are not unique chattels,²⁴ would appear sufficient to sustain the application of the doctrine of fungible goods to these cases. Thereby, any goods on hand of the type ordered by the plaintiff, would satisfy the "specific goods" requirement of Section 68. Another way to avoid

²⁰See 49 Am. Jur. 137-138: "It is well established that when an option which the owner of property gives to another for the purchase of such property is consummated by acceptance according to its terms within the time specified, it merges into a contract for the purchase of the property which equity will enforce by specific performance the same as any other contract wherein the requisite elements of equity jurisdiction are present."

²¹U. L. Ann., Sales (1931) § 68.

²²Gellis v. Falcon Buick Co., 76 N. Y. S. (2d) 94 (1947); Kaliski v. Grole Motors, Inc., 69 N. Y. S. (2d) 645 (1946); Goodman v. Henry Caplan, Inc., 188 Misc. 242, 65 N. Y. S. (2d) 576 (1946); Cohen v. Rosenstock Motors, Inc., 65 N. Y. S. (2d) 481 (1946).

²³McCallister v. Patton, 215 S. W. (2d) 701 (Ark. 1948); Welch v. Chippewa Sales Co., 252 Wis. 166, 31 N. W. (2d) 170 (1948).

²⁴See text at note 10, supra.

the indefiniteness objection is to look at the contract as of the time for performance, as suggested by the court in the principal case.²⁵ When the buyer's date of delivery arrived, judged either by his priority in relation to other prospective purchasers, or within a "reasonable" time after placing his order, the next car that the dealer received of the type ordered by the plaintiff would be the specific chattel required by the Sales Act.

The principal decision, by avoiding the technical obstacles which most of the courts have allowed to paralyze their powers of granting relief in this type of case, has made a feasible application of the modern theory that equity should give specific performance in any case where the remedy is *more* satisfactory than the action at law for damages.²⁶ The result seems particularly desirable in view of the fact that the automobile market has been the subject of much controversy in recent years and has even been under congressional investigation.²⁷ Any reasonable judicial measures tending to dissipate "sharp practice" and to require the contracting parties to live up to their contracts would seem to be justifiable both from a policy standpoint and as a purely mechanical matter regarding the proper exercise of equity's jurisdiction where specific performance of a contract to sell personalty is requested.²⁸

W. H. JOLLY

EVIDENCE—ADMISSIBILITY OF EVIDENCE OF DECEASED'S GOOD CHARACTER
IN HOMICIDE CASE IN WHICH ACCUSED RELIES ON SELF-DEFENSE.
[Virginia]

It is a generally accepted rule of evidence that in a homicide case the defendant cannot bring into evidence proof of the violent or dangerous character of the deceased,¹ and, conversely, that evidence of

²⁵See text at note 17, *supra*.

²⁶The inherent superiority of specific relief, giving to the purchaser exactly what the contract calls for, over damages based on his seeking like goods elsewhere, with the attendant trouble involved and the uncertainty of being able actually to collect a judgment for damages, gives an extensive field for the broadening of specific performance. . . . Walsh, *Equity* (1930) 306. See also 1 Story, *Equity Jurisprudence* (12th ed. 1877) §§ 717-717a.

²⁷See *Richmond Times Dispatch*, Nov. 11, 1948, Vol. 98, No. 316, p. 1.

²⁸For a further discussion of this topic in accord with the views here expressed, see Note (1948) 62 *Harv. L. Rev.* 149.

¹*Lang v. State*, 84 Ala. 1, 4 So. 193 (1888); *Weaver v. State*, 200 Ga. 598, 37 S. E. (2d) 802 (1946); *Dock v. Commonwealth*, 21 Grat. 909 (Va. 1872); *Mealy v. Commonwealth*, 135 Va. 585, 115 S. E. 528 (1923).

deceased's peaceful nature is inadmissible on the part of the state.² In such a situation the character of the deceased is considered immaterial.³

A notable exception to this rule is presented where the defendant pleads self-defense,⁴ for in that case he may, after laying a proper foundation for this plea,⁵ introduce evidence of deceased's dangerous character.⁶ However, when the plea of self-defense is entered, the question arises as to when the state may introduce evidence of deceased's good character—that is, may it immediately offer proof of good character, or must it wait until after the defendant has actually introduced proof of deceased's bad character?

In *Lee v. Commonwealth*,⁷ a recent Virginia case of first impression, such a situation was presented. The defendant, accused of homicide, entered a plea of self-defense, and the Commonwealth sought to introduce evidence of deceased's good reputation. Objection was made by the defendant, but it was overruled and exception was taken. The defendant contended that such evidence was admissible only after he had attacked the character of deceased and then only to rebut this attack. The Commonwealth successfully contended at the trial that the plea of self-defense was a sufficient attack to permit it to show the deceased's good character. In reversing the trial court on this issue, the Supreme Court of Appeals held that only after the accused attacks the deceased's character by attempting to prove the reputation of the de-

²*People v. Hoffman*, 195 Cal. 295, 232 Pac. 974 (1925); *Buttree v. Commonwealth*, 242 Ky. 623, 47 S. W. (2d) 73 (1932); *Dock v. Commonwealth*, 21 Grat. 909 (Va. 1872).

³*State v. Champion*, 222 N. C. 160, 22 S. E. (2d) 232 (1942); 13 R. C. L., Homicide § 219.

⁴The terms "plead self-defense" and "plea of self-defense," commonly employed in the courts' opinions in the cases cited hereafter, are not to be construed in the technical sense of formal pleadings, but only as indicating that particular defense or that particular issue supported by prima facie evidence. Furthermore, since the defendant must always introduce at least prima facie evidence in support of his claim of self-defense, and, since the issue of self-defense must be raised before the deceased's character becomes relevant, evidence of the deceased's good character cannot be introduced until the state offers its rebuttal.

⁵It appears that at least a prima facie case of self-defense must usually be made out; however, the courts are not entirely agreed as to just what constitutes a proper foundation. For a collection of authorities on this point see Notes L. R. A. 1916A 1245, 1255; (1929) 64 A. L. R. 1032, 1036.

⁶*Smith v. United States*, 161 U. S. 85, 16 S. Ct. 483, 40 L. ed. 626 (1896); *State v. Padula*, 106 Conn. 454, 138 Atl. 456 (1927); *Weaver v. State*, 200 Ga. 598, 37 S. E. (2d) 802 (1946); *State v. Wilson*, 236 Iowa 429, 19 N. W. (2d) 232 (1945); *State v. Champion*, 222 N. C. 160, 22 S. E. (2d) 232 (1942); *Harrison v. Commonwealth*, 79 Va. 374 (1884).

⁷188 Va. 360, 49 S. E. (2d) 608 (1948).

ceased for violence and turbulence may the Commonwealth show that the deceased had the reputation of a peaceful, law abiding man; and the plea of self-defense is not, in and of itself, an attack on the character of the deceased such as will warrant rebutting evidence by the state.

Though the rule of the principal case is supported by a clear majority of courts in other jurisdictions, there is authority advocating the admissibility of such evidence on the part of the state as soon as the plea of self-defense is made.⁸ The usual reason (which seems to be more a statement of conclusion than of reason) given for this view is that the plea of self-defense is sufficient to amount to a direct attack on the presumed good character of the deceased and this attack may be rebutted by the state.⁹ Another reason claimed by some to be the logical solution to the problem, is that since the defendant may introduce evidence of his own good character, and since the deceased's character has now been opened to the possibility of attack by virtue of the plea of self-defense, the deceased should have the privilege of showing his own good character.¹⁰ However, in only two jurisdictions has the bare plea of self-defense been found sufficient to warrant the state to include in its evidence in chief proof of the deceased's good character.¹¹ In other cases apparently supporting this view it will be noticed that there were other facts from which the jury could infer that the de-

⁸Thrawley v. State, 153 Ind. 375, 55 N. E. 95 (1899); Ferguson v. State 138 Tenn. 106, 196 S. W. 140 (1917); 1 Wigmore, Evidence (3d ed. 1940) § 63.

⁹Ferguson v. State, 138 Tenn. 106, 196 S. W. 140 (1917). In Thrawley v. State, 153 Ind. 375, 55 N. E. 95, 98 (1899), it was asserted that "the evidence of appellant in support of the charge against deceased was such an attack upon his character for peace as to authorize the state to introduce his good character . . . in disproof of the charge . . ."

¹⁰In State v. Holbrook, 98 Ore. 43, 188 Pac. 947, 954 (1920), it was said: "In a sense, it was an issue whether or not [deceased] was about to violate the law, and his reputation [for peaceableness] would tend to disprove that charge. In principle it is the same as the testimony adduced by the defendants in their own favor on the same feature." Petition for rehearing of this case was denied in State v. Holbrook, 98 Ore. 43, 192 Pac. 640 (1920). However, the court, by way of dicta (192 Pac. 640, 647), pointed out that the rule of State v. Wilkins, 72 Ore. 77, 87, 142 Pac. 589, 592 (1914), relied on by the trial court, which allowed the state to show that the deceased was a peaceable person to overcome the contention of defendant that he acted in self-defense against an attack by decedent, was too broad, but nevertheless, must be followed in this case because it was the law of the jurisdiction at the time of the trial of the instant case. See 2 Wigmore, Evidence (3d ed. 1940) § 246, also in support of this rule.

¹¹Thrawley v. State, 153 Ind. 375, 55 N. E. 95 (1899); Ferguson v. State, 138 Tenn. 106, 196 S. W. 140 (1917). This rule is also supported by Wigmore at two places in his treatise: 1 Wigmore, Evidence (3d ed. 1940) § 63, and 2 Wigmore, Evidence (3d ed. 1940) § 246. Many authorities also include Oregon as following this rule, citing

ceased was a dangerous man, thus warranting rebuttal by the state.¹²

More persuasive and practical reasoning, however, is available to sustain the majority view, now adopted by the Virginia court. It is to be noted, first, that aside from the self-defense factor, evidence of the deceased's character is generally not admissible at all in homicide cases.¹³ Thus the plea of self-defense, in effect, amounts to a condition precedent to the introduction of any such evidence.¹⁴ Since this plea only opens the door to the *possibility of an attack*, the assertion that it alone constitutes an actual attack on the deceased's presumed good character is hardly accurate.¹⁵ Therefore, since the deceased's character is still presumed to be good, if it is to be brought into issue at all, the defendant should be the party to make the first move by introducing evidence to overcome the presumption,¹⁶ as distinguished from merely entering a plea which makes it possible to introduce such evidence.

The argument that since the defendant has the right to show his own good character as part of his evidence in chief, therefore the deceased, through the state, should have the privilege of showing the deceased's good character, is open to the practical objection that it would

State v. Holbrook, 98 Ore. 43, 188 Pac. 947 (1920). However, for a discussion of the situation in that jurisdiction see not 9, *supra*.

¹²Where defendant submitted testimony which, if believed by the jury, would cause them to believe deceased was a violent and dangerous man: *Burnett v. State*, 34 Ariz. 129, 268 Pac. 611, 614 (1928). After evidence of threats by deceased against defendant had been admitted, deceased's good character was admissible: *Thomason v. Commonwealth*, 178 Va. 489, 17 S. E. (2d) 374 (1941); *State v. Arrington*, 88 W. Va. 152, 106 S. E. 445 (1921). In *State v. Todd*, 28 N. M. 518, 214 Pac. 899, 900 (1923), the court spoke as follows: "Here deceased has been characterized by the appellant as carrying a gun for him, lying in wait for him, attempting to murder him . . . , and threatening to murder him. Deceased's character has been thus attacked and blackened as successfully as could possibly have been done by calling his neighbors in to testify to his bad character."

¹³See notes 1, 2, and 3, *supra*.

¹⁴In *State v. Wilson*, 236 Iowa 429, 19 N. W. (2d) 232, 237 (1945), it was observed: "Before evidence of this character or trait is admissible there must have been some preliminary foundation laid . . ." And see 26 Am. Jur., Homicide § 345: "The necessary preliminary showing or appearance of a case of self-defense may be adduced either in the evidence given in behalf of the state in its main case or by the defendant in his defense; the only indispensable prerequisite is that it precede the offered evidence of the decedent's character."

¹⁵See *Kelly v. People*, 229 Ill. 81, 82 N. E. 198, 201 (1907): "... the character of the deceased . . . is presumed to be good until the contrary appears, and unless defendant introduces evidence attacking the general reputation of the deceased in that respect no evidence upon that subject is admissible; and this is true notwithstanding self-defense may be interposed and relied upon." See also *State v. Reed*, 250 Mo. 379, 157 S. W. 316, 318 (1913).

¹⁶*State v. Potter*, 13 Kan. 414 (1874); *State v. Eddon*, 8 Wash. 292, 36 Pac. 139 (1894).

often confuse the jury with unnecessary collateral issues.¹⁷ Furthermore, this plea of self-defense is not entered for the purpose of placing a charge against the deceased, but is interposed as a defense to the charge against the defendant.

In any analysis of this problem it is necessary to keep in mind the purposes for which evidence of the deceased's character may be shown. These are two in number and differ widely, a difference which many courts have failed to notice.

