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Domestic Relations-Injunction against Prosecution of a Divorce Action in a Foreign Jurisdiction [Goldstein v. Goldstein, N. Y. 1940]

RECENT CASES

CONTRACTS—ATTEMPTS OF EMPLOYER TO CONTRACT AGAINST FUTURE COMPETITION OF EMPLOYEES. [Illinois]

Employers, in an attempt to avoid the competition which results from former employees leaving their employment and entering that of another employer or going into business for themselves, frequently put restrictive provisions in the contracts of hire designed to control the actions of the employee after he leaves the service of the employer. Two types of relief for a breach of such a contract may be sought by the employer on the basis of the restrictive terms: (1) He may seek to enjoin the employee from breaching the negative contract term and going into a competing business; or (2) he may seek to recover damages from the employee for the breach of the contract not to compete.[1] This may be a suit to recover actual damages, or to enforce a "liquidated damages" provision included in the contract of hire.

The recent case of *A. J. Canfield Co. v. McGee*[2] is an example of an attempt to apply both kinds of limitations against an ex-employee who was entering a competitive business in violation of a contract term forbidding him to do so. The plaintiff was engaged in manufacturing and selling beverages, defendant being one of his salesmen. Under threat of discharge the defendant was compelled to sign a written contract wherein he agreed not to accept employment from any other corporation or to engage in any competitive efforts without the permission of the plaintiff. The written contract also provided that in case of a breach by the defendant, the plaintiff's damages would be assessed at $100 a day. Plaintiff alleged a breach and sought to enjoin the defendant from engaging in a competitive business in a certain territory and also claimed damages under the liquidated damages provision. The trial court adopted the report of the master in chancery who recommended the injunction but refused to enforce the liquidated damages clause, on the grounds that the amount named in this provision was excessive and unconscionable, and was intended as a penalty rather than as liquidated damages. On appeal by the plaintiff for enforcement of the liquidated damages provision, the Illinois Appellate Court for the First District affirmed the decision of the lower court.

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[1]See Notes(1920) 9 A. L. R. 1456; (1922) 20 A. L. R. 861; (1924) 29 A. L. R. 1331; (1928) 52 A. L. R. 1362; (1930) 67 A. L. R. 1002; (1935) 98 A. L. R. 963.

[2]306 Ill. App. 226, 28 N. E. (2d) 548 (1940).

In the early cases ruling on the effect of "liquidated damages" provisions, the courts generally held such clauses invalid as penalties.[3] Subsequently, courts began to uphold them if they were considered reasonable, but if unreasonable they were said to be penalties, and as such, unenforceable.[4] The tendency today is to uphold more strenuously the freedom of contract by declaring the provisions valid unless clearly unconscionable.[5] However, courts will still invalidate those provisions which are termed penalties because unreasonable.[6]

Such rules are easily stated, but difficulties arise in determining whether a certain contract provides for a "penalty" or for "liquidated damages."[7] In general, the terminology used by the parties is not controlling,[8] but no positive rules can be laid down as a test, for the particular circumstances in each case must control the decision.[9] The real question is whether the parties truly sought to make a fair pre-estimate

[3]See Williston, Contracts (rev. ed. 1936) §§ 774-776, where it is stated that the doctrine originated in the restriction of relief on penal bonds to the actual damage and this idea was extended to all contracts.

[4]See Kemble v. Farren, 6 Bing. 141, 130 Eng. Rep. 1234 (1829).

[5]U. S. v. Bethlehem Steel Corp., 205 U. S. 105, 27 S. Ct. 450, 51 L. ed. 731 (1907), where a steel company contracted to make six gun carriages for the United States to be delivered over a prescribed period on a set schedule with a penalty of thirty-five dollars for each day's delay in delivery. The total delay was 1,096 days and the government discounted 496 of these days because of their own part in the delay. The delay was due in some measure to the government's officials and they were not ready to use the carriages even when they were delivered, but the steel company was found to have been inadequately equipped. The court allowed a deduction from the payment price to the extent of all the delay minus that discounted by the government. Quaille v. Kelley Milling Co., 18 Ark. 717, 43 S. W. (2d) 369 (1931).

[6]Chicago Investment Co. of Miss. v. Hardtner, 167 Miss. 375, 148 So. 214 (1933); Miazza v. Western Union Telegraph Co., 50 Ga. App. 521, 178 S. E. 764 (1935).

[7]"... A penalty is a sum named, which is disproportionate to the damages which could have been anticipated from the breach of the contract, and which is agreed upon in order to enforce performance of the main purpose of the contract by compulsion of this very disportion. Liquidated damages, on the other hand, is a sum fixed as an estimate, made by the parties at the time when the contract was entered into, of the extent of the injury which a breach of the contract will cause. . . ." 3 Williston, Contracts (rev. ed. 1936) § 776. See also for definitions and discussions: Note (1925) 25 Col. L. Rev. 277; McCormick On Damages (1935) § 146; Restatement, Contracts (1932) §§ 339-340.

[8]Greenblatt v. McCall & Co., 67 Fla. 185, 64 So. 748 (1914); Weiss v. U. S. Fidelity & Guaranty Co., 300 Ill. 11, 132 N. E. 749 (1921); Dowd v. Andrews, 77 Ind. App. 627, 134 N. E. 294 (1922); Davis v. Freeman, 10 Mich. 188 (1862).

[9]Lettelleir v. Abilene Flour Mills, 101 Ind. App. 20, 198 N. E. 111 (1935). Concerning the ease or difficulty of ascertaining actual damages: Glazer v. Hanson, 98 Cal. App. 53, 276 Pac. 607 (1929); Restatement, Contracts (1932) § 339. On proportion of named as liquidated damages to actual injury see: Dowd v. Andrews, 77 Ind. App. 627, 134 N. E. 294, 295 (1922); J. I. Case Threshing Machine Co. v. Fronk, 105 Minn. 39, 117 N. W. 229 (1908).

of the probable damages which would occur on possible breach.[10] From the reasoning of the cases, it appears that the most important query is whether the damages as set in the liquidated damages provisions are approximately the amount which the parties, at the time when the contract was executed, might have considered to be the amount of the actual damages which would result if the contract should be breached. Thus, the test of reasonableness depends on appearances as to actual damages at the time of the contract, not at the time of the breach or the trial.[11] If the figures are nearly the same, the court will uphold the provision, stating that it is not unreasonable and that the contract should be enforced according to the intention of the parties.[12] In the principal case a clear example of a "penalty" was presented, for the defendant-employee had been paid $25 per week plus a four or five per cent commission. It is hardly conceivable that such a moderately paid salesman could have been thought capable of causing damages of $100 a day to the employer.

Even though the suit for damages may be unavailing, the employer still has a right to seek injunctive relief, if the remedy at law can be shown to be inadequate.[13] The courts will enjoin an employee from working competitively when the contract of employment contained a provision whereby he promised not to work in a competing enterprise, if the restraint is reasonable,[14] is not against public policy,[15] and will

[10]Kothe v. Taylor Trust, 280 U. S. 224, 50 S. Ct. 142, 71 L. ed. 382 (1930); Sun Printing & Publishing Ass'n. v. Moore, 183 U. S. 642, 669, 22 S. Ct. 240, 46 L. ed. 366, 380 (1902); U. S. v. Bethlehem Steel Corp., 205 U. S. 105, 27 S. Ct. 450, 51 L. ed. 731 (1907); U. S. v. United Engineering Co., 234 U. S. 236, 241, 34 S. Ct. 843, 58 L. ed. 1234 (1914); Giesecke v. Cullerton, 280 Ill. 510, 117 N. E. 777 (1917).

[11]Tennessee Mfg. Co. v. James, 91 Tenn. 154, 18 S. W. 262 (1892). "The unique or ordinary character of the employee and the ease or difficulty of replacing him must be considered in determining the probable damages". McCormick On Damages (1935) § 155, p. 620.

[12]U. S. v. Bethlehem Steel Corp., 205 U. S. 105, 27 S. Ct. 450, 51 L. ed. 731 (1907); Quaille v. Kelley Milling Co., 184 Ark. 117, 43 S. W. (2d) 369 (1931).

[13]Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419 (1887). In this relation, in the principal case it does not appear why damages remedy is not adequate, but the injunction question was not before the Appellate Court, since the appeal was only on the damages issue.

[14]Milwaukee Linen Supply Co. v. Ring, 210 Wis. 467, 246 N. W. 567 (1933). For other illustrative cases of reasonable restrictions see Notes (1920) 9 A. L. R. 1456, 1468; (1922) 20 A. L. R. 861, 865; (1924) 29 A. L. R. 1331; (1928) 52 A. L. R. 1362, 1366; (1930) 67 A. L. R. 1002, 1006; (1935) 98 A. L. R. 963, 971.

[15]Dyar Sales & Machinery Co. v. Bleiler, 106 Vt. 425, 175 Atl. 27 (1934); Milwaukee Linen Supply Co. v. Ring, 210 Wis. 467, 246 N. W. 567 (1933). It is to be noted that illegal "restraint of trade" is cited in most of the cases as a reason for holding the restrictions invalid.

not work undue hardship and oppression.[16] Whether the provision is reasonable or not depends on its being ". . . only such as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interest of the public."[17] Where the restrictive covenant is unlimited as to time and territory, as a general rule, the courts will hold such covenant unreasonable and void.[18] However, it has been held in some jurisdictions that the injunction will be allowed if the contract is fairly entered into, and the conditions are reasonable, even though the limitation as to time is lacking.[19]

The principal case[20] contained a provision which was unlimited both as to time and territory, and, as such, would on its face be unenforceable; but the employer escaped the invalidity of the unlimited provision by asking for relief only as to a limited territory.[21] In cases where the restrictions as to time and territory are unreasonable, if the covenants are severable, the valid covenants will generally be upheld.[22] Where unseverable, some courts have held that no part of the covenant can be enforced.[23] Others are inclined to strain the construction of the

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[16]Smith Baking Co. v. Behrens, 125 Neb. 718, 251 N. W. 826 (1923).

[17]Mandeville v. Harman, 42 N. J. Eq. 185, 7 Atl. 37, 39 (1886).

[18]Wark v. Ervin Press Corp., 48 F. (2d) 152 (C. C. A. 7th, 193); Kinney v. Scarbrough Co., 138 Ga. 77, 74 S. E. 772 (1912); National Linen Service Corp. v. Clower, 179 Ga. 136, 175 S. E. 460 (1934); Martin v. Hawley, 50 S. W. (2d) 1105 (Tex. Civ. App. 1932); Schneller v. Hayes, 176 Wash. 115, 28 P. (2d) 273 (1934).

[19]Smith v. Brown, 164 Mass. 584, 42 N. E. 101 (1895); Farmers State Bank v. Petersburg State Bank, 108 Neb. 54, 187 N. W. 117 (1922); Dow v. Gotch, 113 Neb. 60, 201 N. W. 655 (1924). In Dyar Sales & Machinery Co. v. Bleiler, 106 Vt. 425, 175 Atl. 27 (1924) the court states that the rule as to territory over which the restriction may extend is that wherein the plaintiff's (employer) trade is likely to go.

[20]A. J. Canfield Co. v. McGee, 306 Ill. App. 226, 28 N. E. (2d) 548 (1940).

[21]See (1926) 40 Harv. L. Rev. 326; (1932) 45 Harv. L. Rev. 751; (1932) 17 Minn. L. Rev. 86.

[22]Where the restrictions are unreasonable as to territory: Smith's Appeal, 113 Pa. St. 579, 6 Atl. 251 (1886) (A agreed with B that he would not engage in the business of manufacturing ocher "in the county of Lehigh or elsewhere"; the court held that the contract was severable as to place, and sustained the restriction as it applied to Lehigh county); Trenton Potteries Co. v. Olyphant, 58 N. J. Eq. 507, 43 Atl. 723 (1899). Where the restriction was unreasonable as to time: Oregon Steam Navigation Co. v. Winsor, 20 Wall. 64, 22 L. ed. 315 (U. S. 1873) (A sold B a ship with the stipulation that B would not employ it or allow it to be employed in California waters for 10 years. After 3 years B sold to C with the same stipulation. Since the second restriction was also for 10 years, it would run for 3 years beyond the time during which B was bound to protect A. The court held that the second restriction was divisible and would stand for the 7 years remaining on the first restriction, but was void as to the other 3 years).

[23]Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560, 41 N. E. 1048 (1895) (A agreed to refrain from working as an oil dealer for 5 years within the state of Indiana, ex-

covenant by reading in additional words which make it severable, and therefore enforceable;[24] still others disregard the requirement of severability and, even if the covenant be unreasonable, allow enforcement to a reasonable extent.[25]

Even in the absence of restrictive covenants in the contract of hire, the employer will be protected by an injunction against the use of his trade secrets by a former employee.[26] But a former employee may properly sell to customers of his ex-employer in competition with him,[27] where the names of the customers are not considered as a trade secret. This would be the case when everyone knows that those customers buy those specific goods from someone, or when the customers are members of a readily ascertainable group.[28] Where the names and addresses of the customers are not available to, or at least can not be readily obtained by the public, the opposite result is reached in order to accord protection to the employer.[29]

By way of summary, the courts' tendency toward granting damages or injunctive relief sought by employers upon a breach of an employment contract can be said to be inclining more towards upholding the principle of freedom of contract. The courts still adhere to the rule that

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cepting the city of Indianapolis. The court held that as the restriction was void in covering the whole state, it must be held unenforceable even as to one of the cities of the state); Wisconsin Ice & Coal Co. v. Lueth, 213 Wis. 42, 250 N. W. 819 (1933). See Mason v. Provident Clothing Supply Co., [1913] A. C. 724, 745.

[24]Fleckenstein Bros. v. Fleckenstein, 76 N. J. L. 613, 71 Atl. 265 (1908) (A agreed not to engage in a certain type of business within 500 miles of Jersey City for 25 years. The court construed this provision to restrain A from working either in Jersey City or within 500 miles thereof, and held that it was unreasonable only as to the latter part of the restriction). This was a case involving a claim for damages, but the reasoning would apply equally well in an injunction case.

[25]Hill v. Central West Public Service Co., 37 F. (2d) 451 (C. C. A. 5th, 1930); Davey Tree Expert Co. v. Ackelbeim, 233 Ky. 115, 25 S. W. (2d) 62 (1930); Edgecomb v. Edmonston, 257 Mass. 12, 153 N. E. 99 (1926); Whiting Milk Companies v. O'Connell, 277 Mass. 570, 179 N. E. 169 (1931). See Williston, Contracts (rev. ed. 1937) § 1660. This was the result reached by the trial court in the principal case, and no discussion of the point was made in the Appellate Court opinion.

[26]Golden Cruller & Doughnut Co., Inc. v. Manasker, 95 N. J. Eq. 537, 123 Atl. 150 1923).

It was probably on some such theory that the injunction was awarded in the principal case. Cf. Colonial Laundries, Inc. v. Henry, 48 R. I. 332, 138 Atl. 47 (1927), 54 A. L. R. 343 (1928) where former employees of laundry were enjoined from soliciting the laundrey's customers for a competing business, knowledge of names of customers being "confidential information."

[27]Haut et. al. v. Rossbach et. al., 15 A. (2d) 227 (N. J. 1940).

[28]Fulton-Grand Laundry Co. v. Johnson, 140 Md. 359, 117 Atl. 753 (1922), 23 A. L. R. 420 (1923). See Note (1940) 126 A. L. R. 758.

[29]Abalene Exterminating Co. v. Oser, 125 N. J. Eq. 329, 5 A. (2d) 738 (1939).

the restrictions must be reasonable, but the meaning of this standard is subject to change at the courts' discretion.

Freedom of contract, in such situations as have been considered here, is opposed to the employee's right to work as he chooses. The principle guarantying the right to contract freely is sound only where there is, in fact, free contracting between the parties. The employer should be protected against injury in instances where the employee has access to valuable trade secrets, or is employed in such a unique capacity as to make his work injurious in a competitive business. But all men should be entitled to earn a livelihood, and all men should be placed as nearly as possible on an equal contracting basis. When one party holds a great advantage over the other in bargaining power, the stronger party is likely to impose unfair conditions to which the weaker will comply because he has no choice. In periods when unemployment is as prevalent as it has been in the last decade, and when the employer's bargaining power is thus superior, the courts should take a hand in protecting the employee by limiting the freedom of contract principle when unfair advantage is taken by the employers. If true justice is to be achieved in these cases, the courts, in determining whether the claims of the employers are to be enforced, must not only consider legal rules and principles but must also give some heed to grave social and economic problems.

HOWARD WESLEY DOBBINS

DOMESTIC RELATIONS—INJUNCTION AGAINST PROSECUTION OF A DIVORCE ACTION IN A FOREIGN JURISDICTION. [New York]

The problem of whether equity should exercise jurisdiction to restrain a husband from obtaining a divorce in another state[1] has been raised recently in the case of *Goldstein v. Goldstein*.[2] The plaintiff-wife alleged that she and the defendant had been married in New York and that both of them had remained New York residents from that time.[3]

[1]There is no question of the power of equity to issue such an injunction: 5 Pomeroy, Equity Jurisprudence (2d ed. 1919) § 2091; Restatement, Conflict of Laws (1934) § 96. Historically the equity courts did not have power to restrain foreign actions, but this rule has been altered. Note (1893) 21 L. R. A. 71.

[2]258 App. Div. 211, 15 N. Y. Supp. (2d) 782 (1939), rev'd, 283 N. Y. 146, 27 N. E. (2d) 969 (1940).

[3]No attempt is made to discuss the question of jurisdiction. By his pleadings the husband admitted that he is a New York resident, and even though he may not have appeared personally in the case, substituted service as to him would be good. Rawstorne v. Maguire, 240 App. Div. 1, 269 N. Y. Supp. 39, aff'd, 265 N. Y. 204, 192 N. E. 294 (1934).

She further alleged that her husband was not a bona fide resident of Florida, in which state he was seeking the divorce, and that Florida was without jurisdiction over their marital status.[4] The lower New York court granted her prayer for a permanent injunction forbidding the defendant to obtain the Florida divorce on the grounds that equity had the power to restrain persons within its territorial jurisdiction from doing acts which would work injury to New York citizens.[5] Upon appeal the order of the court was reversed on the determination that the facts gave no basis for equitable relief.[6]

In reaching its conclusion the court proceeded upon the theory that the Florida divorce decree would be a nullity;[7] that, even though the defendant might remarry on the strength of the Florida judgment, the only injury which the plaintiff would sustain would be an injury to her feelings. This, it was thought, was not such a property damage as would warrant the interference of equity.[8] The position of the Court of Appeals appears to be untenable for two reasons. First, as was pointed out in the dissenting opinion, if the defendant is left to continue the Florida divorce action, the plaintiff will suffer a real and irreparable damage. Second, it is well settled that equity will exercise its jurisdiction to prevent an evasion of the domestic laws of the forum.

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[4]Krause v. Krause, 282 N. Y. 355, 26 N. E. (2d) 290 (1940); Lynde v. Lynde, 162 N. Y. 405, 56 N. E. 979, 48 L. R. A. 679 (1900); O'Dea v. O'Dea, 101 N. Y. 23, 4 N. E. 110 (1885). New York has a unique doctrine to the effect that a divorce is invalid in New York when made in a foreign jurisdiction if the parties' last mutual domicile and the present domicile of the defendant spouse is in New York. It was decided by the Supreme Court of the United States that this did not violate the full faith and credit clause of the Constitution. Haddock v. Haddock, 201 U. S. 562, 26 S. Ct. 525, 50 L. ed. 867 (1906).

[5]258 App. Div. 211, 15 N. Y. Supp. (2d) 782 (1939).

[6]283 N. Y. 146, 27 N. E. (2d) 969 (1940).

[7]Unless at least one of the spouses is domiciled in the state, its courts have no jurisdiction to grant a divorce: Wells v. Wells, 230 Ala. 550, 161 So. 794 (1935); House v. House, 25 Ga. 473 (1858); State v. Armington, 25 Minn. 29 (1878); Keil v. Keil, 80 Neb. 496, 114 N. W. 570 (1908); Leferts v. Leferts, 263 N. Y. 131, 188 N. E. 279 (1933); Baumann v. Baumann, 250 N. Y. 382, 165 N. E. 819 (1929); Hubbard v. Hubbard, 228 N. Y. 81, 126 N. E. 508 (1920); Winston v. Winston, 165 N. Y. 553, 59 N. E. 273 (1901); Ditson v. Ditson, 4 R. I. 87 (1856); 1 Beale, The Conflict of Laws (1935) § 113.11; Stumberg, Conflict of Laws (1937) 268 et seq.

[8]Cf. First Nat'l Bank of Kasson v. La Due, 39 Minn. 415, 40 N. W. 367 (1888). Present defendant had instituted a suit in New York to attach property of present plaintiff. The latter asked the Minnesota court to enjoin the prosecution of that action. The court found that no personal service had been or could be made on this plaintiff in New York, and that the proceedings in New York were therefore illegal and void. For this reason, plaintiff was in no danger of suffering any injury from the New York action, and thus no injunction was needed.

To sustain its decision[9] that the plaintiff would suffer no injury sufficient to justify injunction relief, the court relied upon *Baumann v. Baumann*.[10] In that case the defendant-husband and the plaintiff-wife, residents of New York, entered into a separation agreement. Subsequently the defendant obtained a Mexican divorce and attempted to remarry in Connecticut. The plaintiff procured a declaratory judgment stating that she was the lawful wife of the defendant and that his alleged marriage with his second wife was void. In addition, the judgment enjoined the defendants (plaintiff's husband and the alleged second wife) from consummating a marriage ceremony during the plaintiff's lifetime, and restrained the second wife from assuming the plaintiff's marriage name.[11] The Court of Appeals denied the injunction because the defendants by holding themselves out as husband and wife threatened no legal wrong which would entitle the plaintiff to the equitable remedy.[12]

There appears to be no substantial similarity between the principal case and the *Baumann* decision. In the first place, the injunction sought in the latter case was not against the prosecution of a divorce action by the defendant in a foreign jurisdiction, but was primarily to prevent the use of the plaintiff's marriage name by the second wife. The court rightly felt that a mere injury to feelings was an insufficient basis for an injunction.[13] Secondly, there the court was not called upon to prevent any direct pecuniary damage to the plaintiff; in the principal case, on the other hand, the wife would at least be forced to pay for her transportation and that of her witnesses if she defended the divorce

[9]The court did not suggest as a reason for refusal of the injunction that if the injunction were to be issued it might be ineffective if the husband should leave New York State and refuse to obey the injunction. However, it is often declared that equity will not do a vain thing. Electric Steel Foundry v. Huntley, 32 F. (2d) 892 (C. C. A. 9th, 1929); Ebsary Gypsum Co., Inc. v. Ruby, 256 N. Y. 406, 176 N. E. 820 (1931); May v. May, 233 App. Div. 519, 253 N. Y. Supp. 606 (1931). This maxim is mainly applied when the defendant is not within the jurisdiction of the state. Whatever merit there may be in the principle in that situation would not apply here, for the husband was a resident of New York and owned considerable property there over which equity would have *in rem* power.

[10]132 Misc. 217, 228 N. Y. Supp. 539 (1928), modified 250 N. Y. 383, 165 N. E. 819 (1929).

[11]132 Misc. 217, 228 N. Y. Supp. 539 (1929).

[12]250 N. Y. 383, 165 N. E. 819 (1929).

[13]Atkinson v. John E. Doherty & Co., 121 Mich. 372, 80 N. W. 285 (1899); Baumann v. Baumann, 250 N. Y. 382, 165 N. E. 819 (1929); Marlin Firearms Co. v. Shields, 171 N. Y. 384, 64 N. E. 163 (1902), 59 L. R. A. 310 (1903); Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442 (1902), 59 L. R. A. 478 (1903). See Gee v. Pritchard, 2 Swan. 402, 422, 36 Eng. Rep. 670, 677 (1818). McClintock on Equity (1936) § 152.

action in Florida.[14] Thirdly, in the *Baumann* case the wife had received a declaratory judgment stating the effect of the invalid divorce decree,[15] and she had also entered into a separation agreement which made a substantial property settlement. This separation agreement would protect the rights to which the wife was entitled by her marriage.[16]

In the *Goldstein* case the wife had no separation agreement, and as a result she might suffer great property damage if her husband procured the foreign divorce. He might remarry upon the strength of the foreign divorce decree and would be forced to support his second wife as well as his first one.[17] This would double his duty of support and might result in his being unable to provide sufficiently for both of them. The courts would not allow him to show the invalidity of the second marriage as a bar to his legal duty to support his second wife, for equity will not allow a person to show the invalidity of a decree which he has obtained himself.[18] Further, should the plaintiff's husband remarry on the strength of the invalid divorce decree, the plaintiff's right of dower might depend upon whether she was ever validly divorced from her husband.[19] This is especially true of the property owned by her hus-

[14]In Wabash Ry. Co. v. Peterson, 187 Iowa 1331, 175 N. W. 523 (1919), the Iowa court enjoined plaintiff-residents from suing defendant-resident in a Missouri court where most of the witnesses were in Iowa and defendant would have been forced to pay for their transportation for a distance of 200 miles or use depositions.

