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RECENT CASES

CONFLICT OF LAWS—STATUTE OF FRAUDS AS DEFENSE TO ENFORCEMENT OF CONTRACT EXECUTED IN ONE STATE AND SUED ON IN ANOTHER STATE. [Illinois]

The recent case of *Oakes v. Chicago Fire Brick Co.*[1] presents an issue in the conflict of laws field which has been resolved in at least four different ways by the courts of the various American states.[2] Plaintiff and the defendant company had entered into an oral contract in Pennsylvania by which the company had agreed to employ plaintiff for the period of one year. This contract, though not written, was valid and enforceable under Pennsylvania law.[3] Alleging that the defendant had breached its obligation under the contract by discharging him without cause, the plaintiff brought suit, in Illinois, to recover the unpaid balance of his salary. The defendant set up in his defense the Illinois statute of frauds which provides "that no action shall be brought... to charge any person... upon any agreement not to be performed within the space of one year from the making thereof, unless... the agreement upon which such action shall be brought, or some memorandum, or note thereof, shall be in writing." The trial court sustained this defense and dismissed the action on the ground that it was barred by the Illinois statute of frauds, but on appeal this decision was reversed. In holding that its own statute of frauds did not apply, the Illinois Appellate Court interpreted the statute as one affecting only substantive rights of parties contracting in Illinois, and not procedural rights concerning contracts executed outside the state. Hence the Pennsylvania statute of frauds governed, and since the latter had no provision covering the type of contract here sued upon, the contract was held to be enforceable in Illinois.

Whenever the statute of frauds of the forum is invoked as a defense to a contract executed in another state, the statute of which does not require such contracts to be in writing, the court of the forum must

[1] 311 Ill. App. 111, 35 N. E. (2d) 522 (1941).

[2] See: Goodrich, Conflict of Laws (2d ed. 1938) § 85; 3 Beale, Conflict of Laws (1935) § 602. 1; Stumberg, Conflict of Laws (1937) 135; Minor, Conflict of Laws (1901) § 173; 2 Williston, Contracts (rev. ed. 1936) § 527; 27 C. J. 124; 20 Cyc. 279; Note (1936) 105 A. L. R. 652; Restatement, Conflict of Laws (1934) § 334, Comment (b).

[3] There is no provision in the Pennsylvania Statute of Frauds concerning contracts not to be performed within one year. Bernstein v. Lipper Mfg. Co., 307 Pa. 36, 160 Atl. 770 (1932). See Pa. Stat. (Purdon, 1936) tit. 33.

meet the issue of whether its statute affects the substance of the contract or merely the remedy thereof. If it goes to the remedy, the statute of the forum will render the contract unenforceable, even though the contract be valid where made. If, on the other hand, the statute goes to the substance, the law of the place of the execution will govern, and if the contract is valid at that place, it will be enforced where sued upon.[4] The matter is not free from difficulty even when the statutes of both states have provisions relating to the type of contract in question. If the statute of the forum is held to affect the remedy, the contract will not be enforced, irrespective of the interpretation which the state of execution puts upon its own statute. But if the statute of the forum is held to go to the substance, then the enforceability of the contract in the forum depends on the manner in which the state of execution has construed its own statute. If that statute is considered to affect the substance of the contract, enforcement will be denied in the forum; but if it goes only to the remedy, the contract will be held enforceable in the forum.

The principal division of authority in the United States is between the view that the statutes of frauds are essentially procedural—i.e., go only to the remedy—and the view that they are entirely substantive in effect—i.e., operate as a fundamental bar, resulting in a complete absence of any legal rights anywhere. However, two other positions, are represented, though less frequently, in the American decisions. These are the so-called Public Policy doctrine and the *Leroux v. Brown* rule.

The latter doctrine originated in and took its name from an English case[5] in which a contract executed in France and not to be performed within one year was held by the English court to be unenforceable in England even though the contract was valid in France. There the court found that Section 17 of the original Statute of Frauds dealing with the sale of goods was a substantive bar and that Section 4 dealing with other types of contracts[6] was a procedural bar. This distinction

[4]See 3 Beale, Conflict of Laws (1935) § 602.1.

[5]12 C. B. 801, 138 Eng. Rep. 1119 (1852).

[6]Section four of the original statute including the following:

(i) Contract by an executor or administrator whereby he incurs a personal liability to discharge a debt or obligation of testator or intestate.

(ii) Contract to become liable for debt, default, or miscarriage of another.

(iii) Contract made on consideration of marriage.

(iv) Contract for the sale of land or other disposition of land or any interests in land.

(v) A contract which is not to be performed within one year from the making thereof. See Statute of Frauds (1677) 29 Car. 2, c. 3, § 4.

was based on the wording of the two provisions, it being concluded that Section 4 declaring "no action shall be brought" on a contract which failed to meet its requirements, should be interpreted literally and was intended to go to the remedy of such a contract. Therefore the contract in question which came under Section 4 was unenforceable in England. The words of Section 17, "no contract shall be good," were held to be substantive by the same process of reasoning. The American cases which purport to adopt this view are said not to be strongly persuasive, because the degree to which they actually rely on the differences in the particular wording of the statutes is uncertain.[7] However, in *Downer v. Cheesebrough*[8] the Connecticut court apparently did base its decision on the *Leroux v. Brown* distinction.[9] The application and importance of this distinction has been reduced both in England and America by the passage of the English Sale of Goods Act and the American Uniform Sales Act which make Section 4 and Section 17 alike in terminology.[10]

The Public Policy doctrine is evidenced in a few cases[11] holding that the requirement under the law of the forum, even though regarded as a substantive provision as to local contracts, may as a matter of public policy be applied as a procedural requirement to preclude enforcement of an oral agreement valid by the law of the place where it was made and where it was to be performed.[12] This theory seems to be based on the idea that it would not be proper to allow a contract executed in another jurisdiction to be sued upon in the forum unless it meets the statutory requirements for the contracts made in the state

[7]Kleeman v. Collins, 9 Bush 460 (Ky. 1872); Boone v. Coe, 153 Ky. 233, 154 S. W. 900, 51 L. R. A. (N. S.) 907 (1913); Third Nat. Bank of N. Y. v. Steel, 129 Mich. 434, 88 N. W. 1050 (1902).

[8]36 Conn. 39, 4 Am. Rep. 29 (1869).

[9]See also the dissenting opinion by Parker, J., in Simmons v. Crew, 84 F. (2d) 82 (C. C. A. 4th, 1936) in which the distinction is approved. Distinction criticized in Bird v. Monroe, 66 Me. 337, 22 Am. Rep. 571 (1877).

[10]The English Sale of Goods Act changed section 17 to read "shall not be enforceable by action" and the Uniform Sales Act did the same thing in this country, declaring that a contract not complying with the requirements "is not enforceable by action."

[11]Emery v. Burbank, 163 Mass. 326, 39 N. E. 1026, 28 L. R. A. 57 (1895). See also Barbour v. Campbell, 101 Kan. 616, 168 Pac. 879 (1917).

[12]See Goodrich, Conflict of Laws (2d ed. 1938) 204, suggesting a somewhat similar solution in regard to limitations, which are so connected with the cause of action as to be looked upon as substantive, saying: "The statute of the forum shows the local policy as to the time in which such actions are to be brought. It could well be interpreted as limiting locally created rights, and as setting up a procedural bar to all actions of this type, no matter where arising."

where the action is brought. However, this doctrine has not been widely adopted, for most states do not attach to the issue that degree of importance necessary to make it a question of public policy.[13]

The adherents to the two principal views regarding the nature of statutes of frauds have advanced persuasive reasoning to support their respective contentions. The authorities usually cited to support the doctrine that the provisions, regardless of their form, are essentially proceedural,[14] point out that "The language of the statute clearly imports that the agreement precedes the written memorandum, and may exist as a complete and valid instrument, independent of the writing. The memorandum is merely the evidence by means of which the agreement is to be established. . The statute relates simply to the nature or quality of the evidence necessary to establish the agreement and does not touch the obligation or validity of the agreement when admitted or properly proven."[15]

As stated by the Ohio court, the reason upon which this theory rests is that the intended scope of the original Statute of Frauds and those in our country patterned after it was "to prevent perjuries and fraudulent practices which were the outgrowth of the general admission of parol testimony to prove almost every kind of contract... These mischiefs, to remedy which was the chief aim of the statute, arose from the admission of oral evidence . and, obviously, the opportunity and temptation for the commission of frauds and perjuries by admitting parol proof to establish the contracts with which the statute is concerned are not any the less in cases where the agreement was made in another state or country than in those where the agreement involved is one made in this state."[16]

On the other hand, proponents of the view that the provisions, regardless of form, are essentially substantive, are quick to rebut this argument by saying that the fraud and perjury resulting from oral evidence can be checked just as efficiently by holding the provisions

[13]In Henning v. Hill, 80 Ind. App. 363, 141 N. E. 66 (1923), the court said that there was no reason for holding the statute declaratory of public policy, and that the statute, without its effect being extended, protects the interests of all whose contracts are governed by the laws of Indiana, and the court believed that the purpose is fully satisfied when this is done. See also: Canale & Co. v. Pauly & P Cheese Co., 155 Wis. 541, 145 N. W 372 (1914).

[14]Buhl v. Stephens, 84 Fed. 922 (C. C. D. Ind. 1898); Straesser-Arnold Co. v. Franklin Sugar Ref. Co., 8 F. (2d) 601 (C. C. A. 7th, 1925); Heaton v. Eldridge, 56 Ohio St. 87, 46 N. E. 638, 36 L. R. A. 817 (1897).

[15]Buhl v. Stephens, 84 Fed. 922, 926 (C. C. D. Ind. 1898).

[16]Heaton v. Eldridge, 56 Ohio St. 87, 46 N. E. 638, 640, 36 L. R. A. 817, 821 (1897).

substantive,[17] because if the contract is invalid where made it cannot be proved anywhere. This view seems to be better supported by the cases than any other,[18] and is approved by the legal writers.[19] Professor Lorenzen argues that whether the statute of frauds is procedural or substantive rests on the definition of the terms and "... that 'substance' includes all rules determining the legal relations which the courts will declare when all facts have been made known to them, whereas, 'procedure' relates to the process or machinery by which the facts are made known to the court."[20] He further states that the rule that a contract may be proved for other purposes although unenforceable because of the statute of frauds, indicates that the statute was not intended as a rule of evidence which would exclude oral testimony in all cases.[21] Also it is said that the rules that the defendant may admit the execution of the contract and yet rely on the statute,[22] and that the statute of frauds does not affect the contracts made prior to its enactment,[23] show that the statute affects the substance of the contract.[24]

In *Cochran v. Ward*,[25] one of the early cases in which the distinction of form stressed in *Leroux v. Brown* was repudiated and the statute held substantive, the Indiana court said: "It is impossible to consider a contract separately from the remedy given by the law for

[17]Lams v. Smith, 36 Del. 477, 178 Atl. 651, 105 A. L. R. 646 (1935).

[18]Franklin Sugar Ref. Co. v. Holstein Harvey's Sons, 275 Fed. 622 (D. Del. 1921); Lams v. Smith, 36 Del. 477, 178 Atl. 651, 105 A. L. R. 646 (1935); Miller v. Wilson, 146 Ill. 523, 34 N. E. 1111 (1893); Murdock v. Calgary Colonization Co., 193 Ill. App. 295 (1915); Cochran v. Ward, 5 Ind. App. 89, 29 N. E. 795 (1892); Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082, L. R. A. 1917E, 777 (1917); Anderson v. May, 10 Heisk. 84 (Tenn. 1872).

[19]2 Beale, Conflict of Laws (1935) § 334.1; Goodrich, Conflict of Laws (2d ed. 1938) § 85; Lorenzen, The Statute of Frauds and the Conflict of Laws (1923) 32 Yale L. J. 311; 2 Williston, Contracts (rev. ed. 1936) § 527.

[20]Lorenzen, The Statute of Frauds and the Conflict of Laws (1923) 32 Yale L. J. 311, 325.

[21]In support of this rule Lorenzen cites: Vaught v. Pettyjohn, 104 Kan. 174, 178 Pac. 623 (1919); Wilhelm v. Herron, 211 Mich. 339, 178 N. W. 769 (1920); Grisham v. Lutric, 76 Miss. 444, 24 So. 169 (1898); Perkins v. Allnut, 47 Mont. 13, 130 Pac. 1 (1913); Coe v. Griggs, 76 Mo. 619 (1882).

[22]Citing Carpenter v. Murphy, 40 S. D. 280, 167 N. W. 175 (1918).

[23]Citing: Keefe v. Keefe, 19 Cal. App. 310, 125 Pac. 929 (1912); Wilson v. Owens, 1 Ind. Terr. 163, 38 S. W 976 (1897); Chaffe v. Benoit, 60 Miss. 34 (1882); Dunn v. Tharp, 39 N. C. 7 (1845), Hodges v. Johnson, 15 Tex. 570 (1855); Collins v. Kittleberger, 193 Mich. 133, 159 N. W. 482 (1916); McGavock v. Ducharme, 192 Mich. 98, 158 N. W 173 (1916); Dean v. Williams, 56 Wash, 614, 106 Pac. 130 (1910).

[24]See Lorenzen, The Statute of Frauds and the Conflict of Laws (1923) 32 Yale L. J. 311, 321, where Lorenzen sets out the above cited rule along with three other rules which he used as a test to reach his conslusions.

[25]5 Ind. App. 89, 29 N. E. 795, 797 (1892).

its enforcement, because it is this that supplies it with legal vitality. The law is an essential factor in every contract, and is presumed to be considered by the parties in their deliberations. . A right without a remedy for its enforcement is a mere fiction."[26]

Regardless of which of the several doctrines is resorted to in the interpretation of a particular statute of frauds, the result will be the same in regard to contracts which are sued on in the jurisdiction where they are made; and there would be no trouble if all the states had the same statutory provisions and interpreted their statutes in the same manner. The difficulty arises only when a contract made in one state is sought to be enforced in another jurisdiction having a statute which is different in its provisions, or which is the same in its provisions but is given a different construction by the court of that state. Where statutes of both forum and execution states contain the same provisions, a contract made in a state which regards its statute as procedural can be rendered enforceable by the plaintiff's bringing suit in another state which holds its statute to be substantive, this because the forum's view makes its statute applicable only to contracts made in that state, while the statute of the state of execution is regarded as applying only to contracts sued upon in this latter state. In the situation in which the contract is valid where made and a defendant deliberately goes from the state and takes his property to another state having stricter requirements, or in the situation in which the contract is invalid where made and a plaintiff "shops around" to find a jurisdiction with less strict requirements, the different views of the courts as to the effect of statutes of frauds may lead to unsatisfactory results. For when the statutes are held to be essentially procedural, or procedural because of the distinction as to form, a contract which was never valid where made can be enforced if the defendant or his property are found in a jurisdiction whose statute is satisfied. And conversely, a contract which is valid where made can for all practical purposes be rendered void by the defendant moving and taking his property to a state whose statute the contract does not satisfy.[27] This

[26]See Goodrich, Conflict of Laws (2d ed. 1938) § 85. "This [the view that the provisions are essentially substantive] is not only sound as a general legal proposition, but is a result which is most desirable as a commercial matter.... Such interpretation finds support in the interpretation of chattel mortgage and conditional sale recording acts, which are held applicable to local transactions."

[27]See Note (1936) 105 A. L. R. 652, 661, and the argument outlined there to refute the contention that the same results are latent in the generally accepted view that the statute of limitations is procedural.

irregularity should as a practical matter be avoided, and it strongly recommends the substantive doctrine under which such conditions would not arise.

Notwithstanding the foregoing argument, it is within the power of the courts of each state to construe their own statutes as they may see fit. Since prior Illinois decisions have ruled the Illinois statute to be substantive,[28] the decision in *Oakes v. Chicago Fire Brick Co.*[29] represents a proper adherence to precedent. It can be further concluded that the holding is in accord with the most meritorious of the several conflicting interpretations of the statute of frauds.

HOWARD W. DOBBINS

CONTEMPT—LIMITATION OF POWER OF FEDERAL COURTS TO IMPOSE SUMMARY PUNISHMENT FOR CONTEMPT. [United States Supreme Court]

Contempt of court is a phrase used to describe disregard of judicial authority. Contempt is either "civil" or "criminal," though the distinction is not always a clear cut one since some contempts are both civil and criminal.[1] In general, however, civil contempt results from disobedience to judgments, orders, or other processes of the court, which conduct involves private injury. The penalty is usually in the form of damages payable to the injured party.[2] Criminal contempt arises from words or acts which obstruct, or tend to obstruct, the administration of justice.[3] The punishment in this case is imprisonment of the offender or attachment of his property, and is based entirely upon the authority of the judges to eliminate obstructions to the administration of justice in their courts.

The power of all courts to fine and imprison for a criminal con-

[28]Miller v. Wilson, 146 Ill. 523, 34 N. E. 1111 (1893); Murdock v. Calgary Colonization Co. 193 Ill. App. 295 (1915).

[29]311 Ill. App. 111, 35 N. E. (2d) 522 (1941).

[1]In the numerous proceedings against Samuel Gompers for disobeying an injunction issued for Bucks Stove and Range Co., the courts found difficulty in determining the difference between civil and criminal contempt. Gompers was found guilty of civil contempt (33 App. D. C. 516) and won an appeal [221 U. S. 418, 31 S. Ct. 492, 55 L. ed. 797 (1911)]. He was then tried for criminal contempt upon the same evidence [40 App. D. C. 293 and 233 U. S. 604, 34 S. Ct. 693, 58 L. ed. 1115 (1914)]. See Comments of Judge Clark, In re Eskay, 122 F. (2d) 819 (C. C. A. 3rd., 1941).

[2]McClintock, Equity (1936) 20.

[3]7 Halsbury's Laws of England (2nd. ed. 1932) 2.

tempt committed in the presence of the court is considered an inherent power.[4] In the United States, however, Congress has sought to regulate this judicial function in the federal courts. The whole history of the development of criminal contempt law in these courts has lain in the enactment and interpretation of statutes. This process has continued from the enactment of the first statute in 1789[5] down to the recent Supreme Court decision of *Nye v. United States*,[6] which seems to have introduced a fundamental change in the Court's interpretation of the power to punish contempt under the existing statute.

The problem of punishment of contempt was a familiar subject matter of legislation by Parliament, and was naturally included in the first act of Congress dealing with the judiciary.[7] The Act of 1789 provided that federal courts should have power to punish, at their discretion, "all contempts of authority in any cause or hearing before the same. . ."[8] The Act did not enumerate the contemptuous acts that could be punished, but rather acted as a limitation upon the manner in which the power could be exercised.[9] As the circumstances under which the power was to be used were not stated, the possibility of abuse of such an undefined authority was recognized by the courts themselves.[10] But the courts argued that it "will be a public grievance for which a remedy may be supplied by the Legislature."[11]

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[4]7 Halsbury's Laws of England (2nd. ed. 1932) 5: "The power to fine and imprison for contempt committed in the face of the Court is a necessary incident to every court of justice. It is not from any exaggerated notion of the dignity of individuals that insults to Judges are not allowed, but because there is imposed upon the Court the duty of preventing *brevi manu* any attempt to interfere with the administration of justice."

[5]1 Stat. 73, 83 (1789).

[6]61 S. Ct. 810, 85 L. ed. 733 (1941).

[7]Frankfurter and Landis, Power of Congress over Procedure in Criminal Contempts (1924) 37 Harv. L. Rev. 1010, 1023-24.

[8]1 Stat. 73, 83 (1789).

[9]Ex Parte Robinson, 19 Wall. 505, 512, 22 L. ed. 205 (U. S. 1884): "The seventeenth section of the Judiciary Act of 1789 declares that the court shall have power to punish contempts of their authority *in any cause or hearing before them*, by fine or imprisonment, at their discretion. The enactment is a limitation upon the manner in which the power shall be exercised, and must be held to be a negation of all other modes of punishment." (italics supplied). The court then decided that the power to disbar an attorney did not arise under the Act which provided for summary punishment of criminal contempt, unless the attorney's conduct is "gross" and "outrageous" in open court. See Kent's Commentaries (3rd. ed. 1836) 300.

[10]Ex Parte Kearney, 7 Wheat, 38, 45, 5 L. ed. 391 (U. S. 1822); Craig v. Hecht, 263 U. S. 255, 279, 44 S. Ct. 103, 107, 68 L. ed. 293 (1923).

[11]Ex Parte Kearney, 7 Wheat. 38, 45, 5 L. ed. 391 (U. S. 1822), using the words of Lord Chief Justice De Grey in the case of Brass Crosby Lord Mayor of London, 3 Wils. 188, 202 (1771).

In 1826, Judge Peck, a judge of a federal district court, disbarred and imprisoned a lawyer for publishing a detailed and prejudiced criticism of one of his opinions while an appeal was still pending. This over-enthusiastic use of the contempt power, following a series of similiar grievances by other courts, culminated in the impeachment of Judge Peck.[12] He was acquitted, but the very next day, Congress took steps to change the statute so as to limit the contempt power of the federal courts. The new statute,[13] which became law on March 2, 1831 and is still in force, provides that the power of the federal courts to "inflict summary punishments for contempt of court, shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice...."[14] A second section states that any acts of misbehavior which were not included in the first section should be tried before juries as ordinary criminal acts.

Even in the face of this obviously restrictive language,[15] the courts were reluctant to admit that the Act was intended to limit the power to punish criminal contempts, except as regards those arising from publications.[16] In 1880, there began a series of constructions of the

[12]The whole record of the impeachment proceedings before the Senate as a High Court of Impeachment, together with the preliminary proceedings in the House of Representatives are contained in Stansbury, Report of the Trial of James H. Peck (1833).

[13]Jud. Code § 268, 4 Stat. 487 (1831), 28 U. S. C. A. § 385 (1928).

[14]The statute continues: "...the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts. Section II: And it shall be further enacted, that if any person or persons shall, corruptly, or by threats or force, endeavor to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats of force, obstruct, or impede, or endeavor to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable for prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offense." The substance of Section II now appears in Cr. Code § 135, 35 Stat. 1088 (1910), 18 U. S. C. A. § 241 (1927).

[15]Thomas, Problems of Contempt of Court (1934) 61, referring to Kent's Commentaries (2d. ed. 1832) 300, note d, " . the act defined and limited the provisions of the Judiciary Act of 1789."

[16]Ex Parte Poulson, 19 Fed. Cas. 1205, No. 11,350 (E. D. Pa. 1835). The court recognized the restrictions placed on the summary contempt powers and felt that the administration of justice would suffer were the courts to carry out the restrictive intention of Congress. Nevertheless, the court decided that publications, though obstructive, were not included in the acts punishable as contempt under the Act of 1831.

1831 Act which resulted in a far-reaching extention of the power to impose summary penalties for criminal contempt. The entering wedge applied in the process was the provision in the statute which fixed the limits of the contempt power as being over acts *"in the presence of the said courts, or so near thereto as to obstruct the administration of justice."* In the case of *In re May*[17] this provision was held not to require physical proximity of the act to the courthouse, and therefore the misbehavior of a juror, regardless of its place of commission, was summarily punishable as a criminal contempt because it tended to obstruct justice. A few years later, another lower court stated, in dictum, that the Act did not limit the punishment for contempt for an attempted intimidation of a party of the court, regardless of the place of commission, so long as the act was a direct injury to the administration of justice.[18]

The Supreme Court of the United States first had occasion to construe the Act in 1884. In the decision of *Ex Parte Robinson,* although the actual issue was whether an attorney could be disbarred for contempt of court, Justice Fields said, "As thus seen, the power of these [lower] courts in the punishment of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their lawful transactions, and to inforce obedience to their lawful orders, judgments and processes."[19] But five years later the Court failed to follow this strict construction; instead, it ruled that misbehavior in the courthouse, though not in the court room or before the presence of the court, tended to obstruct justice and was therefore summarily punishable as contempt.[20]

Following this refusal of the Supreme Court to construe strictly the language of the Act, the lower courts continued to make gradual extentions of the scope of their contempt powers. Although in the period up to 1918 some statutory restrictions were recognized,[21] yet in general the courts construed the clause in the Act *"or so near thereto as to obstruct the administration of justice"* to include all acts which directly obstructed the administration of justice.[22]

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[17]1 Fed. 737 (E. D. Mich. 1880).

[18]United States v. Anonymous, 21 Fed. 761 (C. C. W. D. Tenn. 1884).

[19]19Wall. 505, 511, 22 L. ed. 205 (U. S. 1884).

[20]Ex Parte Savin, 131 U. S. 267, 9 S. Ct. 699, 33 L. ed. 150 (1889); (the act did not have to occur in the court room to be considered "so near thereto").

[21]Ex Parte Schulenburg, 25 Fed. 211 (C. C. E. D. Mich. 1885); Hillmon v. Mutual Life Insurance Co., 79 Fed. 749 (C. C. D. Kan. 1897); Morse v. Montana Ore Purchasing Co., 105 Fed. 337 (C. C. D. Mont. 1900); Cuyler v. Atlantic & N. C. R. R. Co., 131 Fed. 95 (C. C. E. D. N. C. 1904).

[22]In re Brule, 71 Fed. 943 (D. Nev. 1895) (contempt to bribe a witness, in his

Having already refused to limit the meaning of the Act of 1831 to its express terms, the Supreme Court went even further in the *Toledo Newspaper Co.* case, which arose in 1915.[23] Certain articles and cartoons, published by the defendant, were directed toward Judge Killits while he was considering a case between the Toledo Railways and Light Co. and the city of Toledo. In determining whether the publishers were subject to summary punishment for contempt, the Supreme Court stated that the Act "... conferred no power not already granted and imposed no limitations not already existing... "[24] Applying this reasoning, it found the defendant guilty of contempt, thus showing that even publications could be misconduct so near the presence of the court as to become summarily punishable.

Following the extreme example of this leading case, the courts continued to consider the Act of March 2, 1831 as a non-limiting statute.[25] In 1923, and again in 1929, the Supreme Court, citing the *Toledo* case, decided that the clause "so near thereto" did not mean proximity to the court.[26] This interpretation which placed the emphasis on the

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own home, to remain away from a trial); Ex Parte M'Leod, 120 Fed. 130 (N. D. Ala. 1903) (contempt to commit assault on a United States Commissioner for ordering that the defendant be held for trial on a criminal charge); McCauley v. United States, 25 App. D. C. 404, cert. denied, 198 U. S. 586, 25 S. Ct. 803, 49 L. ed. 1174 (1905) (contempt corruptly to solicit a juror two days prior to the trial at his place of business); United States v. Zavelo, 177 Fed. 536 (C. C. N. D. Ala. 1910) (contempt to serve a civil process on a privileged witness from another state during his privileged period).

[23]220 Fed. 458 (N. D. Ohio 1915), 237 Fed. 986 (C. C. A. 6th, 1916), 247 U. S. 402, 38 S. Ct. 560, 62 L. ed. 1186 (1918).

[24]247 U. S. 402, 418, 38 S. Ct. 560, 564, 62 L. ed. 1186 (1918). In the dissenting opinion (247 U. S. 402, 422, 38 S. Ct. 560, 695, 62 L. ed. 1186), Justice Holmes contended that the acts complained of were not so far carried out as to obstruct the administration of justice and therefore should not constitute contempt. No mention, however, was made concerning the proximity of the act to the court, so it must be inferred that the dissent agreed with this phase of the decision.

[25]In re Independent Publishing Co., 240 Fed. 849 (C. C. A. 9th, 1917) (contempt for a newspaper to print facts and evidence not pertaining to the suit, but concerning the defendant in a pending criminal suit); United States v. Sanders, 290 Fed. 428 (W. D. Tenn. 1923) (contempt to criticize via publications a contempt of court proceeding against a third person); Froelick v. United States, 33 F. (2d) 660 (C. C. A. 8th, 1929) (contempt to write a letter to a special United States Attorney stating that a judge is prejudiced concerning a future suit); Conely v. United States, 59 F. (2d) 929 (C. C. A. 8th, 1932) (contempt to offer to "fix" a criminal suit for a consideration); United States v. Pendergast, 35 F. Supp. 593 (W. D. Mo. 1940) (contempt to bribe a third person to give false testimony which alters a court decision involving insurance rates). Cf. Cornish v. United States, 299 Fed. 283 (C. C. A. 6th, 1924); Coll v. United States, 8 F. (2d) 20 (C. C. A. 1st, 1925).