First, such evidence is admissible to show the state of mind of the defendant.¹⁸ This state of mind of the defendant is of probative value in determining the reasonableness of his apprehension of such violence at the hands of the deceased as will justify the defensive measures taken by the defendant.¹⁹ Thus, conduct of the deceased which, when considered independently of his character, would not warrant extreme defensive measures, might well, when considered in connection with such character, arouse an apprehension of deadly peril such as would justify an extreme defense.²⁰ Obviously, before such evidence can be offered for this purpose, it must be shown that the defendant had knowledge of the deceased's character prior to the killing, for without prior knowledge the defendant would have nothing on which to base his apprehensions.²¹ However, in some cases it has been held that there is a presumption of knowledge of the deceased's character.²²

The second purpose for which this evidence is admissible is to de-

¹⁷In *State v. Potter*, 13 Kan. 414 (1874), Justice Brewer, later a Justice of the United States Supreme Court, said: "Such testimony tends to distract the minds of the jury from the principal question and should only be admitted when absolutely essential to the discovery of the truth." And in *State v. Reed*, 250 Mo. 379, 157 S. W. 316, 318 (1913), it was observed that the admission of such evidence "would open up a Pandora's box of collateral issues to be let into every case, and thereby confuse juries even more extensively than under our present system."

¹⁸*Franklin v. State*, 29 Ala. 14 (1856). 2 Wigmore, *Evidence* (3d ed. 1940) § 246.

¹⁹*Smith v. United States*, 161 U. S. 85, 88, 16 S. Ct. 483, 484, 40 L. ed. 626, 627 (1896). "...any evidence which, according to the common experience of mankind, tended to show that the defendant had reasonable cause to apprehend great bodily harm from the conduct of the deceased towards him just before the killing, was admissible; ... [including] evidence that the deceased had the general reputation of being a quarrelsome and dangerous person ...;" *Edwards v. State*, 58 Okla. Cr. 15, 48 P. (2d) 1087 (1935); 2 Warren, *Homicide* (1938) § 46.

²⁰*Garner v. State*, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232 (1891).

²¹*People v. Hoffman*, 195 Cal. 295, 232 Pac. 974 (1925); *Catalina v. People*, 104 Colo. 585, 93 P. (2d) 897 (1939). In *Dannenburg v. Berkner*, 118 Ga. 885, 45 S. E. 682, 683 (1903), a civil action for assault, the court pointed out: "If they did not know of his quarrelsome disposition, it could not explain their conduct. If they did know thereof, it might have illustrated the motive with which they acted."

²²*Thrawley v. State*, 153 Ind. 375, 55 N. E. 95 (1899); *Trabune v. Common-*

termine which party was the aggressor²³—that is, to prove the deceased's state of mind or character as indicative of a tendency to commit or not commit acts of aggression. In this situation the element of communication to the defendant is immaterial, "for the question is what the deceased probably did, not what the defendant probably thought the deceased was going to do."²⁴

Thus, where the defendant is acquainted with the deceased's character, it follows that this evidence is of probative value for both purposes; but where the defendant has no prior knowledge of the deceased's character it is relevant only in regard to the second purpose: determining who was the aggressor.

When the principal case is considered in the light of the foregoing discussion, it appears that the result was clearly correct. However, the controversy over which rule is to be applied as to when the state may show the deceased's good character where self-defense is relied on, may have been irrelevant to the case. Inasmuch as the facts of the case indicated that the defendant and the deceased were complete strangers, evidence of the deceased's character was admissible only to prove the deceased's state of mind or character as an aid in determining whether or not he was the aggressor. But here it was admitted by the Commonwealth that the deceased was the aggressor.²⁵ This being an established fact, evidence showing that the deceased was not in the habit of committing such acts is irrelevant, and particularly so when the admitted purpose of the Commonwealth in introducing the evidence was only to rebut an attack on the character of the deceased and thus show that he was not a person likely to commit an act of aggression.

J. MAURICE MILLER, JR.

wealth, 13 Ky. L. Rep. 343, 17 S. W. 186 (1891); *Harrison v. Commonwealth*, 79 Va. 374, 52 Am. Rep. 634 (1884); 26 Am. Jur., Homicide § 346.

²³*Williams v. Fambro*, 30 Ga. 232 (1860); *State v. Wilson*, 236 Iowa 429, 19 N. W. (2d) 232 (1945); *McLain v. Commonwealth*, 171 Ky. 373, 188 S. W. 377, 378 (1916), points out that "where . . . there is a serious conflict in the evidence as to who was the aggressor, the defendant has a right, not only to prove the general reputation of the decedent in these respects, but to present evidence by persons intimately acquainted with him to the effect that that was his nature, character, temperament, and disposition." Apparently Connecticut is the only jurisdiction flatly denying the admissibility of such evidence for this purpose, but admitting it for the purpose of showing defendant's apprehensions: *State v. Padula*, 106 Conn. 454, 138 Atl. 456 (1927).

²⁴Wigmore, *Evidence* (3d ed. 1940) § 63.

²⁵*Lee v. Commonwealth*, 188 Va. 360, 49 S. E. (2d) 608, 611 (1948).

INSURANCE—EFFECT OF LIABILITY INSURANCE ON PARENT'S IMMUNITY FROM TORT LIABILITY TO CHILD. [Federal]

The increasing incidence of liability insurance among the general public has, in recent years, prompted repeated challenges against the time-honored proposition that the existence of insurance should not give rise to a cause of action against an insured party in whom the law generally recognized an immunity from liability.¹ The practical significance of a reversal of judicial opinion on this issue would obviously be great in the field of tort liability of charitable institutions,² of municipal corporations,³ and between spouses.⁴ Some suggestion of a possible breach in the solidarity of the restrictive rule as applied in suits against eleemosynary organizations is found in a 1947 Illinois case allowing a tort recovery against a charitable hospital on the ground that "where insurance exists and provides a fund from which tort liability may be collected so as not to impair the trust fund, the defense of immunity is not available."⁵

This basic problem of the effect of liability insurance was recently presented in a different form of action in *Villaret v. Villaret*.⁶ A thirteen year old boy was injured when the automobile in which he was riding, operated by his mother, collided with another car on a highway in Maryland. Acting through his next friend, the child sued his mother in the District Court of the United States for the District of Columbia, for damages in the sum of \$10,000. It was stipulated that Mrs. Villaret had liability insurance in the sum equal to the recovery sought. Her motion to dismiss the complaint as failing to state a claim upon which relief could be granted was denied by the District Court. In reviewing the case on special appeal, the United States Court of Appeals for the District of Columbia stated:

"The existence of liability insurance ought not to create a cause of action where none exists otherwise. A policy of such insurance protects against claims legally asserted, but does not itself produce liability."⁷

As this was a case of first impression under Maryland law, the federal

¹Prosser, *Torts* (1941) 907, 908.

²*Wendt v. Servite Fathers*, 332 Ill. App. 618, 76 N. E. (2d) 342 (1947).

³See Note (1932) 46 Harv. L. Rev. 305.

⁴*Coster v. Coster*, 289 N. Y. 438, 46 N. E. (2d) 509 (1943).

⁵*Wendt v. Servite Fathers*, 332 Ill. App. 618, 634, 76 N. E. (2d) 342, 347 (1947), noted (1948) 5 Wash. and Lee L. Rev. 272.

⁶169 F. (2d) 677 (App. D. C. 1948).

⁷169 F. (2d) 677, 678 (App. D. C. 1948).

court looked to the holdings of the Court of Appeals of Maryland on kindred questions⁸ and decided in accord with the generally prevailing rule that public policy forbids tort suits by an unemancipated child against a parent.⁹

While no rule at common law prevented actions between parent and child for personal torts committed during minority, there is no case on record in which liability was imposed.¹⁰ Since the leading case of *Hewlette v. George*¹¹ in 1891, a long line of cases has upheld the doctrine that "the peace of society and of families composing society, and a sound public policy," forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.¹²

In 1923, Chief Justice Clark of the Supreme Court of North Carolina, in a strong dissenting opinion in the case of *Small v. Morrison*,¹³ gave the first legal expression of a conviction that a suit by a child against its parent for personal tort should be allowed.¹⁴ As the protection of the parent by liability insurance appears to have influenced Justice Clark's views considerably,¹⁵ his opinion serves as a starting point for an investigation of the decisions in this field during the past quarter century with a purpose of determining whether liability insurance has had any effect on the application of the established rule that child cannot sue parent for tort.

Although it ultimately denied recovery, the Michigan Supreme Court found it necessary to recognize the influence of liability insurance on tort suits by child against parent in *Elias v. Collins*.¹⁶ Chief Justice Bird stated that there is a "spice of good sense"¹⁷ to the argu-

⁸*Schneider v. Schneider*, 160 Md. 18, 152 Atl. 498 (1930) (suit by a mother against her infant son; *Furstenburg v. Furstenburg*, 152 Md. 247, 136 Atl. 534 (1927) (suit by a wife against her husband).

⁹*Hewlette v. George*, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682 (1891); *Small v. Morrison*, 185 N. C. 577, 118 S. E. 12, 31 A. L. R. 1135 (1923); *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S. W. 664, 64 L. R. A. 991 (1903); *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788, 68 L. R. A. 893 (1905); *Wick v. Wick*, 192 Wis. 260, 212 N. W. 787, 52 A. L. R. 1113 (1927).

¹⁰McCurdy, *Torts Between Persons In Domestic Relation* (1930) 43 Harv. L. Rev. 1030, 1060.

¹¹68 Miss. 703, 711, 9 So. 885, 887, 13 L. R. A. 682, 684 (1891).

¹²McCurdy, *Torts Between Persons In Domestic Relations* (1930) 43 Harv. L. Rev. 1030, 1063-1069.

¹³185 N. C. 577, 118 S. E. 12, 31 A. L. R. 1135 (1923).

¹⁴See Note (1923) 33 Yale L. J. 315, 319.

¹⁵See Note (1923) 33 Yale L. J. 315, 320.

¹⁶237 Mich. 175, 211 N. W. 88, 52 A. L. R. 1118 (1926).

¹⁷237 Mich. 175, 211 N. W. 88, 89, 52 A. L. R. 1118, 1122 (1926). Chief Justice Bird dissented on grounds other than the effect of liability insurance.

ment that business methods have so changed with the coming of the automobile and insurance thereon, that the common law rule should be modified to allow minors to recover for torts inasmuch as the insurance companies promise to reimburse the insured for any judgment obtained against him for injuries caused by the automobile. Though Justice Bird seemed to favor a change from the common law rule, he felt that "if the rule is to go out or be modified, we think it should be done by the legislature rather than by us."¹⁸

In *Wick v. Wick*,¹⁹ Justice Crownhart also looked to the practical effect of liability insurance and wrote a vigorous dissenting opinion, favoring the right of the child to sue the parent where the parent was covered by liability insurance. He stated:

"Times have changed. Practically no business is now carried on without insurance to protect the owner against his negligence whereby his employees may be damaged. Practically all owners of automobiles protect themselves in the same way. Certainly all prudent men should guard against liability in such cases. Should a man think less of his own flesh and blood than of his employees or the stranger on the highway? And if he is thoughtful enough to insure against misfortune due to his negligence to the public at large, must the court step in and deny the infant member of his family the same chance in life as is possessed by the public? I think not."²⁰

On a special state of facts, the Virginia court in *Worrell v. Worrell*²¹ found a means of allowing recovery to an injured child. A twenty year old daughter, who was injured while riding in a bus owned by her father and operated by one of his employees, was awarded damages in a tort action against her father. The express basis of the holding was the fact that the tort complained of was committed by a parent in his vocational capacity, that the State of Virginia provided for compulsory indemnity insurance to passengers of a common carrier, and that such insurance removed all reasons for immunity. The court seemed to feel that these facts distinguished this case from the ordinary tort action of a child against its parents. The opinion emphasized the influence of compulsory insurance and stressed the fact that the father was in the performance of duties as carrier and not in the parental relation when the injuries were occasioned. But though the court reiterated the prevailing rule that "an insurance policy creates no cause of action

¹⁸237 Mich. 175, 211 N. W. 88, 89, 52 A. L. R. 1118, 1122 (1926).

¹⁹192 Wis. 260, 212 N. W. 787, 52 A. L. R. 1113 (1927).

²⁰192 Wis. 260, 212 N. W. 787, 790, 52 A. L. R. 1113, 1118 (1927).

²¹174 Va. 11, 4 S. E. (2d) 343 (1939).

where no cause of action exists in the absence of insurance," it went on to state that "liability insurance, while it does not, therefore, affect the merits of the cause of action against the insured, does lessen the effect of the liability on the wrongdoer."²² Reminiscent of the language of Justice Crownhart's dissent²³ is the observation of Justice Spratley, speaking for the majority of the Virginia court:

"Can it be that his duties to other passengers are higher than his obligations to his own child, when his interest, her interest and the interest of the State all require the preservation and protection of her rights?"²⁴

In *Lusk v. Lusk*,²⁵ a 1932 West Virginia case, the facts were very similar to those of the *Worrell* case and a recovery was allowed. The court placed considerable emphasis upon the fact that the parent was protected by insurance in a vocational capacity, and pointed out that the existence of the insurance took away the reason for the common law rule forbidding a suit by a minor child against its parents under the maxim when the reason for a rule ceases, the rule itself ceases. The court declared:

"There is no reason for applying the rule in the instant case. This action is not unfriendly as between the daughter and the father. A recovery by her is no loss to him. In fact, their interests unite in favor of her recovery, but without hint of 'domestic fraud and collusion' (charged in some cases). There is no filial recrimination and no pitting of the daughter against the father in this case. No strained family relation will follow. On the contrary, the daughter must honor the father for attempting to provide compensation against her misfortune. Family harmony is assured instead of disrupted."²⁶

Though both this and the Virginia case are possibly distinguishable on their facts from the general type of situation in which recovery is denied, both decisions in denying immunity to the insurance company lean heavily on the theory that the reason for the rule is gone and the rule should not apply.