[15]At the least, the effect of such a decision would be to prognosticate the ultimate outcome of a suit if and when it should be brought in New York. It thus serves to make more certain the rights of the wife as to support, dower, etc. The suit for the declaratory judgment was brought pursuant to the New York Civil Practice Act § 473, which provides that such declaration shall have the force of a final judgment. For a discussion of declaratory judgments, see Borchard, The Declaratory Judgment —A Needed Procedural Reform (1918) 28 Yale L. J. 1; Jacobs, The Utility of Injunctions and Declaratory Judgments in Migratory Divorce (1935) 2 Law & Contemp. Prob. 370; Sunderland, A Modern Evolution in Remedial Rights—The Declaratory Judgment (1917) 16 Mich. L. Rev. 69.

[16]Courts will enforce covenants or promises in separation agreements relating to the maintenance of the wife and other collateral agreements provided the separation has actually taken place at the time of the agreement or immediately afterwards. Pryor v. Pryor, 88 Ark. 302, 114 S. W. 700 (1908); Sumner v. Sumner, 121 Ga. 1, 48 S. E. 727 (1904); Amspoker v. Amspoker, 99 Neb. 122, 155 N. W. 602 (1915); Pettit v. Pettit, 107 N. Y. 677, 14 N. E. 500 (1887); Carson v. Murray, 3 Paige Chan. 483 (N. Y. 1832); Archbell v. Archbell, 158 N. C. 408, 74 S. E. 327, Ann Cas. 1913D 261 (1912); In Re Singer's Estate, 233 Pa. 55, 81 Atl. 898, Ann. Cas. 1913A 1326 (1911).

[17]Krause v. Krause, 282 N. Y. 355, 26 N. E. (2d) 290 (1940).

[18]Krause v. Krause, 282 N. Y. 355, 26 N. E. (2d) 290 (1940); Starbuck v. Starbuck, 173 N. Y. 503, 66 N. E. 193, 93 Am. St. Rep. 631 (1903); Matter of Swayle's Estate, 60 App. Div. 599, 70 N. Y. Supp. 220, aff'd, 172 N. Y. 651, 65 N. E. 1122 (1902).

[19]See Seuss v. Schukat, 358 Ill. 27, 192 N. E. 668, 95 A. L. R. 146 (1934) (an absolute divorce ordinarly terminates all property interests, not actually vested, of di-

band in Florida, for the law of the situs would control there.[20] The plaintiff had no separation agreement establishing her property rights, nor any assurance in the form of a declaratory judgment that her own state would deny the validity of the divorce. Finally, if the plaintiff in the principal case is denied an injunction and wishes to contest the action rather than chance the damages which have been shown to be a possible result of her inaction, she will have to go to Florida with her witnesses, thus suffering direct pecuniary loss.[21] This factor alone has been considered as sufficient to warrant equitable action.[22]

Not even mentioned by the majority of the court in the principal case is the established practice of equity to forestall an evasion of the domestic laws by issuing an injunction against the bringing of a suit by a local resident in a foreign jurisdiction. It has often been held that equity will enjoin these "fraudulent" actions designed to escape the unfavorable aspects of the local law.[23]Thus the case of *Dublin v. Dublin*[24] the plaintiff-wife charged that her husband had voluntarily submitted himself to a foreign jurisdiction to obtain a divorce decree there in order to evade the divorce laws of New York. She claimed that his legal domicile was in New York. He alleged that his legal domicile was in Pennsylvania and that no injunction could be issued against his divorce action even though the court should find that one of his purposes in establishing his domicile in that state was to obtain a divorce on grounds not recognized in New York. The court said that this was an attempted fraud upon the laws of New York, and issued an injunction restraining

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vorced persons in the property of each other which are dependent upon marriage); Monroe County Sav. Bank v. Yeoman, 119 Misc. 226, 195 N. Y. Supp. 531 (1933) (wife who obtains a foreign divorce on grounds not recognized in New York State is not entitled to dower); N. Y. Consolidated Laws (Cahill, 1930) c. 51, Art. 6, § 196: "In case of a divorce, dissolving the marriage contract for the misconduct of the wife, she shall not be endowed."

[20]Restatement, Conflict of Laws (1938) § 248 (2), comment b; Goodrich, Conflict of Laws (2d ed. 1938) § 133; Stumberg, Conflict of Laws (1937) 285.

[21]See note 14, supra.

[22]Wabash Ry. Co. v. Peterson, 187 Iowa 1331, 175 N. W. 523 (1919); Northern Pac. Ry. Co. v. Richey & Gilbert Co., 132 Wash. 526, 232 Pac. 355 (1925).

[23]Cleveland, C. C. & St. L. Ry. v. Shelley, 96 Ind. App. 273, 170 N. E. 328 (1930); Sandage v. Studebaker Bros., 142 Ind. 148, 41 N. E. 380, 34 L. R. A. 363 (1895); Usen v. Usen, 13 A(2d) 738 (Me. 1940); Miller v. Gittings, 85 Md. 601, 37 Atl. 372 (1897); Dehon v. Foster, 4 Allen 545 (Mass. 1863); Gross v. Gross, 13 N. J. Misc. 499, 180 Atl. 204 (1935); Bigelow v. Old Dominion Co., 74 N. J. Eq. 457, 71 Atl. 153 (1908); Kempson v. Kempson, 58 N. J. Eq. 94, 43 Atl. 97 (1899); Jeffe v. Jeffe, 168 Misc. 123, 4 N. Y. Supp. (2d) 628 (1938); Dublin v. Dublin, 150 Misc. 694, 270 N. Y. Supp. 22 (1934); Johnson v. Johnson, 146 Misc. 93, 261 N. Y. Supp. 523 (1933); 9 R. C. L. 523.

[24]150 Misc. 694, 270 N. Y. Supp. 22 (1934).

further prosecution of his action. In the case of *Greenberg v. Greenberg*,[25] which was relied upon by the dissenting judges in the principal case, the husband, a New York resident, was seeking a Mexican divorce. His wife, also a New York resident, sought an injunction to restrain further prosecution of his action. The husband admitted the invalidity of any such Mexican decree, yet the court granted the injunction, saying:[26]

> "It is no answer to say that she must ultimately succeed against any attack made upon her, under the judgment, as it is invalid. The true answer is, that as a citizen of this State she is entitled to the aid of its courts to prevent the commission of a threatened wrong by her husband, also a citizen of this State, by his obtaining a decree of divorce in another jurisdiction, in evasion of the laws of this State, in violation of her rights and in consummation of a patent fraud.

In a case in which the facts were closely similar to those of the instant decision, the Maine court has very recently granted a wife an injunction forbidding the husband to prosecute a divorce action in another jurisdiction. The attempted evasion of domestic laws, and the hardship threatened to the wife were considered sufficient factors upon which to base this decision.[27] Since the pleadings in the principal case were not contested and were taken as true, the attempted evasion of the New York divorce laws by the husband is clearly present. This in itself should justify an injunction.

The decision in the principal case, although not necessarily binding in future cases since this is a question of discretion and not right,[28] is difficult to reconcile with prior decisions in New York[29] and in other

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[25]218 App. Div. 104, 218 N. Y. Supp. 87 (1926).

[26]218 App. Div. 104, 116, 218 N. Y. Supp. 87, 97 (1926).

[27]Usen v. Usen, 13 A. (2d) 738 (Me. 1940). For an application of the same principle in a different factual situation, see Miller v. Gittings, 85 Md. 601, 37 Atl. 372 (1897), where an injunction was issued prohibiting one Maryland resident from suing another in a foreign jurisdiction in order to evade the Maryland gambling laws.

[28]City of Harrisonville, Mo., v. W. S. Dickey Clay Mfg. Co., 289 U. S. 334, 53 S. Ct., 602, 77 L. ed. 1208 (1933); U. S. v. Rogles, 9 F. Supp. 857 (E. D. Mo. 1935); City of Mobile v. Ferrell, 229 Ala. 582, 158 So. 539 (1934); Point O'Woods Ass'n v. Busher, 117 Conn. 247, 167 Atl. 546 (1933).

[29]Dublin v. Dublin, 150 Misc. 694, 270 N. Y. Supp. 22 (1934) (evasion of domestic laws); Richman v. Richman, 148 Misc. 387, 266 N. Y. Supp. 513 (1933) (threatened injury to property rights); Johnson v. Johnson, 146 Misc. 93, 261 N. Y. Supp. 523 (1933), 33 Col. L. Rev. 536, (1934) 28 Ill. L. Rev. 295 (evasion of domestic laws); Greenberg v. Greenberg, 218 App. Div. 104, 218 N. Y. Supp. 87 (1926), (1927) 11 Minn. L. Rev. 467 (evasion of domestic laws and property damages); Gwathmey v. Gwathmey, 116 Misc. 85, 190 N. Y. Supp. 199 (1921), aff'd, 201 App. Div. 843, 193 N. Y. Supp. 935 (1922) (inequitable, vexatious suit).

jurisdictions;[30] and the weight of reason and social policy seem to stand against the result reached.

GEORGE F. MCINERNEY

FUTURE INTERESTS—VALIDITY OF A REMAINDER AFTER A LIFE ESTATE WITH ABSOLUTE POWER OF DISPOSAL. [Virginia]

The law recognizes the right of a testator to make a devise or bequest by which his property shall go either to one donee outright in fee simple, or to one donee for life with a remainder to another donee. But when the testator provides that one donee shall have a life estate with an absolute power to dispose of the property during his life and also directs that a remainder shall go over to another donee, the courts have difficulty in deciding how to regard such a hybrid grant.

This familiar problem was recently raised again in Virginia by the case of *Moore v. Holbrook*.[1] There the testatrix made a general devise and bequest of all her property to her husband, with the power ". . . to dispose of said property as he sees fit—If he chooses to sell it he may do so, in order he may be able to use it for his comfort. . . . [and] Should there be any thing left after his death I desire it to be given to the cemetery for the upkeep of our lot—I desire our names to be put on the monument on our lot. The name of our infant child buried there also to be cut on said monument. . . ." There was also a provision that should the husband still have at his death a silver bread tray, cut glass bowl, one half dozen side dishes, and plates which were given to the testatrix by a Mrs. Wiley, they should go to Mrs. Wiley's daughter. The testatrix's husband survived her by only two months and did not dispose of the property in his lifetime. He died intestate, inasmuch as his will disposing of all of his property in favor of his wife lapsed because her death occurred prior to his. On a bill of complaint brought by the trustees of the cemetery association against the husband's heirs at law—a brother and sister, nieces and nephews—the court held that the husband had taken the property in fee simple or absolutely, and that the gift over as provided for in the wife's will was void because repugnant to the interest given to the first taker.

If the court's conclusions as to the nature of the interests provided

[30]Jenkins v. Jenkins, 194 So. 493 (Ala. 1940); Usen v. Usen, 13 A. (2d) 738 (Me. 1940) and cases therein cited; Cherry v. Cherry, 253 Mass. 172, 148 N. E. 570 (1925); Gross v. Gross, 13 N. J. Misc. 499, 180 Atl. 204 (1935) and cases therein cited; Borda v. Borda, 44 R. I. 337, 117 Atl. 362 (1922).

[1]9 S. E. (2d) 447 (Va. 1940).

for in the will are accepted, the decision in the principal case is in accord with Virginia precedent as first set by the famous case of *May v. Joynes*.[2] In the words of Epes, J., speaking in *Southworth v. Sullivan*:[3]

> "The rule or doctrine of May v. Joynes, 20 Grat. (61 Va.) 692, as it has been developed in that case and the cases which have followed it, may be stated thus: When property, real or personal, is granted, devised, or bequeathed to a person for his life, and afterwards there is granted or given to him either in express terms or by implication, the full power to dispose of the property, this is equivalent to the grant or gift to him of a fee-simple estate, if it be real property, or an absolute estate, if it be personal property, and the gift over of so much of the property as shall not be disposed of by the first taker is void."

This rule that an absolute power of disposal should raise an express life estate to a fee simple estate or give an absolute property represents the distinct minority viewpoint in the United States.[4] The cases supporting the majority rule usually reason that full effect should be given to the testator's intention, and that from a construction of the whole instrument the remainder given negatives any intention to give a fee or absolute property. Although Virginia courts have continued to say that they are giving full effect to the testator's intention,[5] the cases

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[2]20 Grat. 692 (Va. 1857) (not reported until 1871).

[3]162 Va. 325, 332, 173 S. E. 524, 526 (1934).

[4]Representing the majority: Graham v. Sinclair, 89 Ind. App. 119, 165 N. E. 768 (1929); In re Walker's Estate, 277 Pa. 444, 121 Atl. 318 (1923). Also see cases collected, (1932) 76 A. L. R. 1154; (1925) 36 A. L. R. 1180; 2 Simes, The Law of Future Interests (1936) § 598. Virginia cases representing the minority view: Barnett v. Blain, 126 Va. 179, 101 S. E. 239 (1919); Steffey v. King, 126 Va. 120, 101 S. E. 62 (1919); Smith v. Smith's Ex'r., 122 Va. 341, 94 S. E. 777 (1918); Avant v. Cook, 118 Va. 1, 86 S. E. 903 (1915); Taylor v. Johnson, 114 Va. 329, 76 S. E. 325 (1912); Hansbrough v. Trustee of Presbyterian Church, 110 Va. 15, 65 S. E. 467 (1909); Randall v. Harrison, 109 Va. 686, 64 S. E. 992 (1909); Rolley v. Rolley, 109 Va. 449, 63 S. E. 988, 21 L. R. A. (N. S.) 64 (1909); Hunter v. Hicks, 109 Va. 615, 64 S. E. 988 (1909); Davis v. Heppert, 96 Va. 775, 32 S. E. 467 (1899); Farish v. Wayman, 91 Va. 430, 21 S. E. 810 (1895); Hall v. Palmer, 87 Va. 354, 12 S. E. 618, 11 L. R. A. 610, 24 Am. St. Rep. 653 (1891); Bowen v. Bowen, 87 Va. 438, 12 S. E. 885, 24 Am. St. Rep. 664 (1891); Cole v. Cole, 79 Va. 251 (1884); Missionary Society of M. E. Church v. Calvert's Adm'r., 32 Grat. 357 (Va. 1879); May v. Joynes, 20 Grat. 692 (Va. 1857); Brown v. George, 6 Grat. 424 (Va. 1849); Goodwyn v. Taylor, 4 Call. 305 (Va. 1795). Cf. Burwell's Ex'rs. v. Anderson, Adm'r., 3 Leigh 348 (Va. 1831); Shermer v. Shermer's Ex'rs., 1 Wash. 266 (Va. 1794).

[5]The words which are most used to describe the Virginia court's attitude are as follows: "So it is said by the court, in Jeffereys v. Poyntz, 3 Wills. 141, 'That cases on wills may guide as to general rules of construction, but, unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the court, who always look upon the intention of the testator as the polar star to direct them in the construction of wills'." Kennon v. M'Roberts & Wife,

clearly indicate that the rule applied is a "canon of property,"[6] and does not rest on considerations of intention.

After the decision of *May v. Joynes*,[7] the doctrine which had been there originated to cover a case in which an *express life estate* with an absolute power of disposal was lodged in the first taker, with a remainder over, was extended[8] to apply to the situation in which there was an *ambiguous or general devise or bequest* to the first taker with an absolute power of disposal, and a remainder over. It was held here also that the first taker had a fee simple or absolute property, and that the remainder over was void for repugnancy to the fee or absolute property given to the first taker.[9] As to its view concerning the ambiguous or

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. Wash. 96, 103 (Va. 1792). Accord: Wornom v. Hampton Normal & Agricultural Institute, 144 Va. 533, 132 S. E. 344 (1926); Hall v. Palmer, 87 Va. 354, 12 S. E. 618, 11 L. R. A. 610, 24 Am. St. Rep. 653 (1891); Cole v. Cole, 79 Va. 251 (1884); Carr v. Effinger, 78 Va. 197 (1883).

[6]Hansbrough v. Trustee of Presbyterian Church, 110 Va. 15, 63 S. E. 467 (1909); Farish v. Wayman, 91 Va. 430, 21 S. E. 810 (1895).

[7]20 Grat. 692 (Va. 1857).

[8]In Southworth v. Sullivan, 162 Va. 325, 332, 173 S. E. 524, 526 (1934), the court said that the doctrine of May v. Joynes was an extension of the rule that where there is a general or ambiguous devise with an absolute power of disposal and remainder over, the remainder over is void. However, the only case in Virginia arising prior to the decision in May v. Joynes which concerned the general or ambiguous devise type of situation was Madden v. Madden's Ex'rs., 2 Leigh 377 (Va. 1830), which held that the first taker had only a life estate and could dispose of the chattel for life only. In several later cases the doctrine of May v. Joynes has been applied to the situation where there is an ambiguous or general devise. Skinner v. Skinner's Adm'r., 158 Va. 326, 163 S. E. 90 (1932); Fleenor v. Sproles, 148 Va. 503, 139 S. E. 286 (1927); cf. Bing v. Burrus, 106 Va. 478, 56 S. E. 222 (1907). Thus, in Virginia it is possible to say that the doctrine of May v. Joynes has been "extended" to include the situation where there is a general or ambiguous devise instead of an express life estate given to the first taker.

[9]Trice v. Powell, 168 Va. 397, 191 S. E. 758 (1937); Skinner v. Skinner's Adm'r., 158 Va. 326, 163 S. E. 90 (1932); Fleenor v. Sproles, 148 Va. 503, 139 S. E. 286 (1927); Conrad v. Conrad's Ex'r., 123 Va. 711, 97 S. E. 336 (1918); Crutchfield v. Greer, 113 Va. 232, 74 S. E. 166 (1912); Hawley v. Watkins, 109 Va. 122, 63 S. E. 560 (1909); Bing v. Burrus, 106 Va. 478, 56 S. E. 222 (1907); Brown's Guardian v. Strother's Adm'r., 102 Va. 145, 47 S. E. 236 (1903); Carr v. Effinger, 78 Va. 197 (1883); cf. Madden v. Madden's Ex'r., 2 Leigh 377 (Va. 1830).

The above cases are to be distinguished from cases where there is given only a limited power of disposal. Here the Virginia court holds that the first taker has only a life estate. McCready v. Lyon, 167 Va. 103, 187 S. E. 442 (1936); Christian v. Wilson's Ex'rs., 153 Va. 614, 151 S. E. 300 (1930); Bristow v. Bristow, 138 Va. 67, 120 S. E. 859 (1924); Davis v. Kendall, 130 Va. 175, 107 S. E. 751 (1921); Hurt v. Hurt, 121 Va. 413, 93 S. E. 672 (1917); Honaker Sons v. Duff, 101 Va. 675, 44 S. E. 900 (1903); Smythe v. Smythe, 90 Va. 638, 19 S. E. 175 (1894); Johns v. Johns, 86 Va. 333, 10 S. E. 2 (1889); Dunbar's Ex'rs. v. Woodcocks' Ex'r., 10 Leigh 628 (Va. 1840). Also to be distinguished are cases in which an express fee simple is followed by a remainder, the courts holding the latter void. Whitehead v. Whitehead, 6 S. E. (2d) 624 (Va. 1940).

general devise or bequest, Virginia stands with the majority of jurisdictions in the United States.[10] However, there is considerable authority to the contrary. In Nebraska[11] the courts have held that where a will in one clause makes an apparent absolute bequest of property, but in a subsequent clause makes a further bequest of a remainder after the death of the first taker, the two clauses are to be construed together in order to ascertain the true character of the estate given to the first taker. Thus, in *Krause v. Krause*[12] it was said that if the testator intended to give the first taker a fee, he would not have thought it necessary to give that same donee a power to sell; and so, construing the whole will together, it appeared that the first taker was given only a life estate. Arkansas,[13] Massachusetts,[14] Missouri,[15] and Ohio[16] likewise have held directly or by implication that it is not necessary that an express estate for life be designated if the clear intention of the testator is to give only that interest. A New York court in *In re Nugent's Will*[17] held that the limitation over was conclusive proof of an intention not to give the first taker an estate in fee simple.

With the law thus established in Virginia that a remainder could not validly be given after a grant of a life or a general estate with full power of disposal, the legislature in 1908 enacted a statute providing that *"any estate"* might be devised or bequeathed to a grantee with an absolute power of disposition, and then an executory devise or a remainder over to another donee of such of the property as was not disposed of by the first taker, ". . . which said remainder, or executory interest, shall be valid and shall pass as directed by such grantor or testator. . . ."[18] This all-inclusive terminology apparently had the effect of abrogating both of the branches of the *May v. Joynes* rule; and the

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[10]Sims v. Ratcliff, 62 Ind. App. 184, 110 N. E. 122 (1915); Kleaver v. Jacobs, 104 N. J. Eq. 406, 146 Atl. 55 (1929). Also see cases collected: (1931) 75 A. L. R. 72.

[11]Merril v. Pardun, 125 Neb. 701, 251 N. W. 834 (1933).

[12]113 Neb. 22, 201 N. W. 670 (1924).

[13]Piles v. Cline, 197 Ark. 857, 125 S. W. (2d) 129 (1939); United States v. Moore, 197 Ark. 664, 124 S. W. (2d) 807 (1939); City of Little Rock v. Lenon, 186 Ark. 460, 54 S. W. (2d) 287 (1932).

[14]Cotton v. Town of Danville, 17 N. E. (2d) 209 (Mass. 1938); Lord v. Smith, 293 Mass. 555, 200 N. E. 547 (1936); Bramley v. White, 281 Mass .343, 183 N. E. 761 (1933).

[15]Burnet v. Burnet, 244 Mo. 491, 148 S. W. 872 (1912). Compare Walton v. Drumtra, 152 Mo. 489, 54 S. W. 233 (1899), with Cornwell v. Wulf, 148 Mo. 542, 50 S. W. 439 (1898).

[16]Pace v. Pace, 41 Ohio App. 130, 180 N. E. 81 (1931).

[17]142 N. Y. Misc. 594, 255 N. Y. Supp. 236 (1932).

[18]Chapter 146, Acts 1908, p. 187, amending Code Va. (1887) § 2418.

1908 statute was so construed in *Southworth v. Sullivan*,[19] where the court held valid a remainder given after an express estate in fee simple or absolute property with an absolute power of disposal. The very prospect of such a broad decision caused the legislature in 1919 to replace the 1908 Act with the enactment which is in effect at the present time. The 1919 statute provides:

> "If any interest in or claim to real estate or personal property be disposed of by deed or will for life, with a limitation in remainder over, and in the same instrument there be conferred expressly or by implication a power upon the life tenant in his life time or by will to dispose absolutely of said property, the limitation in remainder over, shall not fail, or be defeated, except to the extent that the life tenant shall have lawfully exercised such a power of disposal. . . ."[20]

Although this Act reaffirms the 1908 statute in repudiating the part of the *May v. Joynes* rule concerning a remainder after a *life estate* and full power of disposal, it apparently is intended to authorize a holding that a remainder given after an *ambiguous or general grant* with power of disposal is void. In the principal case the estate was first devised and bequeathed in general terms. This led the court to find that the testatrix's paramount intention was to give her husband the property in fee simple or absolutely, and that any subsequent intent to limit the fee must yield to this main purpose. Thus the court removed the case from the scope of the 1919 statute and held the remainder void under the extended *May v. Joynes* rule.

It is suggested that the Virginia court could reasonably have reached a better result by holding the remainder over valid. By saying that the paramount intent was to be gathered from the general devise first given, the court ignored the rest of the will; and it was the latter provisions which indicated that the testatrix actually intended to give the husband merely a life interest with full power of disposal in his lifetime. The very fact of the addition of a direction as to how the property should be used after his death indicated that his interest was not to be a fee simple or absolute estate, but rather was to terminate at his death.[21] The better interpretative procedure would have been for the court to have first considered the entire will in order to determine

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[19]162 Va. 325, 173 S. E. 524 (1934). This case, though not decided until after the 1908 statute had been greatly restricted by the 1919 Act, was nevertheless decided on the basis of the 1908 statute because the will there involved was subject to the operation of that law.

[20]Va. Code Ann. (Michie, 1936) § 5147.