[26]Craig v. Hecht, 263 U. S. 255, 44 S. Ct. 103, 68 L. Ed. 293 (contempt to write a letter condemning a judge for certain actions in a pending proceeding); Sinclair

word "obstruct" rather than "near" seems to depend, in part, upon the belief developed in criminal law that the act is committed in the place where it takes effect.[27] A more obvious explanation of the broad construction lies in the apprehension of the courts that their authority might be flouted if respect for the judicial processes were not strictly maintained.

It was with this background that the Supreme Court of the United States approached the issues in the case of *Nye v. United States*.[28] The contempt charge grew out of the efforts of Nye and another to obtain the dismissal of a wrongful death action brought by one Elmore against the parties that Nye represented.[29] Nye had, by getting Elmore under the influence of intoxicating liquor, persuaded him to write letters to his attorney and the judge, stating that he was withdrawing his suit. The lower court construed this action on the part of Nye, which had taken place over a hundred miles from the courthouse, as a summarily punishable contempt of court.[30] But the Supreme Court reversed this conviction.

Mr. Justice Douglas, speaking for the Court, admitted that the majority of the decisions in the past had stated that the words "so near thereto" had a causal rather than a geographical connotation. It was pointed out that the *Toledo Newspaper* case had stressed this reasoning, following a number of lower court decisions, and had itself been followed by many of the lower federal courts. But the same tribunal which had handed down the *Toledo* decision now repudiated the reasoning of that case and in the *Nye* decision expressly overruled the *Toledo* case. It concluded that when the statute is construed as a unit, as it must be, it is clearly apparent that Congress wished to limit the number of obstructions to the administration of justice that could be summarily punished as contempts. This was done by limiting the contempt power of the courts in the first section, the second section indicating that those other obstructions that had formerly been punished by summary process should be handled by indictment and trial jury.[31]

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v. United States, 279 U. S. 749, 49 S. Ct. 471, 73 L. ed. 938 (1929) (contempt for a defendant in a criminal suit to hire detectives to shadow the jurors).

[27]Thomas, Problems of Contempt of Court (1934) 63.

[28]61 S. Ct. 810, 85 L. ed. 733 (1941).

[29]Nye was not the attorney for the defendants in the suit for wrongful death against Elmore, but was related by marriage to one of the defendants and as a successful business man agreed to take care of Elmore and end the suit.

[30]113 F. (2d) 1006 (C. C. A. 4th, 1940).

[31]Cr. Code § 135, 35 Stat. 1088 (1910), 18 U. S. C. A. § 241 (1927). This provision, now included in the Criminal Code, was taken from and is in substantially the same form as the second section of the Act of 1831, set out in Note 14, supra.

The Court conceded that Nye was guilty of misbehavior that had obstructed the administration of justice but since this act took place more than one hundred miles from the court, it could not be "in the presence of the court" or "near thereto," and therefore was not punishable under the court's summary contempt power.

The affect of this complete turnabout by the Supreme Court is undoubtedly to restrict the scope of the federal courts' power to impose punishments for actions tending to hamper judicial processes, and the case has already been so construed.[32] Many of the acts formerly dealt with directly by the judges must now be the subject of regular criminal proceedings. It is possible, as argued by the dissenting justices in the *Nye case*,[33] that the interests of justice may suffer from the courts' inability to take immediate action against the persons threatening to obstruct the workings of the judicial machinery. Certainly one result will be delays caused by obstructions which, although in the past were eliminated by the presiding judges, must now be dealt with by the prosecuting attorneys. Depriving the courts of their summary powers may sometimes lead to affronts against the dignity of the tribunals and to offenses against judicial authority.

While recognizing that there are advantages in the liberal interpretation of the words "so near thereto," the strict construction given by the decision in the *Nye* case seems clearly to have at last given full effect to the intention of Congress as expressed in the Act of 1831. Of more fundamental significance is the fact that due regard has been afforded to the theory of the law in the United States which gives an offender against the law a right to jury trial.

WILLIAM C. SOULE

[32]Wimberly v. United States, 119 F. (2d) 713 (C. C. A. 5th, 1941). The case decided that an attempt made prior to the opening of court to influence a juror summoned for court duty was not contempt because the misbehavior took place sixty miles from the court and was therefore not "so near thereto as to obstruct the administration of justice." This was conceived to be the rule established in Nye v. United States.

[33]61 S. Ct. 810, 817, 85 L. ed. 733 (1941). Chief Justice Hughes and Justices Stone and Roberts joined in the dissent, which is supported by the precedents discussed above, as well as by strong policy looking toward the maintenance of the effectiveness of the machinery of justice. See Kent's Commentaries (3rd. ed. 1836) 300, for the opinion that the restrictions of the 1831 Act tend " . . to impair, in the estimation of the public, the value of the administration of justice."

CONTRACTS—ENFORCEMENT OF PROMISE TO GIVE ADDITIONAL COMPENSATION FOR PERFORMANCE OF EXISTING CONTRACT OBLIGATION. [Federal]

A problem which has arisen to plague the courts of virtually every American jurisdiction is presented when one party to a contract refuses to perform according to the terms of the contract, and obtains a promise from the other party either to decrease the scope of performance or to increase the remuneration for performance. When faced with actions to recover the contract price stipulated in the second agreement, the great majority of courts[1] have held these subsequent promises void for lack of consideration. Williston sums up this opinion in these words:

> "On principle the second contract is invalid for the performance by the recalcitrant contractor is no legal detriment to him whether actually given or promised, since, at the time the second agreement was entered into, he was already bound to do the work; nor is the performance under the second agreement a legal benefit to the promisor since he was already entitled to have the work done."[2]

However, a small minority of the courts have held these contracts enforceable. In their efforts to assist the party relying on the substitute agreement, these courts have employed various devices to justify the enforcement of the second contract. Thus, in an early New York case the validity of the contract was upheld on the theory that a party to a contract has a choice between alternative courses of action: he can either perform or he can breach the contract and pay damages. The relinquishment of this "right to break the contract" was held to be sufficient consideration for the new promise.[3] Shortly after this decision the Massachusetts court advanced the doctrine of waiver to support a similar contract. It was there reasoned that upon forming the second contract the promisor impliedly waived the obligations of the promisee under the first agreement.[4] Much the same reasoning has been used in other jurisdictions, but under the technical name of election. The promisor is regarded as having an election to sue or make a new contract. If he elects to enter into a new contract, no further consideration is necessary.[5] Still another device employed in several cases is that

[1] 1 Williston, Contracts (rev. ed. 1936) § 130, n. 3.
[2] 1 Williston, Contracts (rev. ed. 1936) § 130.
[3] Lattimore v. Harsen, 14 Johns. 330 (N. Y. 1817).
[4] Munroe v. Perkins, 9 Pick. 298 (Mass. 1830).
[5] Coyner v. Lynde, 10 Ind. 282 (1858); Holmes v. Doane, 9 Cush. 135 (Mass. 1851).

of implied rescission of the first agreement. If the second contract be construed as operating as an implied mutual rescission of the first contract, no further consideration is required than the mutual promises of the parties, and it makes no difference that the promise of one party involves no increased obligation on his part.[6] One court, although repudiating the implied rescission doctrine, achieved the same result under the theory that should one party perform in reliance on the second contract, it would be fraud if the other party be relieved from performance.[7]

All of these devices have been attacked as unsound.[8] This opposition seems to arise more from a sense of public policy than from any insistence upon a technical adherence to the doctrine of consideration. It is feared that the fostering of these exceptions would lead to a condition where all contractors would refuse to perform in the hope of enticing further compensation from the other party. Such a condition would lead to endless confusion and litigation, and for this reason, if for no other, the majority of jurisdictions have refused to enforce these contracts.

In a few limited situations a method more commonly used than the above in justifying enforcement of the second promise has been the doctrine of unforeseen difficulties. It frequently happens, especially in construction contracts, that the contract is rendered very difficult, if not impossible of performance, by the occurrence of some unexpected and unanticipated event, or by the discovery of some unforeseen, material fact. In such a situation it would seem very inequitable to insist that the party faced with this unreasonable hardship be forced to perform. For this reason, a few jurisdictions have refused to apply the majority rule and have invoked the doctrine of unforeseen difficulties as a means of permitting the contractor to recover on the second contract.[9] But in so doing the courts have zealously paid lip-service to the

[6]Thomason v. Dill, 30 Ala. 444 (1857); Cooke v. Murphy, 70 Ill. 96 (1873); Rollins v. Marsh, 128 Mass. 116 (1880).

[7]Thurston v. Ludwig, 6 Ohio St. 1, 67 Am. Dec. 328 (1856).

[8]1 Williston, Contracts (rev. ed. 1936) § 130A; Notes (1908) 11 L. R. A. (N. S.) 789, (1896) 34 L. R. A. 33; Willston, Successive Promises of Same Performance (1894) 8 Harv. L. Rev. 27; (1917) 16 Mich. L. Rev. 106.

[9]Blakeslee v. Board of Commissioners, 106 Conn. 642, 139 Atl. 106 (1927); Linz v. Schuck, 106 Md. 220, 67 Atl. 286, 11 L. R. A. (N. S.) 789, 14 Ann. Cas. 495, 124 Am. St. Rep. 481 (1907); Martiniello v. Bamel, 255 Mass. 25, 150 N. E. 838 (1926); King v. Duluth M. & N. Ry. Co., 61 Minn. 482, 63 N. W. 1105 (1895); see also U. S. v. Cook, 257 U. S. 523, 42 S. Ct. 200, 66 L. ed. 350 (1922); Grand Trunk Western Ry. Co. v. H. W. Nelson Co., 116 F. (2d) 823, 834 (C. C. A. 6th, 1941).

doctrine of consideration. One court finds consideration by reasoning that:

> "In such a case the natural inference arising from the transaction, if unmodified by any equitable considerations, is rebutted, and the presumption arises that by the voluntary and mutual promises of the parties their respective rights and obligations under the original contract are waived, and those of the new or modified contract substituted for them."[10]

This is apparently nothing more than the theory of implied rescission being limited to a restricted body of factual situations. Nor has the unforeseen difficulties doctrine been free from attack. Williston refuses to recognize this device as well as the others on the ground that unknown and unanticipated difficulties do not excuse a party from fulfilling the original contract.[11]

Maryland is one of the few jurisdictions which are committed to the doctrine of unforeseen difficulties. The operation of this rule is demonstrated in the recent case of *Lange v. United States for the Use of Wilkinson.*[12] This case, though tried in a federal court, was decided in conformity with the law of Maryland, the contract in question having been formed and partially executed within that jurisdiction. The United States Government awarded a contract to Lange for the construction of a laundry at the United States Naval Academy. Lange in turn awarded a sub-contract to Wilkinson for the construction of a laundry chute. The contract called for the use of "corrosion-resisting steel sheets ... conforming to grade 1, class 4 of specification No. 47S20a." The sub-contractor was unfamiliar with this specification, and believing it to call for ordinary corrosion-resisting steel, prepared his bid accordingly. Upon learning that stainless steel, a much more costly material, was required, Wilkinson refused to perform. After several letters and telephone conversations had been exchanged, Lange submitted a second contract, providing for an increase in compensation from $325 to $1106, which was signed and performed by the sub-contractor. Upon the refusal of Lange to pay the agreed sum, Wilkinson instituted this action for the amount set forth in the second contract. Lange's defense was that there was no consideration for the second agreement, but the decision of the Federal District Court[13] granted Wilkinson full compensation on the theory of unforeseen

[10]King v. Duluth, M. & N. Ry. Co., 61 Minn. 482, 63 N. W 1105, 1107 (1895).
[11]1 Williston, Contracts (rev. ed. 1936) § 130A.
[12]120 F. (2d) 886 (C. C. A. 4th, 1941).
[13]United States v. Lange, 35 F. Supp. 17 (D. Md. 1940).

difficulties. The Circuit Court of Appeals affirmed the decision, holding that the factual situation brought this case "within the principle and spirit"[14] of the leading Maryland decision.[15]

Before the validity of this conclusion can be tested, it must be determined what constitutes an unforeseen difficulty. One court laid down the rule that it must be something unforeseen, substantial, not within the contemplation of the parties, and of such a nature as to rebut the inference that one party is endeavoring to extort additional compensation from the other—i.e., the demand must be obviously justified.[16] Clearly there would be no difficulty in fitting the principal case into the scope of this rule, but by comparing the facts of this case with the factual situations in several leading cases which apply the doctrine in question, a distinction may be observed. In each of the latter cases the "unforeseen difficulty" has been some extraneous matter discovered or occurring after the contract had been partially executed, rendering performance difficult;[17] but in the principal case the so-called "unforeseen difficulty" arose out of a false conception as

[14]Lange v. United States for Use of Wilkinson, 120 F. (2d) 886, 890 (C. C. A. 4th, 1941).

[15]Linz v. Schuck, 106 Md. 220, 67 Atl. 286, 11 L. R. A. (N. S.) 789, 14 Ann. Cas. 495, 124 Am. St. Rep. 481 (1907). In this case the contract provided for the digging of a basement under a store. After construction had begun, the contractor found the earth to be of a soft muddy material, the removal of which would necessitate a considerable increase in labor and expense. Upon the owner's promise of additional compensation, the contractor fulfilled the contract. The court held that the promise for additional compensation was supported by valid consideration and consequently enforceable under the doctrine of unforeseen difficulties.

[16]King v. Duluth, M. & N. Ry. Co., 61 Minn. 482, 63 N. W. 1105 (1895). Assuming the test applied by this court to be a reasonable one, and one which might well be used by other courts, the arguments against admitting unforeseen difficulties as an exception to the majority rule seem to be founded more on an insistence upon a technical conformity to the law of consideration than upon any principle of public policy, as contrasted with the objections to the other devices.

[17]United States v. Cooke, 257 U. S. 523, 42 S. Ct. 200, 66 L. ed. 350 (1922) (construction of customs house delayed by San Francisco earthquake and fire); Grand Trunk Western Ry. Co. v. H. W. Nelson Co., 116 F. (2d) 823 (C. C. A. 6th, 1941) (railroad construction interrupted frequently because of cloud on title to land; plaintiff was required to hold men and machinery in readiness at all times); Blakeslee v. Board of Commissioners, 106 Conn. 642, 139 Atl. 106 (1927) (construction of a dam; entry of U. S. into World War greatly increased cost of labor and materials); Linz v. Schuck, 106 Md. 220, 67 Atl. 286, 11 L. R. A. (N. S.) 789, 14 Ann. Cas. 495, 124 Am. St. Rep. 481 (1907) (construction of a basement in which the removal of soil proved more difficult and costly than anticipated); Martiniello v. Bamel, 255 Mass. 25, 150 N. E. 838 (1926) (construction of a basement; foundation had to be dug much deeper than expected because of a fill); King v. Duluth, M. & N. Ry. Co., 61 Minn. 482, 63 N. W. 1105 (1895) (railroad construction in which terrain proved more difficult than anticipated).

to the requirements of a specification, and it arose before the contract was executed in any appreciable degree. From this comparison it appears that the courts, in their efforts to help Wilkinson out of his difficulty, have classified as an unforeseen difficulty situation, a case in which the facts differ considerably from the usual circumstances, and more nearly correspond to another type of situation involving a mistake of fact.

There seems to be no authority laying down any rule by which it can be determined when a particular case should be regarded as an unforeseen difficulty or when it should be classified as a mistake of fact. But an examination of some of the definitions of mistake advanced by various courts,[18] plus an investigation of the factual circumstances which were before those courts, indicates that this case more closely corresponds to a mistake of fact situation.

The usual mistake case involves the equitable remedies of reformation or rescission granting relief from the performance of a burdensome contract duty assumed because of a mistake by the parties as to the facts involved.[19] Although Wilkinson did not go into equity for relief, the facts warrant an assumption that he at least had a proper

[18]Peasley v. McFadden, 68 Cal. 611, 10 Pac. 179, 182 (1886) (mistake is either an unconscious ignorance or forgetfulness of a fact material to the agreement or a belief in the present existence of a thing which does not exist); Callan Court Co. v. Citizens & Southern National Bank, 184 Ga. 87, 190 S. E. 831, 854 (1937) (an erroneous mental condition, conception, or conviction induced by ignorance, misapprehension, or misunderstanding of facts); Barker v. Fitzgerald, 204 Ill. 325, 68 N. E. 430, 432 (1903) (must be material to the transaction and affecting its substance, not merely the incidents); Davis v. Steuben School Tp., 19 Ind. App. 694, 50 N. E. 1, 5 (1898) (an intentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence); Alterac v. Bushko, 99 N. J. Eq. 213, 132 Atl. 511, 512 (1926) (doing of an act under false conviction, which would not have been done except for that conviction).

[19]The jurisdiction of equity to grant relief against the consequences of a mistake has existed for centuries. See McClintock, Equity (1936) Ch. 7. However, there are certain limitations which the courts have imposed in order to restrict this power. The mistake must not be as to some future event: Park v. Boston, 175 Mass. 464, 56 N. E. 718 (1900); mistake must be material: Barker v. Fitzgerald, 204 Ill. 325, 68 N. E. 430 (1903); Kessler v. Herklotz, 190 N. Y. 24, 82 N. E. 739 (1907); mistake must be unintentional: Duff v. Rose, 149 Ky. 482, 149 S. W 884 (1912); relief must be fair and just: Tazewell Coal Co. v. Gillespie, 113 Va. 134, 114 Va. 141, 75 S. E. 757 (1912); must be no mutual recognition of the uncertainty of facts which turn out incorrect: Kinney v. Consolidated Virginia Mining Co., 14 Fed. Cas. 611, No. 7, 827, 4 Sawy, 382 (1877); must not prejudice third persons: State Savings Trust Co. v. Spencer, 201 S. W. 967 (Mo. 1918); mistake must not be the result of culpable negligence: Deare v. Carr, 3 N. J. Eq. 513 (1836); Persinger's Adm. v. Chapman, 93 Va. 349, 25 S. E. 5 (1896). Although some courts have granted relief for unilateral mistake, there is a much greater chance for recovery if mistake can be shown to be mutual. See (1924) 24 Col. L. Rev. 428.

case for equitable determination. There was a mistake relative to a present material fact—the specification—and according to the court's own finding the mistake was mutual.[20] Furthermore, it can safely be presumed that there was no negligence on Wilkinson's part—at least none of a sufficient degree of culpability as to justify equity in refusing relief. It is true that the fact that Wilkinson could have determined the meaning of the specification and failed to do so might seem strong evidence of negligence. The opinion does not touch the subject, but since the court was willing to uphold the second contract on the basis of unforeseen difficulty, there must have been no evidence of culpable negligence or the court would not have considered the difficulty as unforeseeable.

Assuming, therefore, that this case involves a mistake of fact situation, the prejudiced party would have had the right to go into equity to obtain a rescission or reformation of the contract. He did not in fact do so, but instead relied on the promise of the other party to increase compensation for performance. The final question, then, is whether there is anything in the situation which can serve to make the second promise a binding contractual obligation.

Perhaps a valid analogy can be drawn between this case and certain other cases involving forbearance to assert a claim. The early English law held that the forbearance or promise to forbear from asserting an invalid claim was not sufficient consideration to support a contract.[21] As a result, when this problem arose, it was necessary to consider two distinct questions: Was the claim valid? If so, was there a binding contract? In the early 19th century the English courts became more liberal, holding that where the claim was in the process of being prosecuted, the validity of the claim was immaterial.[22] The later English decisions have gone even further and hold that a promise of forbearance is sufficient consideration to support a contract if the

[20]Because of the great variance between the original and second contract prices, it seems almost impossible to believe that Lange was unaware of the mistake. Certainly it would have been apparent had bids been received from other companies. But however strange it may appear, the court apparently found Lange free from all knowledge, because Judge Dobie discussed the point and said that had the evidence indicated that Lange was attempting to snap up a contract in which there was obviously a mistake, he would have held the first contract void. This rule is recognized in 1 Williston, Contracts (rev. ed. 1936) § 94; Restatement, Contracts (1932) § 71c; and has been the subject of judicial decisions in Germeria v. Boyarsky, 107 Conn. 387, 140 Atl. 749 (1928); Tyra v. Cheney, 129 Minn. 428, 152 N. W. 835 (1915).

[21]Barnard v. Simons, 1 Roll. Abr. 26, pl. 39; Loyd v. Lee, 1 Strange 94, 93 Eng. Rep. 406 (1718).

[22]1 Williston, Contracts (rev. ed. 1936) § 135.

promisor has reasonable grounds for believing that he has a valid claim.[23] The latest American cases appear to follow the modern English rule.[24]

By analogy it may be reasoned that in cases involving a mistake of fact, if the prejudiced party has a reasonable basis for believing that the mistake would be sufficient basis for equitable relief, the forbearance from seeking such relief would be sufficient consideration to support a new contract promising additional compensation. Furthermore, there seems no valid reason why forbearance from asserting mistake as a defense in a suit for breach of the original contract would not constitute consideration for a new agreement. At first this analogy may seem nothing more than the device of waiver. In one sense it is a waiver—waiver of the right to seek equitable relief. But on comparison with the doctrine of waiver discussed in a preceding paragraph an important distinction may be observed. The chief objection to the waiver theory is based on the belief that a party to a contract has no "right" to breach the contract. Although it is well recognized that it is within the "power" of that party to do so, it should not be regarded as a legal "right." This problem does not appear in this analogy. It is not a question of breaching the original agreement, but merely the giving up of the right to go into equity for rescission or reformation. Since no court has viewed the situation in this light, the validity of the analogy remains to be tested. But by a similar process of reasoning the court in the principal case could have reached the same fair result as it did, without forcing the case into a category which the facts do not seem to fit.

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CRIMINAL LAW—INTOXICATION TESTS AS A VIOLATION OF THE CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION. [North Carolina and Texas]

With the increasing use of scientific tests for determining whether persons arrested for various criminal offences are intoxicated, the controversy concerning the scope of the constitutional protection against self-incrimination[1] has been renewed. The protection is universally

[23]Cook v. Wright, 1 B. & S. 559, 121 Eng. Rep. 822 (1861); Callisher v. Bischoffsheim, L. R. 5 Q. B. 449 (1870); Holworthy Urban Council v. Holworthy Rural Council [1907] 2 Ch. 62.

[24]For compiled list of cases, see 1 Williston, Contracts (rev. ed. 1936) § 135, n. 7.

[1]U. S. Const. Amend. V "No person . . shall be compelled in any criminal

accepted as prohibiting the extraction of incriminating oral or written testimony from the accused by compulsion. The further question is whether the immunity is broad enough to relieve him from submitting to various types of physical tests which may show results unfavorable to his case. The conflicting viewpoints are exemplified in two recent cases involving admissibility of intoxication tests as evidence of accused's degree of inebriation. In the case of *Apodaca v. State*[2] the defendant, driving while allegedly intoxicated, ran into and killed a pedestrian. When arrested, he was required to attempt to walk on a straight line and make sudden turns, and to give a specimen of urine to determine whether he was intoxicated. Proper objection was made to the attempted introduction into the evidence of the results of these tests, and the objection was sustained in the trial court; this ruling was affirmed on appeal by the Court of Criminal Appeals of Texas. The court stated: "Demonstration by an act 'which tends to self-incrimination is as obnoxious to the immunity guaranteed by the Constitution as one by words.' "[3] It declared that the safer policy is to adhere to the constitutional privilege given effect in long-established precedents rather than to enlarge the number of accepted exemptions.[4]

In direct conflict with the Texas case is the rule announced in the case of *State v. Cash*.[5] Over defendant's objection, the trial court admitted evidence on the results of a blood test and urinalysis of specimens taken from accused to determine the presence or absence of alcohol and morphine in his system. In affirming the defendant's conviction, the highest tribunal of North Carolina, after noting that the record failed to disclose any compulsion on the part of the officers in obtaining the specimens, went on to observe pointedly: "It is the rule in this jurisdiction that physical facts discovered by witnesses on information furnished by the defendant may be given in evidence, even where knowledge of such facts is obtained in a privileged manner, ... by intimidation, duress, etc."[6]

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case to be a witness against himself." All of the state constitutions except two recognize the privilege. Iowa and New Jersey adopt it as part of their common law. State v. Height, 117 Iowa 650, 91 N. W. 935 (1902); State v. Zadnowicz, 69 N. J. L. 619, 55 Atl. 743 (1903).

[2]146 S. W. (2d) 381 (Tex. Cr. App. 1940), applying Texas Const. Art I, § 10.

[3]Apodaca v. State, 146 S. W (2d) 381, 382 (Tex. Cr. App. 1940).

[4]Apodaca v. State, 146 S. W. (2d) 381, 383 (Tex. Cr. App. 1940). The court based its decision upon statements in 16 C. J. 566, and 28 R. C. L. 434, completely ignoring recent case authority in favor of such evidence.

[5]15 S. E. (2d) 277 (N. C. 1941), applying N. C. Const. Art. I, § 11.

[6]15 S. E. (2d) 277, 278-9 (N. C. 1941). The case presented the very unusual situation of a defendant objecting to the evidence of the tests' results because they

The earlier decisions inclined toward the view that it was necessary to extend the constitutional safeguard to prevent unwarranted invasions of the accused's immunity.[7] This attitude continues to influence present day law in the exclusion of much real, as well as testimonial, evidence, resulting in unduly hampering criminal prosecutions, as in the Texas decision. However, some jurisdictions, with the purpose of making possible a fuller ascertainment of the facts, have interpreted the constitutional prohibition as applicable only to testimonial utterances made by the defendant under compulsion.[8] The rule laid down by the North Carolina court seems to be in line with this trend.

An examination into the purpose of the guaranty against self-incrimination will facilitate an intelligent evaluation of the two principal cases. It is evident from the authorities that this protection had its origin in a protest against the cruel inquisitorial methods of interrogating accused persons, and in the fear that falsehoods would often arise from the unlawful physical compulsion.[9] Wigmore states that the attempt to induce the giving of self-incriminating evidence "is the employment of legal process to extract from the person's own

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indicated that he was not intoxicated! The prosecution was for first degree murder, and the defense raised was that accused "was insane at the time of the homicide, due to continued use of liquor, morphine and other opiates, and that he therefore had no recollection of the killing."

[7]Cooper v. State, 86 Ala. 610, 6 So. 110, 11 Am. St. Rep. 84, 4 L. R. A. 766 (1889) (compulsion to submit to the taking of footprint violated accused's constitutional rights when the refusal was admitted in evidence against him); State v. Height, 117 Iowa 650, 91 N. W 935 (1902) (evidence of result of compulsory physical examination of person accused of rape, for the purpose of ascertaining if he was affected with a venereal disease alleged to have been communicated to prosecutrix was inadmissible as violative of his constitutional guaranty); Stokes v. State, 5 Baxt. 619, 30 Am. Rep. 72 (Tenn. 1880) (in murder prosecution evidence on defendant's refusal to make footprint in pan of mud at trial held inadmissible because it was self-incriminating evidence).

[8]Hold. v. U. S., 218 U. S. 245, 31 S. Ct. 2, 54 L. ed. 1021 (1910) (admitted testimony of a witness that accused under compulsion put on a blouse for purposes of identification and it fitted him); State v. Graham, 116 La. 779, 41 So. 90 (1906) (admitted evidence on comparison of footmarks at scene and accused's footprint); State v. Oschod, 49 Nev. 194, 242 Pac. 582 (1926), 24 Mich. L. Rev. 617 (compelling defendant to don shirt at scene of killing held proper); People v. Sallow, 100 Misc. 447, 165 N. Y. Supp. 915 (1917) (fingerprinting evidence held admissible); State v. Cash, 15 S. E. (2d) 277 (N. C. 1941); State v. Gatton, 60 Ohio App. 192, 20 N. E. (2d) 265 (1938) (blood test and urinalysis admissible).