In the case of *Dunlap v. Dunlap*,²⁷ the Supreme Court of New Hampshire allowed a minor son to recover against his father for injuries sustained through collapse of a staging, while the son was work-

²²174 Va. 11, 27, 4 S. E. (2d) 343, 350 (1939).

²³See text at note 20, supra.

²⁴174 Va. 11, 27, 4 S. E. (2d) 343, 349 (1939).

²⁵113 W. Va. 17, 166 S. E. 538, 122 A. L. R. 1357 (1932).

²⁶113 W. Va. 17, 19, 166 S. E. 538, 539, 122 A. L. R. 1357, 1358 (1932).

²⁷84 N. H. 352, 150 Atl. 905, 71 A. L. R. 1055 (1930).

ing for his father. The father carried employer's liability insurance²⁸ and the insurance agent knew that the son was employed. In a forthright manner, the court presents the practical reasoning favoring recovery by the minor child, and the convincing language of the opinion appears logical and sound:

"As often stated before, the sole debatable excuse advanced for the denial of the child's right to sue is the effect a suit would have upon discipline and family life. If, therefore, the situation is such that the suit will not affect those matters at all, the reason for the theory fails, and it should not be applied. There is such a situation here."²⁹

"It will be said that the father's act in taking out insurance against personal liability cannot create the liability where none existed before. The act which creates the liability, or, more correctly, removes a barrier to the enforcement of a right, is the parent's removal of the element which therefore impaired the right."³⁰

Thus, the court in the *Dunlap* case completely broke away from the long line of authority which denies recovery, and the practical approach taken by the New Hampshire court is favored by some Law Review authority³¹ and by at least one authoritative text writer.³² However, it has failed to gain much headway in the courts. In the many instances in which the question has been considered from *Small v. Morrison* in 1923 to *Villaret v. Villaret* in 1948, an overwhelming majority of the courts have endorsed the view that the presence of liability insurance should not create a cause of action where none otherwise exists.³³ Despite the widespread use of liability insurance most courts have clung steadfastly to the principle that public policy denies

²⁸Although Workmen's Compensation Insurance is more analagous to casualty insurance than liability insurance, the court treats the insurance here as liability insurance.

²⁹84 N. H. 352, 150 Atl. 905, 912, 71 A. L. R. 1055, 1067 (1930). The court further said: "In fact, if not in law . . . the insurer became the party liable. More and more such insurance is being looked upon as for the protection of the sufferer, rather than as reimbursement to the wrongdoer." 84 N. H. 352, 150 Atl. 905, 913, 71 A. L. R. 1055, 1068 (1930); "But the essential fact which establishes the suability of the father is that he has provided for satisfying the judgment in some way which removes the suit from the class promotive of family discord." 84 N. H. 352, 150 Atl. 905, 913, 71 A. L. R. 1055, 1069 (1930).

³⁰84 N. H. 352, 150 Atl. 905, 912, 71 A. L. R. 1055, 1067 (1930).

³¹See Note (1933) 19 Va. L. Rev. 730, 732.

³²Prosser, Torts (1941) 906-908.

³³*Rambo v. Rambo*, 195 Ark. 832, 114 S. W. (2d) 468 (1938); *Lund v. Olson*, 183 Minn. 619, 237 N. W. 188 (1931); *Norfolk Southern v. Gretakis*, 162 Va. 597, 174 S. E. 841 (1934); *Securo v. Securo*, 110 W. Va. 1, 156 S. E. 750 (1931).

recovery of child against parent.³⁴ Though the practical arguments for the abolition of the rule appear to have considerable merit, the roots of *stare decisis* in this field of the law are too deep to permit an alteration of the law by judicial action. Most courts feel that the danger of fraud and collusion, which is present in all liability insurance cases, is considerably increased in suits between parent and child.³⁵ If the prevalence of liability insurance at the present time calls for any change in the common law rule, the courts generally have concluded it is a matter for the legislature rather than the judiciary.³⁶

RUFUS B. HAILEY

MORTGAGES—EFFECT OF RETROACTIVE APPLICATION OF STATUTE PROVIDING FOR REDUCTION OF MORTGAGE DEBT BY AMOUNT OF "FAIR MARKET VALUE" OF PROPERTY. [Pennsylvania]

Though in the earlier development of mortgages, neither the law¹ nor equity² courts recognized the right of a mortgagee to a deficiency

³⁴In addition to public policy, the courts further consider the effect on the relationship of parent and child of the cooperation clause which is usually included in liability insurance policies, requiring insured to cooperate fully with insurer in defending against claims which would create liability under the policy. Prosser, *Torts* (1941) 908.

³⁵*Rozell v. Rozell*, 281 N. Y. 106, 22 N. E. (2d) 254, 123 A. L. R. 1015 (1939); 39 Am. Jur. 736.

³⁶39 Am. Jur. 736. No statute has been found which allows specific recovery where the parent is protected by liability insurance, but in the Canadian Case of *Fidelity & Casualty Co. v. Marchand*, 4 D. L. R. 157 (1923), a minor child was allowed recovery from an insured parent. The basis of the recovery was the broad language of a Canadian statute rendering every person capable of distinguishing right from wrong responsible for damages caused by his fault.

¹No right to a deficiency judgment existed in early English mortgage law. A mortgage was regarded as a full conveyance of title to the mortgaged property subject to defeasance upon payment of the debt. If the debt was not paid when due, title vested absolutely in the mortgagee. *Brabner-Smith*, *Economic Aspects of the Deficiency Judgment* (1934) 20 Va. L. Rev. 719.

²At first the foreclosure was regarded as creating a complete bar to an action on the debt, no matter how depreciated the value of the property. Though this theory was abandoned at an early date, the mortgagee still had no satisfactory means of reaching the remaining assets of his debtor. Equity courts refused to apply the maxim that equity having obtained jurisdiction for one purpose will retain it and administer full relief. The mortgagee had to turn back to his legal remedies to enforce his debt and thereby bear the expenses and delays of bringing a separate action. Further, the Chancery Courts took the position that such an action on the debt operated to reopen the foreclosure proceedings and reinstate the mortgagor's equity of redemption. *Tefft*, *The Myth of Strict Foreclosure* (1937) 4 U. of Chi. L. Rev. 575, 586.

judgment, it is now an accepted principle that, under normal circumstances, the creditor is entitled to a judgment for the amount of the debt not satisfied by the liquidation of the mortgage security.³ However, during the depression of the early thirties, when conditions were not normal, this right enabled many mortgagees to obtain a windfall and worked a corresponding hardship upon mortgagors. At a great many of the foreclosure sales there was an acute lack of competitive bidding. Consequently, the mortgagee was able to bid in the property for a negligible amount, and saddle the mortgagor with a large deficiency judgment, often as great as the original debt after court costs and fees were added.⁴

State legislatures, realizing the seriousness of the economic crisis, resorted to various means of alleviating the plight of mortgagors.⁵ Some enacted legislation providing that deficiency suits be stayed for a certain time;⁶ other statutes allowed deficiency suits but provided that the reasonable value of the property should be deducted from the amount decreed to be due;⁷ still others abolished the deficiency judgment entirely.⁸

Many of these enactments were bitterly attacked, mainly on the ground of impairment of the obligations of contracts, but very few were ever declared unconstitutional. Justice Holmes, delivering the opinion of the Supreme Court of the United States in *Home Building & Loan Association v. Blaisdell*,⁹ probably stated most clearly the attitude of the courts in construing the moratory statutes. He conceded that the prohibition against impairing the obligations of contracts has no reference to the degree of impairment. "The largest and least are alike forbidden."¹⁰ But the test of reasonableness, as to what is an impairment, may be changed by a crisis, such as an economic depression. Con-

³Walsh, *Mortgages* (1934) 317.

⁴Perlman, *Mortgage Deficiency Judgments During an Economic Depression* (1934) 20 Va. L. Rev. 771.

⁵Perlman, *Mortgage Deficiency Judgments During an Economic Depression* (1934) 20 Va. L. Rev. 771.

⁶Idaho Gen. Acts (1933) c. 182; Ill. Laws (1933) p. 649; Mich. Pub Acts (1933) No. 98; Minn Laws (1933) c. 339; Mont. Laws (1933) c. 116; N. H. Laws (1933) c. 161; Okla. Sess. Laws (1933) c. 16; Tex. Gen. Laws (1933) c. 102.

⁷Idaho Sess. Laws (1933) c. 150; Kan. Laws (1933) c. 218; N. J. Laws (1933)c. 82; N. Y. Laws (1933) c. 794; S. C. Acts (1933) No. 264.

⁸Ark. Acts (1933) No. 57; N. D. Laws (1933) c. 155. The citations in this note and the preceding two notes were obtained from Perlman, *Mortgage Deficiency Judgments During an Economic Depression* (1934) 20 Va. L. Rev. 771, 772-775.

⁹290 U. S. 398, 54 S. Ct. 231, 78 L. ed. 413, 88 A. L. R. 1481 (1934).

¹⁰*Von Hoffman v. City of Quincy*, 4 Wall. 535, 552, 18 L. ed. 403, 409 (U. S. 1867).

sequently, a regulation which would be unreasonable and therefore an impairment in normal times might be reasonable during an emergency and thus not an impairment. In 1941, the Supreme Court in *Gelfert v. National City Bank of New York*,¹¹ held a New York moratory statute¹² to be constitutional though it was applicable generally, rather than being limited to any declared public emergency. In holding that the Act does not impair the obligations of contracts, the Court pointed to the long history of the control of judicial sales of realty by courts of equity, and ruled that the legislatures can substitute a uniform rule for the more limited control of equity courts.¹³ Thus, the judiciary has demonstrated an inclination to cooperate with the legislatures in providing new forms of relief for the mortgage debtor in normal times as well as during depression periods.

In Pennsylvania, moratory legislation similar to the New York Act was adopted in 1934,¹⁴ 1935¹⁵ and 1937,¹⁶ but each law was declared unconstitutional by the Supreme Court of Pennsylvania.¹⁷ After the New York statute was upheld in the *Gelfert* case, the Pennsylvania legislature in 1941 passed another Act,¹⁸ correcting the special legislation objection to the 1937 Act but retaining the provisions of the 1934 Act, which had been held to be an impairment of the obligations of contracts. The Pennsylvania court in *Fidelity-Philadelphia Trust Co. v. Allen* declared this statute constitutional "on the ground that it is

¹¹313 U. S. 221, 61 S. Ct. 898, 85 L. ed. 1299, 133 A. L. R. 1467 (1941).

¹²New York Civil Practice Act § 1083 which provides that in determining the amount of a deficiency judgment on the foreclosure of a mortgage, the court shall fix the "fair and reasonable market value" of the property, and shall deduct from the amount of the debt either such market value or the sales price of the property, whichever is higher.

¹³"... it is quite uniformly the rule in this country, as in England that while equity will not set aside a sale for mere inadequacy of price, it will do so if the inadequacy is so great as to shock the conscience or if there are additional circumstances against its fairness, such as chilled bidding." *Gelfert v. National City Bank of New York*, 313 U. S. 221, 232, 61 S. Ct. 898, 902, 85 L. ed. 1299, 1303, 133 A. L. R. 1467, 1470 (1941).

¹⁴21 Pa. Stat. Ann. (Purdon, 1948 Supp.) § 806.

¹⁵21 Pa. Stat. Ann. (Purdon, 1948 Supp.) § § 808-820.

¹⁶21 Pa. Stat. Ann. (Purdon, 1948 Supp.) § § 821a-821f.

¹⁷The first two were held to impair obligations of contracts: *Beaver County Building & Loan Ass'n v. Winowich*; 323 Pa. 483, 187 Atl. 481 (1936); *Knox v. Noggle*, 328 Pa. 302, 196 Alt. 18 (1938); the latter was held to be a violation of the constitutional prohibition against special legislation: *Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Scott*, 329 Pa. 534, 198 Atl. 115 (1938).

¹⁸Deficiency Judgment Act, July 16, 1941, P. L. 400, 12 Pa. Stat. Ann. (Purdon, 1948 Supp.) § 2621.1 et seq.

desirable to preserve uniformity of construction of the contract clauses of both state and federal constitutions."¹⁹

There is, however, a vital difference between the New York Act upheld in the *Gelfert* case and the 1941 Pennsylvania statute. The former merely requires the mortgagee to credit the mortgage debtor with the fair market value of the property foreclosed if the confirmation of the foreclosure sale occurred *after* the passage of the Act. Personal judgments received following sales confirmed before the Act, which remained unsatisfied, were not disturbed. On the other hand, the Pennsylvania statute provides for the reduction of personal judgments which were binding *before* the effective date of the law. Granted that uniformity of construction of constitutions is desirable, though "nothing requires the state courts to adopt the rule which the federal or other courts may believe to be the better one,"²⁰ the Supreme Court of Pennsylvania, apparently having taken cognizance of this difference in the New York and Pennsylvania laws,²¹ should have applied this rule of uniformity only to the extent that the two are similar. The court declined to follow this policy as early as 1942, in *Pennsylvania Company for Insurances on Lives and Granting Annuities v. Scott*.²² The *Gelfert* case²³ was again relied on as authority for holding the Pennsylvania statute constitutional when, by its own provision, it was applied retroactively to a foreclosure sale and deficiency judgment which antedated the effective date of the Act. That this decision is clearly fraught with serious implications is demonstrated by the decision rendered in the recent Pennsylvania case of *Dearnley v. Survetnick*,²⁴ which is based squarely upon the *Scott* case as authority.