[21]See cases cited notes 11 to 17 inclusive, supra.

whether a fee simple or a life estate was given to the first taker. Having decided that by implication a life estate was intended, the court could then have concluded that the case came within the 1919 statute, making the remainder over valid. In effect, the decision in the principal case limits the applicability of the statute to instances in which an *express* estate for life is given to the first taker. No such interpretation is required, for so long as the interest is given "for life" the words of the act are satisfied.[22] Under the construction suggested here, the apparent intention of the testatrix to have her property ultimately go to the upkeep of the family cemetery lot would have been fulfilled, and a passage of property by intestate succession to remote collateral heirs of the owner would have been prevented.[23]

As a practical matter, people are certain to continue to write wills similar to the one involved in the instant case, because the custom of making wills without consulting an attorney is too well established to be broken down by judicial decision. No compelling reason can be assigned for defeating the obvious intentions of testators in such cases. Yet as the situation now stands, the intention to make a gift over after a prior estate and absolute power of disposal will be defeated by the Virginia court's application of a "canon of property,"[24] in every case except where an *express* life estate has been given to the first taker.

LYNELL G. SKARDA

PLEADING AND PRACTICE—OBJECTION AFTER VERDICT TO ADMISSIBILITY OF EVIDENCE. [Federal]

In the interest of efficient and orderly trial procedure, courts have long adhered to the common law rule that objections of counsel to evidence offered by the opposing party must be raised at the time the evidence is first introduced at the trial of the case.[1] Upon proper objection

[22]Va. Code Ann. (Michie, 1936) § 5147. See dissent of Holt, J., in the principal case, 9 S. E. (2d) 447, 451-2 (Va. 1940).

[23]The court in the principal case found that the clause creating the remainder was ambiguous because the Justices could not determine whether the testatrix intended to give all her estate to the cemetery or only enough to take care of the upkeep of the lot, and if she meant the latter, then any surplus would become intestate property. The court, of course, wished to avoid intestacy, but under the actual holding all of the property passed by intestacy because the first taker's will had lapsed.

[24]See note 6, supra.

[1]Fuller v. United States, 288 Fed. 442, 445 (App. D. C. 1923): "The general and obviously salutary rule is that objection to the admissibility of evidence should be

at this time, the court will either exclude or admit the evidence; and if it is admitted, the objector may take exception to the ruling, thereby preserving grounds for a new trial if the court's action should prove erroneous. If, however, there is a failure to object at the proper time, the party is commonly said to have waived his right to protest to the evidence.[2] These general principles apply to both written and oral testimony[3] and appear to operate similarly in civil and criminal cases.

Such rules are established to assure an orderly process of deciding what evidence is to be considered in determining the issues of the case, and to prevent the confusion which would result from indiscriminately timed objections to proffered evidence. In extraordinary circumstances, however, when it appears that the interests of justice will be hindered rather than served by an application of the general rule, courts will make an exception and allow a belated objection.[4] An appropriate occasion for such action would seem to arise when the improper evidence is covertly slipped to the jury by opposing counsel with the deliberate intention of gaining an unfair advantage. If for no other reason, the objection should be allowed here as a means of discouraging such unfair

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made at the time it is offered. . . ."; 1 Wigmore, Evidence (3rd ed. 1940) § 18 (A) ". . . *it* [objection to evidence] *must be made as soon as the applicability of it is known* (or could reasonably have been known) *to the opponent,* unless some special reason makes a postponement desirable for him and not unfair to the proponent of the evidence." See also 1 Wigmore § 18 (D).

[2]Seerie v. Brewer, 40 Colo. 299, 90 Pac. 508, 122 Am. St. Rep. 1065 (1907); Wood v. City of Omaha, 87 Neb. 213, 127 N. W. 174 (1910); McInroy v. Dyer, 47 Pa. 118 (1864). See 64 C. J. 168.

[3]Fuller v. United States, 288 Fed. 442 (App. D. C. 1923); Helton v. State, 94 Tex. Crim. Rep. 359, 250 S. W. 1030 (1923) (where testimony by witnesses is admitted without objection, a later objection to similar testimony is not allowable). This rule has also been stated in another way. It has been said that objection to the introduction of parol evidence, after the question has been put and the answer given, comes too late and is not to be allowed. Grissom v. State 21 Ala. App. 568, 110 So. 57 (1926).

[4]A motion after the verdict was heard in the following cases: Holmgren v. United States, 217 U. S. 509, 30 S. Ct. 588, 54 L. ed. 861, 19 Ann. Cas. 778 (1910); Kanter v. Commonwealth, 171 Va. 524, 199 S. E. 477 (1938); State v. Stephenson, 10 S. E. (2d) 819 (N. C. 1940). In the latter case the jury, without the consent of the parties, took into the jury room a copy of the complaint in the civil case which had been brought on the same facts and also a synopsis of the arguments of counsel for the state. This was held to be error, and since the papers were objectionable the verdict of the lower court was reversed. And see other cases discussed in this comment, infra.

It should be noted that in exceptional circumstances courts will, on their own motion, notice errors in the trial procedure not excepted to below. In such instances, no motion of counsel is necessary at any time. See United States v. Atkinson, 297 U. S. 157, 160, 56 S. Ct. 391, 392, 80 L. ed. 555 (1936).

tactics as were employed by the proponent of the evidence, and this regardless of the nature of the evidence itself.[5]

A more perplexing problem is presented when improper evidence reaches the jury by innocent mistake and without the knowledge or fault of either party or counsel. When the true facts are discovered after a verdict against the party who would have opposed the introduction of such evidence, can an objection to the evidence then be made? This problem seems properly to resolve itself into two issues, which should be considered and answered separately if the court is to reach a sound decision. First, should the court even allow counsel to present an objection, inasmuch as the general rule declares that he has waived any right to object by not raising the point when the evidence was presented? Second, having decided that counsel may raise his objection, what must counsel show in order to merit the setting aside of the adverse verdict and the granting of a new trial? Need he only show that improper evidence has reached the jury and is capable of prejudicing his client, or must he show further that this evidence actually prejudiced him?

The exact situation calling for a consideration of these issues was presented in the recent federal case of *United States v. Dressler*.[6] There the accused was tried for kidnapping under the "Lindbergh Act."[7] At the trial, the Government offered in evidence cards bearing the fingerprints of the accused. Counsel for the defendant objected to the fingerprint evidence as such, but it was allowed to go to the jury over his protest. Neither the prosecution nor the defense knew that the reverse sides of the cards bore the defendant's past criminal record. This record showed that the defendant had been convicted of robbery and that a charge of rape had been dropped for want of prosecution. After the jury had returned a verdict of guilty with a recommendation that the death penalty be imposed, but before sentence had been passed, counsel for the accused discovered the material on the backs of the cards and moved to have the verdict set aside and a new trial granted. The trial court denied the motion, but the Circuit Court of Appeals reversed the judgment and ordered a new trial because it felt that the de-

[5]No cases seem to have been decided directly upon this point. It would appear, however, that this rule would be applied should such a case arise, and there is some dicta to this effect. See Leonard v. Schall, 125 Minn. 291, 146 N. W. 1104, 1105 Ann. Cas. 1915C 922, 923-4 (1914); Missouri Pac. Ry. Co. v. Bowman, 68 Kan. 489, 75 Pac. 482, 483 (1904).

[6]112 F. (2d) 972 (C. C. A. 7th, 1940).

[7]47 Stat. 326 (1932), amended, 48 Stat. 781 (1934), 18 U. S. C. A. 408a (Supp. 1940).

fendant had been prejudiced when the information on the backs of the cards was allowed to go to the jury. Though the majority of the court agreed that it was counsel's duty to examine the exhibits for himself to find out if they were what they purported to be, it was decided that here the counsel for the accused was justified in relying upon the Government counsel, and accepting the evidence for what it purported to be, namely, fingerprint evidence alone.[8]

Reserving for the moment the question of prejudice, it should be recognized that in some cases, courts have apparently taken the opposite view on the first question and held that under these circumstances the failure to object during the presentation of the evidence precludes the counsel from even so much as making an objection after verdict. This view was taken by the Court of Appeals for the District of Columbia,[9] and by the Circuit Courts of Appeals for the First[10] and Ninth[11] Circuits, in cases closely similar to the principal case. Thus, in *Rocchia v. United States,*[12] fingerprint cards were introduced as evidence. Unknown to the parties, the backs of these cards carried the criminal history of the accused. The cards were allowed to go to the jury with the consent of the accused. The court held that the defendant had waived his right to object to the part of the cards bearing his criminal record, by expressly consenting to the submission of the cards to the jury.

Inasmuch as counsel is not aware of the existence of the improper evidence when it goes to the jury, certainly he cannot be expected to object to it at that time.[13] It would seem that what the courts mean in

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[8]United States v. Dressler, 112 F. (2d) 972, 975 (C. C. A. 7th, 1940).

That fingerprint evidence is admissible for purposes of identification, see Moon v. State, 22 Ariz. 418, 198 Pac. 288 (1921), 16 A. L. R. 362 (1922); People v. Jennings, 252 Ill. 534, 96 N. E. 1077 (1911), 43 L. R. A. (N. S.) 1206 (1913); People v. Roach, 215 N. Y. 592, 109 N. E. 618, Ann. Cas. 1917A 410 (1915); McGarry v. State, 82 Tex. Crim. Rep. 597, 200 S. W. 527 (1918). Cases collected, (1922) 16 A. L. R. 370. See also, 2 Wigmore, Evidence (3rd ed. 1940) § 414 for a discussion of the use of this method of identification.

[9]Fuller v. United States, 288 Fed. 442 (App. D. C. 1923).

[10]Quercia v. United States, 70 F. (2d) 997 (C. C. A. 1st, 1934). The appellant, after verdict, filed a motion for a new trial on the grounds that the indictment handed to the jury bore on its back the notation of a prior conviction. No objection had been made by counsel for Quercia at the proper time. The motion was denied. The appellate court upheld the trial judge, saying that the granting of a new trial rests on the discretion of the trial judge, and that in this case there had been no abuse of that discretion.

[11]Rochia v. United States, 78 F. (2d) 966 (C. C. A. 9th, 1935).

[12]78 F. (2d) 966 (C. C. A. 9th, 1935).

[13]It may be argued that in the instant case counsel for the defendant did object to the evidence as it was presented. He did in fact object to the fingerprint evidence,

these cases, is that counsel is at fault in not examining the evidence more carefully and thus finding the improper material in time to make a prompt objection to its admission. In the instant case, the court, by implication, met the question of whether the general rule should apply to preclude any objection, by declaring that counsel was justified in relying on the prosecution's statements as to the nature of the evidence contained on the cards.

As to what counsel must show if the objection, once raised, is to be allowed, it is sometimes stated that a mere showing that improper evidence has been admitted and is capable of prejudicing the defendant is not sufficient to warrant the reversal of the judgment and the granting of a new trial.[14] Rather, the aggrieved party must show that the improperly admitted evidence was actually prejudicial, or, to say the same thing, that it was "material." But even in some cases announcing this rule the indications of a possible prejudice are so slight that new trials seem to be granted merely because of the impropriety of the evidence.[15]

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but only as such, and it may be said that his objection was not made with respect to the criminal record of the accused. It was merely a routine objection made in complete ignorance of the so-called prejudicial matter.

[14]Marron v. United States, 18 F. (2d) 218 (C. C. A. 9th, 1926), aff'd., 275 U. S. 192, 48 S. Ct. 74, 72 L. ed. 231 (1927) (in affirming, the Supreme Court did not consider this specific point); Holt v. United States, 218 U. S. 245, 251, 31 S. Ct. 2, 6, 54 L. ed. 1021, 20 Ann. Cas. 1138, 1140 (1910) ("If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day." In this case the jury had read newspaper stories about the case they were trying, but the statement is equally appropriate in the situation involved in United States v. Dressler. In fact, this statement was relied upon by the dissenting judge.); Leonard v. Schall, 125 Minn. 291, 146 N. W. 1104 (1914).

[15]This view was adopted by the majority of the court in the instant case. In support thereof the court cited Little v. United States, 73 F. (2d) 861, 96 A. L. R. 889 (C. C. A. 10th, 1934) and Vicksburgh & Meridian Railroad Co. v. O'Brien, 119 U. S. 99, 103, 7 S. Ct. 118, 120, 30 L. ed. 299 (1886) where it was said: "While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against who it was committed, it is well settled that reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party." See also, 16 R. C. L. 302.

A recent Virginia case, Kanter v. Commonwealth, 171 Va. 524, 199 S. E. 477 (1938), was decided on this basis. The accused, a junk dealer, was prosecuted under a statute providing that if any person bought, received or aided another in concealing stolen goods, knowing them to have been stolen, he should be deemed guilty of the larceny of the goods. Va. Code Ann. (Michie, 1936) § 4448. The police of the city of Norfolk, in an effort to enforce this statute, required all junk dealers to make daily reports of purchases. To give added effect and as a measure of intimidation, the police attached to these reports copies of a repealed statute requiring the jury to find a defendant guilty if he were found in possession of stolen goods which were not entered on his

The further query arises as to what the words "prejudicial" and "material" mean in this connection. Do they imply that only a possibility of prejudice need exist, or must counsel show that actual prejudice did in fact result?[16] Since it may often be difficult to produce proof of actual prejudice, it is probable that the showing of a mere possibility of prejudice is enough. Only on this theory can most of the decisions be explained. But it would seem that at some point the admitted possibility of prejudice may become so remote and so unlikely that it is a senseless obstruction of justice, rather than insurance of it, to set aside a verdict on this basis. This view finds sanction in the decision of the Supreme Court of the United States in *Holmgren v. United States*.[17] There an indictment which was sent to the jury carried on its back the record of the conviction at the former trial of the case. The court was of the opinion that since the notation itself showed that a new trial had been granted, it was as likely to influence the jury favorably toward the defendant as was the record of his conviction to work to his prejudice. The dissent in the principal case seems to be based on such a theory. The view was taken that since the record showed that the rape charge had been dropped and since the defendant had himself confessed the truth of the robbery charge at the kidnapping trial, he had not and could not have been prejudiced by the improper evidence. Therefore, no new trial should be granted.

It must be admitted that the jury could conceivably have been influenced against the defendant by the mere charge of crime and by the added emphasizing of his confession. But the evidence of his guilt of the

books. At the trial the commonwealth's attorney offered such a report in evidence. This was read to the jury over objection of counsel for the defense, the jury being told to disregard the language of the repealed statute. The court found that there was reversible error. In justifying its decision, it said that the defendant had been prejudiced by the language of a statute no longer the law, it being only necessary to show that prejudicial evidence had reached the jury.

[16]In the case of In re Collins, 18 N. J. Misc. 492, 15 A. (2d) 98, 99 (1940) the rule was stated thus: "Where an inadmissible writing . . . improperly reaches the jury during their deliberations, the primary inquiry is whether such extraneous object was of a character *likely to prejudice,* influence or mislead the jurors in their deliberations." (italics supplied)

In Page v. Wheeler, 5 N. H. 91 (1829), when papers were improperly allowed to reach the jury without fault of either party, no new trial was granted because the papers were found to be immaterial, and no prejudice had resulted. Accord: Leonard v. Schall, 125 Minn. 291, 146 N. W. 1104, Ann. Cas. 1915C 922 (1914); Kittredge v. Elliot, 16 N. H. 77 (1844); Falzarono v. Delaware, L. & W. R. R., 119 N. J. L. 76, 194 Atl. 75 (1937). Cases collected, Ann. Cas. 1915C 924. See also, 16 R. C. L. 302; 2 Thompson, Trials (2d ed. 1918) 1862.

[17]217 U. S. 509, 30 S. Ct. 588, 54 L. ed. 861, 19 Ann. Cas. 778 (1910).

kidnapping, for which he was being tried in the instant case, appeared to be very convincing, and the court must have believed that the conviction was justified. However, the majority of the court was too impressed by the severity of the punishment recommended by the jury to allow the verdict to stand. In the language of the court, "If the only question before the jury had been that of guilt or innocence, we believe that the defendant's confession and his own testimony on the witness stand were sufficient to render harmless the consideration of the information furnished by the 'criminal history.' . . . But different considerations are involved in appraising the effect of the 'criminal history' upon the minds of the jurors while they were engaged in deciding whether the death penalty should be recommended."[18] There is doubtless much merit in this view.

But the reasoning of the dissent seems definitely preferable. The indications that the verdict was proper were overwhelming, and the chance of the improper evidence having prejudiced the defendant was slight. In such a situation the error committed in admitting the evidence should be disregarded.

EDMUND SCHAEFER, III

PROCEDURE—EFFECT OF JUDGMENT RENDERED WHEN DEFENDANT WAS ENTICED INTO THE JURISDICTION BY FRAUD. [Iowa]

By a general common law rule, when a person is actually present within the borders of a particular state, he may upon proper service of process be subjected to the jurisdiction of the courts of that state, even though he be a nonresident and only temporarily within its boundaries. Thus, presence within the state is the simplest basis for the exercise of personal jurisdiction.[1] However, where a person is fraudulently

[18] 112 F. (2d) 972, 979-980 (C. C. A. 7th, 1940).

[1] For persons not actually within the state, there are other bases for personal jurisdiction. Restatement, Conflict of Laws (1934) § 77:

"(1) The exercise of jurisdiction by a state through its courts over an individual may be based upon any of the following cirmustances:

"(a) the individual is personally present within the state,

"(b) he has his domicil within the state,

"(c) he is a citizen or subject owing allegiance to the nation,

"(d) he has consented to the exercise of jurisdiction,

"(e) he has by acts done by him within the state subjected himself to its jurisdiction.

"(2) In the absence of all these bases of jurisdiction, a state through its courts cannot exercise jurisdiction over individuals." See also I Beale, Conflict of Laws (1935) §§ 77.1-86.3; Stumberg, Principles of Conflict of Laws (1937) 69; Beale, The Jurisdiction of Courts Over Foreigners (1913) 26 Harv. L. Rev. 283.

induced to enter a state and is then personally served with process, the courts have made an exception by refusing to exercise jurisdiction.[2]

This exception was recognized recently by *Miller v. Acme Feed, Inc.*[3] There the defendant, an Illinois company which manufactured and sold a foodstuff for livestock, had contracts with the plaintiff whereby the latter would act as salesman in a particular district in Iowa and would also handle the company's product as dealer or wholesaler. This necessitated the maintenance of two accounts, one a salesman's account on which were credited commissions for all goods sold in plaintiff's territory, and the other a merchant's account upon which items received by plaintiff were charged directly to him. When a controversy arose concerning those accounts, plaintiff was invited into Illinois allegedly for the purpose of adjusting them. Upon this proposal plaintiff went to defendant's place of business in Illinois and spent part of a day going over the company books. This examination failed to bring the parties to any agreement, defendant claiming that plaintiff was indebted to it in the amount of several hundred dollars. Thereupon notice of suit was served upon plaintiff before a justice of peace and later a judgment was rendered by the justice against plaintiff. Plaintiff made no appearance at the trial, but returned to Iowa and subsequently brought this action to recover on a balance of account for commissions which he asserted were due him from defendant. Defendant by way of answer set up the judgment rendered by the justice in Illinois, denied any indebtedness to plaintiff, and by counterclaim demanded judgment against the plaintiff in the amount of the Illinois recovery, contending that the prior adjudication was entitled to full faith and credit.[4] The court found that the jurisdiction in Illinois was obtained by fraud, pronounced the judgment of that state void, and awarded a recovery to the plaintiff as asked. It considered the full faith and credit requirement inapplicable, and further held that no duty devolved upon the plaintiff to appear in Illinois to defend.

The result which the court has reached in refusing to recognize the foreign judgment is commendable. There is little doubt that a defend-

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[2]Wyman v. Newhouse, 93 F. (2d) 313 (C. C. A. 2d, 1937), 115 A. L. R. 460 (1938); Dunlap & Co. v. Cody, 31 Iowa 260, 7 Am. Rep. 129 (1871).

Courts have similarly refused to exercise jurisdiction over a person brought into the state by force. Ex parte Edwards, 99 Cal. App. 541, 278 Pac. 910 (1929); Ziporkes v. Chmelniker, 47 Hun. 639, 15 N. Y. St. Rep. 215 (N. Y. S. Ct., 1st Dept., 188).

[3]293 N. W. 637 (Iowa 1940).

[4]U. S. Const. Art. IV, § 1, requires that "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

ant enticed into another state by the fraud of the plaintiff should not be amenable to that state's jurisdiction. But the language of the court does not show clearly by just what line of reasoning it arrived at its conclusions. In the first place it was asserted that any judgment procured through a fraudulent obtainment of jurisdiction would be void. This position, although well supported by precedent,[5] is open to criticism. Moreover, the court seems to have overlooked an important phase of the case in failing to give attention to the fact that permission to make a collateral attack on a judgment in the state where sued upon depends wholly on the law of the state where the judgment was rendered. If collateral attack is allowable in the state which has rendered the judgment, only then should the judgment be impeached in such manner in the state where sued upon.[6] And lastly, there is some doubt as to the court's proposition that no duty falls upon a defendant to defend himself in the neighboring jurisdiction where he was fraudulently served with process. Numerous cases and other authorities have so stated,[7] but the advisability of such conduct is open to question on practical grounds.

In stating that the Illinois jurisdiction was fraudulently obtained and that the judgment rendered in that state was void, the court relied strongly on another Iowa decision, *Dunlap & Co. v. Cody*.[8] In that case under similar facts it was held that such fraud in obtaining jurisdiction over the defendant would vitiate the judgment. Analogy was made to

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[5]Wyman v. Newhouse, 93 F. (2d) 313 (C. C. A. 2d, 1937), 115 A. L. R. 460 (1938); Toof, McGowen & Co. v. Foley, 87 Iowa 8, 54 N. W. 59 (1893); Dunlap & Co. v. Cody, 31 Iowa 260, 7 Am. Rep. 129 (1871); Wood v. Wood, 78 Ky. 624 (1880). See Crandall v. Trowbridge, 170 Iowa 155, 150 N. W. 669, 670 (1915).

Other courts have not gone so far as to declare the judgment void, but have merely refused to enforce it. Abercrombie v. Abercrombie, 64 Kan. 29, 67 Pac. 539 (1902). See Commercial Mutual Accident Co. v. Davis, 213 U. S. 245, 256, 29 S. Ct. 445, 448, 53 L. ed. 782 (1909); Union Sugar Refinery v. Mathiesson, 2 Cliff. 304, 24 Fed. Cas. 680, 682, No. 14397 (1864).

Where suit occurred in the state in which the fraud took place, the courts have declined to exercise jurisdiction. Cavanagh v. Manhattan Transit Co., 133 Fed. 818 (C. C. D. N. J. 1905); Heston v. Heston, 56 N. J. L. 235, 28 Atl. 8 (1893); Williams v. Reed, 29 N. J. L. 385 (1862).

[6]Rogers v. Gwinn, 21 Iowa 58 (1866); Levin v. Gladstein, 142 N. C. 482, 55 S. E. 371 (1906), 32 L. R. A. (N. S.) 905 (1911); Restatement, Conflict of Laws (1934) § 440, comment b; 2 Beale, Conflict of Laws (1935) § 440.1; Goodrich, Conflict of Laws (1938) § 206; Stumberg, Principles of Conflict of Laws (1937) 111. See also Woodward, Collateral Attack upon Judgments on the Ground of Fraud (1916) 65 U. Pa. L. Rev. 103; Note (1929) 78 U. Pa. L. Rev. 239.

[7]Wyman v. Newhouse, 93 F. (2d) 313 (C. C. A. 2d, 1937), 115 A. L. R. 460 (1938); Dunlap & Co. v. Cody, 31 Iowa 260, 7 Am. Rep. 129 (1871).

[8]31 Iowa 260, 7 Am. Rep. 129 (1871), hereinafter referred to as the Cody case.

situations in which there was no service of process[9] and in which there was unauthorized attorney appearance.[10] In those instances there was no basis whatsoever for personal jurisdiction. But in case of fraud, the person served is actually within the borders of the state, and courts of that state do have the power to exercise jurisdiction over him.[11] It may be said that except for the fraud he would not have been there; and it might be well and proper for a court to refuse jurisdiction. Still, the presence of such a person, although involuntary, would upon a physical power[12] theory confer jurisdiction. It has been suggested that there is no defect in the court's legal authority to hear and determine the case, but that "the fraud of the judgment plaintiff is the basis of an equitable plea in bar of the judgment. . . ."[13] This would seem to be the better approach; and that such is actually the basis for the refusal to take jurisdiction is indicated by the fact that where the fraud is that of a third person, jurisdiction is usually exercised.[14] Although under either expression of the principle a similar outcome in all probability would be attained, the court in declaring that no jurisdiction existed and that

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[9]Pollard v. Baldwin, 22 Iowa 328 (1867). A judgment rendered against a defendant over whom the court has no jurisdiction is clearly void on any ground. Robertson v. Railroad Labor Board, 268 U. S. 619, 45 S. Ct. 621, 69 L. ed. 1119 (1925); Noxon Chemical Products Co. v. Leckie, 39 F. (2d) 318 (C. C. A. 3rd, 1930); Peeples v. Mullins, 176 Ga. 743, 168 S. E. 785 (1933); McSherry v. McSherry, 113 Md. 395, 77 Atl. 653 (1910); Hildreth v. Thibodeau, 186 Mass. 83, 71 N. E. 111 (1904); Gilbert v. Burnstine, 55 N. Y. 348, 174 N. E. 706 (1941).