[9]Brown v. Walker, 161 U. S. 591, 596-7, 16 S. Ct. 644, 646-7, 40 L. ed. 819 (1896); State v. Ah Chuey, 14 Nev. 79, 33 Am. Rep. 530, 531 (1879); People v. Sallow 100 Misc. 447, 454, 165 N. Y. Supp. 915 (1917); 2 Story, Constitution (4th. ed. 1873) § 1788; 8 Wigmore, Evidence (3d ed. 1940) § 2263.

lips an admission of his guilt, which will thus take the place of other evidence;" and further, the plain object of the constitutional protection is "to stimulate the prosecution to a full and fair search for evidence procureable by their own exertions and to deter them from a lazy and pernicious reliance upon the accused's testimony extracted by force of law."[10] It is thought that in the use of intoxication tests no harm can possibly result to the person of the defendant; nor is there chance of falsehood in the physical facts which speak for themselves. There need be no fear of the employment of a means to extort confessions comparable to that enjoyed by a civil officer of India who observed: "It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence."[11] It would appear from the basic reasons for the constitutional protection that its extension to include intoxication tests is unjustified.

A search of analogous cases supports this conclusion. The fingerprinting of the defendant and its admissibility as evidence is not now considered violative of the privilege.[12] The New York court in passing upon this question pointed out that there is neither torture nor chance of error involved: "... the physical facts speak for themselves; no fears, no hopes, no will of the prisoner to falsify or to exaggerate could produce or create a resemblance of her finger prints or change them in one line, and, therefore, there is no danger of error being committed or untruth told."[13] In deciding the issue of whether a witness may testify that the prisoner, under compulsion, put on a blouse and it fitted him, Mr. Justice Holmes said: "But the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."[14] Also, evidence of accused's measurements,[15] photograph,[16] footprints,[17] nail-scrapings,[18] medical exam-

[10]8 Wigmore, Evidence (3d ed. 1940) § 2263.

[11]8 Wigmore, Evidence (3d ed. 1940) § 2251, p. 312, taken from Sir J. F. Stephen, History of Criminal Law 1.

[12]Moon v. State, 22 Ariz. 418, 198 Pac. 288 (1921), 16 A. L. R. 362, 369 (1922); People v. Sallow, 100 Misc. 447, 165 N. Y. Supp. 915 (1917).

[13]People v. Sallow, 100 Misc. 447, 463, 165 N. Y. Supp. 915 (1917).

[14]Holt v. U. S. 218 U. S. 245, 252, 31 S. Ct. 2, 6, 54 L. ed. 1021 (1910).

[15]U. S. v. Cross, 9 Machey (20 D. C.) 365, 382 (1891). The court said, "It is simply the act of the officers, and is not compelling him to give evidence against himself."

[16]Shaffer v. U. S., 24 App. D. C. 417 (1904) (photographs taken against defendant's will). But see Hawkins v. Kuhne, 153 App. Div. 216, 137 N. Y. Supp. 1090

inations,[19] and acts requiring the removal or replacement of accused's garments for identification,[20] has been held admissible and not within the privilege. These precedents justify the conclusion reached in the recent tentative draft of the Restatement of Evidence which asserts that no person has a privilege to refuse:

> "(a) to submit his body to examination for the purpose of discovering or recording his corporal features and other identifying characteristics, or his physical or mental condition, or
>
> "(b) to furnish or to permit the taking of samples of body fluids or substances for analysis."[21]

(1912), aff'd., 208 N. Y. 555, 101 N. E. 1104 (1913) (court held it was an unlawful assault for defendant to be measured and photographed without a statute authorizing such).

[17]Penton v. State, 194 Ark. 503, 109 S. W. (2d) 131 (1938) (complied with direction, without objection, to make track); Elmore v. Commonwealth, 282 Ky. 443, 138 S. W. (2d) 956, 959-60 (1940) (accused's shoes were taken by compulsion to compare with tracks at scene. The court said, "This provision against self incrimination is generally considered to be a limitation as to testimonial compulsion directed against the defendant as a witness, that is, compelling the defendant himself to say or do something which has a tendency to incriminate himself." The mere act of taking his shoes did not compel him to do any act tending to incriminate him); State v. Graham, 74 N. C. 646, 21 Am. Rep. 493 (1877) (court reasoned that confessions made under compulsion are not received as evidence because they may be influenced by other motives aside from the truth. This objection is not applicable here for no fears or hopes could produce resemblance of the accused's track found in the cornfield); Rickets v. State 23 Okla. Cr. 267, 215 Pac. 212 (1923). Contra: Cooper v. State, 86 Ala. 610, 6 So. 110, 11 Am. St. Rep. 84, 4 L. R. A. 766 (1889).

[18]State v. McLaughlin, 138 La. 958, 70 So. 925 (1916).

[19]People v. Seles, 17 Cal. App. (2d) 75, 61 P (2d) 771 (1936) (voluntarily submitted to examination for morphine scars); People v. Guitery, 126 Cal. App. 526, 14 P (2d) 838 (1932) (acquiesced to examination for gonorrhea); Wehenkel v. State, 116 Neb. 493, 218 N. W. 137 (1928) (submitted without objection to physical and mental tests); State v. Nelson, 162 Ore. 430, 92 P (2d) 182 (1939) (examination for insanity without objection). Contra: People v. Corder, 244 Mich. 274, 221 N. W. 309 (1928), 27 Mich. L. Rev. 471. A quote from this case comment shows the majority attitude: "Whether a physical examination of the accused is a violation of the privilege is the subject of much dispute. Probably no court would refuse to force a defendant to uncover his face that a witness might identify him. The line seems to be drawn, however, at medical examinations of those parts of the body not usually exposed to view." (1928) 27 Mich. L. Rev. 471, 472.

[20]Holt v. U. S., 218 U. S. 245, 31 S. Ct. 2, 54 L. ed. 1021 (1910) (testimony of witness that blouse in question fitted accused); Canty v. State, 238 Ala. 461, 191 So. 260 (1939) (put cap on and ran without objection); Orr v. State, 236 Ala. 462, 183 So. 445 (1938) (required to put cap on); State v. Ah Chuey, 14 Nev. 79, 33 Am. Rep. 530 (1879) (at trial accused forced to roll up sleeve and exhibit tatoo marks on arm); State v. Garrett, 71 N. C. 85, 17 Am. Rep. 1 (1874) (defendant forced to unwrap his hand to show whether burned as she claimed); State v. Strauss, 174 Misc. 881, 22 N. Y. S. (2d) 155 (1940) (defendant required to be forcibly shaved and have haircut).

[21]Restatement, Evidence (Tent. Draft No. 2, 1941) § 205.

Thus the Restatement has tentatively, at least, accorded its sanction to several recent cases in line with *State v. Cash*.[22] In the case of *State v. Gatton*[23] defendant, charged with drunken driving, refused to submit to a blood test or urinalysis. At the trial, evidence of this conduct was admitted over objection by defendant, and the prosecutor urged the jury to consider the refusal to submit to testing as an inference of the defendant's guilt. The Court of Appeals affirmed the conviction which was predicated in part upon evidence of the refusal to submit to the tests. Holding that there was no immunity from such tests, the court stated that the privilege applied purely to disclosure by utterance. Because of the dangers of modern day highway transportation, a tendency to extend the privilege against self-incrimination to the unwarranted length claimed by the defendant was condemned.[24] In an Arizona case[25] where the defendant voluntarily gave a urine sample, the court held this evidence admissible in a conviction for drunken driving. Here the accused had consented to the test, but the court expressed doubt as to whether the constitutional provision against self-incrimination would be applicable even had compulsion been involved, because it regarded the urinal analysis as real evidence rather than testimonial evidence, and therefore not within the protection given by the constitution.

The extent to which accused objected to the tests at the time they were administered is regarded as of vital significance in the decisions of some courts. In *Apodaca v. State*[26] the Texas court held that defendant's constitutional privilege was violated by his being compelled to take the tests, even though he registered no objection at the time.[27] In an Iowa case[28] the court admitted the testimony concerning the results of the tests over the objection of defendant, because he had voluntarily taken the tests, believing they would prove his innocence. That tribunal recognized the privilege against self-incrimination as covering intoxication tests, if the tests were forced upon the accused

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[22]15 S. E. (2d) 277 (N. C. 1941).

[23]60 Ohio App. 192, 20 N. E. (2d) 265 (1938).

[24]Said the court: "Maudlin sentimentality in favor of those accused of crime should not be encouraged." 60 Ohio App. 192, 20 N. E. (2d) 265, 267 (1938).

[25]State v. Duguid, 50 Ariz. 276, 72 P. (2d) 435 (1939).

[26]146 S. W. (2d) 381 (Tex. Cr. App. 1940).

[27]Also Daugherty v. State, 28 Ala. App. 453, 186 So. 780 (1939); State v. Height, 117 Iowa 650, 91 N. W. 935 (1902); Elmore v. Commonwealth, 282 Ky. 443, 138 S. W. (2d) 956 (1940); McManus v. Commonwealth, 214 Ky. 240, 94 S. W. (2d) 609 (1936)

[28]State v. Morkrid, 286 N. W. 412 (Iowa 1939).

by compulsion or entrapment; volunteering to the testing, however, amounted to a waiver of the constitutional protection. Some courts have gone further, and found a waiver of rights in the failure of the accused to object actively to the tests at the time they were made.[29] The issue of whether enforced testing violates the privilege is thus avoided. This view was adopted in a recent New York case[30] in which it was shown that the defendant had submitted to tests without objection because he thought they had to be taken. The evidence of the results was admitted on the ground that the defendant had not been compelled by force or threats to submit to the examination, though it had been made in the presence of the police. The courts expressing this view would apparently go a long way in requiring verbal or obvious objection to the tests as a condition to excluding evidence of the results, even though the defendant may not have been fully apprised of his constitutional right when the tests were being made.

Upon analysis of the two principal cases, it is urged that the rule announced in *State v. Cash*[31] is predicated upon a sounder legal basis and achieves a more desirable and expedient result. The modern trend is admittedly toward the limitation of this constitutional immunity so that it is applicable only to oral or written testimony.[32] This interpretation gives effect to the original purpose of the inclusion of the privilege into the Bill of Rights. The tests are recognized as capable of producing reliable scientific facts incapable of falsification by the accused. The results are real evidence concerning physical facts discovered upon the instigation of the prosecution without the objectionable feature of an admission by the defendant. There seems no basis for contending that with the advent of these blood tests and urinalyses the prosecution would become lackidaisical, as this process

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[29]Wehenkel v. State, 116 Neb. 493, 218 N. W 137 (1928).

[30]Matter of Schmidt v. Dist. Attorney of Monroe Co., 255 App. Div. 353, 8 N. Y. S. (2d) 787 (1938).

[31]15 S. E. (2d) 277 (N. C. 1941).

[32]The better considered cases adhere to the doctrine that the immunity merely "closes the mouth of the defendant," and has no application to compulsory examinations or proof of other physical facts which speak for themselves. Holt v. U. S. 218 U. S. 245, 31 S. Ct. 2, 54 L. ed. 1021 (1910); State v. Ah Chuey, 14 Nev. 79, 33 Am. Rep. 530, 532 (1879) (court said in permitting evidence of tatoo marks on defendant's arm which he was forced to show at the trial for identification purposes: " . it would be a sad commentary upon the wisdom of the framers of our Constitution to say that by the adoption of such a clause they have effectually closed the door of investigation tending to establish the truth."); People v. Sallow, 100 Misc. 447, 165 N. Y. Supp. 915 (1917); State v. Gatton, 60 Ohio App. 192, 20 N. E. (2d) 265 (1939).

is in itself a demonstration of the increasing ingenuity and enterprise displayed by every police force in the apprehension of criminals.

A sound public policy demands the employment of these factually correct "drunkometer" tests[33] to permit speedy and just prosecution of those who persist in jeopardizing the life and limb and property of the public by driving while under the influence of liquor. Where the public safety is imperilled, it would seem wise for the courts in their discretion to limit the individual's constitutional guaranty against self-incrimination to its apparently intended scope—testimonial compulsion.[34]

ROBERT C. HOBSON

EQUITY—FRAUD AS GROUND FOR EQUITY'S JURISDICTION TO ANNUL MARRIAGES. [Virginia]

In the last few decades, sociologists have called attention to a decided increase in the number of divorces and annulments of mar-

[33]There are few large cities in the United states that do not employ some method of determining the degree of intoxication of one charged with drunken driving. It seems that whether it is requiring the accused to do certain acts as in Apodaca v. State, blowing into a balloon to determine the degree of alcohol on the breath, or taking blood and urine samples, the admissibility of these will be put to a judicial test. It is hoped the courts will see the wisdom as well as legal justification in permitting the employment of these tests.

An interesting point is brought out in Bednarik v. Bednarik, 18 N. J. Misc. 633, 16 A. (2d) 80, 90-91 (1941). On the question of the admission into evidence of the results of a blood grouping test, the court stated: "To subject a person against his will to a blood test is an assault and battery, and clearly an invasion of his personal privacy.... To my mind it is not the degree of risk to life, health or happiness which is the determinative factor, but the fact of the invasion of the constitutional right to personal privacy." In this divorce proceeding, the court added that public policy does not favor the granting of a divorce, nor is this a case in which the public interest requires the making of the tests. It is urged by the writer that the New Jersey court would consider blood tests and urinalyses to determine intoxication of a drunken driver of sufficient public interest, as demonstrated by the state's keen interest in stringent traffic regulation.

[34]See Ex Parte Kneedler, 243 Mo. 632, 147 S. W 983, 984, 40 L. R. A. (N. S.) 622 (1912). In upholding a Missouri statute providing that every person involved in an automobile accident in which the person or property of another is injured must give his name, address and license number, the court said: "Common observation and experience show that unrestricted use of motor vehicles on public streets would be extremely dangerous to life and limb and the property of the public. Their use thus becomes a fit subject for state regulation. Every person who operates or uses a motor vehicle must be regarded as exercising a privilege, and not an unrestricted right. It being a privilege granted by the Legislature, a person enjoying such privilege must take it subject to all proper restrictions." People v. Rosenheimer 209 N. Y. 115, 102 N. E. 530, 46 L. R. A. (N. S.) 977 (1913).

riages. The latter action has gained new prominence partially as an offspring of strict divorce laws in some states, and partially from a gradual liberalization of the concepts of equity courts regarding their power to grant annulments on the ground of fraud.[1] By virtue of the recent decision of *Pretlow v. Pretlow*,[2] Virginia may be included in the growing list of states which recognize certain types of fraud as a basis for annulling marriages.

In the *Pretlow* case it appeared that at the time of their marriage Mr. Pretlow was 67, a widower, and of some means, while Mrs. Pretlow was 44, a widow, and of very limited means. Each party had children by former marriages. After they had lived together for about six months, Mr. Pretlow sought an annulment, alleging as fraud that the marriage had not been consummated by sexual intercourse, and that Mrs. Pretlow had never at any time intended that it should be consummated. In granting the annulment, the court had to overcome two arguments raised in behalf of Mrs. Pretlow: (1) fraud is not a proper basis for an annulment suit, and (2) if it were a proper basis, the wording of a Virginia statute stating grounds for annulment should be interpreted to exclude all grounds not mentioned, including fraud.[3]

It is generally recognized that equity courts have inherent power to annul marriages,[4] though this authority has been questioned.[5] There have been great differences of opinion, however, as to what causes will justify an exercise of this jurisdiction of equity. Though fraud has long been accepted as an equitable ground for relief in contract actions, it has not been until comparatively modern times that equity's power to give such relief has been recognized in regard to the marital status.[6]

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[1]Brown, Duress and Fraud as Grounds for the Annulment of Marriage (1935) 10 Ind. L. J. 473, 491; (1920) 20 Col. L. R. 708.

[2]177 Va. 524, 14 S. E. (2d) 381 (1941).

[3]A third point was raised to the effect that the equitable right had been lost to the petitioner because of laches. The court pointed out that laches is delay which works a disadvantage, and found that the rule need not be applied where "delay has done no harm, where conditions have not changed and where it is possible to completely restore the parties to their antecedent rights. The parties here may be placed practically in statu quo, a thing which would be impossible if the marriage had been followed by cohabitation." 177 Va. 524, 14 S. E. (2d) 381, 388 (1941). Laches would have been important, if applicable, because Mr. Pretlow's cross-bill for annulment followed Mrs. Pretlow's suit for divorce, and he asked cancellation of an ante-nuptial settlement.

[4]Rose v. Rose, 9 Ark. 507 (1849); Le Brun v. Le Brun, 55 Md. 496 (1881); Waymire v. Jetmore, 22 Ohio St. 271 (1872); Clark v. Field, 13 Vt. 460 (1841); 2 Kent's Commentaries 76, 77.

[5]Peugnet v. Phelps, 48 Barb. 566 (N. Y. 1867).

[6]Rawdon v. Rawdon, 28 Ala. 565 (1856); Fuller v. Fuller, 33 Kan. 582, 7 Pac. 241

Even though courts have repeatedly pointed out that marriage is a contract, it is undeniable that it is surrounded with social mores[7] and is recognized as a status;[8] and further, that if looked upon as a contract, it is of a type by itself.[9] Because marriage is so affected with policy, writers are restrained from codifying and making rules on a subject which is not and should not be open to detailed rule-making.[10]

(1885); Ridgely v. Ridgely, 79 Md. 298, 29 Atl. 597, 25 L. R. A. 800 (1894); Keyes v. Keyes, 22 N. H. 553 (1851); Clark v. Field, 13 Vt. 460 (1841).

The digests show a great increase in cases after about 1875. More recently the number of cases has been decreasing, probably because every state now has a statute on annulments and 26 of them have statutes allowing annulment for fraud. 1 Vernier, American Family Laws (1931) § 50, Supplement (1938) § 50.

Carris v. Carris, 24 N. J. Eq. 516 (1873), claims the authority from the jurisdiction of the English ecclesiastical courts and from the general power to annul contracts for fraud. There is some question as to the validity of the former claim because the courts of chancery in England did not exercise this jurisdiction. 1 Spence, Eq. Jur. (1846) 702. The Carris case suggests that Chancery could have done so if it wished and therefore that the power inhered in equity in New Jersey. The Pretlow case uses both lines of reasoning, though in Almond v. Almond, 4 Rand. 662 (Va. 1826), the court intimated that ecclesiastical jurisdiction to grant alimony did not inhere in the Virginia court, though the court did grant the petition.

[7]"The mores determine what marriage shall be, who may enter into it, in what way they may enter into it, divorce, and all details of proper conduct in the family relation.... Wedlock is a mode of associated life.... No rules or laws can control it.. No laws can do more than specify ways of entering into wedlock, and the rights and duties of the parties in wedlock to each other, which the society will enforce." Sumner, Folkways (1940) 342, 349.

[8]In re Moorehead's Estate, 289 Pa. 542, 137 Atl. 802, 806 (1927). New York readily annuls marriages for fraud, but in the light of Risk v. Risk, 169 Misc. 287, 289, 7 N. Y. S. (2d) 418 (1938), only before the marriage contract becomes the marriage status—consummation being the point of change to a status. Griffin v. Griffin, 122 Misc. 837, 204 N. Y. Supp. 131 (1924) notes that policy enters where children are begotten, debts are created, real estate involved, and the community has recognized the relation.

[9]Green v. State, 58 Ala. 190, 193, 29 Am. Rep. 739 (1877); Townsend v. Griffin, 4 Har. 440, 442 (Del. 1846). New York has a statute granting divorce on one ground only and this strictness is reflected in the liberality in annulling. ". . our law considers marriage in no other light than as a civil contract." Kujek v. Goldman, 150 N. Y. 176, 182, 44 N. E. 773, 775 (1896). This construction is applied before the contract arises to a martial status. Di Lorenzo v. Di Lorenzo, 174 N. Y. 467, 67 N. E. 63 (1903). A recent New York case holds that the fraud need not concern the essentials of the marriage and that it only need be great enough to have kept the party from consenting if the fraudulent fact had been known. Williams v. Williams, 11 N. Y. S. (2d) 611 (1939). The last cited case is also to be noted as allowing annulment after consummation. The fraud shown was the husband's concealment of a physical deformity which should have led him to investigate for impotency, coupled with his statement that he knew of no reason why he could not have a child.

[10]Policy will prevail over private contract rules in annulment cases in many jurisdictions. Fisk v. Fisk, 6 App. Div. 432, 39 N. Y. Supp. 537, 538 (1896); Morris v. Morris, 132 Okla. 291, 133 Okla. 176, 270 Pac. 833, 835 (1928); In re Higbee, 4

However, two general principles are accepted, though their application is varied: To justify annulment, the fraud must go to the essence of the marriage. Also, it may be taken advantage of only by the spouses, for if they wish to accept the relationship, no one can object.[11]

Three approaches to the cases involving annulment for fraud appear to cover their ramifications.[12] Under the strict English view, announced in the leading case of *Moss v. Moss*,[13] only such fraud as produces the appearance without the reality of consent can be a ground for annulment. Annulment was refused where the wife had concealed her pregnancy by another man at the time of the marriage. As a hypothetical example of the kind of fraud required, the court suggested a situation where one party had impersonated some third person in order to deceive the other party into consenting to the marriage.[14]

A second approach is the "strict American" view in which emphasis is laid on public policy based on an interest in the stability of the marriage relation.[15] Annulment will be granted only in cases where the fraud is said to go to the essence of the marriage contract, or in other words only in extreme cases.[16] While all courts are, of course, not agreed on what acts constitute this essential fraud, some of these types of fraud are misrepresentation or concealment in regard to pregnancy, venereal diseases, and impotence if the marriage has not been consummated.[17]

Thirdly, the so-called "liberal American" view gives the court full discretion in the individual case to dissolve what would otherwise be

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Utah 19, 5 Pac. 693, 697 (1885); Heflinger v. Heflinger, 136 Va. 289, 118 S. E. 316, 320 (1923).

[11]Chipman v. Johnston, 237 Mass. 502, 130 N. E. 65, 14 A. L. R. 119 (1921); McKinney v. Clarke, 2 Swan. 321 (Tenn. 1852). But see Waymire v. Jetmore, 22 Ohio St. 271 (1872), where a guardian sues for his ward. Brown, Duress and Fraud as Grounds for the Annulment of Marriage (1935) 10 Ind. L. J. 473, 479.

[12]Brown, Duress and Fraud as Grounds for the Annulment of Marriage (1935) 10 Ind. L. J. 473, 480; Vanneman, Annulment of Marriage for Fraud (1925) 9 Minn. L. Rev. 497, 514.

[13]L. R. [1897] P. 263.

[14]The rule in England is confused. Upon facts quite like those of the Moss case, an annulment was granted in Dickinson v. Dickinson, L. R. [1913] P 198, 82 L. J. Prob. (N. S.) 121, 109 L. T. (N. S.) 408, 29 T. L. R. 765. It has been suggested that the English rule, as stated, does not allow any annulment for fraud. Brown, Duress and Fraud as Grounds for the Annulment of Marriage. (1935) 10 Ind. L. J. 473, 480.

[15]Also known as the "moderate" or "middle group" view.

[16]Millar v. Millar, 175 Cal. 797, 167 Pac. 394 (1917) (construing a statute requiring that fraud go to the essence of the marriage); Lyon v. Lyon, 230 Ill. 366, 82 N. E. 850 (1907); Chipman v. Johnston, 237 Mass. 502, 130 N. E. 65 (1921).

[17]As suggested by Vanneman, Annulment of Marriage for Fraud (1925) 9 Minn. L. Rev. 497, 514.

an undesirable marriage.[18] *Brown v. Scott*[19] goes about as far as any of the cases in this category. An annulment was granted because the husband represented to a young girl of about half his years that he was a World War hero, when in fact he had spent most of the years of that war in jail.

Any attempt to draw a clear line between the two American views cannot be entirely successful until there are more modern cases.

> "Since the difference between these two extreme American views is one largely of point of view and emphasis, it is not always easy to tell into which category any particular state falls or even to recognize general tendencies. It is believed, however, that the present tendency, even in the conservative states, is generally in the direction of greater liberality. This seems desirable, if not carried too far, as the public interests are hardly served by the enforced continuance of a marriage resulting from the gross fraud of one of the spouses."[20]

It is readily apparent that in the liberal view the courts are emphasizing the contract elements of marriage, and most frauds which will defeat an ordinary contract are held to be sufficient cause for granting an annulment.[21] On the other hand, the stricter attitude toward

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[18]Brown v. Scott, 140 Md. 258, 117 Atl. 114, 22 A. L. R. 810 (1922); Corder v. Corder, 141 Md. 114, 117 Atl. 119 (1922). But in Oswald v. Oswald, 146 Md. 313, 126 Atl. 81 (1924) annulment was refused where defendant wife represented to her Roman Catholic husband that her former husband was dead, when in fact he was living and had been divorced from her. Ysern v. Horter, 91 N. J. Eq. 189, 110 Atl. 31 (1920); Williams v. Williams, 11 N. Y. S. (2d) 611 (1939); Thompson v. Thompson, 202 S. W. 175, aff'd, 203 S. W. 939 (Tex. Civ. App. 1918).

For an extended discussion of New York cases see (1939) 9 Brooklyn L. Rev. 51.

[19]140 Md. 258, 117 Atl. 114 (1922). A number of minor misrepresentations of character were made, and may have influenced the court in its decision. But as a general rule, misrepresentations as to character or wealth are held insufficient fraud to justify an annulment.

[20]Brown, Duress and Fraud as Grounds for the Annulment of Marriage (1935) 10 Ind. L. J. 473, 480. The only danger is in going too far, as New York seems to have in Shonfeld v. Shonfeld, 260 N. Y. 477, 184 N. E. 60 (1933), where the marriage was annulled because the wife induced her husband to marry her upon the representation that if he did she would give him $8,000 to set up a jewelry business, when in fact she had no money. The husband had felt that he could not support a wife unless he was in business.

[21]The rule in New York seems settled that an annulment will be granted if the fraud was an essential element in the giving of consent by an objective, reasonable, and ordinarily prudent person in the same situation. Shonfeld v. Shonfeld, 260 N. Y. 477, 184 N. E. 60 (1933). The following cases granted annulments for a concealed intention never to assume the marital relation or for a secret determination to refuse sexual intercourse, refusal continuing after the marriage: Millar v. Millar, 175 Cal. 797, 167 Pac. 394 (1917) (under a statute); Bishop v. Redmond, 83 Ind. 157 (1882); Heneger v. Lomas, 145 Ind. 287, 44 N. E. 462 (1896); Bolmer v.

annulment emphasizes the concept of marriage as a contract establishing a status, so that not only the parties but also the State and society have an interest.[22]

In the *Pretlow* case it is clear that the Virginia court intended to go beyond the English view, because an American case[23] which criticized and refused to follow the *Moss* case was cited with tacit approval. As between the two American views, the court did not definitely declare itself. The view adopted appears to be a liberal one, for the court referred to its right to grant annulment as coming from the general power to annul fraudulent contracts. The nature of many of the cases cited points in the same direction. The facts of the case would probably have supported an annulment even under the strict American view, however, for the fraud of Mrs. Pretlow seems to have gone to the essence of the marriage contract; and the absence of consummation of the marriage, apart from its relation to the fraud, aided the court in its decision.

Regardless of which approach to the question is adopted, consummation is naturally a factor of importance in annulment cases. It is reasoned that annulment should not be granted because the parties cannot be restored completely to their former status when there has been consummation.[24] In addition, there is a tendency to

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Edsall, 90 N. J. Eq. 299, 106 Atl. 646 (1919); Moore v. Moore, 94 Misc. 370, 157 N. Y. Supp. 819 (1916); Miller v. Miller, 132 Misc. 121, 228 N. Y. Supp. 657 (1928); Barnes v. Wyethe, 28 Vt. 41 (1855). Refusal to submit to intercourse after marriage held to prove similar intention before marriage. Johnson v. Johnson, 257 Ill. App. 587 (1930). Contra: Osbon v. Osbon, 185 Minn. 300, 240 N. W. 894 (1932). Annulments have been refused upon the following grounds: Fraud did not concern the essentials of the contract and existing material facts bearing directly on the marriage state and the health and happiness of the one misled. Longtin v. Longtin, 22 N. Y. S. (2d) 827 (1941). Refusal of sexual intercourse after marriage where such intent was not proved to exist at the time of marriage. Sasserno v. Sasserno, 240 Mass. 583, 134 N. E. 239 (1922).

For limitations imposed under a statute or in interpreting one, see: Williams v. Williams, 2 W. W. Harr. 39, 118 Atl. 638 (Del. 1922); Varney v. Varney, 52 Wis. 120, 8 N. W. 739 (1882). A discussion of the trend toward liberality; Emmerglick, Nullity of Marriage for Fraud (1931) 19 Ky. L. J. 295.