In the *Dearnley* case, the plaintiff, assignee of a mortgage given as security for a \$5,000 bond, instituted foreclosure proceedings in 1933 and received a deficiency judgment for \$4,950, having bought in the property for \$50 at the sheriff's sale. He received this judgment five

¹⁹343 Pa. 428, 22 A. (2d) 896 (1941).

²⁰*Wichita Royalty Co. v. City National Bank*, 306 U. S. 103, 109, 59 S. Ct. 420, 423, 83 L. ed. 515, 519 (1939).

²¹In *Fidelity-Philadelphia Trust Co. v. Allen*, 343 Pa. 428, 22 A. (2d) 896 (1941) the court in a per curiam decision states: "As the record does not involve the application of the Act to sales on judgments in personam made prior to its effective date, no opinion on the subject is expressed." However, from the cases cited therein, the inference arises that if the case arose it would hold a retroactive extension unconstitutional.

²²346 Pa. 13, 29 A. (2d) 328, 144 A. L. R. 849 (1942).

²³313 U. S. 221, 61 S. Ct. 898, 85 L. ed. 1299, 133 A. L. R. 1467 (1941).

²⁴360 Pa. 572, 63 A. (2d) 66 (1949).

years later and received judgment and assessed damages for over \$7,000, including interest accruing from 1933. In 1941, after the Deficiency Judgment Act²⁵ was passed, on petition by plaintiff, the court fixed the "fair market value" of the property at \$4,500, which amount was deducted from the plaintiff's judgment. Plaintiff apparently accepted this ruling of the court, for in 1948 he again revived the debt and received judgment and assessed damages for the reduced amount plus interest from 1941. Defendant, then, on petition, obtained a rule to have the judgment opened on the ground that damages were excessive in that plaintiff received interest on the \$4,500 from 1933 to 1941. Plaintiff appealed from this order. The Supreme Court of Pennsylvania was virtually forced by its previous decisions to affirm the order, for once the ruling of the *Scott* case was accepted, that the "fair market value" statute could be applied retroactively, then it logically followed that interest could only be allowed on the reduced amount. However, the fallacy of this logic lies in the major premise upon which the decision rests—i.e., that the retroactive application of the statute is constitutional.

It is a basic principle of law that a legislature cannot, under the guise of changing a remedy, destroy or impair final judgments obtained before the passage of the act.²⁶ The two reasons most frequently cited for this limitation on legislative power are, that the judgment is property of the judgment creditor of which he can not be deprived without due process of law,²⁷ and that under our system of division of governmental powers, the legislature cannot invade the province of the judiciary to upset judgments which have become binding.²⁸ While it is generally true that there is no vested right in any particular remedy,²⁹ and thus remedies may be altered without depriving one of his constitutional rights, yet a remedy may be so vital to the obligation that any alteration of it materially affects that obligation.³⁰ It seems clear that the plaintiff's remedy here, which was changed by the "fair

²⁵12 Pa. Stat. Ann. (Purdon, 1948 Supp.) § 2621.1 et seq. The act provides that if the sale occurred prior to the effective date of the act and part of the debt remains unsatisfied, then the mortgagee is to petition the court to fix the fair market value of the property, which amount shall be deducted from any deficiency judgment if this value is greater than the sales price.

²⁶*Hodges v. Snyder*, 261 U. S. 600, 43 S. Ct. 435, 67 L. ed. 819 (1923).

²⁷See *McCabe v. Emerson*, 18 Pa. 111, 112 (1851).

²⁸See *Johnson v. Halloway*, 42 Pa. 446, 448, 82 Am. Dec. 526, 528 (1862).

²⁹*Oshkosh Waterworks Co. v. Oshkosh*, 187 U. S. 437, 23 S. Ct. 234, 47 L. ed. 249 (1903).

³⁰*Von Hoffman v. City of Quincy*, 4 Wall. 535, 18 L. ed. 403 (U. S. 1867).

market value" statute, was of the very essence of the mortgage creditor's right to recover payment of the debt.

It is argued in the *Scott* case³¹ that no property right of the plaintiff is destroyed because all that he is entitled to is payment in full for his debt, and, assuming that he will eventually realize the "fair market value" of the property, he will ultimately be paid in full. But in actual practice the reduction of a \$7,000 judgment, which became binding eight years prior to the passage of the statute, to one of less than \$1,000, is very likely to result in an impairment of a vested right. To illustrate, suppose that the plaintiff in the *Dearnley* case, soon after purchasing the property for \$50 had sold it for \$100. Since it appears that the principles which the court laid down in the *Dearnley* case would apply to such facts, the mortgagee's deficiency judgment would have been reduced by \$4,500, while he would have suffered a \$4,400 loss, merely because he could not anticipate the passage of a statute eight years later which would require him to reduce his judgment by the "fair market value" of the property. The court's assumption that the plaintiff will eventually realize \$4,500 from the land is of little solace to others who may have sold during a depression, when the so-called "fair market value" is purely fictional and the "true market value" is a mere fraction of that hypothetical figure.

The essential vice of the *Dearnley* decision lies more directly in economic considerations than in legal concepts,³² because the term "fair market value" cannot be fairly applied retroactively. It has no reference to any particular time; fair price in 1941 would likely have been an exorbitant price in 1933, when the land was sold. Thus, to cope with the burden laid on him by the Pennsylvania court, the mortgagee either must eschew the role of bidder at his own foreclosure sale (thereby often leaving no bidders at all), or must, after bidding in the property, retain it until its actual market value rises to a point equal to what some unknown court at some unknown later date may, by the application of some unknown formula, determine was the "fair market value" at the time of the foreclosure sale. Admitting that the fixing of a "fair market value" is desirable for the protection of the mortgage debtor, this protection would be preserved even if the un-

³¹346 Pa. 13, 29 A (2d) 328, 330, 144 A. L. R. 849, 852 (1942).

³²The holding that the statute can be applied retroactively becomes less important with the passage of time, as the number of persons holding deficiency judgments dating from before July 16, 1941, when the statute was passed, decreases. However, to allow such a decision to remain the law gives an unsound precedent upon which to base subsequent decisions and legislation.

desirable retroactive provision were to be held unconstitutional, since the statute contains a separability clause.³³

WILLIAM S. HUBARD

PROCEDURE—AVAILABILITY OF WRIT OF HABEAS CORPUS TO ATTACK VALIDITY OF ORDER MADE BY COURT WITHOUT JURISDICTION. [Federal]

In a series of cases decided more than half a century ago, the Supreme Court of the United States apparently embraced the doctrine "that a judgment showing on its face lack of jurisdiction of the subject matter [is] void for all purposes."¹ As a result, when such judgments involved the improper incarceration of an individual, they were held subject to collateral attack through the writ of habeas corpus.² More recent decisions have, however, considerably modified this earlier principle, and it is now said that where the fact of jurisdiction has been adjudicated, the judgment cannot be collaterally attacked.³ Thus, in 1931, in the *Baldwin* case,⁴ it was decided that jurisdiction of the person was *res judicata*. Seven years later, determination of jurisdiction over the subject matter was held to be *res judicata*,⁵ and this principle was soon extended to any matter which *might have been litigated*

³³12 Pa. Stat. Ann. (Purdon, 1948 Supp.) § 2621.11. "The provision of this act shall be severable, and if any section, provision or clause thereof be held to be unconstitutional, the decision so holding shall not be construed to affect or impair any other section, provision or clause of this act."

¹Judge Clark, concurring, in *United States ex rel. Sutton v. Mulcahy*, 169 F. (2d) 94, 96 (C. C. A. 2d, 1948).

²*Ex Parte Rowland*, 104 U. S. 604, 26 L. ed. 861 (1881); *Ex Parte Fisk*, 113 U. S. 713, 5 S. Ct. 724, 28 L. ed. 1117 (1885); *Ex Parte Ayers*, 123 U. S. 443, 8 S. Ct. 164, 31 L. ed. 216 (1887); *In re Sawyer*, 124 U. S. 200, 8 S. Ct. 482, 31 L. ed. 402 (1888).

³*Stoll v. Gottlieb*, 305 U. S. 165, 175, 59 S. Ct. 134, 139, 83 L. ed. 104, 110 (1938): "Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them, or either of them, collaterally, or otherwise than on writ of error or appeal to this court."

⁴*Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U. S. 522, 51 S. Ct. 517, 75 L. ed. 1244 (1931). Where the defendant appeared before the court to determine the court's jurisdiction over him and did not appeal from an adverse judgment, he is barred by *res judicata* from questioning the jurisdiction in a later suit on the judgment.

⁵*Stoll v. Gottlieb*, 305 U. S. 165, 59 S. Ct. 134, 83 L. ed. 104 (1938). An adjudication of a federal court in a bankruptcy proceeding was held to be *res judicata* in a suit in a state court brought by a bond holder, who had been notified of the federal proceedings, but did not appear.

in the prior suit.⁶ Having had his day in court and having failed to exercise his right to appeal from the erroneous finding of jurisdiction, the aggrieved party is estopped to dispute the validity of the decision in another type of proceeding.⁷ However, while this estoppel operates generally to sustain improper but unappealed court orders, the right to collateral attack by habeas corpus is still recognized in what are indefinitely termed "exceptional cases."⁸

The confusion which still surrounds this issue is graphically demonstrated in the recent case of *United States ex rel. Sutton v. Mulcahy*.⁹ The controversy grew out of an action for partnership accounting brought in the United States District Court for the Territory of Hawaii, which was dismissed for lack of jurisdiction, the court finding that both Menashe, the plaintiff, and Sutton, the defendant, were residents of New York. A suit in equity was then brought in the territorial court of Hawaii, and upon consent of the parties a receiver was appointed. Thereafter, Menashe brought a suit in the federal district court in New York for the appointment of an ancillary receiver. A temporary appointment was later made permanent, after the court had overruled the defendant Sutton's motion to dismiss for lack of jurisdiction.¹⁰ From these appointments of receivers the defendant did not appeal. An order was entered appointing a master and directing Sutton to give testimony in regard to the location of partnership assets. Sutton's attempt to appeal from this order was dismissed because such an order was held to be not appealable. Subsequently, he refused to answer the questions of the master, and was adjudged guilty of contempt and directed to pay a \$22,000 fine to the ancillary receiver, with opportunity to purge himself of contempt by testifying fully. When he still refused, on advice of counsel, to answer any question, a commitment order was entered fining him \$22,000 and costs, to be

⁶*Chicot County Drainage District v. Baxter State Bank*, 308 U. S. 371, 60 S. Ct. 317, 84 L. ed. 329 (1940). A reorganization under a statute that was later declared unconstitutional required bond-holders to cash their bonds within a year or have them declared cancelled. The plaintiff did not cash his bonds, but after the statute was declared unconstitutional he brought a suit to recover on them. The Supreme Court held that he could not attack the reorganization collaterally, but that he should have attacked directly by appeal.

⁷Note (1948) 9 Ohio St. L. J. 539.

⁸*Bowen v. Johnson*, 306 U. S. 19, 27, 59 S. Ct. 442, 446, 83 L. ed. 455, 461 (1939): "But it is equally true that the rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent."

⁹169 F. (2d) 94 (C. C. A. 2d, 1948), noted (1948) 9 Ohio St. L. J. 539.

¹⁰*Menashe v. Sutton*, 71 F. Supp. 103 (S. D. N. Y. 1947).

paid to the marshal. Sutton then sued out the writ of habeas corpus on the ground that the court making the contempt order was without jurisdiction. The writ was discharged in the district court, and that judgment was affirmed by the Circuit Court of Appeals for the Second Circuit in a two to one decision. Though the entire court assumed, almost without discussion, that the district court which made the contempt order had no jurisdiction of the ancillary receivership suit,¹¹ each of the three judges found it necessary to write a separate opinion on the question of whether the validity of the lower court's action could be tested in habeas corpus proceedings.

Judge Swan, writing the opinion for the appellate court, reasoned that, the orders appointing the receivers being appealable, even though petitioner Sutton failed to appeal from them, the question of jurisdiction was to be regarded as litigated and so immune from collateral attack. Though Judge Clark, concurring, had some misgivings because of his "law-school teachings . . . that a judgment showing on its face lack of jurisdiction of the subject matter was void for all purposes,"¹² he nevertheless "guessed" that Judge Swan was correct on the current state of the law, inasmuch as Sutton "did have plenty of opportunity to continue upon appeal the issue he had already raised below . . ."¹³ Both opinions appear to turn ultimately on the conclusion that the defendant had had the "day in court" to which he was entitled.¹⁴ This

¹¹There are at least two possible grounds which may have been regarded as sufficient by the lower court to support its jurisdiction. One is diversity of citizenship under the 1940 amendment to 28 U. S. C. A. § 41(1) between a citizen of a state and a citizen of a territory. But the United States District Court for the Territory of Hawaii had already found that the defendants " 'though alleged to be residents of the Territory of Hawaii are in fact residents of the State of New York.' " *Menashe v. Sutton*, 71 F. Supp. 103 (S. D. N. Y. 1947). The other possible basis for jurisdiction was that the action for partnership accounting in the territorial court of Hawaii would give the Federal District Court jurisdiction to appoint an ancillary receiver. But that contention was rejected by both Judges Clark and Frank, 169 F. (2d) 94, at 96, and 97, n. 1.

¹²169 F. (2d) 94, 96 (C. C. A. 2d, 1948). Here Judge Clark referred to cases discussed by Justice Rutledge, dissenting, in *United States v. United Mine Workers of America*, 330 U. S. 258, 351-363, 67 S. Ct. 677, 724-730, 91 L. ed. 884, 943-949 (1947) some of which are found in note 2, *supra*.

¹³169 F. (2d) 94, 97 (C. C. A. 2d, 1948).