[10]Harshey v. Blackmarr, 20 Iowa 161, 89 Am. Dec. 520 (1866). A judgment rendered in such fashion is as invalid as where there was no service of process upon the defendant. Hanzes v. Flavio, 234 Mass. 320, 125 N. E. 612 (1920); Lipps v. Panko, 93 Neb. 469, 140 N. W. 761 (1913); Warlick v. Reynolds, 151 N. C. 606, 66 S. E. 657 (1910); Taylor v. Oulie, 55 N. D. 253, 212 N. W. 931 (1927).

[11]1 Beale, Conflict of Laws (1935) § 78.4; Stumberg, Principles of Conflict of Laws (1937) 71; Restatement, Conflict of Laws (1934) § 78, comment d: "At common law a state does not in civil cases exercise jurisdiction over a non-resident brought into the state by the fraud of the plaintiff . . . unless he remains in the state after having a reasonable opportunity to leave the state, or unless he otherwise waives his privilege not to be sued. A state has jurisdiction over such an individual but by the common law rule it does not exercise such jurisdiction. If, pursuant to a statute or otherwise, a state does exercise through its courts jurisdiction over such an individual, the action will be recognized as valid by the courts of other states. . . ."

[12]As to personal jurisdiction founded on physical power, see McDonald v. Maybee, 243 U. S. 90, 37 S. Ct. 343, 61 L. ed. 308, L. R. A. 1917F 458 (1917); Goodrich, Conflict of Laws (1938) § 70, 156; Note (1930) 39 Yale L. J. 889, 893.

[13]Beale, The Jurisdiction of Courts Over Foreigners (1913) 26 Harv. L. Rev. 283, 285.

[14]Blandin v. Ostrander, 239 Fed. 700 (C. C. A. 2d, 1917) (jurisdiction was not exercised because of collusion between plaintiff and third party); Ex parte Taylor, 29 R. I. 129, 69 Atl. 553 (1908).

the judgment was void seems to have used inaccurate language in stating the basis for its conclusion.

The second question concerning the reasoning of the principal case is also demonstrated in the *Cody* case. The plaintiff, suing on a judgment recovered in another state where jurisdiction over the defendant was obtained through false pretenses, resisted the defendant's bill in equity to set aside the judgment by maintaining that such attack should be made in the state rendering the judgment. Though there is some support for this position,[15] the court felt that if the objection to jurisdiction would be sustained in that latter state, then the same objection to jurisdiction should be entertained in the state where the judgment was sued upon. It stated its view in this manner:

> "If such a bill could be sustained in the courts of Illinois, and yet the facts which would afford affirmative relief there do not constitute a defense to the judgment here, it follows that a judgment of a court in Illinois is entitled to *greater* faith and credit in Iowa than would be conceded to it in the court of the State where it was rendered."[16]

The Illinois law was correctly applicable in determining whether or not a collateral attack was proper. Yet nothing in the *Cody* case shows that Illinois law was applied. There was merely an assumption that such relief would be granted in that state. The court in the principal case similarly gave no consideration at all to the matter. The full faith and credit clause was held not to apply, apparently on the basis that the court itself declared the foreign adjudication void by application of Iowa law. However, before declaring it void, the court should have made a reference to the law of Illinois. Then, if collateral attack were permissible in that state on ground of improper jurisdiction, the court should rightly have declined to enforce the judgment.[17]

It was lastly maintained that "there was no duty devolving upon plaintiff either to appear or defend in Illinois, if jurisdiction was in

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[15]Peel v. January, 35 Ark. 331 (1889); Luckenbach v. Anderson, 47 Pa. St. 123 (1864).

[16]Dunlap & Co. v. Cody, 31 Iowa 260, 267, 7 Am. Rep. 129, 135 (1871).

[17]The Cody case is often cited for this proposition of law, but it does not appear that any reference to Illinois law was actually made.

In Wyman v. Newhouse, 93 F. (2d) 313 (C. C. A. 2d, 1937), 115 A. L. R. 460 (1938), the federal court sitting in New York found the service of process upon defendant fraudulent and thought it would have been vacated in Florida, where the judgment was rendered. But it said: "We are referred neither to any statutory provision of Florida, governing the vacation of service of process when affected by fraud, nor to any controlling Florida decision. We are, therefore, free to apply the law of the forum where the service would have been set aside as fraudulent." 93 F. (2d) 313, 314 (C. C. A. 2d, 1937), 115 A. L. R. 460, 463 (1938).

fact fraudulently obtained."[18] If this judgment was void, as so declared by this court, then clearly there would be no necessity to set up the facts showing fraud in the jurisdiction where the action was commenced. The *Cody* case apparently decided this point on public policy. The court there felt that traveling a great distance to make a defense might easily entail more expense than allowing a judgment to be taken and permitting the fraud to triumph. As a practical matter, however, this reasoning does not seem compelling. In view of the fact that a state does have jurisdiction, but merely refuses to exercise it, it would be advisable for a defendant to appear and question the jurisdiction in the court of first instance.[19] This is certainly to be urged where the plaintiff's fraud is not obvious, or where the defendant has remained in the jurisdiction for more than a reasonable time.[20]

FRANK C. BEDINGER, JR.

RIGHT OF PRIVACY—PROTECTION AGAINST THE PUBLICATION OF NEWSWORTHY INFORMATION. [Federal]

The Federal Circuit Court of Appeals in *Sidis v. F-R Publishing Co.*[1] has recently held that where a national magazine in a feature article reviewed the life of a formerly well known child prodigy without his consent, delved into the intimate details of his present life exposing attempts to live in seclusion, and revealed personal idiosyncrasies, no action would lie against the defendant publishing company for violation of a right of privacy.

The idea of a right of privacy as being a legally protected interest is a comparatively new one. It is predicated upon the reasonable desire of normal people to have a certain domain in their personal lives free from the prying eyes and ears of every other person.[2] As frequently stated, it is "the right to be let alone; the right of a person to be free

[18]Miller v. Acme Feed, Inc., 293 N. W. 637, 639 (Iowa 1940).

[19]This principle would not apply in those few jurisdictions in which any appearance is considered a general appearance.

[20]When a court decides that it does have jurisdiction, then such judgment must be given full faith and credit by the courts of other states. Sipe v. Copwell, 59 Fed. 970 (C. C. A. 6th, 1894); Tootle v. McClellan, 7 Ind. Terr. 64, 103 S. W. 766 (1907), 12 L. R. A. (N. S.) 941 (1908); Albright v. Boyd, 85 Ohio St. 34, 96 N. E. 711 (1911). Similar recognition must be given in other states when a court determines that there was no fraud. Jaster v. Curry, 198 U. S. 144, 25 S. Ct. 614, 49 L. ed. 988 (1905).

[1]113 F. (2d) 806 (C. C. A. 2d, 1940), appealed from the District Court, 34 F. Supp. 19 (S. D. N. Y. 1938). Cert. denied, Dec. 16, 1940, 9 U. S. L. Week 158.

[2]Harper, Torts (1933) § 277.

from unwarranted publicity."[3] One cannot afford to be more specific in the statement of the interest without resort to individual cases, but it is generally true that the qualifications on the right as set out in the famous article by Louis D. Brandeis (later, Mr. Justice Brandeis) and Samuel D. Warren[4] continue to exist in the modern conception of the extent of the interest. These are:[5]

1. The right of privacy does not prohibit any publication of matter which is of public or general interest.
2. It does not prohibit the communication of matter which, although private, would be privileged in the same circumstances by the law of libel and slander.
3. There can be no relief for the invasion of privacy by oral publication in the absence of special damage.[6]
4. The right of privacy ceases upon the publication of the facts by the individual or with his consent.
5. The truth of the matter published or absence of malice does not afford a defense in an action for violation of the right of privacy.[7]

The Warren-Brandeis article precipitated the vague thought existent on the subject in 1890,[8] and a number of jurisdictions since that

[3]Brents v. Morgan, 221 Ky. 765, 299 S. W. 967, 970 (1927); 21 R. C. L. 1196; 54 C. J. 816; Cooley, Torts (4th ed. 1932) § 135; Kacedan, The Right of Privacy (1932) 12 B. U. L. Rev. 353, 355-357.

[4]Warren and Brandeis, The Right to Privacy (1890) 4 Harv. L. Rev. 193.

[5]Warren and Brandeis, The Right to Privacy (1890) 4 Harv. L. Rev. 193, 214 et seq.

[6]That this qualification may be outmoded with the advent of radio, see Mau v. Rio Grande Oil, Inc., 28 F. Supp. 845 (N. D. Cal. 1939); Note (1940) 11 Air L. Rev. 83, 90; Note (1940) 12 Rocky Mt. L. Rev. 127, 131.

[7]The tort of violation of privacy as here stated differs from defamation in that it is an injury to one's own peace of mind whereas defamation is an injury to reputation. Themo v. New England Newspaper Pub. Co., 27 N. E. (2d) 753, 755 (Mass. 1940); Winfield, The Law of Tort (1937) § 186. Defamation furthermore is more often concerned with the pecuniary aspects of reputation, Harper, Torts (1933) § 277; Restatement, Torts (1933) § 867, comment a, whereas no special damages need be alleged in an action for violation of privacy, Kunz v. Allen, 102 Kan. 883, 172 Pac. 532, L. R. A. 1918D 1151 (1918). The truth of the matter published affords no defense in an action for violation of privacy, Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931); Mau v. Rio Grande Oil, Inc., 28 F. Supp. 845 (N. D. Cal. 1939), although it affords an absolute defense to an action for defamation, Harper, Torts (1933) § 244. In this aspect of the tort the best analogy is to a common law trespass to person. Restatement, Torts (1933) § 867, comment a. The violation of privacy and defamation are analogous in that they have relations to the opinions of third persons, and are limited by similar public interests of privilege to invade. Restatement, Torts (1933) § 867, comment a; Harper, Torts (1933) § 277.

[8]Up to the turn of the century, the interest had not been given legal protection as an independent personal right. An incidental protection had been secured through

time have given the interest a specific legal protection.[9] Some courts, however, even in these jurisdictions, have seen fit to supplement their holdings with additional factors,[10] whereas, other courts have rejected the interest outright.[11] Because of the divergent views of the courts and the widely varying factual situations which have arisen under alleged violations of the right,[12] the value of precedent in the determination of new cases is limited.[13] The main body of precedent has been concerned with the use of pictures and names for advertising pur-

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the fictions of finding property interests, confidential relations, and implied contracts. Warren and Brandeis, The Right of Privacy (1890) 4 Harv. L. Rev. 193; Kacedan, The Right of Privacy (1932) 12 B. U. L. Rev. 353, 357-367. The results of many of these cases indicated an inclination on the part of the courts to protect some right other than that professedly being protected, and Warren and Brandeis, citing the evils of "yellow journalism," advocated that it was good time that the courts come from behind the masks of fiction and recognize the violation of the right of privacy as an independent personal tort.

[9]Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101 (1905); Kunz v. Allen, 102 Kan. 883, 172 Pac. 532, L. R. A. 1918D 1151 (1918); Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S. W. 364, 34 L. R. A. (N. S.) 1137 (1909); Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499, 1 L. R. A. (N. S.) 1147 (1905); Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911); Flake v. Greensboro News Co., 212 N. C. 780, 195 S. E. 55 (1938). Courts have also recognized the interest by dictum. Metter v. Los Angeles Examiner, 35 Cal. App. (2d) 304, 95 P. (2d) 491 (1939); Themo v. New England Newspaper Pub. Co., 27 N. E. (2d) 753 (Mass. 1940); Edison v. Edison Polyform Mfg. Co., 73 N. J. Eq. 136, 67 Atl. 392 (1907); Holloman v. Life Ins. Co. of Va., 192 S. C. 454, 7 S. E. (2d) 169 (1940).

[10]Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931) (based essentially the same interest upon the California Constitution's guarantee of the right to "pursue and obtain happiness"); cf. Metter v. Los Angeles Examiner, 35 Cal. App. (2d) 304, 95 P. (2d) 491 (1939), note 9, supra; Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911) (supplemented holding with view that a person has a property interest in his picture); Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S. W. 364 (1909) (action also successful on grounds of defamation); Douglas v. Stokes, 149 Ky. 506, 149 S. W. 849, 42 L. R. A. (N. S.) 386 (1912) (publication was also breach of a contractual and confidential relation); Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S. E. 194 (1930) (confidential relation existing between plaintiff and defendant).

[11]Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478 (1902); Henry v. Cherry & Webb, 30 R. I. 13, 73 Atl. 97, 24 L. R. A. (N. S.) 991 (1909); Hillman v. Star Pub Co., 64 Wash. 691, 117 Pac. 594, 35 L. R. A. (N. S.) 595 (1911). The interest was rejected by dictum in Atkinson v. Doherty, 121 Mich. 372, 80 N. W. 285 (1899); Judevine v. Benzies-Montayne Fuel and Warehouse Co., 222 Wis. 512, 269 N. W. 295 (1936).

[12]Green, The Right of Privacy (1932) 27 Ill. L. Rev. 237.

[13]"The question of the existence of this right is a relatively new field in legal jurisprudence. In respect to it, the courts are plowing new ground and before the field is fully developed unquestionably perplexing and harassing stumps and runners will be encountered." Flake v. Greensboro News Co., 212 N. C. 780, 195 S. E. 55, 62-63 (1938).

poses,[14] the making and using photographs,[15] the advertising of bad debts,[16] the placing of pictures in rogue's galleries,[17] and with situations involving no publication, but rather physical invasions of privacy.[18]

When the principal case was before the district court, a review of these decisions was made and the conclusion reached that privacy had been protected only under "exceptional circumstances," and that no case had arisen which held the right of privacy violated by a "newspaper or magazine publishing a correct account of one's life or doings . . . except under abnormal circumstances which did not exist in the case at bar."[19] The Circuit Court of Appeals tacitly adopted this view. Although the situations in the precedent cases referred to may

[14]Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101 (1905) (publication of plaintiff's picture along with a statement falsely attributed to him that he had bought the defendant's life insurance); Kunz v. Allen, 102 Kan. 883, 172 Pac. 532, L. R. A. 1918D 1151 (1918) (motion picture of plaintiff in defendant's store used without her consent for advertising purposes); Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S. W. 364, 34 L. R. A. (N. S.) 1137 (1909) (defendant published an advertising pamphlet in which he falsely attributed to plaintiff a recommendation of a brand of liver pills); Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911) (use of plaintiff's picture along with a false reconmmendation advertising defendant's jewelery); Flake v. Greensboro News Co., 212 N. C. 780, 195 S. E. 55 (1938) (photograph of a radio entertainer used by mistake in connection with a bread advertisement).

[15]Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S. E. 194 (1930) (plaintiff's still-born child was photographd without parents' knowledge, and photographer was selling prints to the public); Douglas v. Stokes, 149 Ky. 506, 149 S. W. 849, 42 L. R. A. (N. S.) 386 (1912) (photographer, after having been hired to make a limited number of pictures of the bodies of plaintiff's dead children which were bound together like siamese twins, attempted to copyright the photograph for himself); Clayman v. Bernstein, 8 U. S. L. Wk. 270 (Penn. Ct. Com. Pleas 1940) (equitable relief granted where a physician, without consent of plaintiff or her husband, took photographs of the plaintiff for the purpose of medical records and while she was in a hospital in a semi-conscious condition).

[16]Brents v. Morgan, 221 Ky. 765, 299 S. W. 967, 55 A. L. R. 964 (1927). Contra: Judevine v. Benzies-Montayne Fuel and Warehouse Co., 222 Wis. 512, 269 N. W. 295 (1936).

[17]Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499, 1 L. R. A. (N. S.) 1147 (1905). Cf. Mabry v. Kettering, 89 Ark. 551, 117 S. W. 746 (1909).

[18]McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 2 S. E. (2d) 810 (1939) (defendant installed a listening device in plaintiff's hospital room to determine the good faith of her illness which she claimed was due to consumption of defendant's product); Goodyear Tire and Rubber Co. v. Vandergriff, 52 Ga. App. 662, 184 S. E. 452 (1936) (defendant impersonated plaintiff over telephone securing confidential price quotations); Byfield v. Chandler, 33 Ga. App. 218, 125 S. E. 905 (1924) (entering a woman's stateroom on a passenger liner); Rhodes v. Graham, 238 Ky. 225, 37 S. W. (2d) 46 (1931) (tapping telephone wires running into plaintiff's home).

[19]Sidis v. F-R Pub. Corporation, 34 F. Supp. 19, 20-21 (S. D. N. Y. 1938).

have differed widely from the publication of articles and news in magazines and newspapers, it does not seem that the court would have been warranted in dismissing the standards of privacy protection as set out in those cases unless new elements were discovered in the case at bar.[20] The court by dictum observed:

> "It must be conceded that under the strict standards suggested by these authors [Warren and Brandeis] plaintiff's right of privacy has been invaded. . . ."
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> ". . . at some point the public interest in obtaining information becomes dominant over the individual's desire for privacy. Warren and Brandeis were willing to lift the veil somewhat in the case of public officers. We would go further, though we are not yet prepared to say how far. At least we would permit limited scrutiny of the 'private' life of any person who has achieved, or has had thrust upon him, the questionable and indefinable status of a 'public figure'."
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> "We express no comment on whether or not the news worthiness of the matter printed will always constitute a complete defense. Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency. But when focused upon public characters, truthful comments upon dress, speech, habits, and the ordinary aspects of personality will usually not transgress this line. Regrettably or not, the misfortunes and frailties of neighbors and 'public figures' are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day."[21]

It is difficult to discern from the above expressions the ground upon which the court actually based its conclusion. It may have been upon a liberal interpretation of privilege to invade the privacy of "public figures" in certain respects. It may have been upon a consideration that the material published was of legitimate news interest. The court, on the other hand, may have intended a new limitation upon the right of privacy which would except from legal protection true statements made in magazines about the interesting "misfortunes and frailties" of all people, and curbed only when transgressing the "community's notions of decency."

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[20]The first cause of action in the complaint was on the plaintiff's right of privacy as recognized in California, Georgia, Kansas, Kentucky, and Missouri—states into which the offending magazine was sent and which recognized the right of privacy "to a certain extent." The court stated that it was under the duty of determining the law of these states according to the mandate of Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed 1188, 114 A. L. R. 1487 (1938).

[21]Sidis v. F-R Pub. Corporation, 113 F. (2d) 806, 809 (C. C. A. 2d, 1940).

It appears that the result reached in the instant case could have been achieved without discarding the standards set forth by Warren and Brandeis. Those authors expressly excepted from the protection of legal machinery those people who hold the status of public figures. Their language does not indicate that they intended to hamper the right of the press to publish news-items, or to reveal certain intimate details of the lives of those people in whom the public has a legitimate interest for other reasons than that they are "politicians, public administrators, or statemen."[22]

As to the question of "public figure," it has been stated in subsequent cases that a well known inventor is a public figure,[23] that authors or artists are public men,[24] that a motion picture star is in this category.[25] On the other hand, a private philanthropist has been considered not such a public figure.[26] The court observed that the plaintiff had been such a person thirty years before, but it did not specifically state, and indeed it hardly seems reasonable, that a former famous child prodigy who had suffered a breakdown and had long since gone into seclusion would be considered a "public figure" in this sense today.

A group of cases has arisen, however, which indicate that an otherwise unknown person can be caught up in the maelstrom of some newsworthy event, and that he thereby surrenders his right to remain in seclusion. The right to publish the details of an event of news interest may be looked upon as a privilege to invade, to a certain extent, the

[22]"Since the propriety of publishing the very same facts may depend wholly upon the person concerning whom they are published, no fixed formal rule can be used to prohibit obnoxious publications. Any rule of liability adopted must have in it an elasticity which shall take account of the varying circumstances of each case. . . . The general object in view is to protect the privacy of private life, and to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn." Warren and Brandeis, The Right to Privacy (1890) 4 Harv. L. Rev. 193, 216.

[23]Corliss v. E. W. Walker Co., 57 Fed. 434 (C. C. D. Mass. 1893). The court went on to reject the idea of privacy because "Freedom of speech and press is secured by the constitution of the United States and the constitutions of most of the states. . . . Under our laws, one can speak and publish what he desires, provided he commits no offense against public morals or private reputation." But see Kacedan, The Right of Privacy (1932) 12 B. U. L. Rev. 600, 601.

[24]Corliss v. E. W. Walker Co., 57 Fed. 434, 435 (C. C. D. Mass. 1893).

[25]Paramount Pictures, Inc. v. Leader Press, 24 F. Supp. 1004 (W. D. Okla. 1938).

[26]Schuyler v. Curtis, 147 N. Y. 434, 42 N. E. 22 (1895). This was stated by Mr. Justice Gray in a dissenting opinion. The matter of public interest was not considered by the majority since it was decided that the relatives of the deceased could not recover, the right of privacy being a personal right dying with the person.

right of privacy. It is to be noted, however, that in these cases the facts which the court must consider in determining whether the party has become an unprotected individual are, as a rule, the very facts the publication of which constitute the alleged invasion of privacy. They are not extraneous facts concerning the plaintiff's position as a "public figure." The issues are thus merged into the mere drawing of a line between legitimate news interest and illgitimate news interest.

In the case of *Metter v. Los Angeles Examiner*,[27] where a newspaper published the picture of the plaintiff's wife along with the story of her suicide, it was held that a suicide is a matter of public interest, and that no action for violation of a right of privacy exists where there is dissemination of news and news events. The court adds that "It might appropriately be observed that 'public or general interest' as used in the . . . opinion is not to be confused with mere curiosity."[28] A similar holding was made in the case of *Jones v. Herald Post*.[29] The plaintiff had witnessed the murder of her husband and had attacked his murderers. The defendant newspaper company printed the story in a somewhat colored fashion, but not disparagingly of the plaintiff. The court refused to allow recovery, considering the plaintiff "an innocent actor in a great tragedy in which the public had a deep concern" and stating that "there are times . . . where one, whether willingly or not, becomes an actor in an occurrence of public or general interest. When this takes place, he emerges from his seclusion, and it is not an invasion of his right of privacy to publish his photograph with an account of such occurrence."[30] In the case of *Melvin v. Reid*, the court, in a dictum, pointed out that "the right of privacy . . . does not exist in the dissemination of news and news events. . . ."[31] New York courts in construing the New York Civil Rights Law[32] which forbids the unauthorized publication of names and pictures for "purposes of trade," have held that the dissemination of news does not come within the statute,[33] and it has been felt that "as far as current events are concerned no distinction

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[27]35 Cal. App. (2d) 304, 95 P. (2d) 491 (1939).

[28]Metter v. Los Angeles Examiner, 35 Cal. App. (2d) 304, 95 P. (2d) 491, 491 (1939).

[29]230 Ky. 227, 18 S. W. (2d) 972 (1929).

[30]Jones v. Herald Post Co., 230 Ky. 227, 18 S. W. (2d) 972, 973 (1929).

[31]Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91, 93 (1931).

[32]New York Civil Rights Law, Art. 5, §§ 50, 51.

[33]Humsiton v. Universal Film Mfg. Co., 189 App. Div. 467, 178 N. Y. Supp. 152 (1919); Moser v. Press Pub. Co., 59 Misc. 78, 109 N. Y. Supp. 963 (1908). Also, Sweenek v. Pathe News, Inc., 16 F. Supp. 746 (E. D. N. Y. 1936).

would be made between the common law right of privacy and the law under the statute of New York."[34]

The cases just considered deal with the publication of "news" at the time of, or soon after, its occurrence. In the instant case, the news facts occurred thirty years before and the only factor bringing the plaintiff again before the public was the "digging out" of interesting reading matter for an avid public.[35] The condition of this former prodigy was thus hardly a matter of a current news event. It would seem that a matter of news interest in this sense would not always continue to have that quality, and that the privilege to invade privacy would disappear as the news interest vanished.[36] There is, however, another conception of the meaning of "news." It is said to have "that indefinable quality of interest, which attracts public attention."[37] Under this view, the history and present condition of the plaintiff, as containing the answer to the question of whether he had fulfilled his early promise, would be "news." This would seem to be the idea of the court when it states that "the misfortunes and frailties of neighbors and 'public figures' are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day."[38]

According to this view the court looks to what people are "interested in" in order to determine what can be written about other people's private lives. It hardly takes account of the human frailty to become more interested as the matter becomes more private. The court, however, states that it would draw the line where the community's notions of decency are outraged.