See Vanneman, Annulment of Marriage for Fraud (1925) 9 Minn. L. Rev. 497, 509, for a list of cases in which annulments have been granted because of fraud. The cases are followed by modern authority, with the possible exception of concealment of epilepsy. See: Lapides v. Lapides, 254 N. Y. 73, 171 N. E. 911 (1930).

[22]Brown, Buress and Fraud as Grounds for the Annulment of Marriage (1935) 10 Ind. L. J. 473, 479.

[23]Brown v. Scott, 140 Md. 258, 117 Atl. 114, 22 A. L. R. 810 (1922).

[24]See note 8, supra; Lyndon v. Lyndon, 69 Ill. 43 (1873); Smith v. Smith, 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800, 68 Am. St. Rep. 440 (1898); Robertson v. Cole, 12 Tex. 356 (1854). Contra: Gatto v. Gatto, 79 N. H. 177, 106 Atl. 493 (1919)

refuse annulment after consummation because consummation usually follows knowledge of the fraud and, where there is no severing of relations between the parties, ratifies the marriage. The courts are far more lenient when the parties have separated immediately upon discovery of the fraud.[25] However, as a factor in defeating annulments, consummation is currently losing some of its force in one respect. A great objection used to be that if the marriage had been consummated, there was the possibilty of offspring, and a decree of annulment would bastardize them.[26] With the advent of statutes legitimizing children of annulled marriages, this objection is being removed.[27]

The second major plea in the *Pretlow* case was based on the argument that in Virginia, equity's jurisdiction to annul marriages is defined and limited by a statute which enumerates the causes upon which an action to annul a marriage may be instituted. Section 5100 of the Code of Virginia provides that "When a marriage is supposed to be void for any of the causes mentioned [in sections 5087-5100] ... either party may ... institute a suit for annulling the same; and, upon due proof of the nullity of the marriage, it shall be decreed to be void by a decree of divorce or nullity." The causes mentioned are inter-racial marriages, marriages prevented by former marriage, marriages of those who leave the state to evade its laws, marriages of persons under the age of consent, and all marriages otherwise prohibited which are solemnized within the state.

It was argued that as the statute indicated when a marriage might be annulled, and set out certain causes, it followed as a matter of course that other causes were excluded. The Virginia court rejected this position without much discussion, mingling this question with that of the inherent power of equity to annul and of the propriety of fraud as a ground for annulment.[28] The court's view is justifiable for

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which denies that marriage's reaching a status and being affected by policy is a valid reason for denying annulment when the parties could not consent in the first place.

[25]Brown v. Scott, 140 Md. 258, 117 Atl. 114, 22 A. L. R. 810 (1922). One should note that the word "consummation" does not necessarily mean cohabitation or sexual intercourse; and this has been held under interpretation of a code provision. Lefkoff v. Sicro, 189 Ga. 554, 6 S. E. (2d) 687 (1939).

[26]The argument is recognized in Gatto v. Gatto, 79 N. H. 177, 106 Atl. 493, 496 (1919).

[27]1 Vernier, American Family Laws (1931) § 50, and especially Supplement (1938) § 50; 4 Vernier, American Family Laws (1931) § 240.

[28]Marriages void by statute have been uniformily held nullifiable though not listed in statutory causes for annulment. 1 Vernier, American Family Laws (1931) § 50.

several reasons. The use of the maxim that "to include one point is to exclude another" is an "illicit major" and "in direct contradiction to the habits of speech of most people."[29] Numerous case authorities. specificially or in effect, reject this mode of statutory interpretation,[30] though the exclusion view has been adopted in many cases.[31] Further, it is recognized that once equity has jurisdiction to grant certain relief, statutes giving a legal remedy in the premises will not be construed to abrogate that power unless they expressly so provide.[32] The principle which underlies this reluctance of equity to surrender a jurisdiction once exercised might well be extended to the situation in which a statute outlining equitable jurisdiction is alleged to be restrictive of a previously exercised power. The effect of a particular statute must, of course, depend on its own individual terms, and if the exact sections involved are ambiguous, other sections read with them may throw light on the legislative intent. Here, a subsequent section, 5105, provides that chancery courts "shall have jurisdiction of suits for annulling or affirming marriage and for divorces. .," not limiting it to specified causes. This statute is apparently intended either to confer powers as broad as its language, or to be merely declaratory of pre-existing law.[33] In either use, fraud remains a ground for annulment. Finally, in a matter so strongly affecting the public interest, it seems appropriate that the discretionary powers of a court of equity rather than the rigid provisions of a legislative enactment should control the decisions in each individual controversy.

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[29]Radin, Statutory Interpretation (1930) 43 Harv. L. Rev. 863, 873.

[30]Ridgely v. Ridgely, 79 Md. 298, 29 Atl. 597, 599 (1894); Heflinger v. Heflinger, 136 Va. 289, 118 S. E. 316 (1923); Heflin v. Heflin, 177 Va. 385, 14 S. E. (2d) 317 (1941); Meredith v. Shakespeare, 96 W Va. 229, 122 S. E. 520, 521 (1924); 25 C. J. 220 n. 17 (e). Some of the preceeding authority is but dicta. The rule must be applied with great caution, see Black, Interpretation of Laws (1911) 220. "The fact that a statute enumerates certain grounds for annulment of a marriage does not imply that no other grounds exist." 17 Am. Jur. 165.

[31]25 C. J. 220 n. 17 (f), C. J. Cyc. Service (1927-1931) 1592. Well over 500 citations are given to cases in which the maxim has been followed or explained. The Supreme Court of the United States has held that it is only a rule of construction and, for statutes, is simply an aid to discovering legislative intent. United States v. Barnes, 222 U. S. 513, 32 S. Ct. 117, 56 L. ed. 291 (1912).

[32]McClintoch, Equity (1936) § 47; 1 Pomeroy, Equity Jurisprudence (4th ed. 1918) § 276.

[33]The latter view is supported by Heflinger v. Heflinger, 136 Va. 289, 118 N. E. 316 (1923), for section 5100, which decision was relied upon in the principal case.

INSURANCE—DISPOSITION OF PROCEEDS OF LIFE INSURANCE POLICY WHERE INSURED HAS BEEN KILLED BY BENEFICIARY WHO IS INSURED'S HEIR. [Pennsylvania]

In the recent case of *Moore v. Prudential Insurance Company of America*,[1] the defendant issued Job W. Moore three insurance policies upon his life, naming his wife, Rosella Moore, the beneficiary. Thereafter, Rosella Moore shot and killed her husband, pleaded guilty to a charge of voluntary manslaughter, and was sentenced to prison. This suit was brought by her as Job Moore's administratix to collect the insurance money. It was held that though she could not recover as beneficiary, she could recover as administratrix of her husband's estate, even though she might thus obtain for herself part of the proceeds by inheritance under the statutes controlling descent and distribution.[2]

It has been almost unanimously held that a sane beneficiary who intentionally and feloniously kills the insured cannot take under a life insurance contract, such holding being based upon the strong rule of public policy not to allow a person to profit by his own crime.[3] Where

[1]Moore v. Prudential Insurance Company of America, 21 A. (2d) 42 (Pa. 1941).

[2]The term "statutes governing descent and distribution" and "statutes controlling descent and distribution" are general, rather than specific, referring to all statutes or constitutional provisions which are applied to determine whether or not a person convicted of felony may take from the estate of the ancestor he has killed. These may be in the state constitution as a provision against forfeiture of estate for felony, or may be simply a statute providing that a murderer may not take from the estate, or one saying a murderer-beneficiary may not so take. It is presupposed that the person, were it not for his felony, would be in a position to take from the estate under the statutes of descent and distribution setting out the order and rank of those who may take therefrom.

[3]The cases cited here are divided into three groups to facilitate citing to points coming later in this discussion. (a) Prather v. Michigan Mutual Life Ins. Co., 19 Fed. Cas. 1244, No. 11, 368 (1878); New York Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591, 6 S. Ct. 877, 29 L. ed. 997 (1886); Tippens v. Metropolitan Life Ins. Co., 99 F. (2d) 671 (C. C. A. 5th, 1938); Henderson v. First Nat. Bk., 229 Ala. 658, 159 So. 212 (1935); Sovereign Camp W. O. W. v. Clark, 184 Ark. 1035, 44 S. W. (2d) 336 (1931); Ill. Bankers' Life. Ass'n. v. Collins, 341 Ill. 548, 173 N. E. 465 (1930); Anderson v. Life Ins. Co. of Va., 152 N. C. 1, 67 S. E. 53 (1910); Filmore v. Metropolitan Life Ins. Co., 82 Ohio St. 208, 92 N. E. 26, 28 L. R .A. (N. S.) 675, 137 Am. St. Rep. 778 (1910); Jamison v. Metropolitan Life Ins. Co., 24 Tenn. App. 398, 145 S. W. (2d) 553 (1940).

(b) Hewitt v. Equitable Life Assur. Soc., 8 F. (2d) 706 (C. C. A. 9th, 1925); Metropolitan Life Ins. Co. v. Banion, 886 F. (2d) 886 (C. C. A. 10th, 1936), 106 F. (2d) 561 (C. C. A. 10th, 1939); Cooper v. Krisch, 179 Ark. 952, 18 S. W. (2d) 909 (1929); Henry v. Knights & Daughters of Tabor, 156 Ark. 165, 246 S. W. 17 (1923); Meyer v. Johnson, 115 Cal. App. 646, 2 P (2d) 456 (1931); Kascoutas v. Federal Life Ins. Co., 189 Iowa 889, 179 N. W. 133 (1920); Nat. Life Ins. Co. v. Hood's Adm'r., 264 Ky. 516, 94 S. W. (2d) 1022 (1936); Slocum v. Metropolitan Life Ins. Co., 245

the killer-beneficiary has been proven to be insane, he has been allowed to recover.[4] It has also been held that one killing in self-defense may recover,[5] as can one who has killed under the apparent necessity of protecting his own mother.[6] The cases involving manslaughter seem to be at variance,[7] though the opinion has been put forward that presence or absence of felonious intent to kill is the proper test of whether or not recovery should be allowed.[8]

The courts also seem unanimous in holding that the incapacity of the named beneficiary to collect does not excuse the insurance company of its liability to pay the amount of the policy.[9] It has been generally held that the administrator or executor of the insured's estate may recover the amount,[10] but whether this comes as a matter of right to the personal representative or is simply a convenient method for the courts to distribute the proceeds of the policy to the proper persons, is not entirely clear. The few cases which consider the question seem to favor the latter viewpoint and have refused to allow

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Mass. 565, 139 N. E. 816, 27 A. L. R. 1517 (1923); Ohio State Life Ins. Co. v. Barron, 274 Mich. 22, 263 N. W. 786 (1935); Merrity v. Prudential Ins. Co., 110 N. J. L. 586, 166 Atl. 335 (1933); Wenker v. Landon, 161 Ore. 450, 88 P (2d) 971 (1939); Robinson v. Metropolitan Life Ins. Co., 69 Pa. Super. 274 (1918); Smith v. Todd, 155 S. C. 323, 152 S. E. 506, 70 A. L. R. 1529 (1930); Murchison v. Murchison, 203 S. W. 423 (Tex. Civ. App. 1918).

(c) Equitable Life Assur. Soc. v. Weightman, 61 Okla. 106, 160 Pac. 629 (1916); De Zotell v. Mutual Life Ins. Co., 60 S. D. 532, 245 N. W. 58 (1932); Wickline v. Phoenix Mutual Life Ins. Co., 106 W Va. 424, 145 S. E. 743 (743 (1928); Johnson v. Metropolitan Life Ins. Co., 85 W. Va. 70, 100 S. E. 865 (1919); Cleaver v. Mutual Reserve Fund Ass'n., [1892] 1 Q. B. 147, C. A., 28 Digest 369, 2969.

[4]Holdom v. Ancient Order U. W., 159 Ill. 619, 43 N. E. 772, 31 L. R. A. 67, 50 Am. St. Rep. 183 (1895).

[5]National Life & Accident Ins. Co. v. Turner, 174 So. 646 (La. App. 1937).

[6]Souverign Camp W. O. W. v. Everett, 58 Ga. App. 642, 199 S. E. 660 (1938).

[7]Minasian v. Aetna Life Ins. Co., 295 Mass. 1, 3 N. E. (2d) 17 (1936). Contra: National Ben. Life Ins. Co. v. Davis, 38 Ohio App. 454, 176 N. E. 490 (1929).

[8]Tippens v. Metropolitan Life Ins. Co., 99 F. (2d) 671 (C. C. A. 5th, 1938). A review of the cases seems to bear out this viewpoint, for the phrase "with felonious intent to kill" is used quite generally and with only slight variations where those exact words are not used. The single word "murder" is often used in the cases to designate the crime, but this is taken to be a general use of the word and not an attempt to tie down application of the rule only to cases involving murder. On the other hand, use of the phrase "with felonious intent to kill" indicates it is used with an idea of limiting the application of the rule to cases involving such intent.

[9]See cases cited, note 2, pgfs. b and c, and National Ben. Life Ins. Co. v. Davis, 38 Ohio App. 454, 176 N. E. 490 (1929).

[10]See cases cited note 2, pgf. b, and National Ben. Life Ins. Co. v. Davis, 38 Ohio App. 454, 176 N. E. 490 (1929).

the administrator or executor to recover for the estate where there were reasons for using another means of disposing of the money.[11]

Difficulty arises, however, where the murderer, barred by public policy from taking as beneficiary, is also a distributee of the insured's estate. A majority of the cases directly on the subject hold that such a person cannot recover, either as beneficiary or distributee.[12] It has even been held that the money may be kept by the insurance company to prevent its being turned over to the insured's administrator for the benefit of the murderer-beneficiary, where he is the sole distributee of the estate and there are no debts of the insured left unpaid.[13]

A smaller group of cases agrees with the instant case in holding that although public policy forbids allowing the beneficiary to take under the contract, the administrator of the insured's estate may recover the money with no instructions from the court to leave out the murderer-

[11]Cases where the money has been given to the administrator as trustee to hold for the other heirs of insured. Equitable Life Assur. Soc. v. Weightman, 61 Okla. 106, 160 Pac. 629 (1916); Cleaver v. Mutual Reserve Fund Assoc., [1892] 1 Q. B. 147, C. A., 29 Digest 369, 2969. Also cases where it has been held that though the insurance company's liability has not been excused, as the murder-beneficiary is the sole distributee of the insured's estate and as insured left no debts not covered by assets already in the estate, administrator could not recover from insurance company (in effect, giving money to insurance company). McDonald v. Mutual Ins. Co., 178 Iowa 863, 160 N. W. 289 (1916); Wickline v. Phoenix Mutual Life Ins. Co., 106 W. Va. 424, 145 S. E. 743 (1928); Johnston v. Metropolitan Life Ins. Co., 85 W. Va. 70, 100 S. E. 865 (1919). This view is also supported in a very able and comprehensive opinion covering the entire subject in De Zotell v. Mutual Life Ins. Co., 60 S. D. 532, 245 N. W. 58 (1932).

It should be noticed that the cases cited in footnote 10 did not consider the question in their opinions for, in most of them, no injustice would be done by permitting the administrator to recover for the estate, because the murderer-beneficiary was not a distributee of the estate. The courts cited here, however, have held as they do in order to keep a murderer who is a distributee of the insured's estate from recovering part of the proceeds of the policy.

[12]McDonald v. Mutual Ins. Co., 178 Iowa 863, 160 N. W. 289 (1916); Slocum v. Metropolitan Life Ins. Co., 245 Mass. 565, 139 N. E. 816, 27 A. L. R. 1517 (1923); De Zotell v. Mutual Life Ins. Co., 60 S. D. 532, 245 N. W. 58 (1932); Wenker v. Landon, 161 Ore. 450, 88 P. (2d) 971 (1939); Wickline v. Phoenix Mutual Life Ins. Co., 106 W. Va. 424, 145 S. E. 743 (1928); Johnston v. Metropolitan Life Ins. Co., 85 W. Va. 70, 100 S. E. 865 (1919); Cleaver v. Mutual Reserve Fund Assoc., [1892] 1 Q. B. 147, C. A., 28 Digest 369, 2969.

[13]McDonald v. Mutual Ins. Co., 178 Iowa 863, 160 N. W. 289 (1916); Wickline v. Phoenix Mutual Life Ins. Co., 106 W. Va. 424, 145 S. E. 743 (1928); Johnston v. Metropolitan Life Ins. Co., 85 W. Va. 70, 100 S. E. 865 (1919). View supported by De Zotell v. Mutual Life Ins. Co., 60 S. D. 532, 245 N. W. 58 (1932).

It should be noticed that these cases hold that the insurance company is not excused of its liability under the policy, but that, as there is no one privileged to take under the policy, the insurance company may keep the money. In this connection, see also State v. Phoenix Mutual Life Ins. Co., 114 W. Va. 109, 170 S. E. 909, 91 A. L. R. 1482 (1933), holding that such money does not escheat to the state.

beneficiary in its distribution. This decision has been reached regardless of the fact that the statutes controlling descent and distribution, which do not preclude a murderer from taking from the estate of the ancestor he has murdered, will permit the beneficiary to take a share of the insurance money from the estate. The cases in this minority group, in effect, apply statutes governing descent and distribution which are contrary to the rule of public policy involved and hence nullify the effect of the rule.[14]

To reach a true understanding of the meaning of the entire body of cases on this subject, it is necessary to consider the statutes in all the cases involved, in order to determine whether this conflict is not caused merely by differences in statutes. Investigation shows that this is not true.

The inclusion of this added factor into the analysis give first, a class of cases decided in jurisdictions either where the statutes controlling descent and distribution provide that a murderer may not take from the estate of the ancestor he has murdered, or where the courts make no mention of statutory control and simply apply to inheritance cases the common law rule of public policy that a person may not be allowed to profit by his own crime. All cases from jurisdictions of this kind hold that the murderer-beneficiary may not take as a distributee

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[14]National Life Ins. Co. of Montpelier v. Hood's Adm., 264 Ky. 516, 94 S. W. (2d) 1022 (1936); National Ben. Life Ins. Co. v. Davis, 38 Ohio App. 545, 176 N. E. 490 (1929); Murchison v. Murchison, 203 S. W. 423 (Tex. Civ. App. 1918).

The courts attempt to justify this action by reasoning along the following lines: "It must be remembered, however, that she will not take in such case as a beneficiary, but the money goes into the estate . . if she gets anything, it will not be by way of beneficiary, but as one of those who are entitled to a distributive share of the husband's estate. . " National Ben. Life Ins. Co. v. Davis, 38 Ohio App. 454, 176 N. E. 490, 491 (1929).

Although the instant case involves voluntary manslaughter and not murder as the cases above, it is properly grouped with them, for there was present the necessary "felonious intent to kill" and a statute controlling descent and distribution which, by construction, allows a person guilty of voluntary manslaughter to take from the estate of the ancestor he has killed. Pa. Stat. (Purdon, 1936) Tit. 20, § 136, Act of June 7, 1917, P L. 429 § 23: "No person who shall be finally adjudged guilty, either as principal or accessory, of murder of the first or second degree, shall be entitled to inherit or take any part of the real or personal estate of the person killed, as surviving spouse, heir or next of kin to such person under the provision of this act." For pertinent discussion see (1941) 27 Wash. U. L. Q. 135, commenting on Metropolitan Life Ins. Co. v. McDavid, 39 F. Supp. 228 (E. D. Mich. 1941).

Hereafter the case will be treated as if it involved murder in its facts and as if its statute, instead of merely permitting one guilty of voluntary manslaughter to take as heir, or distributee, permitted a murderer to take from the ancestor's estate. But of course any conclusions drawn can apply only to cases involving manslaughter in Pennsylvania.

of the insured's estate.[15] There seems to be no question as to the correctness of these decisions.

The next two classes of cases were decided in jurisdictions where the statutes controlling descent and distribution do not preclude a murderer from taking a share of the estate of his murdered ancestor. The two classes differ from each other in their decisions, however, and in the reasoning leading to their decisions.

Cases in the second class reach the conclusion that the murderer-beneficiary cannot recover any part of the insurance money indirectly as a distributee when he could not recover directly as beneficiary.[16] In their holdings they are like the cases of the first class, though their statutes are different. The reasoning of the courts in this second class seems to be as follows: A strong rule of public policy to the effect that a person may not profit by his own crime dictates that the murderer-beneficiary may not take under the insurance policy. But the liability of the insurance company is not excused simply because the beneficiary is incapable of taking. Who, then, is to take the money? The insured's estate, perhaps? Looking forward a step, it is easy to see that if the estate receives the money, the murderer will take a part of it as a distributee of that estate, under the statutes governing descent and distribution. The murderer will thus be allowed to do indirectly that which he cannot do directly. The rule of public policy under which the court is working will then be nullified completely. But the money does not have to be given to the estate of the insured, for the estate is only an intermediary, as trustee holding for the heirs and creditors of the deceased. Courts have given the money to the estate in other instances simply because it was a convenient and proper way of disposing the money. But if such a method of disposal would work an injustice, would permit a murderer to profit by his own crime, it is best to do without that method of disposal. A better way would be to establish a constructive trust in the beneficiary in favor of the creditors and the other heirs and distributees of the insured. Such a disposition would

[15]McDonald v. Mutual Ins. Co., 178 Iowa 863, 160 N. W. 289 (1916); Wenker v. Landon, 161 Ore. 450, 88 P. (2d) 971 (1939). In Slocum v. Metropolitan Life Ins. Co., 245 Mass. 565, 139 N. E. 816, 818, 27 A. L. R. 1517, 1521 (1923), the court simply states: "The same principle of public policy which precludes him from claiming directly under the insurance contract equally precludes him from claiming under the statute of descent and distribution."

[16]De Zotell v. Mutual Life Ins. Co., 60 S. D. 532, 245 N. W. 58 (1932); Wickline v. Phoenix Mutual Life Ins. Co., 106 W. Va. 424, 145 S. E. 743 (1928); Johnston v. Metropolitan Life Ins. Co., 85 W. Va. 70, 100 S. E. 865 (1919); Cleaver v. Mutual Reserve Fund Assoc., [1892] 1 Q. B. 147, C. A., 28 Digest 369, 2969.

not be subject to the statutes governing descent and distribution, would, therefore, permit the rule of public policy under which the court is working to be enforced, and would protect all innocent parties.[17]

The third class of cases holds that the statutes controlling descent and distribution make it necessary to permit the beneficiary to take from the insured's estate as a distributee, in spite of the rule of public policy these courts invariably reaffirm in their opinions.[18] The instant case belongs to this class.

The reasoning of the courts in these cases seems to be as follows: A strong rule of public policy to the effect that a person may not profit by his own crime dictates that the beneficiary may not take under the policy because of his crime. But the insurance company is not excused from its liability merely because the named beneficiary is incapable of taking, and thus the administrator or executor of the insured's estate may collect the amount of the policy. As the statutes controlling descent and distribution make this person, who happens to be the murderer-beneficiary, a distributee of the insured's estate and do not preclude a murderer from taking from his murdered ancestor's estate, the beneficiary may take part of the insurance money as a distributee. The court wishes it could do otherwise, but to establish a constructive trust would be to circumvent a statute and would in fact be a violation of it. For this reason the problem is recommended to the legislature for solution.[19]

The point of variance between the lines of reasoning followed by the second class of cases and that followed by the third class is at a point immediately after the determination that the incapacity of the

[17]The line of reasoning presented here is not found in any of the above cases in the exact manner presented, but is derived from them all, what is considered best and most important of each being given. It is believed, however, that a composite of the line of reasoning followed by all the cases has been presented. A constructive trust was not used in any of the cases, not being necessary or advisable, but it obviously is in accord with the view taken by these courts and it is clear that they would not hesitate to avail themselves of such a device were the facts of a kind which would make its use practical. See 3 Pomeroy, Equity Jurisprudence (4th ed. 1918) § 1054, end of note b., advocating the use of the constructive trust in this situation.

[18]National Life Ins. Co. of Montpelier v. Hood's Adm'r., 264 Ky. 516, 94 S. W. (2d) 1022 (1936); National Ben. Life Ins. Co., v. Davis, 38 Ohio App. 454, 176 N. E. 490 (1929); Murchison v. Murchison, 203 S. W. 423 (Tex. Civ. App. 1918).

[19]Again the line of reasoning presented is a composite, believed to represent accurately the line followed by all the cases, although varying slightly from the line followed in each specific case.

murderer-beneficiary to collect does not excuse the insurance company of its liability to pay, and immediately before the decision as to whom the money should be given. The courts of the second class consider the administrator an instrument of the courts in cases of this kind to be used or not at their own discretion and convenience. Holding the view that they have at their disposal more than one method of distributing the insurance money to the proper persons, the courts look through the administrator to the ultimate takers in order to determine whether the law should use this or some other means of distributing the money.

The courts of the third class, on the other hand, do not consider whether or not they have such an alternative method of disposition of the proceeds until after they have decided that the administrator may recover and that the statutes governing descent and distribution, properly applied to money in the hands of the administrator, will permit the murderer-beneficiary to recover a share of the money as a distributee of the insured's estate. At this time the principle of establishing a constructive trust presents itself in an unfavorable light, as a rather dubious device the sole purpose of which is to facilitate the dodging of a properly applicable statute. But the real question is not whether a properly applicable statute can be evaded, but whether or not the court must establish a situation to which the statute would be properly applicable. This, in turn, is dependent upon whether or not the court has an alternative of action in disposing of the proceeds. If the court has such an alternative, there can be no objection to raising a constructive trust. It would seem that where a court has become bound in a certain case to enforce a rule of public policy and is presented with a choice of two courses of action, one of which would be consistent with the rule of public policy, the other of which would entirely negate the effect of such rule, it should be bound by all the rules of logic and common sense to take the former course.

The question of whether the courts have an alternative or must, by law, turn the money over to the insured's administrator has not been dealt with in many cases, but those which do seem to consider it hold that the court may dispose of the money in some other manner if they consider it advisable.[20] As the results attainable under such a rule are more satisfactory than those obtained by turning the money over to the administrator, the theory of an alternative method of disposition of the proceeds, allowing the courts to establish a constructive trust

[20]See note 10, supra.

for the benefit of the other heirs of the insured and his creditors, without violating the statutes controlling descent and distribution, is thought to be the better view.

It must be remembered that in the principal case the Pennsylvania court had to take into consideration a statute which expressly excluded murderers from inheriting from the estate of the murdered ancestor but which did not mention those guilty of manslaughter.[21] The court felt that it was bound not to extend the disability beyond the point fixed by the legislature, and had no choice but to allow the administratrix to recover the money from the estate. It expressed its dissatisfaction with the result by suggesting that the statute be amended to cover the situation in the case at bar.[22] However, if the court had followed the line of reasoning recommended above, it is believed that a decision more appealing to the conscience and more in accord with the basic rule of public policy not to allow a person to profit by his own crime, could have been reached with no disrespect to the statutes governing descent and distribution.

LEE M. KENNA

PLEADING AND PRACTICE—CORRECTION OF INCONSISTENT VERDICT WHICH HOLDS DEFENDANT-MASTER AND RELEASES DEFENDANT-SERVANT. [Virginia]

The anomaly of inconsistent verdicts rendered by capricious or independent juries recurs frequently in suits against a master and servant jointly for an injury arising from negligence of the servant. In such cases, where the negligence of the servant is the only cause of the plaintiff's injuries, the master's liability is predicated solely upon the negligence of the servant. Yet, many juries have seen fit to render a verdict which holds the master liable and exonerates the servant. Such a verdict is obviously inconsistent within itself and contrary to the well established principle of respondeat superior.[1]

It is impossible to determine exactly what leads a jury to a verdict which is on its face self-contradictory and inconsistent. Perhaps the jury considered itself a practical arbiter and thought that as between an impecunious servant and a bonded or insured master, justice would be

[21]The statute is set out in note 14, supra.

[22]Moore v. Prudential Ins. Co. of America, 21 A. (2d) 42, 45, n. 3 (Pa. 1941).

[1]Cooley, Torts (1880) 533 et seq., Harper, Law of Torts (1933) § 291; Prosser, Torts (1941) 471-475; Restatement, Torts (1939) § 883, Comment b, Ill. 4.

better served by placing the loss upon the one best able to bear it.[2] The jury may have concluded that the joinder of master and servant was merely a procedural device.[3] An inconsistent verdict might be indicative of an attempt on the part of a jury to apportion or delimit damages.[4] Prejudice may have been in the minds of the jurors so as to warp their thinking to the point of completely ignoring the facts and considerations put forth as a basis for their verdict.[5] Or the inconsistency may result simply from mistake—either mistake as to the rules of law involved in the case as given by the trial judge in his instructions, or mistake as to the significance of the facts in the light of these rules of law.