¹⁴The only case cited in the court's opinion on the issue of collateral attack by habeas corpus was an earlier case decided by the same court, *United States ex rel. Emanuel v. Jaeger*, 117 F. (2d) 483 (C. C. A. 2d, 1941). There the relator was the president and sole stockholder of a corporation which filed a petition in the bankruptcy court for reorganization. An agreement was made with one Raskin wherein Raskin was to provide \$2,500 to pay 30% to the creditors in cash. The relator varied from the agreement, and later Raskin applied for a resettlement, which led to the

view seems to be sustained by the cases following the *Baldwin* case which held that where the issue of jurisdiction has been, or could have been litigated, the issue is immune from collateral attack.¹⁵

Judge Frank, dissenting,¹⁶ seemed to concede that the res judicata theory may be valid generally to prevent collateral attacks on judgments, but he argued strenuously that it is not applicable in this case. His view was that, if it is correct to assume that the contempt and commitment orders which petitioner seeks to avoid were not appealable, he did not have a chance to attack the jurisdiction of the court directly at that stage of the proceedings. While it was true that the original orders appointing the receivers were appealable, Judge Frank reasoned that Sutton's failure to appeal from them should not be held to forfeit all rights to object to the court's lack of jurisdiction. Since these orders did not affect him in a practical way, he "felt no bite"¹⁷ in the court's action at that point, and so had no reason to think it necessary to incur the expense of an appeal. The "bite" was felt only in the form of the order to testify before the receiver, which led to the contempt and commitment orders. These orders being non-appealable, the only means by which Sutton could raise the issue of their invalidity because of the court's lack of jurisdiction was through some collateral proceedings.

debtor-corporation being directed to pay Raskin \$3,042.50. Raskin, after failure to collect, moved to include the relator individually as well as the corporation, which motion was granted with an order to deliver the property of the debtor to Raskin. For failure to observe the order, both the debtor and relator were held in contempt and fined \$3,042.50, relator being allowed to purge himself by payment of \$40 per month. This he failed to do, and the bankruptcy court ordered him committed to the custody of the marshal. Between the contempt order and the commitment order, relator's motions for modification were denied. No appeal was taken from any of these orders of the bankruptcy court, but after commitment, relator petitioned for a writ of habeas corpus. The appellate court, finding that the bankruptcy court had passed on its own jurisdiction, came to the conclusion that the bankruptcy court was without jurisdiction over the part of the order on which the commitment was based. "Yet he had opportunity to and did raise that issue in the prior proceeding, and the court found against him. Even if we assume that the court was acting upon erroneous grounds as indicated above, yet *Stoll v. Gottlieb* . . . makes it clear that the matter is settled against collateral attack." 117 F. (2d) 483, 487. The writ was discharged.

In his dissent in the Sutton case, Judge Frank distinguished the Sutton case by saying, "Nor is it a case of commitment for violation of an injunction order, or of an order to turn over funds wrongfully withheld, when the violated order (a) might have been appealed but was not, as in *United States v. Jaeger* . . ." 169 F. (2d) 94, 99 (C. C. A. 2d, 1948).

¹⁵See text at notes 3, 4, 5, and 6, supra.

¹⁶169 F. (2d) 94, 97 (C. C. A. 2d, 1948).

¹⁷169 F. (2d) 94, 99 (C. C. A. 2d, 1948).

This basis for sustaining the writ of habeas corpus may well be questioned for the reason that the exercise of ordinary foresight should have warned Sutton that the "bite" was menacingly in prospect before it was actually felt. One of the practical results to be expected from the appointment of court officers to locate the partnership assets was obviously that Sutton would be required to give testimony on the subject under investigation. But even so, after Sutton had, with some reason and on advice of counsel, foregone the opportunity to appeal, his predicament became such that there were good grounds for making this an "exceptional case" in which habeas corpus should lie.

The Supreme Court in *Sunal v. Large* has given recent recognition to the fact that in exceptional situations "habeas corpus has done service for an appeal . . ." ¹⁸ "That is to say, the writ has at times been entertained either without consideration of the adequacy of relief by the appellate route or where an appeal would have afforded an adequate remedy. Illustrative are those instances where . . . there was a conviction by a federal court whose jurisdiction over the person or the offense was challenged . . ." ¹⁹ But it was also observed that "where the jurisdiction of the federal court which tried the case is challenged . . . habeas corpus is increasingly denied in case an appellate procedure was available for the correction of the error." ²⁰

Judge Swan, having emphasized the failure of petitioner to appeal from the district court's appointment of the receiver, pointed to this latter statement of the Supreme Court as indicating that the principal case situation was not within the "exceptional" classification. ²¹ However, though the writ was discharged in the *Sunal* case, that decision is not authority for the principal decision, for the cases are clearly distinguishable. ²² There the Court held that habeas corpus could not be

¹⁸332 U. S. 174, 179, 67 S. Ct. 1588, 1591, 91 L. ed. 1982, 1987 (1947).

¹⁹332 U. S. 174, 178, 67 S. Ct. 1588, 1591, 91 L. ed. 1982, 1987 (1947).

²⁰332 U. S. 174, 179, 67 S. Ct. 1588, 1591, 91 L. ed. 1982, 1987 (1947).

²¹169 F. (2d) 94, 96 (C. C. A. 2d, 1948).

²²*Sunal*, a Jehovah's Witness, claimed exemption granted by Congress to regular ordained ministers of religion, § 5(d), under the Selective Training and Service Act of 1940. The local board denied the exemptions and classified *Sunal* as 1-A. He reported to the board, after exhausting his administrative remedies trying unsuccessfully to effect a change in classification, but refused to submit to induction. He was then convicted under § 11 of the Act for refusing to submit to induction, and sentenced on March 22, 1945. Evidence at the trial that his classification was invalid was held inadmissible. He did not appeal from the conviction because the chances of securing a reversal seemed slight. However, on February 4, 1946, the Court decided *Estep v. United States*, 327 U. S. 114, 66 S. Ct. 423, 90 L. ed. 567, (1946) which, on similar facts, held such exclusion of testimony to be reversible er-

used as a substitute for a remedy which was at all times clearly present but was not availed of because considered to be futile. It was specifically noted in the opinion that the "error did not go to the jurisdiction of the trial court,"²³ as it admittedly did in the principal case. From the standpoint from which Judge Frank viewed petitioner Sutton's situation, there is the additional distinguishing factor that the contempt orders which were being attacked were not appealable in nature.

Three Justices of the Supreme Court thought that even in the circumstances of the *Sunal* case, the writ should be granted because such action was "'necessary to prevent a complete miscarriage of justice'."²⁴ It is the opinion of Justice Rutledge that, "by the sum of the [Supreme Court] decisions,"²⁵ such is the ultimate test of the availability of habeas corpus, for it is essential "... that the great writ of habeas corpus should not be confined by rigidities characterizing ordinary jurisdictional doctrines."²⁶

Though Judge Frank nowhere employs the term "exceptional case," the tenor of his opinion is clearly that the principal case should be treated as such. The facts that the commitment orders were regarded as unappealable, that Sutton had not felt the need of appealing from the receivership appointments, that he had at all times acted reasonably on advice of competent counsel, that he had merely chosen "the wrong ladder from the district court"²⁷ to the appellate court, and that the ultimate alternatives of paying a large fine or going to jail were very severe, all combine to build up a strong argument for relief.

The flexibility of the application of the habeas corpus writ is further emphasized by the dissent's suggestion of a third alternative approach through which the court could justifiably hear Sutton's case. Though it had been assumed that the commitment orders were not appealable, this point, too, is not without uncertainty.²⁸ Therefore,

ror. *Sunal*, shortly afterwards, filed a petition for writ of habeas corpus to test the validity of his conviction.

²³332 U. S. 174, 181, 67 S. Ct. 1588, 1592, 91 L. ed. 1982, 1989 (1947).

²⁴332 U. S. 174, 188, 67 S. Ct. 1588, 1596, 91 L. ed. 1982, 1992 (1947), quoting from *United State ex rel. Kulick v. Kennedy*, 157 F. (2d) 811, 813 (C. C. A. 2d, 1942). Justices Frankfurter, Rutledge and Murphy were the dissenters.

²⁵332 U. S. 174, 188, 67 S. Ct. 1588, 1596, 91 L. ed. 1982, 1992 (1947).

²⁶332 U. S. 174, 187, 67 S. Ct. 1588, 1595, 91 L. ed. 1982, 1992 (1947).

²⁷169 F. (2d) 94, 101 (C. C. A. 2d, 1948).

²⁸169 F. (2d) 94, 100 (C. C. A. 2d, 1948). Judge Frank cites *Hickman v. Taylor*, 153 F. (2d) 212 (C. C. A. 3d, 1945) as authority for allowing appeal in a similar commitment order, which the Supreme Court affirmed after granting certiorari. But he also points out that it is not easy to reconcile that conclusion with other Supreme Court decisions, such as *Craig v. Hecht*, 263 U. S. 255, 44 S. Ct. 103, 68 L. ed. 293 (1923), where it was held that appeal would lie from criminal contempt, but that

Judge Swan urged that, if the orders are to be regarded as appealable, then, since Sutton had appealed from the discharge of his writ of habeas corpus before the time for appeal from the commitment orders was expired, "it cannot be said that he tried to use habeas corpus as a substitute for an appeal which, because of lapse of time, was no longer open to him."²⁹ In order to free itself from "antiquated procedural technicalism [and] the exaltation of labels,"³⁰ the court should treat the appeal from the dismissal of habeas corpus as if it had been an appeal from the commitment order.

Each of the judges in the principal case would seem to concede that the rules governing the use of habeas corpus are in such a state of uncertainty that rights under that writ are extremely precarious. The *Sutton* decision has surely done nothing to resolve this uncertainty; and a reading of the opinions gives the impression that the judges felt that, in view of the several controversial points involved, the Supreme Court would be called upon to give the final word on the case. It is to be hoped that in this event, the Court will attempt to give a definitive answer to the issue of the availability of habeas corpus writs for making collateral attacks on actions taken by courts without jurisdiction.

RAY S. SMITH, JR.

TORTS—LIABILITY OF DECEDENT'S ESTATE FOR LIBEL CONTAINED IN WILL
AND PUBLISHED ONLY BY PROBATE OF WILL. [South Carolina]

Because of the restrictive effect of the rule that a cause of action for a personal tort abates at the death of the tortfeasor, one who is libeled by defamatory language contained in a probated will is faced with a strong possibility of being left without legal means of recovering compensation for the injury done to him. The cases agree that the executor

a civil contempt order was interlocutory and non-appealable. Also, *Doyle v. London Guarantee & Accident Co.*, 204 U. S. 599, 27 S. Ct. 313, 51 L. ed. 641 (1907). Judge Frank said the ruling in the *Doyle* case seemed to have been modified in *Union Tool Co. v. Wilson*, 259 U. S. 107, 42 S. Ct. 427, 66 L. ed. 848 (1922). There the Supreme Court found that, in an order partly remedial and partly punitive, the criminal features dominate, and since an order punishing criminally is a final judgment, the order was appealable. *Fox v. Capital Co.*, 299 U. S. 105, 57 S. Ct. 57, 81 L. ed. 67 (1936), held that no appeal was available from an order fining or imprisoning for civil contempt except in connection with an appeal from a final judgment or decree.

²⁹169 F. (2d) 94, 101 (C. C. A. 2d, 1948).

³⁰169 F. (2d) 94, 102 (C. C. A. 2d, 1948).

who caused the will to be probated is not personally liable.¹ Because he is bound to offer the will to a court of probate, his act is absolutely privileged. The problem, therefore, is whether the estate of the testator should respond in damages to the injured party.

The Supreme Court of South Carolina recently considered this unique question in *Carver v. Morrow*.² A codicil to a will which had been duly proved and probated after the death of defendant's testatrix contained matter which plaintiff alleged to be libelous. The action was brought against the defendants as executor, on the theory that the probate of the will constituted a publication of the libel. The court sustained defendant's demurrer to the complaint. Inasmuch as the libelous matter in the will was not published in testatrix's lifetime, the common law rule that a personal action ex delicto dies with the person was thought to be sufficient to defeat recovery. In the court's opinion, the executor was not the testatrix's agent for purposes of consummating the tort, but was an agency of the law to probate the will.

The few cases decided on this point show a diversity of opinion.³ The *Carver* case⁴ cited and followed the reasoning employed by the Georgia Supreme Court in *Citizens and Southern National Bank v. Hendricks*,⁵ decided in 1933 and regarded as a "leading case" in the field. Those courts taking the opposite view, holding the estate of the testator liable for damages to the injured party, reason that the common law maxim "actio personalis moritur cum persona" does not apply, in that the cause of action did not accrue in the lifetime of the testator. As pointed out by the Tennessee court in *Harris v. Nashville*

¹*Brown v. Mack*, 185 Misc. 368, 56 N. Y. S. (2d) 910 (1945); *Nagle v. Nagle*, 316 Pa. 507, 175 Atl. 487 (1934); Note (1935) 48 Harv. L. Rev. 1027; "... When a nominated executor in a libelous last will does accept office and publishes the will to the extent of presenting it for probate... the petitioning executor should be... absolutely privileged and protected from personal liability..." *Matter of Payne*, 160 Misc. 224, 230, 290 N. Y. Supp. 407 (1936). For other authority see note 3, *infra*.

²213 S. C. 199, 48 S. E. (2d) 814 (1948).