Obviously there can be no definite standard for the drawing of the line between what is a legitimate, rightful news interest and what is not. It must be left to the courts in each individual case to determine their own standard. Should they, however, take the view that the mores of the community are the guide for determining legitimate public interest? Will they continue to take what is done as the measure of what

[34]Note (1940) 11 Air L. Rev. 83, 85.

[35]The court in the instant case, as a matter of fact, distinguished it from Jones v. Herald Post and Metter v. Los Angeles Examiner by footnoting: "But these decisions involved news events of great current interest to the community." 113 F. (2d) 806, 808 (C. C. A. 2d, 1940).

[36]Note (1940) 11 Air L. Rev. 83, 89.

[37]Associated Press v. International News Service, 245 Fed. 244, 248, 2 A. L. R. 317 (C. C. A. 2d, 1917).

[38]Sidis v. F-R Pub. Corporation, 113 F. (2d) 806, 809 (C. C. A. 2d, 1940).

can be done? The courts are the final arbiters of what can be printed in magazines and newspapers. Will they take upon themselves the burden of raising the standards of journalism, and the mores of the community, or will they let the newspapers and magazines, prompted by a willing public curiosity, dictate to them the standards of what can be written about other people?

Although the court's drawing of the line in the *Sidis* case gives a valid result, yet in the expression of unwillingness to do more than merely accept the community's notions of decency and in the refusal to apply its own standards, the court is not reassuring. FRED BARTENSTEIN, JR.

TELEGRAPHS AND TELEPHONES—QUALIFIED PRIVILEGE OF TELEGRAPH COMPANY TO TRANSMIT DEFAMATORY MESSAGE WHERE SENDER IS NOT PRIVILEGED. [Federal]

A significant step in the delimitation of a telegraph company's liability for the transmission of defamatory messages has been taken by the federal court in *O'Brien v. Western Union Telegraph Co.*[1]

Plaintiff, "at the advice of Father Coughlin," became a candidate for two high political offices. An unknown man in New York, with the purported interest of a lifelong member of the Democratic party, possessed of the fear that the candidacy would have an adverse effect upon the party ticket, presented to the defendant telegraph company for transmission to Father Coughlin a 1,461 word message containing obviously defamatory[2] statements concerning the plaintiff. The only publication relied upon was the delivery of the message to Father Coughlin personally by an employee of the defendant company. Defendant pleaded that it was privileged to make the publication. In affirming the judgment of the district court for the defendant, Magruder, J., speaking for the court, held that a telegraph company could not commit a libel in trans-

[1] 113 F. (2d) 539 (C. C. A. 1st, 1940).

[2] There are many cases supporting the privilege of a citizen to publish to his fellow citizens facts believed by him to be true affecting the fitness of a candidate for public office: Salinger v. Cowles, 195 Iowa 873, 191 N. W. 167 (1922); Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281 (1908), 20 L. R. A. (N. S.) 361 (1909); Fortney v. Stephen, 237 Mich. 603, 213 N. W. 172 (1927); Friedall v. Blakely Printing Co., 163 Minn. 226, 203 N. W. 974 (1925); Briggs v. Garnett, 111 Pa. 404, 2 Atl. 513 (1886); but the Federal Courts have been consistently contra: Post Publishing Co. v. Hallam, 59 Fed. 530 (C. C. A. 6th, 1893); Nevada State Journal Publishing Co. v. Henderson, 294 Fed. 60 (C. C. A. 9th, 1923). See Washington Times Co. v. Bonner, 86 F. (2d) 836, 842-3 (App. D. C. 1936), 110 A. L. R. 393, 401-3 (1937); Note (1929) 8 Tex. L. Rev. 41.

mitting a routine message except in those necessarily rare instances where the company's agent happened to have actual knowledge that the message was false or that the sender was not privileged.[3] It would seem to follow, then, that no matter how obvious the bad faith of the sender was, or how easily the transmitter should have discovered it, a telegraph company has a privilege to transmit a defamatory routine message except when the operator has actual knowledge that the sender is not priveleged or that the message is false.[4]

While at first impression such an extensive privilege seems to be unfair and to put a premium on stupidity, it is believed that this is a most necessary and practical result, and one toward which the courts have been making gradual progress for nearly half a century.[5]

According to the general law of libel, the publication of a defamatory statement is actionable,[6] and the plaintiff need not prove malice to recover.[7] In certain instances, however, in order that the interests of society may be better served, a qualified privilege has been accorded which renders the publication of defamatory matter not actionable. A

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[3]113 F. (2d) 539, 543 (C. C. A. 1st, 1940). "Our conclusion is that if the telegraph company is ever to be held liable for the routine transmission of a defamatory message, it could only be in the necessarily rare cases where the transmitting agent of the telegraph company *happened to know* that the message was spurious or that the sender was acting not in the protection of any legitimate interest, but in bad faith and for the purpose of traducing another." (Italics supplied)

[4]The words of the holding, "necessarily rare cases" and "happened to know," when interpreted with the context seem to admit of no other construction. Cited in the opinion is Restatement, Torts (1938) § 612: "A public utility whose duty it is to transmit messages for the public is privileged to transmit a message although it is obviously defamatory, unless the agents who transmit it know or have reason to know that the sender is not privileged to send it." This is recognized in the opinion as "undoubtedly the law," but the holding of the principal case goes further and in effect, strikes out of the Restatement the qualification "or have reason to know."

There is strong reason to argue that such exclusion of constructive knowledge will make little practical difference. Certainly the evidence necessary to establish constructive knowledge and the evidence necessary to establish actual knowledge will approach and probably be coincident in many cases. The holding in the principal case does not mean that a telegraph company will never be held liable except where its operator is willing to admit he had actual knowledge. The jury can always believe that he did know, in spite of his testimony to the contrary.

[5]Peterson v. Western Union Telegraph Co., 65 Minn. 18, 67 N. W. 646 (1896); 72 Minn. 41, 74 N. W. 1022 (1898); and 75 Minn. 368, 77 N. W. 985 (1899). See footnote 13, infra.

[6]Exceptions are made in a very limited class of persons such as certain public officials; Spaulding v. Vilas, 161 U. S. 483, 16 S. Ct. 631 (1896); Chatterton v. Secretary of State for India, [1895] 2 Q. B. 189; and legislators: Coffin v. Coffin, 4 Mass. 1 (1808), 3 Am. Dec. 189 (1878); Cole v. Richards, 108 N. J. L. 356, 158 Atl. 466 (1932); who have been granted an absolute privilege in the matter.

[7]For a full discussion of this proposition, see Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281, 291-2 (1908), 20 L. R. A. (N. S.) 361, 376-7 (1909).

communication may thus be libelous per se, but if the publication is qualifiedly privileged, then that fact rebuts and neutralizes the malice presumed from the terms alone, and the plaintiff must prove express malice to recover.[8] If this express malice can be shown, the privilege is defeated and the publisher is liable.[9]

The particular problem of the principal case, however, is still one step removed: Is B (the Western Union) who publishes a libel to C (Father Coughlin), but at the request of A (the unknown sender) responsible if A is not privileged? As far as the general law of libel goes, B would be just as liable as would A in the above illustration.[10] When B is under an impression that A is privileged, but A in fact is not, there is especial appeal to exempt B from liability. But that such is not the law of libel was laid down in *Smith v. Streatfeild*[11] in England, and that decision has been followed in this country.[12]

How, then, did a privilege grow up in telegraph companies to take

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[8]Kruse v. Rabe, 80 N. J. L. 378, 79 Alt. 316 (1910), 33 L.R.A. (N. S.) 469 (1911) (attorney with privilege to advise client concerning business integrity of a broker abused privilege by giving advice in a loud voice in public place); Ashcroft v. Hammond, 197 N. Y. 488, 90 N. W. 1117 (1910) (telegram sent from one stockholder to another disparaging a director held privileged and this privilege not defeated by fact sender was only a stockholder); Toogood v. Spyring, 1 C. M. and R. 180, 149 Eng. Rep. 1044 (Ex. 1834) (householder, who thought worker broke into his cellar and spoiled his cider, held privileged to inform the worker's boss and the worker himself in the presence of a third party if done bona fide, but held not privileged to inform a total stranger).

[9]See Harper, Law of Torts (1933) §§ 237, 247-9, 252. There is a split of authority on the question of whether one who believes he is speaking the truth under a qualified privilege defeats the privilege when he has no reasonable grounds to believe in the truth of what he speaks. Privilege defeated: Toothaker v. Conant, 91 Me. 488, 40 Atl. 331 (1898); Briggs v. Garnett, 111 Pa. St. 404, 2 Atl. 513 (1886) (charge that a judge had made possible a "steal" by jury instructions held not privileged where defendant could have checked up on his "reliable" source by consulting the public record). Privilege not defeated: Hemmens v. Nelson, 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 441 (1893) (belief by principal of school about teacher in what he said to school board sufficient to uphold his privilege); Chambers v. Leiser, 43 Wash. 285, 86 Pac. 627 (1906) (stockholder writing another stockholder that corporation officer was a little "daft").

[10]Mere repetition of defamatory matter is actionable. Haines v. Campbell, 74 Md. 158, 21 Atl. 702 (1891); Brewer v. Chase, 121 Mich. 526, 80 N. W. 575 (1899); World Pub. Co. v. Mullen, 43 Neb. 126, 61 N. W. 108 (1894); Dole v. Lyon, 10 Johns. 447 (N. Y. 1813), 6 Am. Dec. 346 (1878); Restatement, Torts (1938) § 576.

[11][1913] 3 K. B. 764, where B printed libelous matter at the request of A who was qualifiedly privileged, it was held that the "expressed" malice of A, in defeating his privilege, would also defeat the privilege of B, although B did not know of the malice in A.

[12]Corrigan v. Bobbs-Merrill Co., 228 N. Y. 58, 126 N. E. 260 (1920); Bigelow v. Sprague, 140 Mass. 425, 5 N. E. 144 (1886); Sweet v. Post Pub. Co., 215 Mass. 450, 102 N. E. 660 (1913).

them out of the general rule of *Smith v. Streatfeild?* The first case in which the privilege of a telegraph company appeared was *Peterson v. Western Union Telegraph Co.*[13] This case held that where the message was clearly susceptible of a libelous meaning and was forwarded under circumstances which warranted the jury's finding that the operator was negligent or acting in bad faith, the company would be liable because the publication would not be privileged. Upon the evidence, the jury found that the defendant had acted maliciously and therefore held it liable.[14] Since the question of malice never arises except when a qualified privilege exists,[15] the court, by the very submission of the malice issue to the jury, adopted the rule that where the operator acts in good faith and in a non-negligent manner, the telegraph company is privileged to transmit a libelous message, even though the sender is not privileged. Thus, while the case is not direct authority for the proposition that a telegraph company has a qualified privilege, nevertheless the doctrine is implicit in the decision of the trial court; and this part of the case was sustained on appeal. If *Peterson v. Western Union Telegraph Co.* left any doubt on this matter, *Nye v. Western Union Telegraph Co.*[16] removed it. In this case it was clear that defendant had neither acted negligently nor in bad faith, and the court held that there was not presented sufficient facts to establish a cause of action, although the message was libelous and the sender was not privileged.[17] The court went on to hold that there was ". . . no reason for requiring of telegraph companies more than such ordinary care and good faith as can be exercised in view of the necessity for prompt action, admitting of neither inquiry nor delay."[18] The *Nye* case is authority, and the first express, direct authority, for a privilege in telegraph companies when such privilege does not exist in the sender, and thus is a departure from

[13]65 Minn. 18, 67 N. W. 646 (1896); 72 Minn. 41, 74 N. W. 1022 (1898); and 75 Minn. 368, 77 N. W. 985 (1899). In the earliest cases involving the liability of a telegraph company, the question of privilege was not raised. Whitfield v. South Eastern Railway Co., El. Bl. & El. 115, 120 Eng. Rep. 451 (K. B. 1858); Dominion Telegraph Co. v. Silver, 10 Can. S. Ct. 238 (1881). In both of these cases the companies themselves originated the defamatory messages for their own purposes and were held liable.

[14]This decision was reversed upon appeal on the ground that the damages awarded were excessive. 65 Minn. 18, 67 N. W. 646 (1896); 72 Minn. 41, 74 N. W. 1022 (1898); and 75 Minn. 368, 77 N. W. 985 (1899).

[15]See footnotes 8, 9, and 10, supra.

[16]104 Fed. 628 (C. C. D. Minn. 1900).

[17]In Peterson v. Western Union Telegraph Co., the jury determined the malice issue. In the Nye case, however, the evidence was so clear that the court held as a matter of law that there was no malice.

[18]104 Fed. 628, 631 (C. C. D. Minn. 1900).

the general rule of *Smith v. Streatfeild.*[19] After the *Nye* case, the liability of a telegraph company which published a libel upon request of an unprivileged sender was dependent on whether the court (or the jury, depending upon the sufficiency of the evidence)[20] decided that the company, in considering the truth of the message and the privilege of the sender to communicate it, acted carefully and in good faith.[21]

This qualified privilege was extended in at least two cases by exempting the telegraph company from liability when the only publication relied upon was the intercommunication of the libel between the different agents of the telegraph company. In *Western Union Telegraph Co. v. Cashman*[22] the denial of liability was put squarely on the ground of no publication.[23] *Flynn v. Reinke,*[24] however, sustained the demurrer of the Western Union as co-defendant in a libel action on the ground that the complaint did not state facts sufficient to constitute a cause of action, because the communication, though published, was

[19][1913] 3 K. B. 764.

[20]Whether or not the message is libelous on its face is a major consideration in the determination of whether the operator acted in good faith. Liability has generally been denied where the message was susceptible of an ambiguous meaning and where the company had no reason to assume that the words meant something not apparent on their face. Stockman v. Western Union Telegraph Co., 10 Kan. App. 580, 63 Pac. 658 (1900); Grisham v. Western Union Telegraph Co., 238 Mo. 480, 142 S. W. 271 (1911). See Nye v. Western Union Telegraph Co., 104 Fed. 628, 630 (C. C. D. Minn. 1900).

[21]This privilege has been supported in all the cases involving the subject matter after the Nye case. In Grisham v. Western Union Telegraph Co., 238 Mo. 480, 142 S. W. 271 (1911) the defendant telegraph company was not held liable when there was nothing obviously defamatory about the message or nothing to question the good faith of the operator. In Paton v. Great Northwestern Telegraph Co., 141 Minn. 430, 170 N. W. 511 (1919) the jury was instructed that if the operator acted carefully and in good faith he was privileged, but that he was not priviliged if he was negligent or wanting in good faith. The court on appeal upheld the instructions and the judgment for the plaintiff. See Smith, Liability of a Telegraph Company for Transmitting a Defamatory Message (1920) 20 Col. L. Rev. 30, 369.

In Western Union Telegraph Co. v. Brown, 294 Fed. 167 (C. C. A. 8th, 1923) the senders gave the impression to the defendant telegraph company that they were privileged in their capacities as United States Marshalls to send a defamatory message. Though the senders were not actually privileged and therefore would have been liable if sued, it was held that the defendant was not liable. Though the message was libelous on its face, the time, circumstances, and occasion of the writing and publication might be such as to rebut and neutralize the malice presumed from the terms alone, and if the defendant acted in good faith he was privileged.

[22]149 Fed. 367 (C. C. A. 5th, 1906).

[23]The court realized that a privilege existed however, by saying that even if there had been a technical publication, there was an entire absence of malice, and that in justice the defendant should not be made to pay. It is to be remembered that the question of malice is an irrelevant consideration unless a qualified privilege exists.

[24]199 Wis. 124, 225 N. W. 742 (1929).

privileged. The court, in relying on a "balancing of considerations" doctrine, said:

> "The law will impute malice where necessary to protect the interest of society and the security of character and reputation. But it tolerates a balancing of considerations, and the weighing of benefits to result, and where the welfare of society is better promoted by a freedom of expression, malice will not be imputed. In such cases the communication is privileged or quasi-privileged in law. Under such circumstances the individual is required to surrender his personal rights for the benefit of the common welfare."[25]

The court observed that the modern weight of authority is that a libelous communication made to a servant or business associate in the ordinary and natural course of business is not actionable.[26] Applying this rule to telegraph companies, the court held that the transmission of a libelous message from one telegraph operator to another or from one telegraph station to another is a privileged communication if done in the usual and ordinary course of business.[27] After this extension of its privilege, a telegraph company in the routine transmission of a libelous message could not be held liable if the defamatory matter only concerned the addressee.[28] If the libel was about anybody but the addressee, however, the rule of *Flynn v. Reinke*[29] would be of no avail, and only the rule of privilege of the *Nye* case[30] would be applicable.

In 1939, the case of *Klein v. Western Union Telegraph Co.*[31] was decided by the New York court. The message involved was clearly susceptible of being libelous and the defendant telegraph company could not help realizing that it was an actionable defamatory message unless the sender was privileged. The appellate court held, however, that upon the evidence [32] any implied malice was rebutted as a matter of law, and

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[25]199 Wis. 124, 225 N. W. 742, 743 (1929).

[26]Globe Furniture Co. v. Wright, 265 Fed. 873 (App. D. C. 1920), 18 A. L. R. 772 (1922); Central of Georgia R. Co. v. Jones, 18 Ga. App. 414, 89 S. E. 429 (1916); Owen v. J. S. Ogilvie Pub. Co., 32 App. Div. 465, 53 N. Y. Supp. 1033 (1898).

[27]Cf. Western Union Telegraph Co. v. Cashman, 149 Fed. 367 (C. C. A. 5th, 1906) where in a similar situation the court based its decision on the determination that there was no publication and thus no cause of action. In Flynn v. Reinke, however, the basis of the decision is privilege, publication being admitted.

[28]There are only two possibilities of publication: That of agent to agent inside the company is ruled out by Flynn v. Reinke. That of publication to the addressee himself has never been actionable in the law of libel.

[29]199 Wis. 124, 225 N. W. 742 (1929).

[30]104 Fed. 628 (C. C. D. Minn. 1900).

[31]257 App. Div. 336 (1939).

[32]A member of an international labor union sent an obviously defamatory message by telegraph to ten officers of the union allegedly interested in the subject matter.

that the verdict of the jury in finding that the defendant did not act in good faith was contrary to the weight of evidence. This privilege was held to be based on the fact that there was nothing to show that the statements were not true, or that as bewteen sender and addressee they were not privileged. This is a strong case, but the immunity acquired under its holding is not so complete as to prevent a telegraph company being held liable where an unprivileged sender displayed strong suspicion and indications of being unprivileged from which a court or jury might find malice in the telegraph operator. In other words, *Klein v. Western Union Telegraph Co.* did not eliminate liability predicated on negligence. It remained for the principal case to take this step.

Thus, when the cases in point before the instant decision are reviewed and contrasted with it, the forward step is better realized. The "balancing of considerations" principle, as spoken of in *Flynn v. Reinke*,[33] seems to be the basis and justification for the holding in the principal case.

The volume of business of a telegraph company is far more today than what it was in 1900 when the *Nye* case[34] was decided.[35] The difficulty and inconvenience of requiring the operators to analyze either the message or the senders from either a factual or legal standpoint is manifest. The indispensability of the telegraph, on the other hand, is as unchallenged as the realization that speed is the essence of its worth. Telegraph companies operate under statutes subjecting them to penalties and fines for discrimination and negligent transmission.[36] The pressure and responsibility thrust upon the companies by these statutes are unbearable unless the companies can comply without subjecting themselves to a libel action. True, on the other hand, a telegraph agent may at times see something about a message that is libelous; but the transmission of messages by telegraph agents is mechanical and routine, and it leaves little, if any, impression upon the minds of the operators. Furthermore, statutes often forbid telegraph companies to divulge the contents of messages.[37]

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[33]199 Wis. 124, 225 N. W. 742 (1929).

[34]104 Fed. 628 (C. C. D. Minn. 1900).

[35]According to the accepted evidence in the principal case, the transmitting office in Boston handled 72,626 messages on the day of the message involved.

[36]See for example, Communications Act of 1934, 48 Stat. 1105 (1934), 47 U. S. C. A. § § 202, 206, 207 (Supp. 1939).

[37]Mo. Rev. Stat. (1909) § 3334. (penalty of $50 for disclosing message to anyone but addressee); Miss. Code Ann. (1892) § 1301 (misdemeanor for clerk to divulge to anyone but addressee).

Does it seem just, then, to hold the telegraph company, through its busy operator, liable except in those necessarily rare instances where he happens to know that the message is false or the sender not privileged? Is the mere fact that the sender or the message looks so suspicious or questionable as to put a normal man on guard sufficient cause to make the operator run the risk of the penal statutes, or even hold up the busy mechanics of the exchange to question and investigate?[38] The decision of *O'Brien v. Western Union Telegraph Co.*,[39] if it will be interpreted as its terms suggest, has at last reached the only practical solution of the matter, and individual rights must, to this extent, give away to the general good.

WILLIAM M. MARTIN

TORTS—PROPERTY—LIABILITY OF VENDOR OF REAL PROPERTY FOR PERSONAL INJURY OF TENANT OF VENDEE CAUSED BY DEFECTIVE CONDITION OF PREMISES. [New York]

The recent New York case of *Pharm v. Lituchy*[1] deals with a statutory extension of the common law conceptions of nuisance and of the duty of landlord to tenant to repair leased premises. The case is of significance also in that the court adopted this landlord-tenant duty as a basis for imposing liability upon a vendor of real property for injuries suffered by one claiming as tenant under the vendee, where the injuries resulted from an accident caused by the disrepair of the premises. The plaintiffs, husband and wife, were tenants in a multiple dwelling house owned by defendant. The ceiling of the kitchen was cracked and in a dangerous condition, and though plaintiffs notified the owner's agent, defendant neglected to remedy the defect. Under these circumstances, defendant conveyed the property to one Rose Lituchy. Shortly after the transfer of title, plaintiff Lorean Pharm was injured when a portion of the ceiling fell. This action was brought against the defendant-vendor, his agent, and the vendee, Lituchy, but the complaint against the latter was dismissed as the evidence showed that she did not know of the defective condition.[2] The trial court held the defend-

[38]It is suggested that in one respect the court may have gone too far in its holding in the principal case. A small rural telegraph office would not present such a convincing impression of urgent activity and could not, thus, claim the exemption on the practical ground on which it was granted in the principal case.

[39]113 F. (2d) 539 (C. C. A. 1st, 1940).

[1]170 Misc. 211, 9 N. Y. Supp. (2d) 657, on appeal, 27 N. E. (2d) 811 (N. Y. 1940).

[2]See this comment, infra, for a discussion of landlord and tenant law on this point.

ant-vendor and his agent liable under the Multiple Dwelling Law of New York, and on appeal the judgment was affirmed.[3]

At common law, a landlord owes no duty to a tenant to repair premises when the landlord has entirely divested himself of possession, except when he makes an express covenant to repair,[4] or where he has knowledge of latent defects which he fails to disclose to the tenant.[5] But, the New York statute imposes a duty upon owners of multiple dwellings to repair defective premises when proper notice has been given.[6] In most of the cases arising under this and similar statutes[7] the courts have construed the duty to repair as running in favor of the tenant and as giving him a civil action for injuries arising from disrepair.[8]

There are few cases involving the liability of a vendor to a vendee or to a third person for personal injuries caused by the disrepair of the premises, but the cases found almost unanimously declare that a vendor is not liable when the injuries arising from his *negligence* in failing to repair occur after the premises have passed out of his control.[9] However, it has been held that if a vendor creates a *nuisance* and

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[3]New York Consolidated Laws (Cahill, 1930) c. 37—a (Multiple Dwelling Law, Laws of 1929, c. 713).

[4]Pignatario v. Myers, 100 Conn. 234, 123 Atl. 263 (1924); Fiorntino v. Mason, 233 Mass. 451, 124 N. E. 283 (1919). Cases collected: 36 C. J. 125.

[5]Hallock v. Smith, 207 Ala. 567, 93 So. 588 (1922); Guenther v. Jackson, 79 Ind. App. 127, 137 N. E. 582 (1922); Smith v. Donnelly, 45 Misc. 447, 92 N. Y. Supp. 43 (1904); Wilcox v. Hines, 100 Tenn. 538, 46 S. W. 297, 41 L. R. A. 278, 66 Am. St. Rep. 770 (1898). Cases collected: 36 C. J. 204 and 206.