Whatever the decisive reason for the inconsistent verdict, by the weight of case authority[6] such a verdict should not be allowed to stand. Apparently four courses of action are open to a trial court when the faulty verdict is returned. The court might:

1—set aside the whole verdict and order a new trial;[7]

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[2]Johnson v. Atlantic Coast Line Ry., 142 S. C. 125, 140 S. E. 443, 447 (1927), holding that the liability of the master and servant for actual damages is joint, but as to punitive damages the ability of the individual wrongdoer to pay is one of the factors to be considered.

[3]"The court cannot shut its eyes to the common practice and purpose of joining a perhaps impecunious servant as a party defendant with the master. It is a perfectly legitimate practice, and although we may know to a moral certainty that the purpose is to prevent a removal to a federal court, it has been decided that the plaintiff's purpose in doing a lawful act could not be inquired into or affect his right to choose his tribunal." Durst v. Southern Ry., 130 S. C. 165, 125 S. E. 651, 654 (1924), on later appeal, 161 S. C. 498, 159 S. E. 844 (1931).

[4]E. g., Lanning v. Trenton & Mercer County Traction Corporation, 3 N. J. Misc. 1006, 130 Atl. 444 (1925); Maddock v. McNiven, 139 Wash. 412, 247 Pac. 467 (1926).

[5]Dunshee v. Standard Oil Co., 165 Iowa 625, 146 N. W 830 (1918) where it is felt that the jury was prejudiced because of the unfair acts of the defendant corporation in forcing a smaller competitor out of business.

[6]New Orleans Ry. v. Jopes, 142 U. S. 18, 12 S. Ct. 109, 35 L. ed. 919 (1891); Southern Ry. v. Lockridge, 222 Ala. 15, 130 So. 557 (1930); Southern Ry. v. Harbin, 135 Ga. 122, 68 S. E. 1103 (1910), 30 L. R. A. (N. S.) 404 (1911); Begin v. Liederbach Bus Co., Inc., 167 Minn. 84, 208 N. W. 546 (1926); Mc Ginnis v. Chicago, R. I. & P. Ry., 200 Mo. 347, 98 S. W. 590 (1906), 9 L. R. A. (N. S.) 880 (1907) [cf. Stith v. J. J Newberry Co., 79 S. W. (2d) 447, 458 (Mo. 1935)]; Lowney v. Butte Electric Ry., 61 Mont. 497, 204 Pac. 485 (1922); (1922) 22 Col. L. Rev. 596; Pangburn v. Buick Motor Co., 211 N. Y. 228, 105 N. E. 423 (1914); Carter v. Atlantic Coast Line Ry., 194 S. C. 495, 10 S. E. (2d) 17 (1940); Doremus v. Root, 23 Wash. 710, 63 Pac. 572 (1901).

[7]Bradley v. Rosenthal, 154 Cal. 420, 97 Pac. 875 (1908); Lowney v. Butte Electric Ry., 61 Mont. 497, 506, 204 Pac. 485, 487 (1922): "It is the universal practice of appellate courts in such cases to reverse the judgment entered upon such inconsistent findings, and remand the case to the trial court for a new trial. Such pro-

2—enter a judgment in favor of both the master and servant;[8]

3—enter a judgment against both the master and servant;[9]

4—set aside the verdict and give final judgment on the evidence, where there is a statutory grant of the power to do so.[10]

Choosing the first procedure, the court might feel that since the servant has been found not liable and the master liable, the jury has been confused or wilfully capricious to the extent of completely disregarding the facts before it for determination—and that a fresh start is therefore in order.[11] Accordingly, the whole verdict will be set aside and a new trial ordered.

The court motivated by the principle of respondeat superior might enter judgment for both the master and the servant. By this principle, the liability of the master is said to be purely derivative from that of the servant where the servant has been negligent while acting within the scope of his authority. Necessarily, if there has been no negligence or presumption of negligence as to the master[12] apart from that of the servant, and if the jury acquits the servant of the charge of negligence, then the entire premise upon which the master's liability stands is undermined and of no effect whatever.[13] It is this line of reasoning

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ceeding is the only logical course, inasmuch as by reason of the conflicting findings the appellate court is wholly unable to determine whether or not the judgment was rightly entered." See Pangburn v. Buick Motor Co., 211 N. Y. 228, 105 N. E. 423, 426 (1914), where the court stated that although the verdict was unfavorable to the plaintiff and therefore he should seek relief, this was a "harsh" obligation and the awarding of a new trial would achieve a "fairer result."

[8]Doremus v. Root, 23 Wash. 710, 63 Pac. 572, 576 (1901), where the court said that were the verdict favoring the servant void, then the cause could be remanded for retrial; but since it was at most error for the trial court to construe the verdict in favor of the servant, the judgment is voidable, and judgment should be entered for the master as well. Southern Ry. v. Lockridge, 222 Ala. 15, 130 So. 557 (1930).

[9]Tutton v. Olsen & Ebann, 251 Mich. 642, 232 N. W. 399, 401 (1930).

[10]Lough v. Price & Dix, 161 Va. 811, 172 S. E. 269 (1934), applying Va. Code Ann. (Michie, 1936) § 6251.

[11]Lowney v. Butte Electric Ry., 61 Mont. 497, 204 Pac. 485, 487 (1922); see Pangburn v. Buick Motor Co., 211 N. Y. 228, 105 N. E. 423, 426 (1914).

[12]Where there exists a statutory presumption of negligence on the part of the master, then it is reasonable that the jury may find against the master and in favor of the servant against whom the presumption does not apply. Davis v. Hareford, 156 Ark. 67, 245 S. W. 833, 835-6 (1922); Holden, J., dissenting in Southern Ry. v. Harbin, 135 Ga. 122, 68 S. E. 1103, 1106 (1910).

[13]It must be recognized here that where the master has been negligent in some manner independent of the act of the servant, his being held liable to the injured plantiff even though the servant is acquitted of his negligence is justifiable. Verlinda v. Stone & Webster Eng. Corp., 44 Mont. 223, 119 Pac. 573 (1911) (failure to provide safe place for plaintiff to work); Fonda v. Northwestern Public Service Co., 138 Neb. 262, 292 N. W. 712 (1940) (misfeasance on part of gas company with re-

that is most often adopted by the courts holding that an inconsistent verdict cannot be allowed to stand.[14] A few courts have reached the same conclusion upon another theory. These have reasoned that if the servant were to be exonerated, then the master would lose his right to recover over against the servant in a subsequent suit.[15] For if the master should be permitted to recover over against the servant, the latter would lose all that he gained by having successfully defended himself against the injured plaintiff. Fairness to the servant, therefore, would decree that his exoneration in the first suit be res adjudicata as to the master when the latter subsequently attempts to recover over against him. Since this immunity of the servant would work a hardship on the master, some courts feel constrained to hold that where the servant is exonerated, the master must likewise be relieved of liability.[16] The result obtained by this means is exactly the same as that reached by the majority of the courts which hold that, admitting the validity of respondeat superior, the master *cannot* be liable, and judgment should therefore be entered in his favor.[17]

Another course of action has been to give this reasoning a unique twist so as to support a judgment *against* both the master and the servant. Where the master is found by the jury to be liable, one court has considered that there is an implication that the servant must also be liable, despite the fact that he has been found not liable.[18] By so

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spect to its duty to inspect installations); Barsoom v. City of Reedley, 101 P. (2d) 742, 746 (Cal. 1940) (where liabilities of individual defendants and of the co-defendant city are created by separate statutes, they are primary liabilities in each case and respondeat superior is not applicable to the city when other defendants are exonerated); see McGinnis v. Chicago, R. I. & P Ry., 200 Mo. 347, 98 S. W. 590, 592 (1906) (where act of servant is act of nonfeasance, master may be held liable though servant is exonerated).

[14]39 C. J. 1367-68, n. 75 (a).

[15]Indiana Nitroglycerine Co. v. Lippincott Glass Co., 165 Ind. 361, 75 N. E. 649, 650 (1905); McGinnis v. Chicago, R. I. & P. Ry., 200 Mo. 347, 98 S. W. 590 (1906); Lowney v. Butte Electric Ry., 61 Mont. 497, 204 Pac. 485, 486 (1922). Generally, if the servant were sued alone and there resulted a decision in his favor, such decision would be res adjudicata as to the master in an action against him by the plaintiff. Featherston v. Newburg & C. Turnpike Co., 71 Hun 109, 24 N. Y. Supp. 603 (1893); see Note (1941) 2 Wash. and Lee L. Rev. 233. New Hampshire, apparently, has adopted a theory of election which will prevent the plaintiff suing the master so long as he has an uncollected but seemingly collectable judgment against the servant. McNamara v. Chapman, 81 N. H. 169, 123 Atl. 229, 231 (1923).

[16]Fimple v. Southern P Co., 38 Cal. App. 727, 177 Pac. 871 (1918); McGinnis v. Chicago R. I. & P. Ry., 200 Mo. 347, 98 S. W. 590, 593 (1906).

[17]See notes 8 and 14, supra.

[18]"The verdict first announced was certainly an inconsistent one. The officials of the corporation had nothing to do with the criminal proceeding, and it could

reasoning, this court makes the verdict complete as to both defendants. This seems to be the application of respondeat superior in reverse.

A fourth remedy may be found in a statutory provision to the effect that a trial court may set aside an inconsistent verdict and enter a final judgment on the evidence.[19] The evidence must admit no reasonable doubt to justify the court in deciding the case upon the merits in the manner of a court directing a verdict. Such a statutory provision is commendable in that it puts an immediate end to the action, avoiding thereby the unnecessary expense of further litigation.

This course of action was adopted by the Supreme Court of Appeals of Virginia in the recent case of *Gable v. Bingler*.[20] There the plaintiff, a plumber, while working on a gasoline pump in the master's automobile service station, was struck by an automobile negligently driven by an alleged employee of the master in the course of the latter's business. Plaintiff instituted his action for damages against both master and servant[21] on the uncontroverted fact that the servant had been negligent[22] while allegedly acting in behalf of the master. The case was submitted to a jury which returned a verdict in favor of the plaintiff against the master, but was wholly silent as to the servant. Thereupon, counsel for the master moved to set aside the verdict, and counsel for

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only be liable if Wheeler [servant] was. We think it was the duty of the court to do just what he did. Had the verdict been received and entered as first announced, the court would have been in duty bound to set it aside." Tutton v. Olsen & Ebann, 251 Mich. 642, 232 N. W. 399, 401 (1930).

[19]Lough v. Price & Dix, 161 Va. 811, 172 S. E. 269 (1934), decided under Va. Code Ann. (Michie, 1936) § 6251: "When the verdict of a jury in a civil action is set aside by a trial court upon the ground that it is contrary to the evidence, or without evidence to support it, a new trial shall not be granted if there is sufficient evidence before the court to enable it to decide the case upon its merits, but such final judgment shall be entered as to the court shall seem right and proper. " See also Va. Code Ann. (Michie, 1936) § 6365, concerning similar powers of appellate courts. It is to be noticed that the quoted statute does not specifically mention the case of inconsistent verdicts; but the general authorization seems clearly broad enough to cover that situation. But see dissent of Holt, J., in the principal case, 15 S. E. (2d) 33, 37 (Va. 1941).

[20]15 S. E. (2d) 33 (Va. 1941), applying statute set out in note 19, supra.

[21]Originally the plaintiff joined the owner of the car, one Ritchie, as defendant with the master and servant, but "The court struck the plaintiff's evidence as to Ritchie. This action of the court was not made the subject of any cross-error on the part of Bingler [plaintiff] and is not now a question for us to consider." Gregory, J., in principal case, 15 S. E. (2d) 33, 34 (Va. 1941).

[22]Counsel for appellant, in their petition for the writ of error, stated that there was little question about the negligence of the servant, or the right of the plaintiff to recover against him. 15 S. E. (2d) 33, 34 (Va. 1941).

the plaintiff moved that a judgment be entered for the plaintiff against the servant as well as against the master. The court overruled the motion of the master, and entered judgment on the verdict against her; and further, it sustained the motion of the plaintiff and entered judgment against the servant also. For the jury's verdict to be totally silent as to the servant was held here as being equivalent to a finding in his favor[23] and not in accordance with the evidence.

The view that an inconsistent verdict is incorrect is supported by an overwhelming majority of jurisdictions.[24] However, some courts have allowed such a verdict to stand.[25] The reasoning of these courts is varied.

The case of *Illinois Central Ry. Co. v. Murphy's Adm'r.*[26] represents a line of decisions sustaining inconsistent verdicts.[27] While many opinions state that the verdict is not improper, they do not suggest a valid basis for their conclusion. Rather, the real issue is avoided by the failure of the courts to consider the effect of the respondeat superior doctrine. Perhaps these courts view the master-servant relationship as being synonymous with a joint tort-feasor relationship, in which case a verdict against either or both defendants would be proper. However, the two defendants who are master and servant do not stand in the same plane of liability as is true when an action has been brought against two alleged joint tort-feasors.[28] When the facts clearly point to the existence of a master-servant relationship and the negligent acts are those of the servant only, it would seem to be the worst sort of fallacy to say that the parties were joint tort-feasors in order to sustain a verdict exonerating one and holding the other.

It has been suggested that the decision in the *Murphy* case is justifiable on the theory that the exercise of discretion by the trial court in

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[23]15 S. E. (2d) 33, 36 (Va. 1941).

[24]39 C. J. 1367, n. 75.

[25]Whitesell v. Joplin & P. Ry., 115 Kan. 53, 222 Pac. 133 (1924); Weil v. Hagan, 166 Ky. 750, 179 S. W. 835 (1915), criticized (1916) 16 Col. L. Rev. 164; Illinois Central Ry. v. Murphy's Adm'r., 123 Ky. 789, 97 S. W. 729 (1906) [But see Illinois Central Ry. v. Appelgate's Adm'x., 268 Ky. 158, 105 S. W. 153, 159-60 (1937)]; DeSandro v. Missoula Light & Water Co., 48 Mont. 226, 136 Pac. 711 (1913); Dunbaden v. Castles Ice Cream Co., 103 N. J. L. 427, 135 Atl. 886 (1927), Note (1927) 36 Yale L. J. 1026.

[26]123 Ky. 787, 97 S. W. 729 (1906), 11 L. R. A. (N. S.) 352 (1908).

[27]Buskirk v. Caudill, 181 Ky. 45, 203 S. W. 864, 866 (1918); Weil v. Hagan, 166 Ky. 750, 179 S. W. 835, 836 (1915); see Texas & P Ry. v. Huber, 95 S. W. 569, 570-71 (Tex. Civ. App. 1906); Gulf, C. & S. F. Ry. v. James, 73 Tex. 12, 10 S. W. 744, 746 (1889).

[28]Pangburn v. Buick Motor Co., 211 N. Y. 228, 105 N. E. 423 (1914).

refusing the master a new trial should not be disturbed.[29] The trial judge is considered to be in the best position for ascertaining the jury's error, and, where his discretion has been exercised, non-interference by the appellate court is perhaps desirable. Practical considerations support such a theory where the possible effect of a new trial would be to prolong the litigation in cases in which the ultimate result is apparent to the appellate court.[30]

Some courts have arrived at the same result as the *Murphy* case by saying that a verdict which ignores the servant should be regarded as no finding as to the servant and so should not be construed to be a finding that the servant was not guilty of negligence.[31] Here the case, as far as the servant is concerned, stands as if it had never been tried,[32] and the master retains whatever rights he had against the servant.[33] It is reasoned that the plaintiff is entitled to the verdict given him by the jury, and for his failure in obtaining a verdict against another equally responsible, plaintiff may have a grievance, but not the master; and the plaintiff should not be concluded by the capriciousness of the jury.[34]

In the light of the foregoing discussion, the trial court in the principal case was correct in exercising its statutory power by setting aside that part of the verdict which exonerated the servant, who was clearly negligent, and in entering judgment for the plaintiff. From all of the evidence there could be no other conclusion than that the servant should have been found liable. It would seem that even without the authority of a statute, a trial court should be justified in entering a judgment against the servant where the evidence is conclusive for liability—this as a belated exercise of its power to direct a verdict where the evidence admits of no doubt. If the trial court is within its power in directing the jury as to what the verdict should be *before* the

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[29]E. g., Tutton v. Olsen & Ebann, 251 Mich. 642, 232 N. W 399, 401 (1930); Ramer v. Hughes, 131 S. C. 490, 127 S. E. 565, 567 (1925).

[30]Durst v. Southern Ry., 130 S. C. 165, 125 S. E. 651 (1924), on later appeal, 161 S. C. 498, 159 S. E. 844 (1931). An extreme case—seven years without change in the ultimate result.

[31]Whitesell v. Joplin & P. Ry., 115 Kan. 53, 222 Pac. 133 (1924); Chesapeake & Ohio Ry. v. Dawson, Adm'r., 159 Ky. 296, 167 S. W. 125 (1914); Melzner v. Raven Copper Co., 47 Mont. 351, 132 Pac. 552 (1913); Sharraba v. McGuire, 7 N. J. Misc. 128, 144 Atl. 327 (1929); Texas & P Ry. v. Huber, 95 S. W. 568 (Tex. Civ. App. 1906); Dalby v. Shannon & Florence, 139 Va. 488, 124 S. E. 186 (1924).

[32]Verlinda v. Stone & Webster Eng. Corp., 44 Mont. 223, 119 Pac. 573 (1911); Dunbaden v. Castles Ice Cream Co., 103 N. J. L. 427, 135 Atl. 886 (1927).

[33]Melzner v. Raven Copper Co., 47 Mont. 351, 132 Pac. 552 (1913).

[34]DeSandro v. Missoula Light & Water Co., 48 Mont. 226, 136 Pac. 711, 718 (1913); Dunbaden v. Castles Ice Cream Co., 103 N. J. L. 427, 135 Atl. 886 (1927).

jury has convened to consider the issues of the case, then it seems reasonable to conclude that as a logical corollary to that power the trial court should be allowed to enter a judgment in accordance with the evidence when the verdict of the jury is inconsistent and self-contradictory. Although no court seems yet to have acted without statutory authorization,[35] a closely similar practice has been used in some cases.[36] The advantages are manifest. By this action, the litigation is brought to an immediate end, and the time and expense of a second trial are saved. Further, the plaintiff is given the full remedy to which he is entitled against all the parties who are responsible for his injuries.

PAUL E. GOURDON, JR.

RELEASE—EFFECT OF RESERVATION OF RIGHTS AGAINST ONE JOINT TORT-FEASOR INCORPORATED INTO COMPROMISE AND RELEASE OF OTHER TORT-FEASOR. [Federal]

Under Anglo-American common law, one to whom multiple tort liability is owing by a group of individuals has the privilege of suing and collecting from any one or more of the parties, without regard

[35]By the common law, where a trial court refuses to direct a verdict, and upon writ of error, the judgment in the lower court is held to be erroneous, the judgment must be reversed and the cause remanded for a new trial. See Slocum v. New York Life Insurance Company, 228 U. S. 364, 33 S. Ct. 523, 57 L. ed. 878 (1913), where it was held that a New York statute which authorized the appellate court to order the trial court to give judgment for the appellant under these circumstances, without remanding for a new trial, was violative of the constitutional provision guaranteeing jury trial. Contra: Bothwell v. Boston Elevated Ry. Co., 215 Mass. 467, 102 N. E. 665 (1913), L. R. A. 1917F, 167. See W. S. Forbes & Co. v. Southern Cotton Oil Co., 130 Va. 245, 108 S. E. 15 (1921) holding constitutional § 6251 of the Virginia Code, set out in note 19, supra.

[36]Baltimore and Carolina Line, Inc. v. Redman, 295 U. S. 654, 55 S. Ct. 890, 79 L. ed. 1636 (1935). At the conclusion of the evidence, defendant moved to dismiss plantiff's complaint and moved also for a directed verdict, both motions being on the ground that the evidence was insufficient to support a verdict for plaintiff. The trial court reserved its ruling on the motions and sent the case to the jury. The jury returned a verdict for plaintiff, upon which judgment was entered. The defendant appealed, and the upper court held the evidence insufficient, reversed the judgment and ordered a new trial. The Supreme Court held that the proper action for the intermediate court was to reverse the trial court's judgment and order a dismissal of plaintiff's complaint on the merits. See 28 U. S. C. A. § 723 C, Rule 50, providing that "whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to later determination of the legal questions raised by the motion." The court can, after the verdict is returned, "either order a new trial or direct the entry of judgment as if the requested verdict had been directed."

to how they may adjust the burden among themselves. However, this privilege sometimes becomes a source of difficulty to a plaintiff, who may seek to apportion the burden among the several defendants and settle with some of them without litigation. One defendant may be anxious to pay an amount partially satisfying the plaintiff's total claim in order to be relieved of liability for the entire claim. Since this is his purpose in settling, of course he demands that in return for the payment he shall be discharged from all further responsibility. But the law regards the wrongdoing of all the tort-feasors as one wrong and the liabilities of all a single liability. Hence, a full release to one of the joint tort-feasors eliminates the wrong entirely and releases all the other wrongdoers.[1]

This situation and the unsatisfactory results which may follow from the application of the common law rules are exemplified in the recent decision of *Eberle v. Sinclair Prairie Oil Co.*[2] Plaintiff's intestate was killed in an explosion allegedly due to the joint negligence of the Sinclair Company and the McGeorge Corporation. Plaintiff first brought suit in a state court against McGeorge to recover damages for the wrongful death of decedent.[3] However, before the case came to trial, plaintiff entered a contract of compromise with McGeorge, accepting $7,500 in settlement of the action which had been instituted. The contract expressly released McGeorge but declared that the settlement was without prejudice to the rights of plaintiff against other joint tort-feasors. The parties submitted this compromise to the court before which the suit was pending, and that court approved it, ordering that the suit be dismissed with prejudice as to McGeorge but that the compromise should be without prejudice to the claims of plaintiff against any of the other tort-feasors for damages for the death of the intestate. Plaintiff thereafter brought a second suit in this same court against Sinclair Company for the wrongful death. Sinclair obtained a removal to a federal district court and asserted that the compromise and the judgment entered thereon was a bar to the action. The district court upheld this contention and dismissed the suit against Sinclair,[4] which holding was affirmed by the Circuit Court of Appeals for

[1]Harper, Torts (1933) 678; Prosser, Torts (1941) 1107; 23 R. C. L. 405. See cases cited note 7, infra.

[2]120 F. (2d) 746 (C. C. A. 10th, 1941).

[3]The action in this case and the subsequent action against Sinclair, both brought in the district court of Seminole County, Oklahoma, stated two causes of action—one for the wrongful death, and another for conscious pain and suffering before death. In both suits, employees of the companies were joined as defendants.

[4]Eberle v. Sinclair Prairie Oil Co., 35 F. Supp. 296 (E. D. Okla. 1940).

the Tenth Circuit. The latter court stated that it would have upheld the reservation of rights against Sinclair if plaintiff had done no more than enter a compromise with McGeorge and release it from liability. However, once the state court incorporated the compromise and settlement into the judgment, the situation was the same as if the plaintiff had received a judgment against one tort-feasor for the stipulated amount and a satisfaction of the judgment. The satisfaction of a judgment against one tort-feasor necessarily extinguished the single cause of action arising from the wrongful death, and the court had no power to reserve a right of action for the plaintiff against the other tort-feasor.

Such a decision presents for consideration two very controversial questions:[5] (1) What is the effect of a reservation of a right to sue other joint tort-feasors in a compromise and release made with one of the wrongdoers? (2) What is the effect of a judgment rendered on the completed settlement which expressly reserves the right to sue other of the joint tort-feasors?

Upon the first question the courts have been said to be in sharp and irreconcilable conflict.[6] Under the common law rule, the release of one of several joint wrongdoers operates to release the others, irrespective of any reservation to sue and regardless of the intention of the parties thereto.[7] This doctrine is predicated upon several and varying grounds: (1) that the instrument is to be construed most strongly against the maker, and the included reservation is inoperative because it is repugnant to the very nature of the instrument;[8] (2) that the cause of action is one and indivisible, and therefore when the releasor dismisses his action against one, he by necessity releases it

[5]This note is concerned only with the problems which arise under a release containing a reservation to sue another, and is not intended to deal with the ordinary unconditional release or with covenants not to sue.

[6]Ducey v. Patterson, 37 Colo. 216, 86 Pac. 109, 111 (1906); Smith v. Dixie Park & Amusement Co., 128 Tenn. 112, 157 S. W. 900, 901 (1913); Harper, Torts (1933) 678-9.

[7]Flynn v. Manson, 19 Cal. App. 400, 126 Pac. 181 (1912); Farmers' Savings Bank v. Aldrich, 153 Iowa 144, 133 N.W. 383 (1911); Gilpatrick v. Hunter, 24 Me. 18, 41 Am. Dec. 370 (1844); Ellis v. Bitzer, 2 Ohio 89, 15 Am. Dec. 534 (1825) [overruled by Adams Express Company v. Beckwith, 100 Ohio St. 348, 126 N.E. 300 (1919)]; Smith v. Dixie Park & Amusement Co., 128 Tenn. 112, 157 S.W. 900 (1913) (dictum); McLaughlin v. Siegel, 166 Va. 374, 185 S.E. 873 (1936); Abb v. Northern Pacific R. Co., 28 Wash. 428, 68 Pac. 954, 58 L. R. A. 293, 92 Am. St. Rep. 864 (1902); see 1 Cooley, Torts (3rd ed.) 161.

[8]Seither v. Pennsylvania Traction Co., 125 Pa. St. 397, 17 Atl. 338, 4 L. R. A. 54, 11 Am. St. Rep. 905 (1889); Abb v. Northern Pacific R. Co., 28 Wash. 428, 68 Pac. 954, 58 L. R. A. 293, 92 Am. St. Rep. 864 (1902).

against all others, irrespective of the intention to the contrary;[9] (3) that satisfaction is the test of whether a bar arises to the subsequent action, and therefore if the complainant accepts what is equivalent to a satisfaction in law it automatically becomes a satisfaction in fact;[10] (4) that, where the demand for damages is unliquidated, the court cannot say that the acceptance by the injured party of a small or large amount is not acceptance in full satisfaction of the claim;[11] (5) that, where the instrument is under seal, there arises an irrebuttable presumption that the consideration given therefor is adequate;[12] (6) that the law considers the released one as the sole wrongdoer just as if he never had had a co-tort-feasor, and therefore there is no one left to sue;[13] (7) that the ability to release on part payment of the claim affords the injured party the opportunity to obtain more than the injury warrants by menacing the tort-feasors with suit;[14] and (8) that to recognize the theory that a release given to one releases the other only on a pro tanto basis is to deprive the other of the benefit of such a release because he will be put in fear of admitting his own liability by pleading it.[15]

However formidable these arguments may seem to be, they have each ignored a cardinal principle of modern law in construing written documents—to carry out, wherever feasible, the intention of the parties. Obviously the intention of the releasor was not to give up his entire

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[9]Kirkland v. Ensign-Bickford Co., 267 Fed. 472 (D. Conn. 1920); Jones v. Chism, 73 Ark. 14, 83 S. W. 315 (1904); Chetwood v. California Nat. Bank, 113 Cal. 414, 45 Pac. 704 (1896); Parry Mfg. Co. v. Crull, 56 Ind. App. 77, 101 N.E. 756 (1913); Atwood v. Brown, 72 Iowa 723, 32 N.W 108 (1887); Matheson v. O'Kane, 211 Mass. 91, 97 N. E. 638, 39 L. R. A. (N. S.) 475 (1912); Muse v. De Vito, 243 Mass. 384, 137 N. E. 730 (1923); McBride v. Scott, 132 Mich. 176, 93 N. W. 243, 61 L. R. A. 445, 102 Am. St. Rep. 416 (1903); Burns v. Womble, 131 N. C. 173, 42 S. E. 573 (1902); Sunset Copper v. Zickrick, 125 Wash. 565, 217 Pac. 5 (1924).

[10]Ducey v. Patterson, 37 Colo. 216, 86 Pac. 109 (1906); Moffit v. Endtz, 232 Mich. 2, 204 N. W. 764 (1925).