³The estate has been held liable in *Brown v. Mack*, 185 Misc. 368, 56 N. Y. S. (2d) 910 (1945); *In re Gallagher's Estate*, 10 Pa. Dist. 733 (1901); *Harris v. Nashville Trust Co.*, 128 Tenn. 573, 162 S. W. 584 (1914). The estate was held not liable in *Citizens & Southern National Bk. v. Hendricks*, 176 Ga. 692, 168 S. E. 313 (1933).

⁴213 S. C. 199, 48 S. E. (2d) 814, 816 (1948).

⁵"If a paper executed as a will expresses libelous matter, and the act of the executor in propounding the will is relied on to complete the offense and afford ground for recovery against the estate, such reliance must fail, because the testator has died. If it be said that the act of the executor in propounding the will could be taken into account, the reply is that the executor was a creature or agency of the law to administer the estate, and was not the testator's representative in the continuation or consummation of the testator's wrong." 176 Ga. 692, 168 S. E. 313, 315 (1933).

Trust Co., "To say that an action dies with the person . . . implies that the cause of action existed in the lifetime of the person; that it was existing while the person lived and abated with his death."⁶ The executor is considered the agent of the testator to probate the will, and the agent having published the libel in pursuance of the authority given, the estate-principal is held liable.

Regardless of which result the decisions reach, much attention is given in the opinions to the question of whether the executor can be held to have acted in an agency capacity in publishing the libel by probating the will. It is, of course, a basic principle that publication is an essential element of libel, and until such publication no action for damages will lie.⁷ Generally the defamatory matter must be published by the defendant, but if a person writes a libelous statement, leaving it in such form that it will necessarily be published by others, he is liable if such results were intended.⁸

In spite of this accepted premise that publication can be made by another than the party alleged to have committed the libel, it seems necessary to concede that for the purposes of the instant case, liability based on a true agency relationship between the testator and executor cannot be supported upon orthodox doctrines. Although the principal is responsible for publication of a libel through an agent,⁹ this is true only where the principal is alive at the time of publication; and, in general, where not coupled with an interest, the authority of the agent is terminated upon the death of the principal.¹⁰ To say that the

⁶128 Tenn. 573, 162 S. W. 584, 586 (1914).

⁷*McDaniel v. Crescent Motors*, 249 Ala. 330, 31 S. (2d) 343, 172 A. L. R. 204 (1947); *McFarlan v. Manget*, 179 Ga. 17, 174 S. E. 712 (1934); *Satterfield v. McLellan Stores*, 215 N. C. 582, 2 S. E. (2d) 709 (1939); *Fingerhut v. Weiner*, 147 Misc. 269, 263 N. Y. Supp. 636 (1933); "The basis of the action is damages for injury to the character in the opinion of others. This cannot arise but from publication." *Harper, Torts* (1933) 500. See *Prosser, Torts* (1941) 810.

⁸*Sourbier v. Brown*, 188 Ind. 554, 123 N. E. 802 (1919); *James v. Powell*, 154 Va. 96, 152 S. E. 539 (1930); "It is not necessary that the publication of a libel should be effected solely or directly by the author of it personally. For if a person having a printed or written defamatory statement parts with it in order that its contents may become known . . . [it] will amount to a publication . . ." *Newell, Slander and Libel* (4th ed. 1924) 200. Also see *Harper, Torts* (1933) 501.

⁹*Bacon v. Michigan Central R. Co.*, 55 Mich. 224, 21 N. W. 324, 54 Am. Rep. 372 (1884); *Mann v. Life & Casualty Ins., Co.*, 132 S. C. 193, 129 S. E. 79 (1925); "It is well settled that a principal is responsible where authority is given to an agent to publish libelous words and a publication is made by the agent in substantial accord with his authority." *Harris v. Nashville Trust Co.*, 128 Tenn. 573, 162 S. W. 584, 585 (1914). For a complete discussion of this question, see *Note* (1944) 150 A. L. R. 1338.

¹⁰*Streit v. Wilkerson*, 186 Ala. 88, 65 So. 164 (1914); *Ferguson v. Pilling*, 231

executor is the agent of the testator for purposes of consummating the tort "would be an extraordinary extension of the law governing the relationship of principal and agent."¹¹

The issue of publication by agency, however, seems actually to be secondary in significance to the effect the courts see fit to give the maxim that actions ex delicto die with the person. Under the traditional rules concerning defamation cases, in the absence of an enabling statute the cause of action dies with the defamer.¹² But as the *Harris* case¹³ indicated, the present situation differs from the normal libel case in that the cause of action did not arise until after the defamer's death.¹⁴ As there is no tort action until after the death of the testator, the way is open for courts to rule that cases employing the general rule in normal defamation situations are not precedents on the exact issue involved in this type of case. The courts are thus free to decide the question either way on grounds of policy and fundamental justice.

Those courts refusing to hold the estate of a deceased person liable for an act consummated after his death fear that they would be setting a precedent for other types of actions against a decedent's estate, such as may arise "if a man digs a pit for his enemy and dies, and later the enemy falls into the pit and is injured . . . [or one] hires another to assault his enemy and dies and later the assault is committed as he or-

Iowa 530, 1 N. W. (2d) 662; "The reason for this rule is that the authorized acts of the agent are in their nature the acts of the principal, and by legal fiction the agent's exercise of authority is regarded as an execution of the principal's continuing will." *Carver v. Morrow*, 213 S. C. 199, 48 S. E. (2d) 814, 817 (1948); *Restatement, Agency* (1933) § 120.

¹¹*Carver v. Morrow*, 213 S. C. 199, 48 S. E. (2d) 814, 816 (1948).

¹²This is true under the common law rules even though suit has been instituted against the defamer before his death. *Reed v. Real Detective Pub. Co.*, 63 Ariz. 294, 162 P. (2d) 133 (1945); *Blodgett b. Greenfield*, 101 Cal. App. 399, 281 Pac. 694 (1929); *Note* (1907) 6 Ann. Cas. 513; *Legis.* (1935) 48 Harv. L. Rev. 1008; 1 R. C. L. 48; 1 C. J. S. 200.

¹³*Harris v. Nashville Trust Co.*, 128 Tenn. 573, 162 S. W. 584 (1914).

¹⁴Publication is an essential element of libel, and this was accomplished by probate of the will. Though it may be argued the libel was published during decedent's lifetime by the dictation of the will to a stenographer, still this is not the publication complained of. *Citizens & Southern National Bk. v. Hendricks*, 176 Ga. 692, 168 S. E. 313 (1933); *Brown v. Mack*, 185 Misc. 368, 56 N. Y. S. (2d) 910 (1945); *In re Gallagher's Estate*, 10 Pa. Dist. 733 (1901); *Harris v. Nashville Trust Co.*, 128 Tenn. 573, 162 S. W. 584 (1914). Further, every repetition of the defamation is a republication giving rise to a new cause of action. *Taylor v. Hungerford*, 205 Iowa 1146, 217 N. W. 83 (1927); *Sharpe v. Larson*, 70 Minn. 209, 72 N. W. 961 (1897); *Sawyer v. Gilmer, Inc.*, 189 N. C. 7, 126 S. E. 183, 41 A. L. R. 1184 (1925); 53 C. J. S. 137; *Prosser, Torts* (1941) 812.

dered."¹⁵ However, unless one is a stern convert to the belief that the common law is perfect and changeless, it may be answered that recovery *should be allowed* against the estate under these related circumstances, inasmuch as a deliberate wrong was done and an actual injury was suffered.¹⁶ But another answer is available, in that these supposedly comparable situations differ in one important respect from the libel case. The *defamer* knows there will be no tort until after his death, whereas in the illustrative cases the wrongdoer does not know that he will die before a recovery can be had. In adhering rigidly to the rule that the death of the libeling testator defeats the cause of action, the courts are encouraging a voluntary, intentional wrongdoer as he selects a means of almost certain publication, secure in the knowledge that the defamed party will have no recovery.¹⁷

While the contrary view imports into the law the principle that a decedent's estate is liable for a tort having no existence in his lifetime, the benefits to be gained by the allowance of the testamentary libel action are worth the risk of the adoption of such a rule. "It is better that the residuary legatee should be to some extent cut short than that the person wronged should be deprived of redress."¹⁸ Weight is added to this contention by the fact that circumstances have made it impossible for the libeled person even to attempt to reduce the damages by securing a retraction or an apology from his defamer.

The common law maxim, "actio personalis moritur cum persona," has long been discredited by the courts and many writers,¹⁹ and legislatures have shown their disfavor by rejecting the maxim in compar-

¹⁵Carver v. Morrow, 213 S. C. 199, 48 S. E. (2d) 814, 817 (1948), quoted by the South Carolina court from Note (1933) 87 A. L. R. 234.

¹⁶"Since the medieval notion that tort actions are punitive has long been abandoned, the wrongdoer's death should not end liability, and his distributees should be made to satisfy claims against him. And since, conversely, compensation is the purpose of modern tort recovery, it should accrue not only to a living person but also to his estate on this analysis, the coincidence of the deaths of both parties is immaterial." Legis. (1935) 48 Harv. L. Rev. 1001, 1012. As to legislative reaction to the maxim, see note 19, *infra*.

¹⁷"No more effective means of publishing and perpetuating a libel can be conceived than to secure the inscription of such matter on court records, as by probate of a will." Harris v. Nashville Trust Co., 128 Tenn. 573, 162 S. W. 584, 585 (1914).

¹⁸Pollock, *The Law of Torts* (11th ed. 1936) 62.

¹⁹Hoopar v. Gorham, 45 Maine 209 (1858); "The maxim . . . is by no means a favorite with the courts. It has no champion at the date, nor has any judge or law writer risen to defend it for 200 years past." Harris v. Nashville Trust Co., 128 Tenn. 573, 162 S. W. 584, 586 (1914); Legis. (1935) 48 Harv. L. Rev. 1001; Note (1945) 32 Va. L. Rev. 189; Harper, *Torts* (1933) 501; Prosser, *Torts* (1941) 814; Tiffany, *Death by Wrongful Act* (1893) § 14.

able instances.²⁰ It seems that the courts in denying the right to maintain a libel action against the decedent's estate are giving little recognition to these statutes as starting points for judicial law-making. A new statute is to be viewed "as an exemplification of a general principle which is to take its place beside other precepts—whether founded in codes or accepted expositions of the jurist—as an integral part of the system, there to be extended to analogous situations not within the precise terms."²¹

If the maxim, though criticized on principle and infringed upon by legislatures, is still regarded as too formidable to be overthrown or evaded in cases of defamation by will, a feasible means appears in most instances whereby the courts can at least avoid the infliction of the injury for which the law would be powerless to atone. Several courts have agreed that upon the request of the executor, the probate court may strike the libelous passages from the will and admit only its dispositive features to probate.²² Whenever the defamation is apparent to the executor, he should be willing to take this step to protect the defamed party by the prevention of the publication of the libel, since the testator's intent as to the distribution of his estate can still be effectively carried out.²³ However, no duty should be placed upon the executor to petition the court to delete the defamatory passages from the will,²⁴ because that would place a burden upon him of determining many close questions of fact as to whether an actionable libel is contained in the will.

²⁰For a complete study of survival legislation classified according to each interest invaded, see Evans, *A Comparative Study of the Statutory Survival of Tort Claims for and against Executors and Administrators* (1931) 29 *Mich. L. Rev.* 969. By statute, actions for libel survive the death of the defendant in eight jurisdictions. Conn. Gen. Stat. (1930) § 6090; Ind. Ann. Stat. (Burns, 1933) § 2-402; Iowa Code (1946) § 611.20; La. Civ. Code Ann. (1930) § 1712; Mont. Rev. Code Ann. (Choate, 1921) § 9086; N. H. Pub. Laws (1942) c. 355, § 15; N. Y. Dec. Est. Laws (1935) § 118.

²¹The Future of the Common law (1937): Stone, *The Common Law in the United States* 120, 131.

²²That the probate court possesses such power seems now to be settled in New York: *Matter of Bomar*, 18 N. Y. Supp. 214 (1892); *Matter of Speider*, 128 Misc. 899, 221 N. Y. Supp. 223 (1926); *Matter of Payne*, 160 Misc. 224, 290 N. Y. Supp. 407 (1936); *Matter of Draske*, 160 Misc. 587, 290 N. Y. Supp. 581 (1936); and in England: *Marsh v. Marsh*, 1 Swa. & Tr. 528, 6 Jur. (n.s.) 380 (1860); *In Goods of White*, 137 L. T. 65 (1914).

²³In thus deleting the defamatory matter from the will the publication by probate is prevented. *Matter of Draske*, 160 Misc. 587, 290 N. Y. Supp. 581 (1936). The court endorsed the view holding the estate liable and said: "The prevention of such a diversion of assets to the defamed person is, therefore, in furtherance both of the basic testamentary intent and of the advantage of the beneficiaries named in the will." 160 Misc. 587, 595.

²⁴*Brown v. Mack*, 185 Misc. 368, 56 N. Y. S. (2d) 910 (1945).

In instances in which, the executor failing to have the objectionable passages deleted, the libel is published by the probate of the will, the courts, instead of adopting the passive attitude of the principal case, would do better to follow the example of the Tennessee court in taking full advantage of the opportunities available for avoiding the application of the maxim that the testator's death bars recovery.