Of course, if the landlord undertakes to make repairs, though not under duty to do so, he assumes the duty of making the repairs properly. Simms v. Kennedy, 74 Fla. 411, 76 So. 739 (1917), L. R. A. 1918C 297.

[6]New York Consolidated Laws (Cahill, 1930) c. 37-a, § 78 (Multiple Dwelling Law, Laws of 1929, c. 713), as amended, New York Consolidated Laws (Cahill, 1931-35 Supp.) c. 37-a, § 78 (Multiple Dwelling Law, Laws of 1931, c. 228).

[7]Ga. Civil Code (1910) § 3699; Iowa Code (1935) c. 323; La. Rev. Civ. Code, art. 2322; Mich. Act. no. 167 § 71, Public Acts, 1917 C. L. Supp. (1922) § 5180 (73); Minn. Stat. (Mason, 1927) § 1630-3, 126.

[8]A civil action is allowed on the theory that the statute was designed to protect tenants and the right to seek redress was intended to extend to all whom there was a purpose to protect. Altz v. Leiberson, 233 N. Y. 16, 134 N. E. 703 (1922). In Annis v. Britton, 232 Mich. 291, 205 N. W. 128 (1925), the court speaks of the duty of landlord as "ultra-contract" and of his failure to obey the statute as negligence per se. But see Johnson v. Carter, 218 Iowa 587, 255 N. W. 864, 93 A. L. R. 774 (1934), and Palmigiani v. D'Argenio, 234 Mass. 434, 125 N. E. 592 (1920), where no civil action was allowed the tenant on the theory that the statute was designed to impose a criminal penalty for non-compliance.

[9]Liability not imposed: Stone v. Heyman Bros., 124 Cal. App. 46, 12 P. (2d) 126 (1932) (injury to vendee from defective skylight, unknown to vendor); McQuillan v.

conveys the premises under circumstances which indicate that he authorized its continuance, he is liable for injuries resulting from the nuisance even after he has parted with title and possession.[10]

The upper court in the principal case based its opinion chiefly upon this "continuing nuisance" concept. The Multiple Dwelling Law had the effect of making the disrepair of the multiple dwelling house a nuisance,[11] and the reasonable inference to be drawn from the vendor's failure to repair the premises after reasonable notice is that he authorized a continuance of the dangerous condition. Thus, the situation presents the aspects requisite for an application of the nuisance rule, and the vendor's liability should continue after the conveyance. Considerations of justice demand that if the vendor had proper notice of the defect and failed to repair within a reasonable time, he should be held liable for the subsequent injury. The mere fact that he conveyed the land before the injury occurred should not relieve him from responsibility. Liability in cases of nuisance is not predicated upon the ownership of the land on which the nuisance exists, but upon the failure to act or the doing of an act which occasions the injury.[12] In situations of

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Clark Thread Co., 172 Atl. 370 (N. J. S. Ct. 1934) (injury to third person off premises caused by defective condition of walk in front of premises); Palmore v. Morris, T. & Co., 182 Pa. St. 82, 37 Atl. 995, 61 Am. St. Rep. 693, 3 Am. Neg. Rep. (1897) (injury to third person off premises caused by falling gate); Smith v. Tucker, 151 Tenn. 347, 270 S. W. 66 (1925), 41 A. L. R. 830 (1926) (injury to one claiming under vendee, caused by defective mantel, known to both vendor and vendee and which vendor promised to repair). See also Upp v. Darner, 150 Iowa 403, 130 N. W. 409, 32 L. R. A. (N. S.) 743 (1911) (injury to horse of invitee of vendor caused by barbed wire fence erected by vendor contrary to local ordinance). Cases collected: (1926) 41 A. L. R. 842. But see Kilmer v. White, 254 N. Y. 64, 171 N. E. 908 (1930).

[10]Injury to a third person not on premises: Cumberland Telephone and Telegraph Co. v. Lawrence, 271 Fed. 89 (C. C. A. 5th, 1921); Lamb v. Roberts, 196 Ala. 679, 72 So. 309 (1916), L. R. A. 1916F 1018; Wilks v. New York Telephone Co., 243 N. Y. 351, 153 N. E. 444 (1926). Injury to adjoining land: Hyde-Park Light Co. v. Porter, 167 Ill. 276, 47 N. E. 206 (1897); Brown v. St. Louis-San Francisco R. R., 268 S. W. 678 (Mo. App. 1925); Robertson v. Monroe, 80 N. H. 258, 116 Atl. 92 (1922); East Jersey Water Co. v. Bigelow, 60 N. J. L. 201, 38 Atl. 631 (1897); Wilkerson v. Garrett, 229 S. W. 666 (Tex. Civ. App. 1921). Contra: Slavitz v. Morris Park Estates, 98 Misc. 314, 162 N. Y. Supp. 888 (1917) (shows old New York rule that for a grantor of premises to be liable for continuance of a nuisance he must continue to derive some benefit from it). Cases collected: 86 Am. St. Rep. 508; 14 Am. Dec. 336. No cases were found specifically in point, where the vendor conveyed property with a disrepair amounting to a nuisance, but the analogy in the above cases is very close.

[11]New York Consolidated Laws (Cahill, 1930) c. 37-a, §4, pgf. 30 (Multiple Dwelling Law, Laws of 1929, c. 713).

[12]In Cumberland Telephone and Telegraph Co. v. Lawrence, 271 Fed. 89, 90 (C. C. A. 5th, 1921), the court said: "The liability of the creator of a nuisance for the reasonably to be expected consequences of it does not cease to exist as a result of the property or structure constituting it passing from his possession or control. He remains liable because he was the author of the original wrong." See note 14 Am. Dec. 336.

this type there should be no distinction between nuisances arising from misfeasance and those arising from the negligent failure to perform a duty which constitutes a statutory nuisance. The position of the court in the principal case is by implication supported by cases which hold that the grantee of land upon which a nuisance, created by the grantor, exists is not responsible merely because he became the owner of the premises. The grantee is held not to be liable to third persons until he has notice or is asked to abate the nuisance.[13] Conversely, the grantor should be subject to liability until such an event occurs.

However, the vendor, under equitable principles, should not be subject to liability indefinitely. The court in the principal case held that the liability of the vendor continues after the conveyance "at least until the new owner has had a reasonable opportunity to discover the condition on prompt inspection and to make necessary repairs."[14] In this same vein it was suggested in *Kilmer v. White*[15] that the vendee is not responsible for the dangerous condition of the premises until he has had notice and time to repair. This view was also expressed in the trial court's opinion in *Palmore v. Morris*.[16] But in that case the appellate court, in reversing the lower court's decision, said that it would not imply a covenant into the deed of conveyance to the effect that the grantor would be liable to third persons for defects in the premises for a reasonable time after the grantee took possession.[17]

The trial court in the instant decision considered the disrepair as constituting negligence and failed to consider the nuisance aspect. It suggested the application of the "Restatement exception" to the general rule of non-liability of the vendor for negligence—that where the vendor is guilty of deception by concealing or failing to disclose a known dangerous condition, he is made liable.[18] Under this exception

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[13]Lamb v. Roberts, 196 Ala. 679, 72 So. 309 (1916), L. R. A. 1916F 1018; Willitts v. Chicago, Burlington & K. C. R. R., 88 Iowa 281, 55 N. W. 313 (1893); Martin v. Chicago, R. I., & P. R. R., 81 Kan. 344, 105 Pac. 451 (1909); Daniels v. St. Louis-San Francisco R. R., 36 Okla. 421, 128 Pac. 1089 (1912), 50 L. R. A. (N. S.) 929 (1914). Cases collected: 14 Am. Dec. 336, 86 Am. St. Rep. 508.

[14]27 N. E. (2d) 811, 812. (N. Y. 1940).

[15]254 N. Y. 64, 171 N. E. 908 (1930). This also was suggested by way of dictum in Ahern v. Steele, 115 N. Y. 203, 22 N. E. 193 (1889).

[16]182 Pa. St. 82, 37 Atl. 995, 61 Am. St. Rep. 693, 3 Am. Neg. Rep. 597 (1897). Trial court's opinion discussed 37 Atl. 995, 999, 61 Am. St. Rep. 693, 696 (1897).

[17]182 Pa. St. 82, 37 Atl. 995, 999, 61 Am. St. Rep. 693, 696, 3 Am. Neg. Rep. 597 (1897).

[18]Restatement, Torts (1934) § 353, "A vendor of land, who conceals or fails to disclose to his vendee any condition whether natural or artificial involving unreasonable risk to persons upon the land, is subject to liability for bodily harm caused

a vendor innocent of conscious deception can expect his vendee to discover dangerous conditions on the premises. But if the vendor conceals the defect, it is not likely that the vendee will discover it, and the vendor should be held liable for any injury arising from this defect.[19] Although the trial court found that this rule was applicable, its position does not seem logical. Here, since the tenant, claiming under the vendee, had notice of the defect, it should not be said that the vendor concealed the defect from the vendee. And it was the tenant who was injured, not the vendee.

The Restatement rule has received little support. Most of the cases hold that the vendor owes no duty to a purchaser to disclose dangerous defects, or that the rule of caveat emptor applies to sales of land in the absence of fraud.[20] *Kilmer v. White*[21] appears to be the only vendor-vendee case which has accepted the Restatement doctrine. In that case liability was not imposed on the vendor, but the court intimated that it might have been in a proper action. However, the case is not quite clear because the court speaks of a continuing nuisance as well as considering the disrepair from the negligence standpoint. It might be argued that a rule that a vendor's liability for negligence continues after conveyance would disrupt the free alienation of real property. This may be the reason why most of the cases deny continuing liability of the vendor in this situation.[22] But, from a viewpoint of personal

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thereby to the vendee and others upon the land with the consent of the vendee or his subvendee, after the vendee has taken possession if (a) the vendee does not know of the condition or the risk involved therein, and (b) the vendor knows of the condition and the risk involved therein and has reason to believe that the vendee will not discover the condition or realize the risk."

[19]In a somewhat analogous situation, that of landlord and tenant, it is generally held that the landlord has a duty to disclose dangerous latent defects in the premises to the tenant, where the landlord knows or should reasonably know of the defects. Cowen v. Sunderland, 145 Mass. 363, 14 N. E. 117 (1887); Harris v. Lewistown Trust Co., 326 Pa. 145, 191 Atl. 34 (1937); Stenberg v. Wilcox, 96 Tenn. 163, 33 S. W. 917 (1896), 34 L. R. A. 615 (1896-7). Cases collected: Wilcox v. Hines, 100 Tenn. 538, 46 S. W. 297 (1898).

[20]Upp v. Darner, 150 Iowa 403, 130 N. W. 409, 32 L. R. A. (N. S.) 743 (1911); Slavitz v. Morris Park Estates, 98 Misc. 314, 162 N. Y. Supp. 888 (1917); Palmore v. Morris T. & Co., 182 Pa. St. 82, 37 Atl. 995, 61 Am. St. Rep. 693, 3 Am. Neg. Rep. 597 (1897); Smith v. Tucker, 151 Tenn. 347, 270 S. W. 66 (1925), 41 A. L. R. 830 (1926).

[21]254 N. Y. 64, 171 N. E. 908 (1930). This case is generally accepted as illustrating the Restatement point of view. See Harper, Torts (1938) § 101; (1930) 10 B. U. L. Rev. 567; (1931) 16 Corn. L. Q. 130.

[22]In Palmore v. Morris, T. & Co., 182 Pa. St. 82, 37 Atl. 995, 999, the court said: "Public policy does not demand that such clogs on the transfer of real estate should be imposed by construction, nor does the law warrant such an implication."

fault—a breach of duty constituting negligence—the vendor should continue to be liable, since he is the original wrongdoer.

The Multiple Dwelling Law under which the principal case was decided has extended the common law in two respects: It has created a duty in the owner of property upon proper notice to repair, and it has extended the common law concept of nuisance. At common law the vendor would not have been liable, for the type of disrepair existing in the principal case would probably not have constituted a nuisance, even though it has been held in earlier New York cases that a nuisance may be a dangerous condition due to negligence.[23] It is not likely that liability would have been imposed upon the vendor in the absence of the statutory duty to repair the premises. Without that the defendant would not have been liable to the plaintiff as landlord, and could not have been held liable when he became vendor.[24]

This decision would seem to be correct in its approach to the problem on the nuisance theory; and in a more appropriate situation an imposition of liability on the theory of a concealment of the defect would be proper. To let a man escape liability for his wrong-doing by merely conveying the premises would appear contrary to ordinary notions of justice. True, the vendee should inspect and repair the premises as soon as they come under his control. But if the injury occurs within such a short time after the conveyance that no reasonable man would have the opportunity to repair, the vendee, who is guilty of no conscious wrongdoing, should be relieved from paying damages. Instead, the damages should fall upon the vendor, who by his breach of duty created the dangerous situation.

CARTER GLASS, III

TORTS—WIFE'S RIGHT AGAINST LIQUOR VENDOR TO RECOVER FOR LOSS OF HUSBAND'S CONSORTIUM. [Arizona]

The question of whether a wife may recover damages from a saloonkeeper for loss of consortium resulting from the consumption of intoxicating liquors sold to her husband has recently been considered in *Pratt*

[23]Klepper v. Seymour House Corporation of Ogdensburg, 246 N. Y. 85, 158 N. E. 29 (1927), 62 A. L. R. 955 (1929); McFarlane v. City of Niagara Falls, 247 N. Y. 340, 160 N. E. 391, 57 A. L. R. 1 (1928).

[24]The court did not consider the possibility of contributory negligence on the part of the tenant, but this issue might properly have determined the case. Contributory negligence would not be barred as the law of negligence applies to a negligent nuisance. The housing statutes have generally been construed as not affecting the defenses of contributory negligence and assumption of risk. Note (1934) 93 A. L. R. 782.

v. Daly.[1] It appeared that the plaintiff's husband was an habitual drunkard, and that the defendant, knowing this fact, continued to sell him intoxicants in spite of the wife's protests and warnings. The wife brought an action for damages alleging that the defendant had deprived her of her husband's consortium. Recovery was granted on the ground that the sale of liquor by the defendant constituted a direct and intentional invasion of the plaintiff's interest in her husband's society. The major issue facing the court was whether the sale of liquor by the defendant, or the consumption thereof by the husband, was the proximate cause of the injury.[2] The court found that through repeated drinking of intoxicants the husband had become such an inebriate that he no longer had the volition to resist consuming any liquor made available to him. Thus, since the sale is certain to be followed by the consumption of the liquor and resulting intoxication, "the consumption and the sale of such substances are, therefore, merged and become the act of the vendor; the sale is, therefore, the proximate cause of the loss of consortium. . . ."[3]

Although the right of the wife to maintain a suit for loss of consortium has in rare instances been permitted at common law,[4] the great weight of authority is to the effect that, in the absence of statute, no such right exists.[5] This rule necessarily results from the common law principle that the legal status and personality of a married woman are merged in that of her husband, so that only the husband can have any action for an injury to the wife or her interests.[6] However, Married

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[1]104 P. (2d) 147 (Ariz. 1940).

[2]It should be noticed that where a cause of action arises out of an intentional invasion of the plaintiff's rights by the defendant, the question of proximate cause is seldom put in issue. The court in the principal case apparently employed this terminology because the decisions in the "drug cases," note 12, infra, which were considered analogous to the instant case, were based upon the theory that the sale, and not the use of the drugs, was the proximate cause of the loss of consortium.

[3]104 P. (2d) 147, 151 (Ariz. 1940).

[4]Foot v. Card, 58 Conn. 1, 18 Atl. 1027, 18 Am. St. Rep. 258 (1889), 6 L. R. A. 829 (1890) (wife can maintain an action for the alienation of her husband's affection and society). Se Haynes v. Nowlin, 129 Ind. 581, 29 N. E. 389 (1891); Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, 18 (1889).

[5]Duffies v. Duffies, 76 Wis. 374, 45 N. W. 522, 8 L. R. A. 420 (1890); Crocker v. Crocker, 98 Fed. 702 (C. C. D. Mass. 1899); Doe v. Roe, 82 Me. 503, 20 Atl. 83, 17 Am. St. Rep. 499, 8 L. R. A. 833 (1890); Hougton v. Rice, 174 Mass. 366, 54 N. E. 843, 75 Am. St. Rep. 351 (1899), 47 L. R. A. 310 (1900); Hodge v. Wetzler, 69 N. J. L. 490, 55 Atl. 49 (1903).

[6]Madden on Persons and Domestic Relations (1931) § 54; Shipman on Common-Law Pleading (1923) § 228, p. 398; Tiffany, Law of Persons and Domestic Relations (1896) 48; cf. Tiffany, 78-79.

Women's Statutes[7] have been enacted in virtually all states, relaxing the common law restrictions. The wife is now accorded a general permission to sue, which includes the right to recover for injuries to the marital relationship.[8] It is now a generally accepted doctrine that the wife has a legally protected interest in the consortium of her husband and may recover for an intentional and direct invasion of the right;[9] but the courts have not recognized that the wife has such a cause of action for the mere negligent injury of her husband.[10]

In *Flandermeyer v. Cooper*[11] the wife was granted recovery for loss of consortium resulting from the sale of morphine by the defendant pharmacist to her husband, a drug addict. The court found that the defendant knew the husband was a drug addict and was conscious of the effect of the continued sales to him. He was no longer a free agent capable of controlling his own conduct and capable of exercising an independent judgment with reference to the use of this drug, but was merely the instrument through which this "treacherous" drug was transferred from the druggist's hand into his own system. In stating that the sale was the proximate cause of the injury, the court said:

> ". . . Individuals must be held to have contemplated the natural and probable result of their own acts purposely and intentionally

[7]For example, Ill. Rev. Stat. (1935) c. 68, ¶ 1; Minn. Stat. (Mason, 1927) vol. 2, § 9168; Consolidated Laws of N. Y. (Cahill, 1930) c. 14, § 57; Va. Code Ann. (Michie, 1936) § 5134.

[8]Nichols v. Nichols, 147 Mo. 387, 48 S. W. 947 (1898) (wife recovered from third person for enticing husband away from her); Oppenheim v. Kridel, 236 N. Y. 156, 140 N. E. 227 (1923), 28 A. L. R. 320 (1924) (wife recovered from third person for criminal conversation with her husband); Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N. E. 102, Ann. Cas. 1913A 983, 40 L. R. A. (N. S.) 360 (1912) (wife accorded right of action for sale of drugs to her husband). Contra: Crocker v. Crocker, 98 Fed. 702 (C. C. D. Mass. 1899) (Massachusetts statute interpreted as allowing no action for mere alienation of affections); Farrell v. Farrell, 118 Me. 441, 108 Atl. 648 (1920) (denied recovery to wife for alienation of husband's affections by father-in-law; Maine statute authorizes a wife to sue only a female defendant on this ground); Hodge v. Wetzler, 69 N. J. L. 490, 55 Atl. 49 (1903) (married woman held not to be able to maintain an action under the statute of New Jersey which has not abrogated the rule that the husband and wife are to be regarded as one person).

[9]Root v. Root, 31 F. Supp. 562 (N. D. Calif. 1940) (alienation of affections); Oppenheim v. Kridel, 236 N. Y. 156, 140 N. E. 227 (1923), 28 A. L. R. 320 (1924) (criminal conversation); Moberg v. Scott, 38 S. D. 422, 161 N. W. 998 (1917), L. R. A. 1917D 732 (loss of consortium).

[10]Fuller v. American Telephone and Telegraph Co., 21 F. Supp. 741 (D. Mass. 1937); Sobolewski v. German, 2 Harr. 540, 127 Atl. 49 (Del. Super. 1924); Feneff v. New York Central and Hudson River R. R., 203 Mass. 278, 89 N. E. 436 (1909), 24 L. R. A. (N. S.) 1024 (1910). Contra: Hipp v. E. I. Dupont de Nemours & Co., 182 N. C. 9, 108 S. E. 318 (1921), 18 A. L. R. 873 (1922).

[11]85 Ohio St. 327, 98 N. E. 102, Ann. Cas. 1913A 983, 40 L. R. A. (N. S.) 360 (1912).

committed, and it would be just as reasonable to say that due regard for the rights of others would not require the individual in the ordering of his own affairs to take into account the force of gravity, as to say that one who sells morphine to a person known by the seller to be a helpless victim of this drug is not required to contemplate the natural and probable result of the use the unfortunate purchaser is sure to make of it."[12]

Though the rule applied to drugs in *Flandermeyer v. Cooper* and other cases of like nature seems clearly applicable to the closely similar factual situation of the principal case, yet the common law doctrine concerning injuries resulting from the sale of intoxicating liquor does not support this analogy. The courts have consistently held that a saloon-keeper is not responsible for injuries sustained either by the consumer of the liquor or by third persons as a result of the negligent acts of the inebriate.[13] Here the consumption, not the sale, is said to be

[12]85 Ohio St. 327, 98 N. E. 102, 107, Ann Cas. 1913A 983, 988, 40 L. R. A. (N. S.) 360, 365-6 (1912). Also, Hoard v. Peck, 56 Barb. 202, 206 (N. Y. 1867) This is said to be the first case to recognize the now widely accepted principle that there are substances which, when habitually consumed, destroy the consumer's power to escape their use, and seriously impair his health. The plaintiff husband recovered for loss of consortium from a druggist selling laudanum. The court said: "The druggist, by the act of handing it to her for that purpose, [drinking as a beverage] is as much responsible for the consequences as though he assisted her directly in pouring it down her throat." Holleman v. Harward, 119 N. C. 150, 25 S. E. 972, 56 Am. St. Rep. 672 (1896), 34 L. R. A. 803 (1897). The husband was permitted to recover from a druggist for selling opium to the wife, a known drug-addict, resulting in the loss of consortium. The court held that the druggist and the wife joined in doing acts injurious to the rights of the husband.

[13]King v. Henkie, 80 Ala. 505, 60 Am. Rep. 119 (1886); Britton's Adm'r. v. Samuels, 143 Ky. 129, 136 S. W. 143, 34 L. R. A. (N. S.) 1036 (1911); See Kraus v. Schroeder, 105 Neb. 809, 182 N. W. 364, 365 (1921); Seibel v. Leach, 233 Wis. 66, 288 N. W. 774 (1939). See Restatement, Torts (1932) § 696 dealing with the liability of the drug dispenser to the wife for the sale of a habit-forming drug to the husband, in subsection (c) states: "The expression 'habit-forming drugs' as used in this Section does not include intoxicating liquors." The court in the principal case explained this as not a declaration that the decided cases exclude liquor from the rule but rather as merely a recognition that the precise issue had not been presented to and determined by any court.

Many states have passed Civil Damage Acts which afford statutory remedies for injury or damage resulting from the sale of intoxicating liquors. A typical example of these Acts is the Dram Shop Act, Ill. Rev. Stat. (1935) c. 43, ¶ 42, "Every husband, wife, child, parent, guardian, employer or other person, who shall be injured, in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving alcoholic liquor, have caused the intoxication, in whole or in part, of such persons; . . ." A similar West Virginia statute, Code of W. Va. (1931) c. 60, Art. 1, § 22, limits this liability to those injuries caused by unlawful sales of liquor. And see the discussion in the principal case, 104 P. (2d) 147, 154 (Ariz. 1940).

It is thought that an action such as the one permitted in the principal case would be allowed under these statutes.

the proximate cause of the injury.[14] In reaching a decision for the plaintiff-wife in the principal case, the Arizona court experienced considerable difficulty in breaking away from the precedents established in the liquor cases. Though the two prevailing judges were ultimately able to find legal theory to support the decision desired, the Chief Justice felt that he was forced to dissent from a result which he deemed just but not supported by the established law.[15] He believed that the decision of the majority required "the judicial department of the government to invade and take over a function of the lawmaking department" and to "create a right of action when none existed theretofore."[16] He pointed to the long list of cases establishing the common law rule in liquor cases, and emphatically denied that the contrary decisions in the drug cases could be applied when intoxicating liquors were involved. While the dissenting judge's reference to precedent is unanswerable, his rejection of the analogy of the drug cases seems an illogical and technical view. The mere fact that one harmful substance is termed a "drug" and the other a "liquor" should not be a determining factor in imposing liability. If the factual situations are the same and the harmful effects practically identical, there would seem to be no justification for such a fine distinction when the result in both instances is wrongfully to deprive the wife of the husband's consortium. Or, to speak in the terminology of the courts, the sale of the substance is as much the proximate cause of the injury in liquor as in drug cases, when the victim's power to resist the temptation to consume has been destroyed in both situations.[17]

[14]King v. Henkie, 80 Ala. 505, 60 Am. Rep. 119 (1886). Deceased drank liquor sold to him by defendant saloon-keeper when he was helplessly drunk, the drunkenness causing him to have an accident resulting in his death. The court denied recovery to his administrator saying that when he purchased and drank the liquor causing his death, it was his own negligence and wantonness in consuming the intoxicants which placed him in such a helpless state, not the negligence of the defendant in selling to him when helplessly drunk. Britton's Adm'r. v. Samuels, 143 Ky. 129, 136 S. W. 143, 34 L. R. A. (N. S.) 1036 (1911). The court held that the death of the deceased was not produced by the unlawful sale of the liquor but by the drinking thereof. Therefore the unlawful act complained of was not the proximate cause of the injury. Seibel v. Leach, 233 Wis. 66, 288 N. W. 774, 775 (1939). Plaintiff brought an action against defendant Leach who, while intoxicated, had driven his car against plaintiff's car, and defendant Landerman who sold the intoxicants to Leach. In holding Landerman, the tavern keeper, not responsible, the court said, "The common law rule holds the man who drank the liquor liable and considers the act of selling it as too remote to be a proximate cause of an injury caused by the negligent act of the purchaser of the drink."