[11]Flynn v. Manson, 19 Cal. App. 400, 126 Pac. 181 (1912); Eastman v. Grant 34 Vt. 390 (1861); Ellis v. Essau, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830 (1880).

[12]Allen v. Ruland, 79 Conn. 405, 65 Atl. 138 (1906), but see Dwy v. Connecticut Company, 89 Conn. 74, 92 Atl. 883 (1915); Louisville & N. R. Co. v. Allen, 67 Fla. 257, 65 So. 8 (1914); Gunther v. Lee, 45 Md. 60, 24 Am. Rep. 504 (1876); Leddy v. Barney, 139 Mass. 394, 2 N. E. 107 (1885); Carpenter v. W. H. McElwain Co., 78 N. H. 118, 97 Atl. 560 (1916); Rodgers v. Cox, 66 N. J. L. 432, 50 Atl. 143 (1901); Stires v. Sherwood, 75 Ore. 108, 145 Pac. 645 (1915).

[13]Gilpatrick v. Hunter, 24 Me. 18, 41 Am. Dec. 370 (1844), but see McCrillis v. Hawes, 38 Me. 566 (1854).

[14]J. E. Pinkham Lumber Co. v. Woodland State Bank, 156 Wash. 117, 286 Pac. 95 (1930).

[15]Smith v. Dixie Park & Amusement Co., 128 Tenn. 112, 157 S. W. 900 (1913).

claim for damages when he made an express reservation of a right to sue; rather, he intended to give up only a portion of that claim without suit. It has often been said that the law favors and encourages compromise;[16] but to prevent the injured party from releasing part of his claim out of court is certainly antagonistic to this general proposition.

The New York, Connecticut and Ohio courts have condemned the common law approach to the problem on the ground that it involves the sacrifice of equitable attainment for technical and artificial concepts of joint liability and extinguishment.[17] The latter court has aptly phrased its disapproval of the rule:

> "... where it is charged that two or more persons have committed a wrong against another, the question arises, may one of these persons buy his peace, settle all claims for damages made against him, solely for his own benefit and his own release, leaving or reserving all question as to the liability of others for independent and later determination? Why not? What primary element of justice is violated by such a proceeding save the dictum of some court?"[18]

By simple deduction the problem should become one of when has the injured party received complete satisfaction of his just claim for damages. The claimant can have but one complete satisfaction; and having that, the cause of action is extinguished as to the other wrongdoers, not because they did no wrong, nor because their position has been condoned, but merely because some one of the tort-feasors has rectified the injury by the payment of sufficient damages to satisfy the claim.[19] Satisfaction implies complete compensation; release, the

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[16]Steenhuis v. Holland, 217 Ala. 105, 115 So. 2 (1927). The Alabama Code (Note 24, infra) requires that all releases be given effect according to the intention on the parties. See also Code of West Virginia (1931) c. 38, Art. 12, §5.

[17]Dwy v. Connecticut Company, 89 Conn. 74, 92 Atl. 883, 886 (1915), criticizing the reasons of the courts following the common law rule, "as purely technical and artificial, unmindful of the intent of the parties, and not conducive to just and equitable results." Walsh v. New York Central R. Co., 204 N. Y. 58, 63, 97 N. E. 408, 410 (1912) wherein the court, speaking of the same situation, said: "it is one of those harsh, although strictly logical common law rules which has had to make way for the modern tendency to substitute justice for technicality wherever that is possible."

[18]Adams Express Co. v. Beckwith, 100 Ohio St. 348, 126 N. E. 300 (1919). In so stating the rule in Ohio, the court expressly overruled the earlier case of Ellis v. Bitzer, 2 Ohio St. 89, 15 Am. Dec. 534 (1825) which had been the law in that state for nearly one hundred years and which had followed the common law rule of release. By implication the Adams case thereby threw doubt on the many cases in other jurisdictions which relied so strongly on the validity of the Ellis case.

[19]Ayer v. Ashmead, 31 Conn. 447, 83 Am. Dec. 154 (1863); Middaugh v. Des Moines Ice & Cold Storage Co., 184 Iowa 969, 169 N. W. 395 (1918).

giving up of a cause of action for some compensation. Many American courts seem to have confused the two and in so doing have given no regard to the intention of the parties.[20]

Since the essential end to be achieved is the satisfaction of the claim, if the discharge of the defendant in the second suit prevents satisfaction, it is improper. The most feasible means of determining whether or not there has been satisfaction does not lie in dependence on technical rules, but rather in allowing the jury to answer the simple question: Has the plaintiff been adequately compensated by the other wrongdoer? If the jury finds that the claim for damages has been satisfied in fact by the released party, then the defendant in the present action must be released irrespective of any reservation to sue contained in the release. If the jury finds that the plaintiff's claim has not been satisfied, then it must look to the intention of the parties in making the release.

Many courts have laid down rules of thumb for determining intention in these situations. Some hold that the presence of the seal unequivocally expresses the intention to release all;[21] others hold that the reservation to sue must be written out in unmistakable terms.[22] The English and the New York courts have held that the presence of a reservation to sue in a release shows that the intention of the parties was not to make a release at all, but rather to formulate a mere covenant not to sue, which does not extinguish the cause of action.[23] By these legalistic gymnastics the latter courts have carried out the intention of the injured parties. Instead of using such rules and devices to resolve what seems properly a question of fact, the courts would do better to follow the practice established in Alabama by statute and judicial decision. In that jurisdiction the intent of the parties is declared to determine whether the release operates to extinguish the cause of action or merely to reduce pro tanto the liability of other tort-feasors. And this intent is an issue of fact for the jury to decide on the basis of all available evidence.[24]

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[20]Prosser, Torts (1941) 1108.

[21]Snow v. Chandler, 10 N. H. 92, 34 Am. Dec. 140 (1839); Bloss v. Plymale, 3 W. Va. 393, 100 Am. Dec. 752 (1869).

[22]Edens v. Fletcher, 79 Kan. 139, 98 Pac. 784, 19 L. R. A. (N. S.) 618 (1908); Bloss v. Plymale, 3 W. Va. 393, 100 Am. Dec. 752 (1869); Black v. Martin, 88 Mont. 256, 292 Pac. 577 (1930); Pearce v. Hallum, 30 S. W (2d) 399 (Tex. Civ. App. 1930).

[23]Duck v. Mayeu [1892] 2 Q. B. 511; Gilbert v. Finch, 173 N. Y. 455, 66 N. E. 133 (1903). See Dwy v. Connecticut Company, 89 Conn. 74, 92 Atl. 883, 890 (1915) for the concurring opinion of Justice Wheeler advocating the complete change of the common law rule to avoid this obvious subterfuge.

[24]Code of Alabama (1923) § 7669, applied by Steenhuis v. Holland, 217 Ala.

Once having decided that the more reasonable approach to the problem is to follow the intention of the parties, the second basic question under consideration is squarely in point—shall that intention be carried out even where the compromise and settlement by release has been turned into an affirmative judgment in favor of the complainant? Does the mere entry of the release into the court records as a judgment defeat the intention on the theory that the satisfaction of a judgment on a single cause of action constitutes an extinguishment of that action so as to make the judgment stand as res adjudicata to any subsequent suit predicated on the same cause?

The federal courts in the instant case thought that this must be true. While freely admitting that, in ordinary release situations, the intention of the injured party, rather than the technical rules of joint liability, should govern, they reverted to technicality in this peculiar situation, holding that, where the judgment was satisfied, the cause was forever extinguished. Therefore, the court approving the compromise was powerless to reserve in the plaintiff the right to proceed against Sinclair.[25]

Though the common law rule that the satisfaction of a judgment against one joint tort-feasor bars action against the others is well supported by precedent,[26] it seems no less formalistic than the rule regarding ordinary releases. The same observations as to the unsoundness of the latter rule apply with equal force to the former. Both ignore the vital factor of the intention of the parties to settle the claim against one tort-feasor by taking partial compensation from him, while retaining the right to go against the others to obtain the remainder of the compensation needed for complete satisfaction. Reason dictates that this intention should be carried out despite the judgment and satisfaction thereof, especially when the intention has been as clearly manifested as in the principal case. Having already accepted the view that the intention of the parties, rather than artificial pro-

105, 115 So. 2 (1927). This case goes further than others in liberalizing the methods of arriving at intention, holding that the release need not even contain a reservation of a right to sue in it to be vulnerable to a parol attack. See also the concurring opinion in Dwy v. Connecticut Company, 89 Conn. 74, 92 Atl. 883, 890 (1915); Covington v. Westbay, 156 Ky. 839, 162 S. W. 91, 93 (1914).

[25]Eberle v. Sinclair Prairie Oil Co., 120 F. (2d) 746 (C. C. A. 10th, 1941); but see Meixell v. Kirkpatrick, 29 Kan. 679 (1883).

[26]Harper, Torts (1933) 678; Prosser, Torts (1941) 1106; 34 C. J. 983; First National Bank of Richmond v. Bank of Waverly, 170 Va. 496, 197 S. E. 462 (1938); and cases in the courts' own jurisdiction in the principal case: City of Wetumka v. Cromwell-Franklin Oil Co., 171 Okla. 565, 43 P. (2d) 434 (1935); Cain v. Quannah Light & Ice Co., 131 Okla. 25, 267 Pac. 641, and cases cited at 643 (1928).

cedural rules of joint liability and extinguishment, should control where a release is accompanied by a reservation of rights, the court seems to have taken an anomalous step in denying the validity of the intention doctrine in favor of another artificial procedural concept when the release has been incorporated into a judgment.

MARION G. HEATWOLE

SECURITY—LIMITATIONS ON THE APPLICATION OF THE TWO FUNDS DOCTRINE OF MARSHALLING OF ASSETS. [Pennsylvania]

Under the "Two-Funds Doctrine" branch of equity's power of marshalling assets, it is accepted as a general proposition that when one creditor has a lien on two properties in the hands of the same debtor, and another creditor has a junior lien upon only one of these properties, the first creditor may be compelled in equity to proceed first against the singly encumbered security.[1] This doctrine, though raised to benefit the junior creditor, does not give him a lien or vested right,[2] but rather is a principle of equity based on natural justice and applied to promote fair dealing and protect the equitable rights of creditors.[3] Equity will not permit a senior creditor who has two funds for security to "disappoint" a junior creditor who can go against only one of these two funds for payment.[4] If the senior creditor in this situation were allowed to enforce his lien against the only security of the junior creditor, the latter would be compelled to rely solely upon the solvency of the debtor for the payment of his obligation.

The senior lienor cannot disregard these equities of the junior

[1]Burnham v. Citizen's Bank of Emporia, 55 Kan. 545, 40 Pac. 912 (1895); Henshaw, Ward and Co. v. Wells, 9 Humph. 567 (Tenn. 1848); Lloyd v. Galbraith, 32 Pa. 103, 108 (1858); 2 Jones, Mortgages (8th ed. 1928) 235; Walsh, Mortgages (1934) 237. It is generally agreed that the doctrine of marshalling found its way into the English law in the early case of Lanoy v. The Duke of Athol, 2 Atk. 444, 26 Eng. Rep. 668 (Ch. 1742). See (1936) 24 Iowa L. Rev. 328, 329. As early as 1815, Chancellor Kent said: "This [doctrine of marshalling] is a rule founded in natural justice, and I believe it is recognized in every cultivated system of jurisprudence." Cheesebrough v. Millard, 1 Johns. Ch. 409, 412 (N. Y. 1815).

[2]Stokes v. Stokes, 206 N. C. 108, 173 S. E. 18 (1934).

[3]Willey v. St. Charles Hotel Co., 52 La. Ann. 1581, 28 So. 182, 186 (1899); Dilworth v. Federal Reserve Bank of St. Louis, 170 Miss. 373, 154 So. 535, 92 A. L. R. 1076 (1934); Merchants' State Bank of Fargo v. Tufts, 14 N. D. 238, 103 N. W. 760 (1905); 35 Am. Jur. 386, 387 and cases cited therein.

[4]In re Terens, 175 Fed. 495, 497 (E. D. Wis. 1910); Sterling v. Brightbill, 5 Watts 229, 30 Am. Dec. 304 (Pa. 1836); Aldrich v. Cooper, 8 Ves. 382 (1803); 2 Freeman, Judgments (5th ed. 1925) 2125.

lienor, even in dealing with the security before any marshalling decree has been rendered. For if the doubly secured creditor has notice of the equities in favor of the junior creditor which would make for the marshalling of assets, and releases the singly encumbered security, he must account to the junior creditor to the extent of the value of the security he has released.[5] But the junior lienor must have given him actual notice of his lien and of his intentions to seek a marshalling of assets.[6]

Since the doctrine is a creature of equity, the equity court has full discretion not to apply it when marshalling would not make for an equitable determination. Many cases have arisen in which the fact situations seemed appropriate for the working of the doctrine, but in which the courts in the exercise of their discretion have found that its application would lead to an inequitable result. The first and best known limitation on the marshalling of assets under the two funds doctrine is imposed where its application would prejudice the rights of the doubly secured creditor.[7] The courts have reasoned that while it is proper to help the junior creditor realize upon his security when the interests of others are not thereby threatened, yet it would be unjust to entrench upon the rights of the senior creditor merely because another claimant had taken an imperfect security from the same debtor.[8] Thus, marshalling was denied where it would have resulted

[5]Jackson v. Finance Corporation of Washington, 41 F. (2d) 103 (App. D. C. 1930); Burnham v. Citizens' Bank of Emporia, 55 Kan. 545, 40 Pac. 912 (1895); Merchants' State Bank of Fargo v. Tufts, 14 N. D. 238, 103 N. W. 760 (1905); 5 Pomeroy, Equitable Jurisprudence (2d ed. 1919) § 2293.

[6]Gore v. Royse, 56 Kan. 771, 44 Pac. 1053 (1896). In 35 Am. Jur. 391 it is stated that "In order that the senior lienor may be held responsible for loss of the security of the singly charged fund, he must, no doubt, have had knowledge or notice of the junior creditor's encumbrance on the doubly charged property; and the junior claimant must be able to show that he did not fail to notify his opponent of his intention to seek a marshalling of assets." It has been held that the mere recording of the junior mortgage is not sufficient notice to the senior creditor. McLean v. LaFayette Bank, 4 McLean 430, 16 Fed. Cas. 280, No 8889 (1848).

[7]Merrill v. National Bank of Jacksonville, 173 U. S. 131, 19 S. Ct. 360, 43 L. ed. 640 (1899); Gordon v. Arata, 114 N. J. Eq. 294, 168 Atl. 729 (1933); Benedict v. Benedict, 15 N. J. Eq. 150 (1862); Woman's Hospital v. Sixty-Seventh Street Realty Co., 265 N. Y. 226, 235, 192 N. E. 302, 306, 95 A. L. R. 1031 (1934); 35 Am. Jur. 389 and cases cited therein.

[8]Miles v. National Bank of Kentucky, 140 Ky. 376, 131 S. W. 26 (1910); 5 Pomeroy, Equity Jurisprudence (2d ed. 1919) § 2289.

It has also been said that marshalling will not be decreed to the prejudice of a third creditor. See 5 Pomeroy, Equity Jurisprudence (2d ed. 1919) § 2290: ". . a third mortage may be given, covering property included in the first [mortgage] but not in the second. To compel a marshalling of securities would prejudice the

in such disadvantages to the senior creditor as additional expense, inconvenience, and an unreasonable delay of fifteen months in foreclosing a mortgage held by the senior creditor.[9] It also has been denied because the singly encumbered land was not within the jurisdictional boundaries of the court, and therefore the creditor would have been forced to bring another suit in another jurisdiction in order to foreclose the mortgage on that property.[10]

Another limitation on the doctrine has been raised to protect the equitable rights of the debtor. Originally marshalling was invoked only to adjudicate the contesting equities of creditors. The debtor was not regarded as having any equities which would rise higher than the justice in giving the junior creditor his security.[11] The later announcement that such equities did exist in favor of the debtor was regarded by some courts as a startling and dangerous limitation of the doctrine.[12] Yet today it is generally recognized that the doctrine will not be applied where it will trench on the rights of the debtor.[13] A typical case arises where the debtor has declared a homestead in his singly encumbered land. The courts will not require the senior creditor to enforce his lien against the homestead as would be required if the regular marshalling rules were applied.[14] If the homestead was established before the junior lien was created against the doubly burdened property, it can readily be reasoned that the junior lienor is not entitled to aid because he took his lien "with knowledge of the existing equities which the homestead carries, amongst which is the important

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rights of this third party. The right to marshalling being a mere equity and not a lien, it is generally held that it is subject to displacement and defeat by subsequently acquired liens upon the funds." See also Gilliam v. McCormack, 85 Tenn. 597, 4 S. W. 521, 524 (1887).

[9]Bates v. Paddock, 118 Ill. 524, 9 N. E. 257 (1886); Heidelbach v. Fenton, 180 Ill. 312, 54 N. E. 329, 72 Am. St. Rep. 207 (1899); Carter v. Tanners' Leather Co., 196 Mass. 163, 81 N. E. 902 (1907), 12 L. R. A. (N. S.) 965 (1908).

[10]Sternberger v. Sussman, 69 N. J. Eq. 199, 60 Atl. 195 (1905). Cf. Willey v. St. Charles Hotel Co., 52 La. Ann. 1581, 28 So. 182 (1899).

[11]State Savings Bank of Anderson v. Harbin, 18 S. C. 425 (1882); Abbott v. Powell, 1 Fed. Cas. 24, No. 13 (1879). See Nolan v. Nolan, 155 Cal. 476, 101 Pac. 520, 523 (1909).

[12]Bartholomew v. Hook, 23 Cal. 277 (1863). Cf. Searle v. Chapman, 121 Mass. 19 (1876); White v. Polleys, 20 Wis. 503, 91 Am. Dec. 432 (1866).

[13]Wyman v. Ft. Dearborn National Bank, 181 Ill. 279, 54 N. E. 946, 48 L. R. A. 565, 72 Am. St. Rep. 259 (1899); Butler v. Stainback, 87 N. C. 216 (1882); National Valley Bank of Staunton v. Kanawha Banking and Trust Co., 151 Va. 446, 145 S. E. 432 (1928); 35 Am. Jur. 389.

[14]Marr v. Lewis 21 Ark. 203, 25 Am. Rep. 553 (1876); Nolan v. Nolan, 155 Cal. 476, 101 Pac. 520 (1909); Dickson v. Chorn, 6 Iowa 19, 33-34 (1858); Butler v. Stainback, 87 N. C. 216 (1882); Harris v. Allen, 104 N. C. 86, 10 S. E. 127, 128 (1889).

one to direct the senior mortgagee to have recourse first to lands other than the homestead."[15] In several instances, courts have apparently adopted the even broader rule that the homestead equity of the debtor is superior to the marshalling equity of the junior creditor, regardless of the time of creation of the two interests. It is explained that to decree a marshalling "would be but an indirect method of subjecting a homestead to the payment of debts," contrary to the policy of the law as declared in homestead legislation.[16] Upon similar principles, it has been held that marshalling will not be decreed where the debtor's equities arose from dower rights in the singly encumbered land.[17]

A third situation in which the court will not marshall assets is demonstrated by the facts of the recent case of *Stofflett v. Kress*.[18] Stofflett was the holder of a judgment against two pieces of real estate owned by Kress and his wife, as tenants by the entireties, as well as against property owned by Kress individually. Maranuk had a judgment against Kress individually, and he filed a petition to set aside the execution of Stofflett's judgment again the individually owned land of Kress. Because the proceeding was based entirely on a Pennsylvania statute[19] and because the petitioner failed to show that the judgment of the senior creditor was "invalid or fraudulent" as the statute required, the court thought that the only possible decision was a dismissal of the petition. It is arguable that the court should have gone ahead to consider whether the petitioner should be given another

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[15]Nolan v. Nolan, 155 Cal. 476, 101 Pac. 520, 522 (1909) (court found that the homestead had been declared by the debtor to defraud the creditor of his security, and held that such a homestead did not carry with it an equity superior to the junior creditors).

[16]Marr v. Lewis, 31 Ark. 203, 25 Am. Rep. 553 (1876). See, Dickson v. Chorn, 6 Iowa 19, 33-34 (1858); McArthur v. Martin, 23 Minn. 74, 80-81 (1876); Butler v. Stainback, 87 N. C. 216, 219-220 (1882); Harris v. Allen, 104 N. C. 86, 10 S. E. 127, 128 (1889).

[17]Stokes v. Stokes, 206 N. C. 108, 173 S. E. 18 (1934) (court said that dower was higher than homestead, and therefore the widow's equities in her dower were superior to the equities of the junior lienor to compell a marshalling).

[18]21 A. (2d) 31 (Pa. 1941).

[19]Pa. Stat. (Purdon, 1936) Tit. 12 § 911. The statute provides, in brief, that where an execution has been issued on a confessed judgment, any creditor of the judgment debtor may petition that the execution be stayed and the validity of the judgment inquired into. The petitioner must allege in his petition and prove at the hearing that the judgment is invalid or fraudulent. Maranuk contended that the execution issued on Stofflett's judgment should be vacated because its purpose was to defeat the rights of Maranuk to levy on Kress' individually owned property and to "immunize" that property from the lien of his judgment.

form of relief on the basis of a possible equity of marshalling in his favor.[20] The trial court seems to have taken that step, and did order what amounted to a marshalling.[21] As a matter of procedural law in the jurisdiction, however, the Supreme Court found this to be improper and therefore reversed the judgment.

A consideration of the substantive rights and equities of the parties leads to the conclusion that the petitioner should have been denied relief on general marshalling principles also. A well recognized rule of marshalling requires that the debtor be common to both creditors.[22] As stated by Lord Eldon: ". but it was never said, that, if I have a

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[20]The rules stated in the opinion seem to be in direct contradiction to the general doctrine of marshalling, for the court declared: " 'The interest of other creditors may be affected thereby, but, until it is shown that their rights are violated, no one has a standing to challenge the appellant's right to use the means provided by law for the enforcement of [her] claim.' " Stofflett v. Kress, 21 A. (2d) 31, 32 (Pa. 1941). However, this language was used only in relation to the decision that no relief could be given under the statute on which the petition was based. In the last paragraph of the opinion, it was suggested that the junior lienholder might, "upon proper application, be entitled to subrogation to [the senior lienholder's] rights against the property held by entireties." This seems another way of saying that marshalling might have been in order, had relief been sought on that theory.

[21]See Stofflett v. Kress, 21 A. (2d) 31-32 (Pa. 1941). The lower court had held the Stofflett judgment and lien to be valid, but had vacated the execution and ordered Stofflett not to proceed against the land owned individually by Kress. It reasoned that " '. justice, equity and fair dealing, as well as the usual practice and procedure require [appellant] to proceed against the properties held by [Joseph Kress and Anna Kress] by entireties.. If she cannot make her money out of these properties, it will then be time enough to proceed against the separate property.. ' "

[22]Gaines v. Hill, 147 Ky. 445, 144 S. W 92, 39 L. R. A. (N. S.) 999 (1912); Gordon v. Arata, 114 N. J. Eq. 294, 168 Atl. 729 (1933); Sterling v. Brightbill, 5 Watts 229, 30 Am. Dec. 304 (Pa. 1836); Lloyd v. Galbraith, 32 Pa. 103 (1858); Savings and Loan Corp. v. Bear, 155 Va. 312, 154 S. E. 587 (1930); Blakemore v. Wise, 95 Va. 269, 272, 28 S. E. 332, 333 (1897). In the latter case the court observed: "To invoke the doctrine of marshalling securities both sources of payment must belong to the common debtor. The equity is not invoked against the doubly secured creditor, but against the common debtor, and can not be invoked against the common debtor if that course would trench upon the rights, or operate to the prejudice, of the creditor entitled to the double fund." See 5 Pomeroy, Equitable Jurisprudence (2d ed. 1919) § 2291.

There is an exception to the rule requiring a common debtor, as stated in Saving and Loan Corp. v. Bear, 155 Va. 312, 338, 154 S. E. 587, 596 (1930): " .that, though the funds belong to different persons, yet, if from independent equities there is, in equity, a duty resting upon the owner of the property which is subject to the two liens to pay off the lien thereon to the exoneration of the owner of the property which is subject to only one lien, a court of equity will enforce that duty at the instance of junior lien creditor who has a lien on only the one property by marshalling the assets or applying the doctrine of subrogation." See 35 Am. Jur. 399; 12 L. R. A. (N. S.) 965 (1908).

demand against A. and B., a creditor of B. shall compell me to go against A., without more; as if B. himself could insist that A. ought to pay in the first instance."[23]

To understand the policy behind this requirement, the equities of the parties involved must be further examined. It is true that to require the senior creditor to enforce his lien on security given by a debtor not common to both creditors would in fact benefit the junior creditor to the extent of the value of the security, as in the usual case in which the two funds doctrine is applied—i.e., the security given by the common debtor to the junior lienor would be free from the claims of the superior creditor. But the junior lienor would be benefited to the detriment of a third party who was in no way obligated to him, whereas in the regular marshalling situation only the common debtor is affected detrimentally. Where the two debtors are jointly liable on the debt to the senior creditor, an equity of contribution exists between the two, so that if one pays more than his share, he may call upon the other to repay him to the extent of the excess payment. Should the senior lienor proceed against the property owned by the two debtors together, the result might be that the debtor not common to both creditors would have to satisfy more than his share of the debt. In that case, his equity of contribution would be a charge on the individually owned property of the common debtor; but it is from this property that the junior lienholder wishes to satisfy his claim. The courts regard the single debtor's equity of contribution as stronger than the marshalling equity of the junior creditor, who had taken the imperfect security with notice of the facts, and therefore, marshalling is denied.[24] Thus, Maranuk could not have required Stofflett to levy on the land held by Mr. and Mrs. Kress as tenants by entireties, in order that the land owned by Mr. Kress individually might be left to satisfy Maranuk's lien. Mrs. Kress' equity of contribution would have given her a stronger claim against the latter property than Maranuk's equity of marshalling would have afforded him.

HOMER A. JONES, JR.

[23]Ex parte Kendal, 17 Ves. 514, 520, 34 Eng. Rep. 199, 201-202 (1911).

[24]Though many opinions recite the rule that marshalling will not be decreed unless the two claimants are creditors of a common debtor (see note 22, supra), courts very rarely go on to give the reasoning which supports that limitation. However, the explanation set out in the text is believed to be the correct one, and is substantiated by the following authorities: Dorr v. Shaw, 4 Johns. Ch. 17 (N. Y. 1819); Sterling v. Brighthill, 5 Watts 229, 30 Am. Dec. 304 (Pa. 1836); see Savings & Loan Corp. v. Bear, 155 Va. 312, 336, 154 S. E. 587, 595 (1930); Lile, Notes on Equity Jurisprudence (1921) 196, Illustration VIII.

SECURITY—PRIORITY OF RIGHTS AS BETWEEN AUTOMOBILE DEALER'S CHATTEL MORTGAGEE AND PURCHASER WITHOUT ACTUAL NOTICE OF LIEN. [Federal]

The long standing conflict of interest between holders of security liens against property and subsequent purchasers of the property without notice of the liens has received a renewed emphasis under present-day systems of automobile financing. The older phase of the question, which involved real property lienors and purchasers, has been largely resolved by the enactment of recording statutes.[1] These laws require that charges against realty be made a matter of public record which gives constructive notice to all persons of the existence of the lien. Failure of the lien-holder to record makes the claim of a subsequent bona fide purchaser of the property superior to the unrecorded interest. This same system has been extended to cover security interests in chattels, by statutes requiring recording of chattel mortgages and conditional sales contracts.[2] However, the courts have been more reluctant to accept these recording acts as determinative of the priority of opposing claims to personal property.

This reluctance is demonstrated by the recent case of *Fogle v. General Credit, Inc.*, the facts of which are typical of the litigation of this issue arising from modern automobile finance transactions. A dealer in new and used automobiles executed a chattel mortgage upon four used automobiles to General Credit, Inc., the finance company, to secure payment of a loan. The mortgage, which was duly recorded, prohibited the sale of the cars until the lien upon the same had been paid and satisfied. It was understood by the parties to the mortgage that the dealer was to display the cars in his showroom. Fogle, without actual notice of the outstanding mortgage lien, purchased one of the cars, paid for,[3] and took possession of it. He then demanded delivery of the certificate of title, and thereupon learned that the credit company, as chattel mortgagee, held the certificate. The dealer became insolvent,

[1]See examples: Tex. Stat. (Vernon, 1936) c. 3, art. 6627; Tenn. Code Ann. (Michie, 1938) § 7635 (providing for registration), § 7666 (relating to the effect of registration).