I. LEAKE WORNOM, JR.

TORTS—LIABILITY FOR INJURIES ARISING FROM EMOTIONAL DISTURBANCES IN ABSENCE OF INDEPENDENT TORT. [Ohio]

The common law antipathy toward recognition of emotional disturbance as legal damage, exemplified in such statements as "mere words do not constitute an assault," has, for the past half century, been indirectly under attack, particularly by textwriters.¹ Nevertheless, the principle of non-liability in such cases has not been abandoned by the courts, though great inroads have been made on the scope of its application.² It is apparent that the courts are reluctant to enter the field of etiquette, and engage in an attempt to regulate the manners of people. The immediate injury from a "verbal assault" is mental suffering, and the courts have refused to recognize such injury alone as the basis of a cause of action, reasoning that the door would thereby be opened to a flood of fraudulent litigation and that the damages sought would be too speculative and difficult of proof.³

¹Street, *Foundations of Legal Liability* (1906) 475: "Granting that legal principle expands as new conditions arise which educate the human mind to higher and subtler conceptions of injury, there appears to be no theoretical reason why this new form of damage [mental distress] should not be given recognition if it really answers the needs of a complex and enlightened society."; Goodrich, *Emotional Disturbance as Legal Damage* (1922) 20 Mich. L. Rev. 497, 506: "It is submitted . . . that whenever a wrongful act by a defendant creates an emotional disturbance in a plaintiff from which injurious physical consequences can be found as a fact to have resulted, the right to recover is complete, unless some affirmative defense is made out."; Magruder, *Mental and Emotional Disturbance in the Law of Torts* (1936) 49 Harv. L. Rev. 1033, 1058; 1 Miss. Code Ann. (1942) § 1059.

²*Emden v. Vitz et al.*, 198 P. (2d) 696 (Cal. App. 1948); *Dunn v. Western Union Tel. Co.*, 2 Ga. App. 845, 59 S. E. 189 (1907); *Weber-Stair Co. v. Fisher*, 119 S. W. 195 (Ky. 1909); *Johnson v. Sampson*, 167 Minn. 203, 208 N. W. 814 (1926); *Saenger Theatres Corp. v. Herndon*, 180 Miss. 791, 178 So. 86 (1938); *Lipman v. Atlantic Coast Line Ry. Co.*, 108 S. C. 151, 93 S. E. 714 (1917); *Prosser, Intentional Infliction of Mental Suffering: A New Tort* (1939) 37 Mich. L. Rev. 874, 879-887.

³*Smith v. Gowdy*, 196 Ky. 281, 244 S. W. 678 (1922); *Spade v. Lynn & Boston R. R.*, 168 Mass. 285, 47 N. E. 88 (1897); *Ward v. West Jersey & S. R. R.*, 65 N. J. L.

The recent Ohio case of *Bartow v. Smith*⁴ serves to demonstrate both the perseverance with which the courts still cling to this view and the insecurity of the foundation on which it rests. The plaintiff, Mrs. Bartow, who was pregnant at the time the offense occurred, brought an action for slander, charging the defendant with the wilful, intentional, and malicious infliction of mental suffering which produced physical injury upon her through the use of obnoxious and profane language directed toward her by the defendant who knew of her condition.

The trial court granted the defendant's motion to dismiss the petition on the ground that the acts alleged did not amount to a case of slander per se, and that special damages necessary to sustain an action of slander per quod were not pleaded. The appellate court reversed that judgment, reasoning that the plaintiff, though failing to make out a cause of action for slander, was entitled under Ohio procedure to go to the jury on the allegation that defendant's wilful acts caused "emotional disturbance and bodily injury to her nerves . . ."⁵

Called upon to choose between the theories adopted by the two lower tribunals, the Justices of the Supreme Court of Ohio divided four to three in reversing the intermediate court and reinstating the trial court's judgment dismissing the plaintiff's petition. The majority regarded the issue as being whether "profane and atrocious language not slanderous and unaccompanied by menacing actions or attitudes, threats, trespass, or invasions of the serenity of private premises or a home [gives] rise to a cause of action,"⁶ and held that the defendant's conduct, though "atrocious, inexcusable and certainly unworthy of any one claiming to be a gentleman,"⁷ was not actionable because none of the traditional forms of action comprehended the situation stated in the petition.

In adopting the orthodox common law rule that on technical grounds mere words are not actionable, the court also endorsed the practical reasons usually advanced for the rule:

"The damages sought to be recovered are too remote and speculative. The injury is more sentimental than substantial. Being

383, 47 Atl. 561 (1900); *Mitchell v. Rochester Ry.*, 151 N. Y. 107, 45 N. E. 354 (1896); *Huston v. Freemansburg Borough*, 212 Pa. 548, 61 Atl. 1022 (1905); Prosser, *Intentional Infliction of Mental Suffering: A New Tort* (1939) 37 Mich. L. Rev. 874, 875.

⁴149 Ohio St. 301, 78 N. E. (2d) 735 (1948).

⁵149 Ohio St. 301, 78 N. E. (2d) 735, 737 (1948).

⁶149 Ohio St. 301, 78 N. E. (2d) 735, 739 (1948).

⁷149 Ohio St. 301, 78 N. E. (2d) 735, 740 (1948).

easily simulated and hard to disprove, there is no standard by which it can be justly, or even approximately, compensated.'"⁸

In two vigorous dissenting opinions, the minority of the court attacked the reasoning of the majority as attempting "to test liability in this case by postulating the tort of assault, and then assuming the position that, since the words spoken did not constitute a technical assault, no recovery can be had."⁹ Rather than restrict liability within such narrow limits, the dissent argued that "When any person wilfully, intentionally and without excuse sets in motion forces which cause physical injury to another by whatever means he may choose, he becomes liable under the law for such physical injury or harm."¹⁰

The technical nature of the majority's legal objections to the plaintiff's complaint as well as the narrowness of the difference which separated the two sides of the court are both indicated by the emphasis which the prevailing opinion lays on the absence of any allegation of assault, battery or trespass in the facts set out in the petition. It was clearly implied that had the plaintiff alleged "that she was put in fear or terror or that defendant was guilty of any conduct which amounted to even a slight assault . . . [or] that there was . . . [a] violation of the serenity, peace and quiet of the home," a good cause of action would have been stated, on which the jury could have awarded damages for mental suffering.¹¹

Professor Prosser has described this device for making mere words actionable, as consisting of the allegation of some independent tort, such as assault or false imprisonment, which provides a cause of action

⁸149 Ohio St. 301, 78 N. E. (2d) 735, 740 (1948), quoting *Reed v. Ford*, 129 Ky. 471, 112 S. W. 600, 601 (1908) which was quoted with approval in *Smith v. Gowdy*, 196 Ky. 281, 285, 244 S. W. 678, 679 (1922).

⁹149 Ohio St. 301, 78 N. E. (2d) 735, 743 (1948).

¹⁰149 Ohio St. 301, 78 N. E. (2d) 735, 743 (1948). See also the separate dissent of Judge Zimmerman, 78 N. E. (2d) 735, 746: "...where one wilfully and with a malicious motive uses vile and opprobrious language toward another, under conditions where deleterious consequences might reasonably be anticipated, and the use of such language does in fact cause an emotional disturbance resulting in physical harm, the actor may be made to respond in damages for the consequences of his inexcusable and reprehensible conduct."

¹¹149 Ohio St. 301, 78 N. E. (2d) 735, 740 (1948). See *Interstate Life & Accident Co. v. Brewer*, 56 Ga. App. 599, 193 S. E. 458, 463 (1937). Plaintiff was allowed to recover for mental pain and suffering, where an insurance agent entered plaintiff's sick room and willfully caused an altercation over the amount of insurance due, though the only physical impact resulted from the agent's tossing some coins onto the bed, one of them striking plaintiff's body. "However slight the injury occasioned by the impact of the coin, it was nevertheless such a physical injury as would, with pain and suffering, make out a case for the assessment of damages . . ."

to serve as "a peg upon which to hang the mental damages."¹² He calls these "parasitic damages" the "entering wedge," opening the way for the ultimate recognition of liability for mental suffering. But as yet, the cases still sustain the necessity of the independent tort, in fact if not in holding, on which to hang the "parasitic damages."¹³ Thus, a recognized form of action must be alleged in a plaintiff's complaint to make it possible for the case to go to the jury.¹⁴ And no doubt, in many cases where the plaintiff has suffered great mental anguish, and a traditional type of action was alleged in the complaint, the jury has "found" the independent tort whether it existed or not, thereby permitting the plaintiff to recover for the mental suffering.

The judicial resistance to abandonment of the rule requiring an independent tort may well spring in part from the fact that, if the rule were not adhered to, it would hardly ever be possible for the court to dispose of a case on demurrer. Questions which under the orthodox rule are questions of law and within the province of the court would become questions of fact to be determined by the jury. Whether the complaint states a cause of action would still be a question for the court, but allegations of any conduct which causes mental suffering would, as far as the court is concerned, be sufficient to state a cause of action. The contention that this result is undesirable is met in *Continental Casualty Co. v. Garrett*,¹⁵ in which the court stated that the actionable words statute of Mississippi which leaves to the jury the question of whether the words are actionable has not been found unsatisfactory from an administrative standpoint.

¹²Prosser, *Torts* (1941) 58.

¹³*Emden v. Vitz et al.*, 198 P. (2d) 696 (Cal. App. 1948); *Bartow v. Smith*, 149 Ohio St. 301, 78 N. E. (2d) 735 (1948). See also cases cited note 3, *supra*.

¹⁴*Interstate Life & Accident Co. v. Brewer*, 56 Ga. App. 599, 193 S. E. 458 (1937), note 11, *supra*.

¹⁵173 Miss. 676, 161 So. 753, 754, (1935): "The great weight of authority, under the common law, is that mere words, however offensive or insulting, when the conduct of the party does not amount to an assault, are not actionable Whether this general doctrine of the common law is to be put upon the basis that the violation of right in such cases belongs merely to the domain of good morals and is not a wrong of which the law should take cognizance, or whether it has been thought that the door would be opened too wide for the maintenance of fictitious claims, or, if not fictitious, that injuries resulting from such wrongs are so difficult of estimation according to dependable legal standards that it would be better in the interest of the community to deny them, we need not now pause to consider; but we might, with propriety add that if the latter be the ground upon which the common-law judges were moved to deny the action, our own experience under our actionable words statute, section 11, Code 1930 . . . has been such as to largely disprove the fears entertained by the ancient judges."

The decision in another recent case, *Emden v. Vitz et al.*,¹⁶ handed down by a California District Court of Appeal, gives force to the indication in the Ohio case that the so-called "entering wedge" device is beginning to destroy the solidity of the orthodox common law forms of action. In that case, the plaintiff, upon discovering that her key would not open the door of her apartment, went to the manager's office in the apartment building to complain and seek assistance. There the plaintiff was met by the three defendants, the manager and two female assistants. With one assistant leaning against the door so that the plaintiff could not leave, the other two defendants screamed and shouted and shook papers at her, saying that the OPA could not run the property and that she no longer had an apartment there. The plaintiff was frightened, and as a result of the fright suffered physical injuries.

The trial court held that the plaintiff had been unlawfully evicted from her apartment and that defendants had wrongfully withheld permission to remove her personal belongings. The plaintiff was awarded judgment of \$1,000 damages for loss of personal property, and \$2,000 for personal injuries.

On appeal, the court rejected the defendant's contention "that there can be no cause of action for personal injuries resulting from fright caused chiefly by spoken words alone,"¹⁷ and affirmed the judgment for personal injuries. The court's holding was based on the proposition that "the right to maintain an action for a wrongful invasion of [physical well-being] cannot validly turn upon any supposed distinction between cases where the physical injuries are the direct and immediate result of the defendant's wrongful conduct, and cases where they are the consequence of mental or emotional excitation caused by that conduct."¹⁸ The right to recover is "dependent upon the nature of the results rather than the nature of the tortious conduct."¹⁹

Although the court recognized that "The determination whether or not given conduct is legally wrongful . . . may involve factual distinctions of importance and substance,"²⁰ noticeable in the decision is the absence of any statement of reasons for and finding that the defendants' conduct was tortious. Also, the court cited as authority cases²¹ which

¹⁶198 P. (2d) 696 (Cal. App. 1948).

¹⁷198 P. (2d) 696, 698 (Cal. App. 1948).

¹⁸198 P. (2d) 696, 698, 699 (Cal. App. 1948).

¹⁹198 P. (2d) 696, 699 (Cal. App. 1948).

²⁰198 P. (2d) 696, 700 (Cal. App. 1948).

²¹*Whitsel v. Watts*, 98 Kan. 508, 159 Pac. 401 (1916); *Johnson v. Sampson*, 167 Minn. 203, 208 N. W. 814 (1926).

were distinguished in *Bartow v. Smith*²² because of the presence of an independent tort. There is no doubt that the California court could have found a recognized type of tort action had it sought to do so, because the evidence showed facts sufficient to constitute false imprisonment and assault. But no such effort was made. Apparently assuming the independent tort, or perhaps finding it in the mere words of the defendants (which from the language of the decision is most probable), or perhaps simply not requiring one, the court stated, "... once the wrongful quality [of the defendant's conduct] is established, it matters not whether that conduct consisted of acts alone, . . . or of mere spoken words alone, for the legal inquiry in each case is thenceforth confined to the well-established channels of proximate cause and damages."²³ The similarity of this language to that employed by the dissenting justices in *Bartow v. Smith*²⁴ is easily observed.