[15]Pratt v. Daly, 104 P. (2d) 147, 153 (Ariz. 1940).

[16]Pratt v. Daly, 104 P. (2d) 147, 153-4 (Ariz. 1940).

[17]It may be suggested that a material difference between the drug and the liquor cases lies in the fact that at the present time the sale of drugs is illegal except in

Several courts have intimated that under similar circumstances, they might apply the same rule of liability for the sale of liquor that they have applied for the sale of drugs. In the recent South Dakota case of *Swanson v. Ball*[18] the plaintiff sued for loss of consortium resulting from the sale of intoxicants to her husband by the defendant saloonkeeper, despite her protests in the form of legally served notices to desist. The lower court overruled the defendant's demurrer. Defendant, on appeal, urged that plaintiff could show no actionable right by reliance on a case allowing recovery against a vendor of drugs, because drugs unquestionably constitute more serious danger to the human being than does intoxicating liquor. The court expressed itself as being unimpressed by the defendant's argument and upheld the trial court in ordering a trial on the merits. The court declared:

> ". . . independent of any specific statute the wife has a cause of action against anyone wrongfully interfering with the marital relationship regardless of the agency or instrumentality employed to inflict the loss."[19]

Nearly half a century ago the Supreme Court of North Carolina, in holding a vendor liable in a drug case, compared drugs and liquors in an emphatic expression of dictum:

> ". . . It is lawful to sell laudanum as a medicine. It is also lawful to sell spiritous liquors as a beverage upon the dealer's complying with the license laws, except in the cases prohibited by statute. Certainly no fair inference can be drawn from this that damages may not be recovered from one who knowingly and wilfully sells or gives laudanum or intoxicating liquors to a wife, in such quantities as to be attended by such consequences to the wife as are set out in the complaint in this action."[20]

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very limited situations whereas the sale of liquor is for the most part legal. It might seem unjust to hold the vendor of liquor liable for damages resulting from the sale when there is nothing illegal in the sale itself. The solution to this argument seems two-fold. First, when the drug cases were decided the sale was not prohibited as it is now. Therefore, it appears analogous to the sale of liquor at present. Second, simply because the sale of liquor is lawful in general it does not necessarily follow that its sale is lawful under all circumstances. When the wife's right to her spouse's consortium conflicts with the vendor's right to dispense liquor, the former is more worthy of recognition and protection by the courts.

[18]290 N. W. 482 (S. D. 1940).

[19]290 N. W. 482, 483 (S. D. 1940).

[20]Holleman v. Harward, 119 N. C. 150, 25 S. E. 972, 974, 56 Am. St. Rep. 672, 676, 34 L. R. A. 803, 805 (1886). Also Hoard v. Peck, 56 Barb. 202, 205 (N. Y. 1867), where the court said: "But, independent of the statute, if a party should allow a wife or servant of another to frequent his drinking room, without the knowledge of the husband or master, and should daily furnish the wife or servant with liquors to be *there drank,* until intoxicated, and the husband or master thereby sustains a pecuniary loss,

It may be argued that to permit this type of action will result in the filing of indiscriminate actions against liquor dealers. But as the court in the principal case observed, if the facts of the cases do not justify the suit, the courts will eliminate them with dispatch,[21] discouraging further litigation unless predicated upon the following propositions: (1) Defendant's knowing of the marital relationship; (2) defendant's understanding that the spouse is such an habitual drunkard that he can not resist the intoxicating liquor; (3) defendant's realizing the poisonous effects which intoxicants have on the spouse. With these essential prerequisites the vendor ought to know that the natural and probable result of the sale of the intoxicating liquor will be the loss of the consortium of the spouse. This should be basis enough for a finding of proximate causation between sale and injury.

Merely because the *Pratt* case is new and finds no precedent in the courts, it should not follow that this type of action cannot be maintained.[22] "It is the boast of the common law that 'its flexibility permits its ready adaptability to the changing nature of human affairs.' "[23] Although the Arizona court in the principal case found no case "on all fours" with it, the legal principles upon which the court predicated its opinion are well-established in the common law. The social and moral good which will result from the doctrine laid down in this case can not be overlooked by any court which is guided by a purpose to make the common law adaptable to needs arising with changing conditions of society.

ROBERT C. HOBSON

TORTS—PRESCRIPTIVE RIGHT TO MAINTAIN A NUISANCE. [New Jersey]

The complainants in *Benton v. Kernan*[1] filed a bill in equity to restrain defendants from operating their quarry and "Kern-O-Mix" business in such a manner as to constitute a nuisance. The complainants charged that the blasting of the rock occasioned their homes to be shaken and damaged, endangered their lives, and caused noises and

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does it follow because it is lawful to sell it as a beverage, under other circumstances, that it is lawful for a party, daily, to help the wife or servant to become intoxicated, to the loss and damage of the husband or master? . . ."

[21]Pratt v. Daly, 104 P. (2d) 147, 151 (Ariz. 1940).

[22]Holleman v. Harward, 119 N. C. 150, 25 S. E. 972, 974, 56 Am. St. Rep. 672, 674 (1896), 34 L. R. A. 803, 805 (1897).

[23]Flandemeyer v. Cooper, 85 Ohio St. 327, 98 N. E. 102, 104, Ann. Cas. 1913A 983, 986, 40 L. R. A. (N. S.) 360, 363 (1912).

[1]127 N. J. Eq. 434, 13 A. (2d) 825 (1940).

noxious odors which affected their health. The neighborhood was zoned as residential, but the quarry had been established many years previous to the residential development. The court enjoined the defendants from perpetrating the nuisance, and in so holding overruled defendants' contention that they had acquired a prescriptive right, asserting the "well-settled" New Jersey doctrine that no right of prescription can be acquired to maintain a nuisance.

Though the New Jersey court apparently applied the proper rule for its jurisdiction,[2] it appears to represent a minority view. Courts of other states have frequently declared that the rule is well established that one can acquire a prescriptive right to maintain a private[3] nuisance,[4] but notwithstanding these positive statements, there is a decided dearth of cases in which such prescriptive rights have actually been established.[5] Only in rare instances have claimants been able to bring themselves within the several fundamental standards applied by the courts to ascertain whether a prescriptive right has been obtained.

The first requirement demanded is the necessity of adverse use under claim of right. In *Schumaker v. Shawhan*[6] the court had occasion to explain the meaning of "adverse use." In that case plaintiff brought suit because defendant was polluting the stream and rendering it unsatisfactory for domestic purposes, contrary to plaintiff's right to a reasonable enjoyment thereof. The refuse had been deposited in the stream for 40 years, though defendant had been responsible for this activity only during the two years before the suit. Defendant pleaded a right by prescription. The court held that defendant had not acquired such a right because there was not a sufficient adverse use in that although the stream for many years had carried the refuse, not until several years past had it rendered the water unwholesome.[7] *Hester v. Sawyers*[8] states a correlative requisite in the court's emphatic declara-

[2]See cases cited in instant decision, Benton v. Kernan, 127 N. J. Eq. 434, 13 A. (2d) 825 at 841-2 (1940).

[3]In contradistinction, it is well settled that a person cannot acquire a prescriptive right to maintain a public nuisance. Drew v. Hicks, 101 Cal. XVII, 4 Cal. Unrep. 440, 35 Pac. 563 (1894); 20 R. C. L. 498, and cases cited therein.

[4]46 C. J. 750, and cases cited therein. Also cases cited in notes 6 to 15, infra.

[5]29 Cyc. 1206.

[6]93 Mo. App. 573, 67 S. W. 717 (1902). Also Stremph v. Loethen, 203 S. W. 238 (Mo. App. 1918).

[7]Accord, North Point Consolidated Irrigation Co. v. Utah & S. L. Canal Co., 16 Utah 246, 52 Pac. 168, 40 L. R. A. 851 (1898).

[8]41 N. M. 497, 71 P. (2d) 646, 651 (1937). The discussion by the court in this case of what constitutes prescription and how the right may be acquired is unusually thorough and instructive.

tion that a prescriptive right "cannot grow out of a strictly permissive use, no matter how long the use." However, the court points out that a permissive use may later become adverse if by words or act the user shows his intention of adverse claim.[9] The prescriptive period will then begin to run from the time the transition from permissive to adverse use is made, and does not relate back to any point that was purely permissive.

A second requisite deemed necessary by the courts, is that the use must have been a nuisance for which an action could have been maintained at any time during the prescriptive period.[10] And the party claiming the right has the burden of proving that plaintiff could have maintained an action against him during the entire prescriptive period.[11]

An equally salient requirement in determining whether a prescriptive right has become absolute, and one equally difficult of proof, is that the claimant must show that during the entire period he has caused an injury of the same grade and character as that complained of. In a Minnesota case[12] complainant brought suit to enjoin maintenance of defendants' gas plant which emitted nauseous fumes. The plant had been operating for fifteen years. It was found, however, that during the last seven years, because of enlargement of the plant, the harm had been appreciably altered and increased. On the basis of this difference in use, the court denied defendant a prescriptive right.

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[9]Clarke v. Clarke, 133 Cal. 667, 66 Pac. 10 (1901); Omodt v. Chicago, M., and St. P. R. Co., 106 Minn. 205, 118 N. W. 798 (1908); Pitzman v. Boyce, 111 Mo. 387, 19 S. W. 1104, 33 Am. St. Rep. 536 (1892) (prescriptive easement cases).

[10]In Charnley v. Shawano Water Power Improvement Co., 109 Wis. 563, 85 N. W. 507, 509 (1901) defendant had for 40 years maintained a dam which caused plaintiff's land to be flooded. It was held that plaintiff had had an action for the entire period, and his acquiescence and failure to press a claim gave rise to a prescriptive right in defendant. The court said: "That one may obtain a prescriptive right of flowage under proper conditions cannot be disputed. It is a right which must have been claimed and maintained in hostility to the right of person against whom it is set up. . . . It must have been continuous, exclusive, known to, and acquiesced in by, the owner of the rights affected thereby. . . . When these conditions concur, and the use has been extended for a period of 20 years or more, the prescriptive right becomes absolute."

[11]Stamm v. City of Albuquerque, 10 N. M. 491, 62 Pac. 973, 974 (1900) states that defendant assumes the onus of proving that for the entire period he has violated "the law to the extent and with the results charged and proved against him with the practical acquiescence of the person injured, and to the extent that during the whole time an action would lie against him."

[12]Matthews v. Stillwater Gas and Electric Co., 63 Minn. 493, 65 N. W. 947 (1896). Also, Ralston v. United Verde Copper Co., 37 F. (2d) 180 (D. Ariz. 1929), aff'd, United Verde Copper Co. v. Ralston, 46 F. (2d) 1 (C. C. A. 9th. 1931).

It also has been stated frequently by courts that in order to give rise to a perscriptive right the use must be uninterrupted and continuous for the full period.[13] The Alabama court has explained in typical language that the fact that defendant operated its mine in such a manner as to constitute a nuisance "does not show that the results to the plaintiff were uniform, or the same, during said period . . . the pollution of the water may have gradually grown so as to render it unfit for use during the last period, but which was not the case during the first part of the time, and the deposits may have been harmless at first, but gradually increased to the extent of injuring or destroying the value of the land upon which it was permitted to accumulate."[14] Such continuity of use, however, does not necessarily imply constant use. A Michigan case exemplifies the distinction when it states that the use, "in order to create a prescriptive right, need not be constant, in the sense of daily occupancy or use. It must be continuous and uninterrupted, but not necessarily constant. It is necessarily an irregular use, depending upon season and rainfall; and it is sufficient if the use be the ordinary use, and be resorted to without interruption wherever necessary in operation of the power."[15]

Although the courts in the above decisions and in similar cases involving the issues invariably express the rule that a person can acquire a perscriptive right to maintain a private nuisance, yet the denial of such right is often based on unconvincing reasoning. And in denying the right on the basis that the claimant has failed to meet one or several of the so-called necessary "requisites," the courts have been too eager to state the rules without pointing out satisfactorily in what respects the user has failed to measure up to the standards. It becomes evident, then, that the oft-asserted right is in fact granted only with great reluctance. The courts seem to have repeatedly demonstrated an unexpressed hostility to the prescriptive nuisance right. Perhaps this opposition is

[13]Stouts Mountain Coal Co. v. Ballard, 195 Ala. 283, 70 So. 172 (1915). Defendant mine owner contaminated stream whereby plaintiff was shorn of his right to reasonable use thereof for domestic purposes. Court held defendant's prescription had not been established because the use did not produce a uniform result throughout the period of adverse holding.

[14]195 Ala. 283, 70 So. 172, 174 (1915). Also, Watkins v. Pepperton Cotton Mills, 162 Ga. 371, 134 S. E. 69 (1926); Mississippi Mills Co. v. Smith, 69 Miss. 299, 11 So. 26 (1892) (where court allowed prescriptive right on finding that use was continuous); Stremph v. Loethen, 203 S. W. 238 (Mo. App. 1918).

[15]Cornwell Manufacturing Co. v. Swift, 89 Mich. 503, 50 N. W. 1001, 1004 (1891). Also Lawton v. Herrick, 83 Conn. 417, 76 Atl. 986 (1910) (precription to be valid must be reasonable). For a similar requirement, compare Chessman v. Hale, 31 Mont. 577, 79 Pac. 254 (1905) (character and extent of use).

based on the fact that to grant the claim is to deprive a person of his property for a purely private purpose of another.[16] The courts also may feel that nuisances are usually of such a noxious character that they reflect themselves incidentally against the "public good." In this sense courts too may feel that nuisances tend more toward a "criminal" than a civil wrong.

The possibility of obtaining the benefits resulting from a prescriptive right to maintain a nuisance without actually relying on the theory of prescription is suggested in connection with the Statute of Limitations. If this method can be invoked, the essence of the prescriptive right can be secured in considerably less time than the regular prescriptive period, and at the same time the reluctance of the courts to find the necessary requisites of a prescriptive right can be circumvented. To demonstrate this possibility let it be assumed that defendant has been perpetuating a nuisance for six years prior to plaintiff's bringing his action (i. e. for six years plaintiff has had a cause of action); and that a state statute provides for a limitation period of five years on the right to sue for damages, and a prescriptive period of fifteen years. If it further be assumed that the nuisance involved comes within those types which courts classify as "permanent," the person injured by the nuisance would, under the prevailing doctrine, find himself barred by his delay from bringing an action for damages.[17] For the rule as supported by the weight of authority is that when by wrongful acts a "permanent" nuisance is created, the injured party has a single cause of action in which he may recover for his entire damage, both past and prospective.[18] Since this cause of action accrues at the creation of the

[16]See McKinney v. Trustees of Emory and Henry College, 117 Va. 763, 767-8, 86 S. E. 115, 117 (1915) for a hint that a prescriptive nuisance right bears analogy to an outright condemnation of land.

[17]See cases and authorities cited in notes 18 and 19, infra.

For a temporary nuisance the rule is otherwise. If a temporary nuisance exists, there may be a right of action for injuries suffered within the last five years preceding the bringing of suit, though the right of action for earlier injury had been lost. May v. George, 53 Ind. App. 259, 101 N. E. 393 (1913); Wells v. New Haven and Northampton Co., 151 Mass. 46, 23 N. E. 724 (1890). For a full discussion, see McCormick on Damages (1935) 500-515.

[18]Town of Troy v. Cheshire R. R. Co., 23 N. H. 83, 55 Am. Dec. 177 (1851) (case appears to have originated the doctrine that all damages are recoverable in one action); International Shoe Co. v. Gibbs, 183 Ark. 512, 36 S. W. (2d) 961 (1931); N. K. Fairbank Co. v. Bahre, 313 Ill. 636, 73 N. E. 322 (1905); McCormick on Damages (1935) 504-5.

Representing the contrary view that plaintiff must bring successive actions and recover only for injuries suffered by the time each trial is brought: Aldworth v. City of Lynn, 753 Mass. 53, 26 N. E. 229, 10 L. R. A. 210 (1891). See McCormick on Damages (1935) 402-4.

nuisance and cannot be split, the plaintiff's right of recovery will be barred unless the action is brought within the prescribed number of years from the time the nuisance began.[19]

The injured party may then seek to obtain relief as to the future by asking equity to enjoin the continuance of the nuisance. Whether equity too will refuse to aid the petitioner for an injunction, after he has delayed for a considerable time in seeking relief, is a question which cannot be squarely answered. It has been said in some jurisdictions that laches does not depend, as does the Statute of Limitations, on the expiration of a definite time but rather on the circumstances of each case.[20] However, it is universally agreed that equity will not aid in the enforcement of stale claims,[21] and it has been pointed out that the trend, at least, is for equity to follow courts of law as to limitations.[22] The court in *McNair v. Burt*[23] states emphatically what would seem to be the prevailing rule at the present time:

> "As this is a case which could have been brought in an action at law, the jurisdiction at law and in equity is concurrent. In such a case of concurrent jurisdiction, the equity court does not enforce the doctrine of laches, but instead is bound by the statute of limitations which governs in actions at law."

Numerous other courts have stated this same principle in differing

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[19]Missouri Pacific R. Co. v. Davis, 186 Ark. 402, 53 S. W. (2d) 851 (1932); Schlosser v. Sanitary District of Chicago, 299 Ill. 77, 132 N. E. 291 (1921); McDaniel v. City of Cherryvale, 91 Kan. 40, 136 Pac. 899, 50 L. R. A. (N. S.) 388 (1913); Gorman v. Chicago, B. & Q. R. Co., 166 Mo. App. 320, 148 S. W. 1009 (1912); Virginia Hot Springs Co. v. McCray, 106 Va. 461, 56 S. E. 216 (1907); McCormick on Damages (1935) 513.

[20]Sullivan v. Portland and K. R. R., 94 U. S. 806, 811, 24 L. ed. 324 (1876): "Every case is governed chiefly by its own circumstances; sometimes the analogy of the Statute of Limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient. . . ." Patterson v. Hewitt, 11 N. M. 1, 66 Pac. 552, 55 L. R. A. 658 (1901); Townsend v. Vanderwerker, 160 U. S. 171, 16 S. Ct. 258, 40 L. ed. 383 (1895); Alsop v. Riker, 155 U. S. 448, 15 S. Ct. 162, 39 L. ed. 218 (1894).

[21]Hayward v. National Bank, 96 U. S. 611 at 618, 24 L. ed. 855 (1877).

[22]Speidel v. Henrici, 120 U. S. 377, 7 S. Ct. 610, 30 L. ed. 718 (1887); Note (1931) 79 U. of Pa. L. Rev. 341. For a general discussion, see McClintock on Equity (1936) 38.

[23]68 F. (2d) 814, 815 (C. C. A. 5th, 1934). This was an action for an accounting and for recovery for losses sustained by a bank through mismanagement by the directors. Here the "concurrent" jurisdiction of law and equity would apparently allow a suit in either court for approximately the same type of relief. In nuisance cases, of course, the remedies of the injured party would take different forms in the two tribunals. But the jurisdiction of law and equity are "concurrent" in the sense that the victim of the nuisance can obtain some type of relief in either court.

terminology;[24] and, in some jurisdictions where the distinction between law and equity has been abolished, a plea of the statute has been held good.[25]

So in the hypothetical case the plaintiff, having had for the entire six years both an action at law for damages and a suit in equity for an injunction, is precluded from any relief whatever, and the fifteen year prescriptive period has in effect been reduced to five years.[26] There would seem to be nothing to prevent courts from thus giving one what is in effect a prescriptive right by such an application of the Statute of Limitations. However, courts so reluctant to allow a prescriptive right to be acquired in the regularly established prescriptive period might well also be hesitant to allow an analogous "right" to be obtained in less than the full period.[27]

ROBERT G. ISGRIGG

[24]Metropolitan National Bank v. St. Louis Dispatch Co., 149 U. S. 436, 13 S. Ct. 944, 37 L. ed. 799 (1893); Kelley v. Woodley, 228 Ala. 401, 153 So. 745 (1934); Hayes v. Belleair Development Co., 120 Fla. 326, 162 So. 698 (1935); People ex rel. Blair v. Michigan Central R. Co., 145 Mich. 140, 108 N. W. 772 (1906); Keys v. Leopold, 241 N. Y. 189, 149 N. E. 828 (1925); Taylor v. Slater, 21 R. I. 104, 41 Atl. 1001 (1898).

[25](1926) 26 Col. L. Rev. 362, 363. "Along with the abolition of the distinction between law and equity the statutes have become applicable alike to suits formerly cognizable in law or equity and the question is no longer whether equity will apply the same limitations but whether the particular action is barred."

[26]Though no instance has been discovered in which courts have actually reached this result, yet in Virginia the Court of Appeals has by its decisions in two cases virtually taken the position that it would give a defendant this "quasi-prescriptive" right in a proper situation. In Virginia Hot Springs Co. v. McCray, 106 Va. 461, 56 S. E. 216 (1907) the plaintiff's action for damages for defendant's nuisance was held barred by the Statute of Limitations, because the "permanent" nuisance had been in operation to the plaintiff's damage for more than the five year limitations period. In McKinney v. Trustees of Emory and Henry College, 117 Va. 763, 86 S. E. 115 (1915) the suit was for an injunction to restrain the continuance of a "permanent" nuisance. The trial court denied the injunction, apparently on the ground that the nuisance had been in operation for more than the five year limitations period. Though the Court of Appeals reversed and remanded, it did so on the finding that the nuisance had not been in existence for that long a time. There seemed to be no doubt that the trial court was sound in its legal theory, nor that the upper court would have held the plaintiff barred had the facts shown that the limitations period had run. If the court will bar different plaintiffs from legal and equitable relief, there seems to be no reason why it would not likewise bar the same plaintiff of relief should the occasion arise.

[27]See Face & Son v. Cherry, 117 Va. 41, 45, 84 S. E. 10, 11 (1915) where the court held that plaintiff was not guilty of laches in suing to enjoin a nuisance created by the operation of a brick kiln, because though the nuisance had been instituted seventeen years before suit, yet within the past few years new kilns had been constructed in the brick yard which aggravated the annoyance being suffered by the plaintiff. The court held that since "The conditions creating the nuisance . . . have been gradual and cumulative in their character . . . the evidence makes out a case of continuing nuisance, to which the doctrine of laches does not apply."

WILLS—RIGHT OF CREDITOR OF HEIR OF TESTATOR TO CONTEST ALLEGEDLY INVALID WILL. [Iowa]

The recent case of *In Re Duffy's Estate*[1] raises the question of the right of the creditor of an heir to contest the probate of a will by which his debtor, the heir, will be disinherited. Hugh Duffy's will and codicil bequeathed and devised his property to his thirteen children in equal shares. The portion left to his son George, however, was by the terms of the will placed in trust for him, so as to be unavailable for the payment of his debts. Before the testator's death the Fairbank State Bank had obtained judgments against George in the amount of $8000. The will and codicil were entered for probate, at which time the Bank filed objections to the probate, charging that the testator was at the time of execution of the will of unsound mind, and was incapable of making a will. The proponent's demurrer followed and was sustained, and judgment was entered probating both will and codicil. The Supreme Court of Iowa reversed the judgment, stating that the demurrer should have been overruled, and the contestant given a chance to present its grounds for contest.