[2]See examples: Ill. Rev. Stat. (1941) c. 95, § 1 (providing for registration), § 4 (relating to the effect of registration); Tenn. Code Ann. (Michie, 1938) § 7192.

[3]The plaintiff Fogle delivered his old car to the dealer for which he received credit for $225 of the agreed purchase price of $625. He also gave the dealer a cashier's check drawn by The City Bank (also a plaintiff in the present action), which had advanced this sum to Fogle in return for a chattel mortgage on the purchased automobile. Neither plaintiff had actual knowledge of the mortgage held by the finance company.

never having satisfied the lien on the cars. Fogle sued the finance company to obtain the certificate of title, and the company by counterclaim asked for judgment in the amount of its lien against the car. The trial court dismissed the plaintiff's complaint and entered judgment for the credit company on the counterclaim.[4] But the Court of Appeals for the District of Columbia reversed the judgment, holding that the mortgagee, having allowed the mortgaged stock in trade to be left in the mortgagor's possession, was estopped to assert his lien against a purchaser without actual notice of the encumbrance.[5]

In its result, this case is in agreement with the decisions in the majority of the jurisdictions in which the controversy has been passed on,[6] but almost as many courts have reached the opposite conclusion and accorded priority to the mortgagee's lien.[7] These courts favoring the mortgagee maintain that the recording acts are general in terminology and certainly are broad enough to cover the automobile situation. They assert that since the legislature has acted to resolve the contest between the two claimants by making the recording determinative, then the court should carry out the lawmakers' mandate.

However, the courts standing with the principal case in protecting

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[4]71 App. D. C. 338, 110 F. (2d) 128 (1940).

[5]122 F. (2d) 45 (App. D. C. 1941). As a second contention, the mortgagee maintained that the sale of the car to the purchaser was void because the certificate of title had not been assigned to him by the dealer, as was required by statutory provision. However, the lienor was also guilty of a violation of a statute by retaining the certificate of title. The court refused to give greater effect to one of the provisions than to the other, and added that the provision which the lienor had violated was directed against exactly the sort of transaction in which the lienor had participated.

[6]Kearby v. Western State Sec. Co., 31 Ariz. 104, 250 Pac. 766 (1926); Coffman v. Citizens' Loan & Inv. Co., 172 Ark. 889, 290 S. W. 961 (1927); Western State Accep. Corp. v. Bank of Italy, 104 Cal. App. 19, 285 Pac. 340 (1930); Moore v. Ellison, 82 Colo. 478, 261 Pac. 461 (1927); Boice v. Finance & Guaranty Co., 127 Va. 563, 102 S. E. 591, 10 A. L. R. 654 (1920); Gump Inv. Co. v. Jackson, 142 Va. 190, 128 S. E. 506 (1925) (conditional sales contract.) See, In Re Hallbauer, 275 Fed. 126, 127 (S. D. Fla. 1920); Denno v. Standard Accep. Corp., 277 Mass. 271, 178 N. E. 513, 515 (1931); Hostetler v. National Accep. Co., 36 Ohio App. 141, 172 N. E. 851, 852 (1930), Beck v. New Bedford Accep. Corp., 3 A (2d) 55, 57-61 (R. I. 1938); Employers' Casualty Co. v. Helm, 295 S. W. 955, 957 (Tex. Civ. App. 1927). And see notes 9 and 10, infra, for cases protecting the purchaser on theories other than estoppel.

[7]Palmisano v. Louisiana Motors Co. Inc., 166 La. 416, 117 So. 446 (1928); Finance & Guaranty Co. v. Defiance Motor Truck Co., 145 Md. 94, 125 Atl. 585 (1924); Nat'l Bond & Inv. Co. v. Union Inv. Co., 260 Mich. 307, 244 N. W. 483 (1932); Utica Trust & Deposit Co. v. Decker, 244 N. Y. 340, 155 N. E. 665 (1927); Whitehurst v. Garrett, 196 N. C. 154, 144 S. E. 835, 838 (1928) ("Whatever may be the holding elsewhere, the registration of mortgages is favored in this jurisdiction."); Hardin v. State Bank, 119 Wash. 169, 205 Pac. 382 (1922).

the purchaser, follow the theory that the constructive notice furnished by the recordation of a mortgage or conditional sales contract is not sufficient. They have avoided the effect of the recording statutes by declaring, on various reasoning, that subsequent purchasers of chattels without actual knowledge of the outstanding lien should be protected.[8] It is sometimes said that the mortgagor was the agent of the mortgagee, so that the latter was bound by the acts of his agent in selling the car.[9] Also, where the mortgagor has been given permission to retain and sell the chattel, the mortgagee has been held to have waived his lien by extending that privilege.[10] But both of these reasons, insofar as they are applied to the ordinary situation, are novel inventions and do not accord with the intention of the parties. Such arguments merely demonstrate the determination of the courts to protect the purchaser, and are not valid reasons for such decisions.

The more often used and more sensible theory is that the mortgagee is estopped to dispute the claims of the purchaser. This view is the basis of a leading decision rendered by the Virginia court in *Boice v. Finance and Guaranty Co.*, where the court said:

> "It is true that, as a rule, the seller of personal chattels cannot confer upon a purchaser any better title than he himself has; but if the owner stands by and permits a seller, who is a licensed dealer in such goods, to hold himself out to the world as the owner, to treat the goods as his own, place them with similar goods of his own in a public showroom, and offer the same indiscriminately with his own to the public, he will be estopped by his conduct from asserting his ownership against a purchaser for value without actual notice of his title. The constructive notice furnished by a recorded mortgage or deed of trust in such cases is not sufficient."[11]

It is to be noted that mere possession is not sufficient to constitute the necessary representation in the application of the doctrine of estop-

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[8]It has been said that the purchaser should be protected even if he had actual notice of the mortgage, because he would be justified in relying "on the mortgagee's implied consent to the sale." Cudd v. Rogers, 111 S. C. 507, 98 S. E. 796, 797 (1919).

[9]Nat'l City Bank of Rome v. Adams, 30 Ga. App. 219, 117 S. E. 285 (1923); Simons v. Northeastern Finance Corp., 271 Mass. 285, 171 N. E. 643 (1930) (provision that dealer could not sell car without mortgagee's consent was a secret limitation of agent's ostensible authority.)

[10]Martin v. Duncan Automobile Co., 50 Nev. 91, 252 Pac. 322 (1927); Howell v. Board, 185 Okla. 513, 94 P (2d) 830 (1939); Cudd v. Rogers, 111 S. C. 507, 98 S. E. 796 (1919); Southern Wisconsin Accep. Corp. v. Paull, 192 Wis. 548, 213 N. W. 317 (1927). See also 14 C. J. S. 874 n. 74.

[11]127 Va. 565, 570, 102 S. E. 591, 593, 10 A. L. R. 654, 658 (1920).

pel.[12] As in the principal case, the possessor must have been one who normally in the course of his business sold such articles, and the evidence must be clear that he appeared to have been the owner.[13] In such situations the lien-holder will not be heard to deny that the ostensible ownership is actual.[14] The philosophy of these courts is represented by the equitable maxim that "where one of two innocent persons must suffer loss because of the fraudulent act of a third person, the law places the loss upon the one who put it in the power of the third person to commit the fraud."[15] It is reasoned that the mortgagee, by permitting the dealer-mortgagor to keep the car in his salesroom with other stock in trade, made possible the misconduct of the dealer in selling the car as his own unencumbered property without satisfying the mortgage lien.

The court in the principal case advanced further reasoning to deprive the lien-holder of the benefit of the recording statutes.[16] It was said that the registry system, in addition to giving constructive notice of encumbrances, is calculated to furnish prospective purchasers of chattels an opportunity to examine the titles and discover any outstanding liens. But the mortgagee, by knowingly permitting the dealer to handle the goods as though they were his own, threw the purchaser off guard and made it appear unnecessary to make a search of the records.[17] By this peculiar logic, the court concluded that the mortgagee had destroyed the very basis upon which his defence of recordation would have rested.[18]

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[12]Drain v. La Grange State Bank, 303 Ill. 303, 135 N. E. 780 (1922); Cadwallader v. Shaw, 127 Me. 172, 142 Atl. 580 (1928).

[13]"If it were otherwise, people would not be secure in sending their watches or articles of jewelry to a jeweler's establishment to be repaired, or cloth to a clothing establishment to be made into garments." Levi v. Booth, 58 Md. 305, 315 (1882). See (1938) 22 Ill. L. Rev. 652; (1931) 29 Mich. L. Rev. 527. The estoppel applies when the owner "has given the external indicia of the right of disposing of his property." Boice v. Finance & Guaranty Co., 127 Va. 563, 571, 102 S. E. 591, 593, 10 A. L. R. 654, 659 (1920), citing Saltus v. Everett, 20 Wend. 267, 32 Am. Dec. 541, 548 (N. Y. 1838), which quoted Lord Ellenborough.

[14]As when the mortgagee stands by in silence and watches the mortgagor deal with the car as the owner. Employers' Casualty Co. v. Helm, 295 S. W 955 (Tex. Civ. App. 1927). See also Winakur v. Sapourn, 156 Md. 682, 145 Atl. 342 (1929).

[15]Moore v. Ellison, 82 Colo. 478, 261 Pac. 461, 462 (1927).

[16]Fogle v. General Credit Inc., 122 F. (2d) 45, 49 (App. D. C. 1941).

[17]To the same effect is Boice v. Finance & Guaranty Corp., 127 Va. 563, 102 S. E. 591, 10 A. L. R. 654 (1920).

[18]Moreover, it is the finance company's duty to see to it that cars upon which it has a lien are not left under the control of a dealer on his sales floor, to be offered to the public. Gump Investment Co. v. Jackson, 142 Va. 190, 128 S. E. 506 (1925). Or at least the company must see that the cars are marked so as to warn the public of

However, these arguments are not entirely convincing, and have been rejected by courts which have refused to protect the purchaser. The New York Court of Appeals in *Utica Trust & Deposit Co. v. Decker* answered the estoppel arguments by declaring:

> "It is the universal rule that an owner, by the mere delivery of possession of chattels to another is not thereby precluded from claiming title thereto. Neither is it sufficient to work an estoppel, that the person to whose possession the owner intrusts the chattel is a dealer in similar merchandise. . . It might be said that if the doctrine were otherwise, no automobile owner could safely leave his car in a garage, where the business of selling cars is conducted for the purpose of storing the same or having it repaired. . . . Again it is not sufficient to make out an estoppel that the possessor of the chattel is authorized by the owner to exhibit the same for the purpose of obtaining offers of purchase."[19]

It may be observed that the case for the lien-holder is further supported by the rules in the analogous situations involving encumbrances on realty. It is conceded that the mortgagees of land do not lose their liens to purchasers merely because mortgagors retain possession, or appearances of ownership, or power to sell.[20] The very purpose of recording acts for realty liens is to protect the lienor against purchasers from the mortgagor. Consequently, it is arguable that the rule should not be different in the case of personalty where the mortgagor retains possession with the appearance of ownership.

Since the situation in the principal case is such that one of two innocent parties must suffer, the application of legal principles may give a less satisfactory solution than the comparison of practical considerations. The courts protecting the purchaser are ultimately influenced by the belief that as a practical matter, the risk of loss in these cases should not be put on the public. It is clear that if such a duty to examine the records were imposed on purchasers, an intolerable burden would be placed upon millions of persons, and the capacity of the registry officials would be overtaxed.[21] Moreover, since people

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the outstanding lien. See Hostetler v. National Accep. Co., 36 Ohio App. 141, 172 N. E. 851, 852 (1930).

[19]244 N. Y. 340, 348-9, 155 N. E. 665, 667-8 (1927) where the court relied upon Biggs v. Evans [1891] 1 Q. B. 88, and Smith v. Clews, 114 N. Y. 190, 21 N. E. 160, 4 L. R. A. 392, 11 Am. St. Rep. 627 (1887), "We think that the cases of *Biggs v. Evans* . and *Smith v. Clews* . . are precise authority to the effect that the plaintiff was not estopped by its conduct from asserting title to the automobiles. "

[20]See Va. Code Ann. (Michie, 1936) § 5194 and notes thereto.

[21]Moore v. Ellison, 82 Colo. 478, 261 Pac. 461 (1927); Hostetler v. National Accep. Co., 36 Ohio App. 141, 172 N. E. 851 (1930); Boice v. Finance & Guaranty

generally do not have any comprehension of complicated modern financing systems used by retail automobile dealers, it is too much to expect that the prospective buyer will realize that his dealer may not have a clear title to the cars in his showroom. And it would be almost an impossible task to educate the public to the fact that they must search the records before purchasing. Even if it is assumed that this duty could be made clear, the argument remains that to apply the registry acts so as to put the risk on the purchasers would hamper free business enterprise, because potential purchasers would be reluctant to buy under such risks.[22] It is also arguable that the fiction of constructive notice should not be indulged too far. It is the mortgagee, not the purchaser, who can best afford to bear the loss. The finance companies may and usually do charge higher fees to distribute possible losses from such sources and thus protect themselves in advance; or they may insure against the chance of loss and pass the cost of the insurance on to the retailer.[23]

The jurisdictions which hold that the lienor should prevail also are influenced by practical and policy considerations. It is observed that in considering the hardship to purchasers in requiring them to examine the records for liens a substantial distinction must be recognized between a mortgaged stock of goods consisting of small articles and one comprised of such large and easily identifiable articles as automobiles.[24] It is reasoned that it might well be an intolerable inconvenience to purchasers to require a search of records where small inexpensive articles are involved; but it appears that an undertaking as infrequent as the purchase of an automobile, involving a great deal of

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Co., 127 Va. 563, 102 S. E. 591, 10 A. L. R. 654 (1920). While these cases contain no exact expression of the proposition for which they are here cited, their opinions carry a clear implication to that effect.

[22]A demand upon purchasers to search the records would hinder the consummation of business transactions. Coffman v. Citizen's Loan & Investment Co., 172 Ark. 889, 290 S. W. 961 (1927); Boice v. Finance & Guaranty Co., 127 Va. 563, 102 S. E. 591, 10 A. L. R. 654 (1920). See (1920) 18 Mich. L. Rev. 788.

[23](1929) 7 N. C. L. Rev. 306, 309 n. 14.

[24]Any such distinction was rejected in Boice v. Finance & Guaranty Co., 127 Va. 563, 569, 102 S. E. 591, 592, 10 A. L. R. 654, 657-8 (1920): "It is true that they [automobiles] are bulky, and are easily susceptible of accurate description and continued identification through the medium of the registry laws. They also involve the expenditure of considerable sums of money. But this is the mere statement of a fact, not a reason for the supposed distinction. . Neither size, value, nor identification marks can exempt an article from the application of the principle involved." The court, however, failed to give any authority or reason to support its very postive declaration.

expense, would warrant an examination of the record to see whether the title is clear.[25] Today the chattel mortgage and conditional sales transactions are almost universally employed as a means of financing the purchase of cars by the dealer from the manufacturer. It would therefore seem that the public should be aware of the fact that dealers may not have the unencumbered ownership of the cars which they are displaying. The public should not be deceived by the "indicia of ownership," when very few dealers have the resources to do their own financing.[26]

It has also been pointed out that to disregard the registration of such mortgages would imperil a thriving loan business, would destroy a useful system of financing retailers, and would result in the disruption of automobile distribution.[27] For unless protection against claims of purchasers be accorded, the security holders would ultimately refuse to make such loans, and the retailers would have no way to finance their purchases. The alternative development would be that the lienor would seek to pass on the loss by charging the retailer higher fees and interest rates. Such charges would in return be passed on to the purchasers in the form of higher prices for cars. Thus, the entire prospective car buying public would suffer for the purpose of relieving the careless purchasers of the burden of looking out for their own interests.

It must be conceded that the arguments advanced to support both conclusions are persuasive, and the decisions favoring either of the claimants may be regarded as satisfactory, if they are based on sound practical considerations rather than artificial legal concepts. Whichever view is to be chosen, the solution to the problem is more appropriately a matter for legislation than for judicial interpretation,[28] since statutory regulation is ordinarily a better means of giving forewarning to the interested parties.

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[25]Palmisano v. Louisiana Motors Co. Inc., 166 La. 416, 117 So. 446, 448 (1928).

[26]However, one court has expressly ruled against this line of reasoning. Denno v. Standard Acceptance Corp., 277 Mass. 271, 178 N. E. 513 (1931).

[27](1939) 88 U. of Pa. L. Rev. 367.

[28](1929) 7 N. C. L. Rev. 306 (suggesting the incorporation in the registry acts of a provision of the Uniform Chattel Mortgage Act); Note (1936) 45 Yale L. J. 534, 537. See Employers' Casualty Co. v. Helm, 295 S. W. 955 (Tex. Civ. App. 1927) for general statute applicable to such cases.

TORTS—CHOICE OF LEGAL THEORIES IN THE DETERMINATION OF REAR-END COLLISION CASES. [Pennsylvania]

The facts confronting the Superior Court of Pennsylvania in the recent case of *Bierman v. Allegheny County*[1] are representative of the situations in many highway accident cases.[2] The plaintiff's minor son, a passenger in a vehicle driven by another, was killed in a collision with the girder of a narrow bridge. The accident occurred on a clear, dry night when the car, driven at 25 to 30 m.p.h., failed to negotiate a slight curve approaching the bridge. It was alleged that the county was negligent in failing to maintain the proper safeguards. The problem involved in this type of case is whether one riding in an automobile, which is negligently driven by another, can recover against a defendant by whose alleged negligence certain defects or obstructions exist upon the highway. In the instant case, the court held that the county was not negligent. It was said, moreover, that had the county been negligent in failing to maintain the proper safeguards at the bridge, there could be no recovery for the death of the plaintiff's son because the negligence of the driver of the car was, as a matter of law, the proximate cause of the death.

A survey of the leading cases in this field reveals that four legal principles may be applicable to the facts before the court in each instance: (1) negligence of the defendant, (2) imputed negligence, (3) contributory negligence, and (4) proximate cause.

As illustrated by the principal case, the most obvious technique of denying recovery is to find that the defendant was not negligent. Such a holding avoids the necessity of any consideration of the conduct of the driver or passenger.[3]

The second principle is generally applicable in those cases in which the driver and the plaintiff-occupant are engaged in a common purpose[4] or joint enterprise.[5] In such cases any negligence of the driver

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[1]21 A. (2d) 112 (Pa. Super. 1941).

[2]Often these are called "rear-end collision" cases. As the term implies, they are those in which the plaintiff's vehicle strikes the defendant's vehicle parked upon the road. So frequent were cases in which the obstruction was the defendant's parked vehicle that, by common usage of lawyers, the term now has come to include all such highway collision cases whatever may be the particular type of obstruction.

[3]Myers v. Sanders, 194 So. 300 (Miss. 1940); Hines v. Carrol, 99 P (2d) 113 (Okla. 1940); Ross v. Buchanan, 140 S. W. (2d) 203 (Tex. 1940).

[4]Wentworth v. Waterbury, 90 Vt. 60, 96 Atl. 334 (1916).

[5]Salt River Valley User's Ass'n. v. Green, 104 P (2d) 162 (Ariz. 1940); Beck v. Hooks, 218 N. C. 105, 10 S. E. (2d) 608 (1940).

will be imputed to the plaintiff-occupant so as to bar his recovery. The Michigan court, moreover, consistently imputes the driver's negligence to the occupant as a matter of law, regardless of whether there is a common enterprise or not.[6]

The third principle, that of finding contributory negligence on the part of the plaintiff-occupant, is very frequently utilized by the courts.[7] It has been found applicable in cases in which the plaintiff failed to protest the speed, particularly under circumstances of poor visibility;[8] failed to warn the driver of obstructions which were clearly seen,[9] or in the exercise of reasonable care ought to have been seen;[10] or diverted the attention of the driver just prior to the moment of collision.[11]

The fourth principle has been found applicable in several recent cases.[12] The question presented is whether the proximate cause of the plaintiff-occupant's injury is the negligence of the driver in colliding with the obstruction or the negligence of the defendant in placing the obstruction upon the highway.[13]

While some cases have been disposed of by an application of one of these four principles to the facts, the particular theory applicable

[6]Hubbard v. Canavara, 295 Mich. 499, 295 N. W. 240 (1940); Plaskett v. Van Buren County Road Commission, 295 Mich. 54, 294 N. W. 95 (1940); Jewell v. Rogers, 208 Mich. 318, 175 N. W. 151 (1919).

[7]Schleif v. Grigsby, 88 Cal. App. 795, 263 Pac. 255 (1927); Habenstreit v. City of Belleville, 302 Ill. App. 383, 23 N. W. (2d) 808 (1939); Chesapeake & P. Telephone Co. v. Merriken, 147 Md. 572, 128 Atl. 277, 41 A. L. R. 763 (1925); Maxson v. Bay County, 290 Mich. 86, 287 N. W. 389 (1939); Davis v. F. M. Stamper Co., 148 S. W. (2d) 765 (Mo. 1941); Cheney v. County of Erie, 258 App. Div. 932 (N. Y. 1940); Logan County v. Bicher, 980 Ohio St. 432, 121 N. E. 535 (1918); Toler v. Hawkins, 105 P. (2d) 1041) (Okla. 1940); Willetts v. Butler, 141 Pa. Super. 394, 15 A. (2d) 392 (1940); N. & W. R. R. v. James, 147 Va. 179, 136 S. E. 660 (1927); Beach v. Seattle, 85 Wash. 379, 148 Pac. 39 (1915); Brubaker v. Iowa County, 174 Wis. 574, 183 N. W. 690, 18 A. L. R. 303 (1921).

[8]Costello v. State, 131 Misc. 65, 222 N. Y. Supp. 271 (1928).

[9]Boltinghouse v. Thompson, 12 S. W. (2d) 253 (Tex. Civ. App. 1928).

[10]Glick v. Baer, 186 Wis. 268, 201 N. W. 752 (1925).

[11]Smoak v. Charleston County, 128 S. C. 379, 122 S. E. 862 (1924).

[12]Morgan Hill Paving Co. v. Fondville, 218 Ala. 556, 119 So. 610 (1928); Horton v. MacDonald, 105 Conn. 356, 135 Atl. 442 (1926); Wood v. Socony-Vacuum Oil Co., 259 App. Div. 1106 (N. Y. 1940); Torrey v. State of N. Y., 175 Misc. 259 (N. Y. 1940); City of Hamilton v. Dilley, 30 Ohio App. 558, 116 N. E. 147 (1928); Wills v. Anchor Cartage & Storage Co., 260 Ohio App. 66, 159 N. E. 124 (1926).

[13]This question was well set out in Gold v. Kiker, 216 N. C. 511, 5 S. E. (2d) 548 (1939). Yet it has been held that, where the injury to the plaintiff-occupant was caused by the concurring negligence of both the driver and the defendant, neither can defend by saying it was the concurring negligence of the other that caused the injury. Gary v. Geisel, 59 Ind. App. 565, 108 N. E. 876 (1915); County Commissioners of Howard County v. Leaf, 177 Md. 82, 8 A. (2d) 756 (1939), City of Hamilton v. Dilley, 30 Ohio App. 558, 166 N. E. 147 (1928).

often varies from case to case within the same jurisdiction.[14] Other cases use varying combinations of two or more principles. This was true in *Johnson v. Overland Transportation Co.*[15] in which the defendant's truck and trailer stalled on an icy hill. The defendant failed to place flares at the scene as required by statute but did wave a flashlight from the cabin of the truck. Somewhat later, the car in which the plaintiff was riding collided with the truck, and the plaintiff was injured. The jury found that the defendant was negligent, that his negligence was the proximate cause of the plaintiff's injury, and that the plaintiff was not contributorily negligent. In sustaining a verdict for the plaintiff, the appellate court said that, as a matter of law, the negligence of the driver, if any, was not imputable to the plaintiff.

Logically, all of these principles are properly considered in every case. The resolution against the plaintiff of any one of the four issues arising from these four principles will defeat his action. Conversely, only a resolution of all four in favor of the plaintiff will sustain his action. It must be demonstrated (1) that the defendant was negligent, (2) that no negligence was imputable to the plaintiff, (3) that the plaintiff was not contributorily negligent, and (4) that the defendant's negligence was the proximate cause of the plaintiff's injury. Actually, however, following the usual procedural rules, the court only considers those issues which have been properly raised at the trial by either counsel for the plaintiff or the defendant. Consequently, there is not a uniform application of a given legal principle to a given fact situation. Rather, any one of the legal principles may be applied to a given fact situation, and the particular rule applied varies from case to case. It is primarily the fact situation that resolves each case, and not the fact situation as coupled with a particular legal principle. Therefore, it is only by classifying the cases factually that the course and trend of the decisions can be perceived. While no complete marshalling of all the factual elements found in the cases can be made here, those

[14]The cases below indicate that in the important states of New York, Ohio, and California, for example, the courts may principally discuss contributory negligence, and again, in the same basic factual situation, may consider the question largely from the proximate cause viewpoint. Compare Cheney v. County of Erie, 258 App. Div. 932 (N. Y. 1940) with Torrey v. State, 175 Misc. 259 (N. Y. 1940) and Wood v. Socony-Vacuum Oil Co., 259 App. Div. 1106 (N. Y. 1940). Compare Logan County v. Bicher, 98 Ohio St. 432, 121 N. E. 535 (1918) with Wills v. Anchor Cartage & Storage Co., 26 Ohio App. 66, 159 N. E. 124 (1927) and City of Hamilton v. Dilley, 30 Ohio App. 558, 166 N. E. 147 (1928). Compare Schleif v. Grigsby, 88 Cal. App. 795, 263 Pac. 255 (1927) with Smarda v. Fruit Grower's Supply Co., 32 P. (2d) 439 (Cal. 1934).

[15]227 Iowa 487, 288 N. W. 601 (1939).

factors which appear to be the most important will be pointed out. The scope of this analysis is merely to use these facts as suggestive of the type of situation in which the courts tend to allow or to deny recovery.

In the majority of cases allowing recovery, the allegedly negligent defect or obstruction causing the accident was camouflaged. Either it was not properly lighted, or was the same color, or approximately the same color, as the road, or the lights and shadows at the time of collision were such as to make the highway appear to extend where actually it did not extend.[16] In cases denying recovery this important camouflage element was lacking in most instances.[17] Often the court

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[16](I) Cases where the camouflaged obstruction, often due to improper lighting, was the same color, or approximately the same color, as the road: Schleif v. Grigsby, 88 Cal. App. 795, 263 Pac. 255 (1927) (wire above highway completely concealed by foliage); O'Connell v. Chicago & N. W. R. R., 305 Ill. App. 430, 27 N. E. (2d) 644 (1940) (color of trestle girder blended with the roadway in a dimly lighted place); Chesapeake & P. Telephone Co. v. Merriken, 147 Md. 572, 128 Atl. 277, 41 A. L. R. 763 (1925) (telephone guy wire was within the traveled portion of a state road at a sharp turn); Boyd v. Kansas City, 291 Mo. 622, 237 S. W. 1001 (1922) (girder running lengthwise in the center of the bridge roadway was painted the same color as the road and was not lighted to show the danger); City of Hamilton v. Dilley, 30 Ohio App. 558, 166 N. E. 147 (1928) (a platform post was unlighted in the middle of a dimly lighted highway); Gold v. Kiker, 216 N. C. 511, 5 S. E. (2d) 548 (1939) (white abutment of bridge merged completely with a new strip of concrete laid to the right of the abutment.)

In the following cases the camouflaged condition was of a transitory nature. Johnson v. Overland Transportation Co., 227 Iowa 487, 288 N. W. 601 (1939) (unlighted truck was substantially the same color as the road); Kent County v. Pardee, 151 Md. 68, 134 Atl. 33 (1926) (6" hole was covered by a puddle); Davis v. F. M. Stamper Co., 148 S. W. (2d) 765 (Mo. 1941) (same as Johnson case above); Wills v. Anchor Cartage & Storage Co., 26 Ohio App. 66, 159 N. E. 124 (1926) (same); Willetts v. Butler, 141 Pa. Super. 394, 15 A. (2d) 392 (1940) (hole 14" deep was substantially the same color as the road).