Having avoided the technical objections to recognizing the cause of action, the California court also brushed aside the "practical" arguments. In refuting the defendants' contention that maintenance of such an action would flood the courts with litigation, it was declared that the contention "is but an argument that the courts are incapable of performing their appointed tasks, a premise which has frequently been rejected."²⁵

Since this case, on the facts, can be placed in the same category with prior cases which allowed recovery for mental suffering after first finding a recognized tort, it remains to be seen whether other courts will follow it as precedent for allowing mere words to be actionable when they result in injurious physical consequences. However, from the decision of the California court and the vigorous dissent in *Bartow v. Smith*,²⁶ it seems that the courts are at least beginning to think seriously about the argument of the textwriters that mental suffering incurred as a result of a deliberate "verbal assault" should be recognized as the basis of a cause of action without any very drastic departure from established law. As observed by the dissent in the *Bartow* case, "In recent years, the courts have . . . determined that it is the responsibility of the law to grant a remedy for a substantial wrong even though a new term must be invented to describe it."²⁷

²²149 Ohio St. 301, 78 N. E. (2d) 735, 738 (1948).

²³*Emden v. Vitz, et al.*, 198 P. (2d) 696, 700 (Cal. App. 1948).

²⁴149 Ohio St. 301, 78 N. E. (2d) 735, 743, 746 (1948). See text at notes 9 and 10 supra.

²⁵*Emden v. Vitz et al.*, 198 P. (2d) 696, 700 (Cal. App. 1948).

²⁶149 Ohio St. 301, 78 N. E. (2d) 735 (1948).

²⁷149 Ohio St. 301, 78 N. E. (2d) 735, 740, 741 (1948).

Mental suffering or "mental anguish" has been called by Professor Prosser an "orphan child;"²⁸ but since an orphan once had known parents, perhaps it would be more correct to say that this child is about to be legitimized by the courts and will soon find itself spoken to, if not welcome, within the family of torts.

GEORGE H. GRAY

TORTS—LIABILITY OF RADIO STATION FOR DEFAMATION BROADCAST BY LESSEE OF ITS FACILITIES. [New Jersey]

The recent case of *Kelly v. Hoffman et al.*,¹ while adding one more decision in a field of law in which there exists a paucity of precedents, calls attention once more to the unsettled state of the law of radio defamation. In this case of first impression in the state, the Court of Errors and Appeals of New Jersey² refused to apply the rule of so-called absolute liability against the defendant radio broadcasting corporation which had leased its facilities to a co-defendant whose employee had spoken defamatory words concerning plaintiff into its microphone. Rather, the court held that the defendant broadcasting company would be liable only if a lack of due care could be shown, electing to decide the case upon the duty of the defendant as a disseminator of the defamation rather than as a publisher. The majority opinion avoids the issue of whether radio defamation should be considered as libel or slander, saying that such a decision is immaterial to the facts at hand since the defamatory words were actionable per se and no special damages need be alleged or proved.

Contending that radio defamation is of an unique character, a strong dissent criticizes the majority opinion's attempt to place such objectionable broadcasting in the same category as dissemination of defamatory material by news-vendors and book sellers. The dissenting Justice advocates, instead, the imposition of absolute liability regardless of fault:

"Stringent as it may be, this rule is justified by the almost limitless publication which radio broadcasting achieves. In a fleeting

²⁸Prosser, *Intentional Infliction of Mental Suffering: A New Tort* (1939) 37 Mich. L. Rev. 874.

¹61 A. (2d) 143 (N. J. 1948).

²On September 15, 1948, twelve days after the principal case was decided, a revision of the New Jersey court system was put into effect, under which the new Supreme Court replaced the former Court of Errors and Appeals. See Special Number of the Rutgers University Law Review, Nov., 1948, at page 59.

minute a defamatory remark is spread to the general public without effective means of retraction. Thus radio broadcasting compares to libel in its widespread publication, obtained in the latter case through written communications. On the other hand, being spoken, whether from manuscript or not, it resembles slander. The nature of this defamation, therefore, does not permit its identification as libel or slander and to be properly treated should be classed as a distinct and new problem."³

Though an analysis of the various aspects of the controversy indicates that the result reached by the decision is sound, the court has not been able to contribute much to the attainment of a solution to the problems of whether liability without fault should be applied to radio stations and whether defamation by radio should be classified as libel or slander or a distinct new tort.

The popular justification for the familiar distinction between types of defamation is that libel, being written or printed, reveals more malice and is of a more permanent nature, and therefore can be presumed to cause more damage. However, the real basis of the distinction appears to spring from historical accident,⁴ and when cases of radio defamation began to come before the courts, a very nice problem was presented in the development of the substantive law to meet the advances of science. Several courts have side-stepped the question, saying that a determination of whether the reading of defamatory words from a script constitutes libel or slander is immaterial to the case at hand;⁵ but when compelled to meet the issue, the American courts have uniformly held that the reading of defamatory matter constitutes libel.⁶ In an Australian case,⁷ however, the Supreme Court of Victoria

³Kelly v. Hoffman et al., 61 A. (2d) 143, 147 (N. J. 1948).

⁴The Star Chamber had first assumed jurisdiction over the new art of printing, adopting the Roman law and treating libel as a criminal matter. When the common law courts took over the jurisdiction of the Star Chamber in 1641, libel retained some of its criminal aspects and was treated as a tort distinct from slander, which had long been within the jurisdiction of the law courts. See Restatement, Torts (1938) § 568, comment (b). For an early criticism of this distinction, see Lord Mansfield's opinion in *Thorley v. Lord Kerry*, 4 Taunt. 355, 128 Eng. Rep. 367 (1812).

⁵Josephson v. Knickerbocker Broadcasting Co., 179 Misc. 787, 38 N. Y. S. (2d) 985 (1942); *Irwin v. Ashurst*, 158 Ore. 61, 74 P. (2d) 1127 (1937); *Miles v. Louis Wasmer, Inc.*, 172 Wash. 466, 20 P. (2d) 847 (1933).

⁶*Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889 (W. D. Mo. 1934); *Sorensen v. Wood*, 123 Neb. 348, 243 N. W. 82, 82 A. L. R. 1098 (1932); *Hartmann v. Winchell*, 296 N. Y. 296, 73 N. E. (2d) 30, 171 A. L. R. 759 (1947); *Hryhorijiv (Grigorieff) v. Winchell*, 180 Misc. 574, 45 N. Y. S. (2d) 31 (1943), *aff'd* without opinion 267 App. Div. 817, 47 N. Y. S. (2d) 102 (1943).

⁷*Meldrum v. Australian Broadcasting Co., Ltd.*, [1932] Vict. L. R. 425.

ruled that the reading of defamatory matter from a script was slander and not libel, basing the holding on the fact that the publication of a libel must convey to the persons to whom it is published the permanent form in which it is expressed or recorded, citing by analogy libel by statute, effigy, or picture, which cannot be published by oral description.

The legal character of defamatory remarks extemporaneously uttered into the microphone, without a written script, was considered in *Locke v. Gibbons*.⁸ There, defendant, a newscaster, in order to make the news more exciting and dramatic, "interpolated" certain untrue remarks during a broadcast of plaintiff's news report of floods in the Ohio Valley, and plaintiff contended that this action injured him in his business as a news reporter. The New York court held these extemporaneous defamatory remarks to be slander since that tort had long been considered as spoken defamation, no matter how large the audience. Direct authority on this issue is still scarce and inconclusive, and the American Law Institute's refusal to take any definite position as to whether an extemporaneous defamatory broadcast would constitute libel or slander is indicative of the general uncertainty at this point.⁹

The question of whether a radio broadcasting corporation which has leased its facilities is to be held absolutely liable or merely to a standard of due care for defamation broadcast over its mechanisms, is much more fundamental. Exponents of the absolute liability view present an analogy of radio broadcasting to the newspaper publishing trade, arguing that the broadcasting company is a publisher of defamation just as is the newspaper publisher.¹⁰ It has been contended that the manipulation of the controls by the trained radio engineer during the course of the broadcast amounts to an actual publishing of the defamatory matter in the same sense that the printing presses of a newspaper publish a libel.¹¹ But this analogy has been discredited on the ground that the newspaper, by setting the defamatory words into print, *intends* to publish the written words, thereby "consenting,"¹² while defamatory remarks may be suddenly launched out into the air-ways by a speaker

⁸164 Misc. 877, 299 N. Y. Supp. 188 (1937).

⁹Restatement, Torts (1938) § 568, comment (f).

¹⁰*Sorensen v. Wood*, 123 Neb. 348, 243 N. W. 82, 82 A. L. J.R. 1098 (1932); *Miles v. Louis Wasmer, Inc.*, 172 Wash. 466, 20 P. (2d) 847 (1933).

¹¹*Vold, Defamatory Interpolations in Radio Broadcasts* (1940) 88 U. of Pa. L. Rev. 249; *Vold, The Basis for Liability for Defamation by Radio* (1935) 19 Minn. L. Rev. 611.

¹²*Seitz, Responsibility of Radio Stations for Extemporaneous Defamation* (1940) 24 Marq. L. Rev. 117.

before the program monitor can cut him off. Also, the newspaper has an opportunity through its proof-readers and type-setters to check its material carefully for any defamation which might be contained therein.

Several analogies have been urged in favor of imposing upon the radio broadcasting company only a limited liability based on negligence standards. In the first of these it is contended that the broadcasting of defamation is similar to a telephone company's carrying defamatory words over its lines; but this reasoning is easily refuted by the fact that the telephone company is a common carrier and cannot discriminate among its users, and that it merely carries the message from the speaker to one listener, "in a sealed envelope, as it were."¹³

The telegraph analogy is also suggested to avoid absolute liability, for the telegraph company is held only to a standard of due care.¹⁴ But this argument is rejected because the courts feel that there is not sufficient similarity between the transmitting of written messages and the actual processes of broadcasting, and also that there is a vast difference in the extent of the harm done by the widespread defamation of radio.¹⁵

Professor Bohlen has offered other and more persuasive comparisons in support of the limited liability view.¹⁶ The radio station, if treated as a disseminator of the defamatory matter such as a news-vendor or book seller, would be liable for the defamation if, and only if, it had failed to exercise reasonable care to keep scandelmongers away from its microphones. This view was adopted by the principal case. Also, there seems to be little difference between the activity of a radio station and that of the proprietor of a large auditorium equipped with a public address system who leases his facilities to a political orator to address a large audience.

In the few decisions in this field, adoption of the newspaper analogy has been the common basis for imposing liability without fault. In 1932, *Sorensen v. Wood*,¹⁷ cited and approved the following year by *Miles v. Louis Wasmer, Inc.*,¹⁸ held the radio broadcasting company

¹³*Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 899, 890 (W. D. Mo. 1934).

¹⁴*Parker v. Edwards*, 222 N. C. 75, 21 S. E. (2d) 876 (1942); Restatement, Torts (1938) § 612.

¹⁵*Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 8 A. (2d) 302, 124 A. L. R. 968 (1939); Vold, *The Basis for Liability for Defamation by Radio* (1935) 19 Minn. L. Rev. 611, 652-3.

¹⁶Bohlen, *Fifty Years of Torts* (1937) 50 Harv. L. Rev. 725, 731.

¹⁷123 Neb. 348, 243 N. W. 82, 82 A. L. R. 1098 (1932).

¹⁸172 Wash. 466, 20 P. (2d) 847 (1933).

absolutely liable under the newspaper analogy. In each of these cases a script had been submitted, and the station had had ample opportunity to check it for defamatory matter. This line of authority was carried even further in 1934, by the case of *Coffey v. Midland Broadcasting Co.*,¹⁹ in which a federal court held a Kansas City radio station absolutely liable when the program during which the defamatory words were read originated in New York City and was carried to the local outlet station in Kansas City by telephonic connection. Following the newspaper analogy, the court seemed to believe that since the *Sorensen* and *Miles* cases could have been decided on the basis of negligence, their holding the broadcasting company liable irrespective of fault served to make them especially strong authority for the imposition of absolute liability.

The leading case in support of the limited liability view is *Summit Hotel Co. v. National Broadcasting Co.*²⁰ There, after the broadcasting company had exercised all possible care, and a script containing no defamatory matter had been rehearsed several times for the radio program, the sponsor's master of ceremonies uttered an extemporaneous defamatory remark concerning plaintiff. It was held that the newspaper analogy did not apply to the field of extemporaneous radio defamation, and the court said that "a close examination of the Pennsylvania law [of defamation by newspapers] will show that our rule is not one of absolute liability, but rather, of a very strict standard of care to ascertain the truth of the published matter."²¹

With the decision of the New Jersey court in the principal case the sanction of one more precedent is added to the limited liability view, but this merely leaves the courts in more even division on the point. While the text writers generally favor the adoption by the courts of the view of the *Summit Hotel Co.* decision, the suggestion in the instant case that such "questions of social policy [are] to be resolved in the legislative forum"²² may indicate the more appropriate method of settling the controversy. Several state statutes have already been passed imposing only limited liability based upon negligence standards of due care. An Iowa statute³³ requires the broadcasting company to prove the exercise of due care to exonerate itself from liability, while

¹⁹8 F. Supp. 889 (W. D. Mo. 1934).

²⁰336 Pa. 182, 8 A. (2d) 302, 124 A. L. R. 968 (1939).

²¹336 Pa. 182, 8 A. (2d) 302, 307, 124 A. L. R. 968, 975 (1939).

²²61 A. (2d) 143, 146 (N. J. 1948).

³³Iowa Code (1946) c. 659-5.

a Florida law²⁴ gives the radio station the right to compel the submission of a written script at least twenty-four hours before the proposed broadcast, and if the script is submitted and checked the station will not be liable for "ad-libbed" defamatory utterances.

Similar action is needed by other legislatures to bring about a quicker and more precise determination of the nature of the liability of radio broadcasting companies leasing their facilities than can be attained by the slow and piecemeal method of judicial decision, as represented by the principal case.

WILLIAM S. TODD

²⁴Fla. Stat. (1941) § 770.03.