A will contest is a statutory proceeding.[2] Some states regard it as similar to a common law action and give jurisdiction over the contest to a common law court. Others regard it as equitable in nature.[3] The usual requirement for contesting probate of a will is one of "interest." By interpretation of the statutes it is held that all persons "interested" may contest the probate of the will.[4] The question then arises as to who possesses this statutory qualification. It has been held that the interest sufficient to support a will contest is "a direct, immediate and legally ascertained pecuniary interest in the devolution of the testator's estate,"[5] or the interest possessed by one "directly affected in a pecuniary sense by a settlement of the estate,"[6] or "an interest in the property of the estate affected by the will."[7] The jurisdiction deciding the principal case has said that "such action [probate contest] can be taken only by

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[1]292 N. W. 165 (Iowa 1940).

[2]1 Page, Wills (2d. ed. 1928) § 542, 909-910.

[3]1 Page, Wills (2d. ed. 1928) § 542, 909-910.

[4]See 40 Cyc. 1241; L. R. A. 1918A 447 et seq., and cases cited in both works.

[5]See Bloor v. Platt, 78 Ohio St. 46, 84 N. E. 604, 605 (1908).

[6]See Re Biehn's Estate, 41 Ariz. 403, 18 P. (2d) 1112, 1114 (1933).

[7]In Re Meredith's Estate, 275 Mich. 278, 266 N. W. 351, 356 (1936). Also see Chilcote v. Hoffman, 97 Ohio St. 98, 119 N. E. 364, 366 (1918),". . . a person who has such a direct pecuniary interest in the devolution of the testator's estate as would be impaired or defeated by the will, or be benefitted by setting it aside" may contest.

one who would have a beneficial interest in the estate, if there was no such will."[8]

Parties generally permitted to contest probate are the heirs or next of kin who would take in case of intestacy, unless they take a larger share by the will than by intestacy,[9] beneficiaries of an earlier will by which their share was greater than under the will being contested,[10] purchasers from an heir,[11] and the state, if the property would escheat in the absence of a will.[12] There is a conflict of authority as to whether personal representatives can raise objections to the will. Many courts allow the executor named in a prior will to contest; and a smaller number of jurisdictions allow contest by the administrator who was appointed on the supposition that there was no will.[13] It is generally held that creditors of the testator may not contest his will, their interest being unaffected by the will;[14] nor may purchasers from the deceased in his lifetime contest.[15]

Most authorities hold that the general creditor of the heir does not possess the requisite interest to contest.[16] However, the judgment or lien creditor of the heir, in the majority of cases,[17] is held to have an

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[8]See In Re Estate of Stewart, 107 Iowa 117, 118, 77 N. W. 574 (1898).

[9]Hays v. Bowden, 159 Ala. 600, 49 So. 122 (1909); In Re Adkin's Will, 179 Iowa 1025, 162 N. W. 193 (1917); Alden v. Johnson, 63 Iowa 124, 18 N. W. 696 (1884); Biles v. Dean, 14 So. 536 (Miss. 1893).

[10]Buckingham's Appeal, 57 Conn. 544, 18 Atl. 256 (1889); McDonald v. McDonald, 142 Ind. 55, 41 N. E. 336 (1895); Kennedy v. Walcutt, 118 Ohio St. 442, 161 N. E. 336 (1928).

[11]Hooks v. Brown, 125 Ga. 122, 53 S. E. 583 (1906); Savage v. Bowen, 103 Va. 540, 49 S. E. 668 (1905).

[12]State v. Rector, 134 Kan. 658, 8 P. (2d) 323 (1932); State v. Lancaster, 119 Tenn. 638, 105 S. W. 858 (1907).

[13]See Atkinson on Wills (1937) 465–6 and cases there cited.

[14] Montgomery v. Foster, 91 Ala. 613, 8 So. 349 (1890).

[15]Pena y Vidaurri's Estate v. Bruni, 156 S. W. 315 (Tex. Civ. App. 1913). The plaintiff was a purchaser of land from the testator before the death of the latter. The will purported to pass the land to another, and plaintiff attempted to contest, charging that probate of the will would cast a cloud on his title. The contest was not permitted.

[16]See Atkinson on Wills (1937) 467. Also see Watson v. Alderson, 146 Mo. 333, 48 S. W. 478, 482 (1898); In Re Langevin, 45 Minn. 429, 47 N. W. 1133 (1891). Contra: Brooks v. Paine's Ex'r, 123 Ky. L. Rep. 271, 90 S. W. 600 (1906).

[17]In Watson v. Alderson, 146 Mo. 333, 48 S. W. 478, 482 (1898) it was said, "A lien creditor . . . has the same direct and immediate interest in the probate of a will by which that title would be divested that an heir at law has." Mullins v. Fidelity and Deposit Co., 30 Ky. L. Rep. 1077, 100 S. W. 256 (1907); Smith v. Bradstreet, 16 Pick. 264 (Mass. 1834); In Re Langevin, 45 Minn. 429, 47 N. W. 1133 (1891); Matter of Coryells Will, 4 App. Div. 429, 39 N. Y. S. 508 (1896); Bloor v. Platt, 78 Ohio St. 46, 84 N. E. 604 (1908).

interest sufficient, though there is a substantial body of authority denying him the right to contest.[18]

In the *Duffy* case, at the testator's death and before the probate probate proceedings, the judgments in favor of the Bank had already been filed so as to constitute a lien upon any realty which the heir might inherit. To probate an invalid will would be to deprive the contesting Bank of something of material value to it,[19] for the Bank had a lien which would attach the instant title vested in the heir.[20] Because the judgment creditor's claim to the heir's share of the estate is thus more direct and definite, it is said that the position of such a creditor is patently stronger than is that of the general creditor, who has only an expectancy and no tangible interest in the debtor's real estate until he has pursued his claim to judgment or has secured a lien on the property.

Courts denying the judgment creditor the right to contest have not been consistent in their approach. An early Pennsylvania case denied the right mainly on the basis of the danger of tying up large estates by creditors with comparatively small debts owing to them from the heir.[21] A Tennessee case based its holding on the fact that the creditor can only act in the right of the heir who in this case was quite satisfied not to contest.[22] Two later cases held as they did only by a restrictive construction of the statutes of their respective states which postulated that those who took an interest in the estate by virtue of and under the will might contest the probate.[23]

The decision of the *Duffy* case allowing the judgment creditor to contest would seem to be preferable to those cases denying him that right. However, it is suggested that an even better approach might be to retain the qualification of interest, but to widen its scope so as to include any party who stands to be materially prejudiced by the probate of an invalid will. The distinction, for example, between the rights of judgment and mere general creditors does not appear to turn on any substantial difference in their need for legal relief. The claim of the one is not more appealing to the sense of justice than that of the other.

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[18]Lockard v. Stephenson, 120 Ala. 641, 24 So. 996 (1899); Lee v. Keech, 151 Md. 34, 133 Atl. 835 (1926); Bank of Tennessee v. Nelson, 3 Head. 634 (Tenn. 1859). See Keeler v. Lauer, 73 Kan. 388, 85 Pac. 541 (1906); In Re Shepard's Estate, 170 Pa. St. 323, 32 Atl. 1040 (1895).

[19] In In Re Langevin, 45 Minn. 429, 47 N. W. 1133 (1891) the court observed that the liens would be conclusively unseated by the probate of a spurious will.

[20]See 68 C. J. 906 and cases cited therein.

[21]In Re Shepard's Estate, 170 Pa. St. 323, 32 Atl. 1040 (1895).

[22]Bank of Tennessee v. Nelson, 3 Head. 634 (Tenn. 1859).

[23]Lockard v. Stephenson, 120 Ala. 641, 24 So. 996 (1899); Lee v. Keech, 151 Md. 34, 133 Atl. 835 (1926).

Of course, the possibility of multiplicity of suits deserves consideration, for to tie up estates for long periods by the contest proceedings of petty creditors would admittedly be unfortunate. However, in practice it is not probable that this objection would be of great importance since the costs of the suit would prevent most actions by small creditors. The fact that in the one case the creditor has been diligent enough to pursue his claim to judgment should not make his claim more meritorious. The probate court would necessarily have to assure itself of the validity of the general creditor's claim, but there should be little delay occasioned thereby and nothing should be made to turn on this fact. To admit the general creditor into the group of those who might contest probate would not open the door to fraud, which is the only eventuality to be feared in actual probate practice. And on theory alone there seems to be no reason why any person having knowledge of the illegal circumstances surrounding the making of a will should not be permitted to further the ends of justice by having a day in court.

A related problem is suggested by that of the *Duffy* case. Is there such an obligation on the heir to pay his debts that he can be forced to contest the will by a general creditor who is himself unable to object to probate? The word "debt" connotes an obligation to pay which is enforceable in an action at law.[24] This obligation is always present in a true debt, but the manner in which it is to be paid or the means of forcing payment do not enter into the definition.[25] The obligation of the debtor to take voluntary steps to put himself in a position to pay the debt is a moral one only. The creditor can usually enforce his claim by the regular method of suit at law on the debt and enforcement of the judgment by attachment or execution and levy if necessary. But it does not appear that the extraordinary remedy of forcing the heir to contest the will in order to give him a chance at an heir's share has been made available to the creditor.[26] A somewhat analogous remedy may be seen in the familiar "creditors' suit," which is a proceeding in equity to force the discovery and application to the payment of debts,

[24]Haynie v. Robertson, 58 Ala. 37, 39 (1877). See State v. Hawes, 112 Ind. 323, 326, 14 N. E. 87, 88 (1887); Kidd v. Puritana Cereal Food Co., 145 Mo. App. 502, 122 S. W. 784, 788 (1909). See 17 C. J. 1376.

[25]See Dunsmoor v. Furstenfeldt, 88 Cal. 522, 529, 26 Pac. 518, 520 (1891); Melvin v. State, 121 Cal. 16, 53 Pac. 416, 419 (1898); Rodman v. Munson, 13 Barb. 188, 197 (N. Y. 1859).

[26]That a court of equity has no jurisdiction, independent of statute, of an action to revoke the probate of wills, see Crawfordsville Trust Co. v. Ramsey, 178 Ind. 258, 98 N. E. 177 (1912). No such statutes have been found giving the creditor the right to force a contest.

of equitable assets and property not subject to the process of levy and sale, or execution at law.[27] It may be, but usually is not, brought by a single creditor. However, a prerequisite to the bringing of this suit is the creditor's having first exhausted his remedy at law by a judgment; the general creditor cannot, in the absence of statute, collect his claim in this proceeding in equity.[28] Hence, the general creditor of the heir would hardly be in position to rely on any form of creditors' suits as a precedent for the nature of relief which he seeks.[29] The only case resembling this situation, in which a suit by a creditor was allowed, concerned a judgment creditor.[30]

The *Duffy* case also suggests the question of whether or not the legatee can disclaim his legacy, if the effect will be to prejudice the rights of the creditors who desire to subject the property in the debtor-legatee's hands. That a legatee may so disclaim is the general rule.[31] The creditor has no right, nor the court jurisdiction, to compel acceptance.[32] Here also the general creditor by majority rule is in a helpless position. Such situations, demonstrating as they do the unfortunate plight of the general creditor, serve to support the contention that the doctrine of the *Duffy* case should be extended to include the general creditor among those entitled to contest the probate of an allegedly invalid will.

JOHN E. PERRY

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF A STATUTE IMPOSING LIABILITY WITHOUT FAULT OF NON-CONTRIBUTING EMPLOYERS. [West Virginia]

In the recent West Virginia case of *Prager v. W. H. Chapman & Sons Co.*[1] the Supreme Court of Appeals held unconstitutional a 1937 amendment to the State's Workmen's Compensation Act. The amended

[27]See 15 C. J. 1380 and cases therein cited. See also Bouvier's Law Dictionary (1934) 254.

[28]See 15 C. J. 1388 and cases cited.

[29]In the case of In Re Shepard's Estate, 170 Pa. St. 323, 324, 32 Atl. 1040, 1041 (1895) the court by a question states its opinion as to this lack of remedy on the part of the general creditor. "Assume that on a contest, at the instance of the son, the will could be set aside; how can he be compelled to initiate or carry on such a contest?"

[30]Komorowski v. Jackowski, 164 Wis. 254, 159 N. W. 912 (1916).

[31]Lehr v. Switzer, 213 Iowa 651, 239 N. W. 564 (1931); Schoonover v. Osborne, 193 Iowa 474, 187 N. W. 20 (1922); Strom v. Wood, 100 Kan. 556, 164 Pac. 1100 (1917); Tarr v. Robinson, 158 Pa. St. 60, 27 Atl. 859 (1893); Bradford v. Calhoun, 120 Tenn. 53, 109 S. W. 502 (1908).

[32]Robertson v. Schard, 142 Iowa 500, 119 N. W. 529 (1909); Bains v. Globe Bank and Trust Co., 136 Ky. 332, 124 S. W. 343 (1910).

[1]9 S. E. (2d) 880 (W. Va. 1940).

statute[2] provided that any non-contributing or defaulting employer should be liable to his employees for all damages suffered by reason of accidental personal injuries or accidental death sustained in the course of and resulting from their employment; and that the employer should not be allowed to plead in defense (1) the fellow servant rule, (2) assumption of risk, (3) contributory negligence, (4) the negligence of someone whose duties are prescribed by statute. Before the amendment the statute[3] had been the same in all respects except that it included a clause expressly stating that the employer was liable only in case the employee's injuries were caused by the "wrongful act, neglect or default" of the employer or of some of his agents or employees.

The defendant in this action demurred to the plaintiff's declaration on the ground that there could be no recovery because there was no allegation of a breach of a legal duty. The lower court overruled the demurrer, but the Supreme Court of Appeals sustained it. The statute was declared unconstitutional on the ground that although the legislature could abolish the common law defenses, it could not impose liability without fault in an action entirely outside the Workmen's Compensation statute.[4]

While readily admitting that the legislature could pass a compulsory compensation act under the police power, the court ruled that the police power did not give the legislature the authority to impose liability on an employer without fault, as the police power could not be extended to control private rights as between individuals. The attempt of the legislature to impose a liability on the employer, "the effect of which may be, in case of an injury to the employee to transfer to him the property of the employer merely because of the existence of a master and servant relationship, and where there was no fault on the part of either . . ." was branded arbitrary and violative of due process requirements of the State and Federal Constitutions.[5]

Judge Hatcher in his dissent[6] argued that the doctrine of no liability without fault is just another judge-made defense like contributory negligence, assumption of risk, and the fellow servant rule, and that if the legislature can set aside the latter three, it can also abrogate the former. To sustain his contention that the amendment was within the police

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[2]W. Va. Code (1937) § 104-2-8.

[3]W. Va. Code (1931) § 23-2-8.

[4]The court further held the act invalid because it violated a provision of the state constitution that no act shall embrace more than one object, and that object shall be expressed in the title. W. Va. Const. Art. VI, § 30.

[5]9 S. E. (2d) 880, 884 (W. Va. 1940).

[6]9 S. E. (2d) 880, 884 (W. Va. 1940).

power, Judge Hatcher relied on the reasoning of Mr. Justice Holmes that "there is no more certain way of securing attention to the safety of the men, an unquestionably constitutional object of legislation, than by holding the employer liable for accidents."[7]

In interpreting the wording of the amended statute to determine that it was intended to hold an employer liable without fault, the court seems to have adopted a narrow and technical view. In at least three jurisditions[8] statutes have been passed in phraseology similar to the one in question, and each of these has been construed to require either that the plaintiff must prove the defendant negligent in order to recover or that the defendant must show that there was no negligence on his part in order to avoid liability. In view of these authorities it appears that the West Virginia court could have found that the statute did not dispense with the requirement of fault. But the West Virginia court apparently felt itself bound to hold as it did because the 1937 amendment entirely omitted the phrase of the earlier statute which required the plaintiff to show that the defendant was guilty of a "wrongful act, neglect or default"[9] in order to secure a recovery.

The Workmen's Compensation Acts of many states are similar to the West Virginia Act prior to the 1937 amendment. These Acts have consistently been upheld by the highest courts of the states.[10] These courts have declared that there can be no objection to the legislatures' abolishing the common law defenses[11] inasmuch as they were all judge-made and can be abrogated by legislative authority. In *Borgnis v. Falk*

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[7]Inspiration Consolidated Copper Co. v. Mendez (Arizona Employers' Liability Cases), 250 U. S. 400, 432, 39 S. Ct. 553, 560, 63 L. ed. 1058 (1919), 6 A. L. R. 1537, 1551 (1920).

[8]Ill. Laws of 1911, p. 314 as interpreted by Crooks v. Tazewell Coal Co., 263 Ill. 343, 105 N. E. 132 (1914) (the Illinois law today is not the same); Iowa, Acts 35th Gen. Assembly, c. 147 as interpreted by Hunter v. Colfax Consol. Coal Co., 175 Iowa 245, 154 N. W. 1037 (1915); amended, 157 N. W. 145 (1916); Mass. Stat. 1911, c. 751 as interpreted by In re Opinion of Justices, 209 Mass. 607, 96 N. E. 308 (1911); Ray v. Western Union Telegraph Co., 258 Mass. 303, 154 N. E. 853 (1927); Hutchinson v. Sovrensky, 267 Mass. 5, 165 N. E. 698 (1929).

[9]W. Va. Code (1931) § 23-2-8.

[10]N. J. Pub. Laws 1911, pp. 134 and 763 as interpreted by Sexton v. Newark District Telegraph Co., 84 N. J. L. 85, 86 Atl. 451 (1913), aff'd., 86 N. J. L. 701, 91 Atl. 1070 (1914); 102 Ohio Laws 524 as interpreted by State ex rel. Yaple v. Creamer, 85 Ohio St. 349, 97 N. E. 602 (1912); Texas, Acts 33rd Legis., c. 179 as interpreted by Middleton v. Texas Power & Light Co., 108 Tex. 96, 185 S. W. 556 (1916); Wis. Laws 1911, c. 50 as interpreted by Borgnis v. Falk Co., 147 Wis. 327, 133 N. W. 209 (1911).

[11]These defenses, as involved in the Workmen's Compensation Acts in these cases are: (1) The assumption of risk, (2) the fellow servant rule, (3) contributory negligence.

Co.[12] the Wisconsin court, in sustaining the legislative abolition of assumption of risk and the fellow servant rule, declared that these defenses were not entrenched behind any express constitutional provision and that they had not been created by any legislative provision. It was further observed that the defenses were evolved by the courts at a time when industries of all kinds were comparatively simple and free from danger. Since each employee knew his fellow employees, it was not unreasonable to hold that he assumed the risk of their carelessness. But in the last half century conditions of industry have greatly changed, and the legislatures have properly seen fit to change the rules governing liability. The other courts in upholding their state acts have relied for their reasoning on Mr. Justice Van Devanter's opinion in *Mondou v. N. Y., N. H. & H. R. R.*[13] where the Supreme Court of the United States held valid the Federal Employers' Liability Act applying to railroads.[14] The Justice declared:

> "Of the objections to these changes [in common law defenses] it is enough to observe: First. 'A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process ;but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.' "[15]

It would seem that these authorities could be taken to indicate that any common law defense created by the courts could be wiped away by the legislature. As Judge Hatcher pointed out in the dissent in the principal case, "there is nothing in the dogma of no liability without fault of such 'exceptional sanctity' as to set it apart from, or above, the [other] common law defenses. . . ."[16] The Supreme Court of the United States has said that the common law rules affecting negligence

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[12]147 Wis. 327, 133 N. W. 209 (1911).

[13]223 U. S. 1, 32 S. Ct. 169, 56 L. ed. 327 (1912).

[14]35 Stat. 65, c. 149, U. S. Comp. Stat. (Supp. 1909) p. 1171. This act eliminated the common law defenses, but the court held that it did not deprive any person of property without due process of law, or abridge any liberty of contract in violation of the 5th amendment.

[15]Mondou v. N. Y., N. H. & H. R. R. (Second Employers' Liability Cases), 223 U. S. 1, 50, 32 S. Ct. 169, 175, 56 L. ed. 327 (1912). Mr. Justice Van Devanter was himself quoting from the opinion of Mr. Chief Justice Waite in Munn v. Illinois, 94 U. S. 113, 134, 27 L. ed. 77, 87 (1876).

[16]9 S. E. (2d) 880, 885 (W. Va. 1940).

are guides of conduct and tests of liability which are subject to change by the sovereign authority.[17] In various instances defendants have been held liable though there was no negligence on their part, as in the case of a railroad causing a fire along its right of way,[18] and cattle causing injury to sides of a highway.[19]

The Arizona Employers' Liability Law[20] imposed absolute liability upon employers in those businesses which the legislature declared hazardous. In upholding this law, the Supreme Court of the United States[21] decided that it did not infringe upon the employer's rights under the Fourteenth Amendment merely because it might be novel and unwise; and that making the employer assume the liability, though contrary to the common law concept, was not a violation of due process. The court pointed out that in several cases it has held that liability may be imposed without fault and that the rules of negligence can be changed.[22]

The New York case of *Ives v. South Buffalo Ry.*[23] is the only case that has been found in which a statute similar to the one in question has been declared unconstitutional. The statute[24] involved in this case differed from the West Virginia law only in that it included employers in only certain specified occupations and did not provide a fund to which the employers could subscribe and thus relieve themselves of full liability for the payments. The court struck down the law because it deprived employers of due process of law in that it might impose liability on the employer where there was no fault on his part. This case has been criticized;[25] and New York has circumvented the decision by a

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[17]N. Y. Central R. R. v. White, 243 U. S. 188, 200, 37 S. Ct. 247, 251, 61 L. ed. 677 (1916), L. R. A. 1917D 1.

[18]St. Louis & San Francisco Ry. v. Mathews, 165 U. S. 1, 17 S. Ct. 243, 41 L. ed. 611 (1897).

[19]Jones v. Brim, 165 U. S. 180, 17 S. Ct. 242, 41 L. ed. 677 (1897). See also, Tenn. Code Ann. (Michie, 1932) § 2682.

[20]Ariz. Rev. Stats. (1913), pars. 3153-3162; Laws of 1912, Reg. Sess., c. 89.

[21]Inspiration Consolidated Copper Co. v. Mendez (Arizona Employees' Liability Cases), 250 U. S. 400, 39 S. Ct. 553, 63 L. ed. 1058 (1919), 6 A. L. R. 1537 (1920).

[22]Mondou v. N. Y. Central R. R. (Second Employers' Liability Cases), 223 U. S. 1, 49-51, 32 S. Ct. 169, 174-175, 56 L. ed. 327 (1912); N. Y. Central R. R. v. White, 243 U. S. 188, 37 S. Ct. 247, 61 L. ed. 667 (1917); Hawkins v. Bleakly, 243 U. S. 210, 37 S. Ct. 255, 61 L. ed. 678 (1917); Mountain Timber Co. v. Washington, 243 U. S. 219, 37 S. Ct. 260, 61 L. ed. 685 (1917); Middleton v. Texas Light & Power Co., 249 U. S. 152, 39 S. Ct. 227, 63 L. ed. 527 (1919).

[23]201 N. Y. 271, 94 N. E. 431 (1911).

[24]N. Y. Laws 1910, c. 674, Art. 14a.

[25]Notes (1911) 34 L. R. A. (N. S.) 162; (1911) 24 Harv. L. Rev. 647.

constitutional amendment[26] and a new statute[27] which has been upheld by the Supreme Court of the United States.[28]

It is believed that the West Virginia Legislature, if it desires to do so, can still take steps to achieve at least a substantial part of its original aims in spite of the effect of the principal case. It can follow the suggestion of the court and pass a compulsory act,[29] or it can pass an act which imposes liability only for fault, but shifts the burden of proof to the employer and requires him to show that he is free from negligence. It is suggested that until some further action is taken by the legislature, the status of workmen's compensation in West Virginia is in considerable doubt. For the court in its opinion did not limit its decision of unconstitutionality to any specific clause in the statute, and thus may be thought to have destroyed the effect of the entire amended section of the 1937 Act. If this is true, the employer would seem again to have the right to plead any of the common law defenses, as was the situation before workmen's compensation acts were adopted.

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[26]N. Y. Const. Art. I, § 19.

[27]N. Y. Laws 1913, c. 816, as re-enacted and amended by N. Y. Laws 1914, c. 41, and amended by N. Y. Laws 1914, c. 316.

[28]N. Y. Central R. R. v. White, 243 U. S. 188, 37 S. Ct. 247, 61 L. ed. 667 (1917).

[29]If a state can pass a compulsory act forcing all employers to participate in the workmen's compensation system, it may well seem to follow that the state can use any means short of absolute compulsion to induce employers to subscribe to a voluntary compensation act. Apparently the West Virginia court would deny this conclusion on the reasoning that the passage of a compulsory act involves the use of the police power for a public purpose, whereas the abrogation of the defense of no-fault involves a control of private rights between individuals. And the police power cannot be invoked in the latter situation. See Prager v. W. H. Chapman & Sons Co., 9 S. E. (2d) 880 at 883 (W. Va. 1940).