(II) Case where the lights and shadows were such as to make the highway appear to extend where actually it did not extend: Habenstreit v. City of Belleville, 302 Ill. App. 383, 23 N. E. (2d) 808 (1939) (driver, failing to see that the street ended, drove onto the railroad tracks beyond; there was no light on barricade to show the danger); Maxson v. Bay County, 290 Mich. 86, 287 N. W 389 (1939) (because a warning post had previously been broken off, the highway appeared to lie straight ahead when actually it turned sharply to the left). This situation is well shown by the culvert cases of this kind: Laird v. Berthelote, 63 Mont. 122, 206 Pac. 445 (1922) (lights of the approaching vehicle flashed over a partially washed out culvert making the road appear unbroken); Logan County v. Bicher, 98 Ohio St. 432, 121 N. E. 535 (1918) (same); Dillabough v. Okanogan, 105 Wash. 609, 178 Pac. 802 (1919) (same); Brubaker v. Iowa County, 174 Wis. 574, 183 N. W. 690, 18 A. L. R. 303 (1921).

[17]Hubbard v. Canavara, 295 Mich. 499, 295 N. W. 240 (1940); Torrey v. State, 175 Misc. 259 (N. Y. 1940); Costello v. State, 131 Misc. 65, 222 N. Y. Supp. 271

placed greater emphasis on this fact than on any other mentioned.[18] The question of camouflage, furthermore, was important regardless of the legal principle applied. In some cases it was considered in showing the negligence of the defendant,[19] in others the plaintiff's contributory negligence, or his lack of contributory negligence,[20] in others both the negligence of the defendant and the lack of the plaintiff's contributory negligence;[21] and still in others in showing that the defendant's negligence was, or was not, the proximate cause of the plaintiff's injuries.[22]

Also the fact that the driver, either with or without the request of the plaintiff-occupant, reduced his speed prior to the moment of collision was found in some cases allowing recovery.[23] This fact was not greatly stressed and was mentioned only in connection with the plaintiff's contributory negligence. Yet in most cases denying recovery, it appeared that there was no reduction of speed whatsoever.[24] This failure to reduce speed was considered in connection with the plaintiff's contributory negligence in some cases,[25] and in others with the proximate cause of his injuries.[26] This again demonstrates the importance of the factual element rather than the particular legal principle applied.

Another significant fact, found in practically every case allowing

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(1928); Jefson v. Crosstown Street R. R., 72 Misc. 103, 129 N. Y. Supp. 233 (1911); White v. Portland Gas & Coke Co., 84 Ore. 643, 165 Pac. 1005 (1917); Wentworth v. Waterbury, 90 Vt. 60, 96 Atl. 334 (1916); Glick v. Baer, 186 Wis. 268, 201 N. W. 752 (1925).

[18]O'Connell v. Chicago & N. W. R. R., 305 Ill. App. 430, 27 N. E. (2d) 644 (1940) (court strongly emphasized the unlighted girder in showing the defendant's negligence).

[19]Boyd v. Kansas City, 291 Mo. 622, 237 S. W. 1001 (1922).

[20]Dillabough v. Okanogan, 105 Wash. 609, 178 Pac. 802 (1919) (lack of plaintiff's contributory negligence); Glick v. Baer, 186 Wis. 268, 201 N. W. 752 (1925) (presence of plaintiff's contributory negligence).

[21]Davis v. F. M. Stamper Co., 148 S. W. (2d) 765 (Mo. 1941); Brubaker v. Iowa County, 174 Wis. 574, 183 N. W. 690, 18 A. L. R. 303 (1921).

[22]City of Hamilton v. Dilley, 30 Ohio App. 558, 116 N. E. 147 (1928) (defendant's negligence was proximate cause); Torrey v. State, 175 Misc. 259 (N. Y. 1940) (defendant's negligence was not proximate cause).

[23]Johnson v. Overland Transportation Co., 227 Iowa 487, 288 N. W. 601 (1939); Wills v. Anchor Cartage & Storage Co., 26 Ohio App. 66, 159 N. E. 124 (1926).

[24]Costello v. State, 131 Misc. 65, 226 N. Y. Supp. 271 (1928); Jefson v. Crosstown Street R. R., 72 Misc. 103, 129 N. Y. Supp. 233 (1911); Beck v. Hooks, 218 N. C. 105, 10 S. E. (2d) 608 (1940); White v. Portland Gas & Coke Co., 84 Ore. 643, 165 Pac. 1005 (1917); Smoak v. Charleston County, 128 S. C. 379, 122 S. E. 862 (1924); Glick v. Baer, 186 Wis. 268, 201 N. W. 752 (1925).

[25]Jefson v. Crosstown Street R. R., 72 Misc. 103, 129 N. Y. Supp. 233 (1911); Glick v. Baer, 186 Wis. 268, 201 N. W. 752 (1925).

[26]Beck v. Hooks, 218 N. C. 105, 10 S. E. (2d) 608 (1940).

recovery, was that the plaintiff had no previous knowledge of the obstruction.[27] This circumstance was not always emphasized and was only mentioned in showing that the plaintiff was not contributorily negligent. Yet most cases in which the plaintiff had previous knowledge, recovery was denied.[28] In some, the plaintiff's previous knowledge was used as a basis for imputing negligence;[29] in others it was discussed in connection with his contributory negligence.[30] Again is illustrated the importance of the factual element rather than the legal principle.

Some factual elements, however, seem to play little part in determining the outcome of the cases. The fact that the plaintiff had been drinking prior to the collision,[31] or that he was asleep at the time of the accident,[32] or that he was seated in the front or back of the vehicle[33]

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[27]In only three of the cases herein cited as allowing recovery did the plaintiff have previous knowledge and in each of these instances the courts found extenuating circumstances: Schleif v. Grigsby, 88 Cal. App. 795, 263 Pac. 255 (1927) (here the wire was completely hidden by foliage); Kent County v. Pardee, 151 Md. 68, 134 Atl. 33 (1926) (driver was more familiar with the road than the plaintiff-occupant); Chesapeake & P. Telephone Co. v. Merriken, 147 Md. 572, 128 Atl. 277, 41 A. L. R. 763 (1925) (plaintiff did not know the driver was unacquainted with the obstruction; furthermore, the plaintiff was asleep at the time of the accident).

Previous knowledge is ordinarily a factor tending to deny recovery. In the following cases, the defendant sought unsuccessfully to prove that the plaintiff had previous knowledge in order to escape liability. Morgan Hill Paving Co. v. Fondville, 218 Ala. 556, 119 So. 610 (1928); Board of Commissioners of Logan County v. Bicher, 98 Ohio St. 432, 121 N. E. 535 (1918); Willetts v. Butler, 141 Pa. Super. 394, 15 A. (2d) 392 (1940).

[28]Smoak v. Charleston County, 128 S. C. 379, 122 S. E. 862 (1924); Rebillard v. Minneapolis, 216 Fed. 503 (C. C. A. 8th, 1914).

[29]Rebillard v. Minneapolis, 216 Fed. 503 (C. C. A. 8th, 1914).

[30]Smoak v. Charleston County, 128 S. C. 379, 122 S. E. 862 (1924).

[31]In only two cases herein cited had the plaintiff been drinking. Smoak v. Charleston County, 128 S. C. 379, 122 S. E. 862 (1924) and Tapscott v. Chicago, 301 Ill. App. 322, 22 N. E. (2d) 774 (1917). Since these cases reached opposite results, it cannot be said from them that drinking by the plaintiff is a factor tending either to produce, or deny, recovery.

[32]In Tapscott v. Chicago, 301 Ill. App. 322, 22 N. E. (2d) 774 (1917) and in Gold v. Kiker, 216 N. C. 511, 5 S. E. (2d) 548 (1939) the court mentioned that the plaintiff was alseep but gave no significance to this fact. In Chesapeake & P Telephone Co. v Merriken, 147 Md. 572, 128 Atl. 277, 41 A. L. R. 763 (1925) the court allowed the jury to consider the fact that the plaintiff was asleep in deciding if he was contributorily negligent. But it cannot be said from these cases that this is a factor tending either to produce, or deny, recovery. It is suggested, however, that the fact the plaintiff was asleep should favor his recovery. In such a case, he has entrusted himself to the care of the driver. But in cases where the plaintiff was drinking this was not so. Usually both driver and plaintiff indulge together. It would seem that this fact would favor denying recovery.

[33]Of 17 cases allowing recovery in which the court mentioned the position

were elements apparently unconnected with the outcome of the cases.

It may be objected that the thesis of this analysis is in error because the facts themselves determine the legal principles to be applied. Granted that such facts as no previous knowledge by the plaintiff or the failure to reduce speed are used only in showing that the plaintiff was not contributorily negligent, yet the converse of these facts have been used by the courts under two or more different principles. Previous knowledge has been found applicable under both the principle of contributory negligence and imputed negligence, while no reduction of speed has been found applicable under both contributory negligence and proximate cause. These facts, obviously, do not necessitate the application of only one principle and preclude the application of any other. Moreover, the fact of camouflage, present in most cases allowing recovery, was used in various instances by the courts under three different principles—negligence of the defendant, contributory negligence of the plaintiff, and proximate cause. Suppose a case in which the obstruction was camouflaged, in which the plaintiff had no previous knowledge, and in which there was a reduction of speed, at the plaintiff's request, prior to the collision. On the basis of this fact situation the court could overcome defendant's arguments against recovery regardless of which of the three theories he chose to rely on. Thus, it would seem to be the facts, and not the facts as coupled with a particular legal principle, that actually determined the outcome of the case. This thesis is even more apparent in cases denying recovery. In such instances the court may apply one of several different theories in considering any one factual element. Where several such elements are present together in a given case, any of the four legal principles could be adopted as a point on which to turn the decision.

CHARLES LEE HOBSON

TORTS—RIGHT TO RECOVER FOR MENTAL DISTURBANCES CAUSED BY NEGLIGENT WRONGS. [Connecticut]

The courts have long been reluctant to impose tort liability for the infliction of mental disturbances and their physical consequences.[1]

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of the plaintiff, in 13 the plaintiff was in the front seat. In the remaining 4 he was in the back seat. Of 9 cases denying recovery in which the court mentioned the position of the plaintiff, in 6 the plaintiff was in the front seat, and in the remaining 3 he was in the back seat.

[1]Several writers have dealt extensively with the general historical back-

A number of reasons have been advanced to justify this limitation. First, under the common law no legal right to absolute peace and quiet was recognized, nor was there any right to complete freedom from emotional disturbances.[2] The courts felt that in a society of close personal associations each individual would inevitably suffer some emotional upset through his contact with those around him. This mental suffering was generally believed too trivial, and its consequences too slight, to require the courts to overburden their dockets with suits involving such minor claims.[3] Furthermore, to the early tribunals the very word "mental" suggested an intangible thing which, in itself, could not form the basis of a legal cause of action.[4] There must have been some direct, material, or tangible injury that could have been perceived by the senses and, thus, would be a proper subject of testimony by the citizens of the community.[5] As far as these courts were concerned, mental suffering and its consequences were too subjective to enable an accurate estimate by a jury of the extent to which the plaintiff had been harmed.[6] Because of the inadequacy of medical knowledge on this subject, it was almost impossible to trace with any certainty the mental anguish or resulting injury back through the fright or nervous shock to the alleged wrongful conduct. Fabricated claims might be so easily feigned and so difficult to refute that the machinery of justice would be inadequate to separate the true from the false.[7]

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ground and development of this subject: Bohlen, Fifty Years of Torts (1937) 50 Harv. L. Rev. 725, 732; Bohlen and Polikoff, Liability in New York for the Physical Consequences of Emotional Disturbance (1932) 32 Col. L. Rev. 409; Bohlen and Polikoff, Liability in Pennsylvania for Physical Effects of Fright (1932) 80 U. of Pa. L. Rev. 627; Goodrich, Emotional Disturbance As Legal Damage (1922) 20 Mich. L. Rev. 497; Green, "Fright" Cases (1933) 27 Ill. L. Rev. 761, 873; Hallen, Damages for Physical Injuries Resulting from Fright or Shock (1933) 19 Va. L. Rev. 253; Magruder, Mental and Emotional Disturbance in the Law of Torts (1936) 49 Harv. L. Rev. 1033; Throckmorton, Damages from Fright (1921) 34 Harv. L. Rev. 260.

[2]Magruder, Mental and Emotional Disturbance in the Law of Torts (1936) 49 Harv. L. Rev. 1033, 1035.

[3]Mitchell v. Rochester Ry. Co., 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604 (1896); Bowles v. May, 159 Va. 419, 433, 166 S. E. 550, 555 (1932); See also Bohlen, Studies in the Law of Torts (1926) 254.

[4]Mitchell v. Rochester Ry. Co., 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604 (1896).

[5]Bohlen, Studies in the Law of Torts (1926) 255.

[6]Bohlen, Studies in the Law of Torts (1926) 255; Prosser, Torts (1941) 54.

[7]Spade v. Lynn & S. R. Co., 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393 (1897); Ward v. West Jersey & S. R. Co., 65 N. J. L. 383, 47 Atl. 561 (1900); Mitchell v. Rochester Ry. Co., 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781,

While this general restrictive attitude retains much of its force in modern American courts, it no longer is effective in its original scope. For purposes of examining the present-day application of the limitation, such mental disturbances as may be involved must be divided into several categories: (1) Mental disturbances produced by direct physical injury. (2) Mental disturbances alone. (3) Mental disturbances producing physical injury.

It appears that the first class of harms was never within the restrictive rule in the same sense as were the latter two. Ever since the courts have recognized tort liability based on negligent infliction of injuries, they have allowed recovery for mental suffering and pain where it was contemporaneous with a physical injury of a traumatic nature.[8] A recent case has observed that "The real basis for the requirement that there shall be a contemporaneous bodily injury or battery, is that this guarantees the reality of the damage claimed."[9] It is reasoned that there is not a strong likelihood of fraudulent claims being maintained and compensated, because the jury, through the physical injury, has something tangible upon which to base its decision. And since the injury itself gives a right of action for damages, to allow the injured person to seek damages for mental suffering and pain connected with the traumatic injury would not encumber the courts with additional suits on their dockets.

Where mental anguish alone is involved, however, modern courts are not inclined to recognize a right of recovery.[10] The same reasons as were given in the earlier cases are still regarded as valid in that situation. Several courts have made limited exceptions to this general view.[11] A minority of states have held telegraph companies liable for

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56 Am. St. Rep. 604 (1896); Huston v. Freemansburg Borough, 212 Pa. 548, 61 Atl. 1022, 3 L. R. A. (N. S.) 49 (1905).

[8]A large number of cases will be found cited in 17 C. J., Damages § 153; 25 C. J. S., Damages § 65; 8 R. C. L., Damages § 74; Prosser, Torts (1941) 213.

[9]Orlo v. Connecticut Co., 21 A. (2d) 402, 405 (Conn. 1941).

[10]Furlan v. Rayan Photo Works, Inc., 171 Misc. 839, 12 N. Y. S. (2d) 971 (1939); Ewing v. Pittsburg C. C. & St. L. R. Co., 147 Pa. 40, 23 Atl. 340 (1892). See also the cases collected in Notes (1923) 23 A. L. R. 361, (1926) 44 A. L. R. 428, (1928) 56 A. L. R. 657.

[11]Where the defendant's acts, causing the mental disturbance, have been intentional or wilful, the authorities agree that there can be a recovery for mental anguish alone. Erwin v. Milligan, 188 Ark. 658, 67 S. W. (2d) 592 (1934); Prosser, Torts (1941) 58: " . the infliction of mental injury may be a cause of action in itself. Its limits are as yet ill defined, but it has been extended to its greatest length in the case of intentional acts of a flagrant character, whose enormity adds especial weight to the plaintiff's claim, and is in itself an important guarantee that the mental disturbance which follows is serious and not feigned."

suffering occasioned by negligent delivery or transmission of a message.[12] Likewise, recovery has been allowed for the negligent mishandling of corpses.[13] The courts that have recognized these exceptions have reached their results through much the same line of reasoning. In each case the defendant's act is an actionable wrong within itself because it has violated some legal right of the plaintiff, such as the "property right" of the next of kin of a corpse,[14] or has breached some technical legal duty owed to the plaintiff.[15] The departure from the restrictive common law rule in these cases is said to be justified by the fact that the original objections do not apply with sufficient force to offset the injustice of not allowing recovery. Thus, the courts have tried to draw an arbitrary line so that the chance of fraudulent suits is minimized, and with limits narrow enough that vexatious litigation is improbable.

It is in the consideration of the third class of mental disturbances that the modern courts are in greatest disagreement. Many courts still deny that there can be any cause of action where physical injuries such as paralysis, nervous breakdown, insanity, or miscarriage, result from fright or fear occasioned by a mere negligent act and not accompanied by a direct physical injury[16] or "impact."[17] Their reasoning,

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[12]Western Union Tel. Co. v. Redding, 10 Fla. 495, 129 So. 743, 72 A. L. R. 1192 (1930) (construing a Florida statute); Mentzer v. Western Union Tel. Co., 93 Iowa 752, 62 N. W. 1 (1895).

[13]Crenshaw v. O'Connell, 150 S. W. (2d) 489 (Mo. 1941).

[14]Note (1934) 18 Minn. L. Rev. 204.

[15]In all of these situations, it seems sufficiently obvious that the technical 'legal right' invaded, which is mentioned but not stressed, and does not itself enter into the damages assessed, is the barest excuse to permit recovery for the real mental injury, often the only substantial damage to be found." Prosser, Torts (1941) 63.

[16]Braun v. Craven, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199 (1898); Gardner v. Cumberland Telephone Co., 207 Ky. 249, 268 S. W. 1108 (1925); Nelson v. Crawford, 122 Mich. 466, 81 N. W. 335 (1899); Davis v. Cleveland Ry. Co., 135 Ohio St. 401, 21 N. E. (2d) 169 (1939); Koplin v. Louis K. Liggett Co., 322 Pa. 333, 185 Atl. 744 (1936); Bowles v. May, 159 Va. 419, 166 S. E. 550 (1932); See, Arkansas Motor Coaches, Inc. v. Whitlock, 199 Ark. 820, 136 S. W. (2d) 184, 186 (1940); Freedman v. Eastern Massachusetts St. Ry. Co., 299 Mass. 246, 12 N. E. (2d) 739, 740 (1938); Spiegel v. Evergreen Cemetery Co., 117 N. J. L. 90, 186 Atl. 585, 587 (1936); Comstock v. Wilson, 257 N. Y. 231, 177 N. E. 431, 76 A. L. R. 676, 678 (1931).

[17]Many courts do not require contemporaneous injury of a traumatic nature but allow recovery if there has been some slight physical impact or battery concurrent with the fright. These courts, which deny recovery unless there is impact, have admitted the justice of recovery in permitting the most absurd and trivial things to constitute sufficient impact to form a basis of recovery: See Arkansas Motor Coaches, Inc. v. Whitlock, 199 Ark. 820, 136 S. W. (2d) 184 (1940) (recognized such a thing as 'constructive injury' in the case of duress, eviction from a

though rendered unpersuasive by the modern experience and development of our judicial system, is well stated by the Supreme Court of Pennyslvania:

> "It requires but a brief judicial experience to be convinced of the large proportion of exaggeration, and even of actual fraud, in the ordinary action for physical injuries from negligence; and if we opened the door to this new invention [recovery for mental suffering and resulting physical injuries] the result would be great danger, if not disaster, to the cause of practical justice."[18]

Representing an increasing trend to allow recovery even under these circumstances,[19] however, is the recent Connecticut case of *Orlo*

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bus); Porter v. Delaware L. & W. Ry. Co., 73 N. J. L. 405, 63 Atl. 860 (1906) (dust in the eye); Freedman v. Eastern Massachusetts St. Ry. Co., 299 Mass. 246, 12 N. E. (2d) 739 (1938) (plaintiff twisted her shoulder—no external mark of injury); Comstock v. Wilson, 257 N. Y. 231, 177 N. E. 431, 76 A. L. R. 676 (1931) (scraping of cars considered a battery and invasion of plaintiff's legal rights).

[18]Huston v. Borough of Freemansburg, 212 Pa. 548, 61 Atl. 1022, 1023 (1905).

The courts which deny recovery where there is no "impact" have given as their reasons these tort principles:

(1) There is no duty owed by the defendant to the plaintiff to exercise care not to frighten the plaintiff: Braun v. Craven, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199 (1898); Reed v. Ford, 129 Ky. 471, 112 S. W. 600, 19 L. R. A. (N. S.) 225 (1908); Ewing v. Pittsburg C. C. & St. L. Ry. Co., 147 Pa. 40, 23 Atl. 340 (1892).

(2) The resulting physical injuries are too remote in the chain of causation to allow recovery—too remote a consequence: Mitchell v. Rochester Ry. Co., 151 N. Y. 107, 45 N. E. 354 (1896); Ewing v. Pittsburg C. C. & St. L. Ry. Co., 147 Pa. 40, 23 Atl. 340 (1892). Contra: Sloane v. Southern Cal. R. R., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 893 (1896); Chiuchiolo v. New England Wholesale Tailors, 84 N. H. 329, 150 Atl. 540 (1930); Pankopf v. Hinkley, 141 Wis. 146, 123 N. W. 625 (1909); Dulieu v. White [1901] 2 Q. B. 669.

(3) The physical injury resulting from fright is not the natural and probable consequence of the defendant's negligence: Spade v. Lynn & R. R., 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 519 (1897); Mitchell v. Rochester Ry. Co., 151 N. Y. 107, 45 N. E. 354 (1896); Victorian Rys. Com'rs. v. Coultas, 13 A. C. 222 (1888); See also the cases collected in Note (1921) 11 A. L. R. 1122. Contra: Gardner v. Newman Hospital, 58 Ga. App. 104, 198 S. E. 122 (1938); Green v. T. A. Shoemaker & Co., 111 Md. 69, 73 Atl. 688, 23 L. R. A. (N. S.) 667 (1909); Hanford v. Omaha & C. B. St. Ry. Co., 113 Neb. 423, 203 N. W 643, 40 A. L. R. 970 (1925); Chiuchiolo v. New England Wholesale Tailors, 84 N. H. 329, 150 Atl. 540 (1930); Simone v. Rhode Island Co., 28 R. I. 186, 66 Atl. 202 (1907).

(4) The defendant could not reasonably foresee that such consequences would result from his negligence: For a complete discussion of the entire subject including this last argument see Bohlen, Studies in the Law of Torts (1926) 259ff, especially 287, 288.

[19]Gardner v. Newman Hospital, 58 Ga. App. 104, 198 S. E. 122 (1938); Clemm v. Atchison T. & S. F. Ry. Co., 126 Kan. 181, 268 Pac. 103 (1928); Green v. T. A. Shoemaker & Son, 111 Md. 69, 73 Atl. 688, 23 L. R. A. (N. S.) 667 (1909); Purcell v. St. Paul City Ry. Co., 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203 (1892); Cashin v.

v. Connecticut Co.[20] There, the plaintiff had been riding in his automobile, following the defendant company's trolley car. Through the operator's negligent handling of the trolley pole, the trolley wire and the wires leading to a street light were broken and their ends, highly charged with electricity, came into contact with the oncoming automobile in which the plaintiff was a passenger. The plaintiff remained in the auto and was unable to prove that any electrical shock, burns, or other injuries of a traumatic nature were received at the time of the accident. Plaintiff claimed that he received nervous shock and experienced severe fright from the wires hissing, flashing, and spitting all about him. He furthermore claimed that he shook and trembled all over and was confined to the hospital about a month, and a condition of diabetes and arteriosclerosis from which he had suffered was aggravated; and that he continued to be disabled and under medical attention until the time of the trial, nearly a year after the accident. The trial court instructed the jury that the plaintiff could not recover unless he could show some injury of a traumatic nature from the application of some outward force. The Supreme Court of Errors of Connecticut reversed the trial court, observing:

> "The refusal to allow a recovery in such a case is not rested on 'a logical deduction from the general principles of liability in tort, but [is] a limitation of those principles upon purely practical grounds' ... it is a matter of 'administrative policy' in the particular jurisdiction."[21]

As a statement of its own policy, the Connecticut court declared that:

> ".. where it is proven that negligence proximately caused fright or shock in one who is within the range of ordinary physical danger from that negligence, and this in turn produced injuries such as would be elements of damage had a bodily injury been suffered, the injured party is entitled to recover."[22]

Northern Pac. Ry. Co., 96 Mont. 92, 28 P (2d) 862 (1934); Hanford v. Omaha & C. B. St. Ry. Co., 113 Neb. 423, 203 N. W. 643, 40 A. L. R. 970 (1925); Sparks v. Tennessee Mineral Products Corporation, 242 N. C. 211, 193 S. E. 31 (1937); Chiuchiolo v. New England Wholesale Tailors, 84 N. H. 329, 150 Atl. 540 (1930); Simone v. Rhode Island Co., 28 R. I. 186, 66 Atl. 202 (1907); Mack v. South Bound Ry. Co., 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679 (1898)); Colsher v. Tennessee Electric Power Co., 19 Tenn. App. 166, 84 S. W. (2d) 117 (1935); Frazee v. Western Dairy Products, 182 Wash. 578, 47 P (2d) 1037 (1935); Lambert v. Brewster, 97 W. Va. 124, 125 S. E. 244 (1924); Sundquist v. Madison R. R., 197 Wis. 83, 221 N. W. 392 (1928).

[20] 21 A. (2d) 402 (Conn. 1941).

[21] Orlo v. Connecticut Co., 21 A. (2d) 402, 405 (Conn. 1941).

[22] Orlo v. Connecticut Co., 21 A. (2d) 402, 405 (Conn. 1941).

Consequently, the court disposed of the opposing arguments, supposedly based on tort principles, by observing that the injury in this case was such that an ordinary man, knowing what the trolley operator knew or should have known, would have foreseen that this injury was of the general nature of harms which would result from his negligent wrong.[23] The court then demonstrated its sound understanding of the doubtful nature of the reasoning which is given to support the restrictive view of the many courts which have refused to recognize liability for mental injuries received without the occurrence of physical impact:

> "There is hardly more risk to the accomplishment of justice because of disparity in possibilities of proof in such situations than in those where mental suffering is allowed as an element of damage following a physical injury or recovery is permitted for the results of nervous shock provided there be some contemporaneous slight battery or physical injury. Certainly it is a very questionable position for a court to take, that because of the possibility of encouraging fictitious claims compensation should be denied those who have actually suffered serious injury through the negligence of another."[24]

The decisions of the early courts in denying recovery for mental suffering in negligence cases are not open to severe criticism. A study of the legal machinery and medical knowledge at their disposal will reveal such basic inadequacies in procedure and information as to justify their fears of doing more injustice than justice through allowing recovery. But the modern courts which still invoke the old non-recovery rule are obviously open to strong criticism. When the reasons behind a rule cease to exist, the rule ceases to be efficacious. Through the years the reasons behind the rule forbidding recovery for alleged mental injuries have been largely eliminated. The legal machinery and medical learning of modern times have improved to a point where the courts should be competent to handle situations such as the *Orlo*

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[23]The court here seems to wish to continue the narrow test of "foreseeability" to determine whether defendant owed a duty to plaintiff which defendant's negligence violated. See (1928) 27 Mich. L. Rev. 227; Note (1938) 48 Yale L. J. 303. However, many modern writers favor the broader "reasonable and natural consequence" test. See (1929) 29 Col. L. Rev. 53.

[24]Orlo v. Connecticut Co., 21 A. (2d) 402, 405 (Conn. 1941). The Connecticut court might have found sufficient "impact" here on which to base the recovery without stretching the judicial content of that word further than many other courts have done; but, instead, it chose to take the more sensible position of recognizing that recovery was necessary when a negligent act caused sufficient mental disturbance to result in physical injuries regardless of whether there was some technical "impact" accompanying the mental disturbance.

case presented, with reasonable assurance that justice will be attained. No longer are the parties to the suit incompetent to testify; no longer is there an impossibility of obtaining accurate proof or disproof of mental suffering; no longer is it difficult to establish fright or nervous shock as a link in the chain of causation; no longer is it thought that emotional disturbance may not produce very real and severe injury. Therefore, since the few injustices that may occur are so completely offset by the justice that may be rendered in recognizing a right of recovery in these situations, those tribunals adhering to the traditional rule occupy the peculiar position of failing in the express purpose for which they were established.

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