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PREPARATION FOR CRIME AS A CRIMINAL ATTEMPT

By JOHN S. STRAHORN, JR.*

Both as fascinating and as fruitless as the alchemists' quest for the philosopher's stone has been the search, by judges and writers, for a valid, single statement of doctrine to express when, under the law of guilt, preparation to commit a crime becomes a criminal attempt thereat. Some judges, concerned with deciding and rationalizing specific fact situations relating to separate defined crimes, have enunciated statements of doctrine purporting to be valid for all possible situations under all crimes. Some writers, visualizing a greater variety of situations and crimes, have essayed to lay down general rules. Other judges and writers have denied the capacity of the field for valid generalization.

It is not the purpose of this article to assert that any one of the extant statements of doctrine in the matter is necessarily valid, nor to attempt to propound any new one claimed to be an improvement on earlier ones. Rather the scope of inquiry will be merely to investigate the extent to which a unitary statement reflecting the law and the policy of the topic can be worked out which may, at least, be helpful in understanding the subject even though it will not always give the answer with mechanical perfection.

The approach will be to discuss the facts of some of the leading cases, together with the statements of doctrine therein announced, against the background of the social policy and philosophy of the law of attempts. Particularly to be emphasized will be the matter of which one of the conflicting theories of the purpose of punishment has been and should be adhered to and emphasized in adjudicating and rationalizing attempt problems.

This article serves as a somewhat belated sequel to one¹ published by the writer practically a decade earlier in which earlier article one particular phase only of the attempt problem was treated. It is planned now to deal principally with the remaining definite area in which there is dispute as to criminality. The earlier article dealt with the cases

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¹The Effect of Impossibility on Criminal Attempts (1930) 78 U. Pa. L. Rev. 962.

where the attempt had failed because of the impossibility of success. This one will treat of the problem of when the preparation to commit a crime (the possibility of success assumed, or immaterial) has gone far enough to constitute a criminal attempt.²

Implicit in the statement of the problem is the idea that the time of the accruing of criminality as for an attempt is at some moment *prior* to when guilt as for the major crime would attach and, at the same time, is normally at some moment *subsequent* to that of the formation of the intent and the doing of the first act peculiarly concerned with the execution of that intent. It was seen, in the impossibility area,³ that the doing of an act expected by the actor to be completely successful could, as circumstances varied, involve complete crime, criminal attempt, or non-criminal attempt. There is a similar trichotomy in the preparation field, i. e., complete crime, criminal attempt thereat, or not-yet-criminal attempt.

THE SOCIAL POLICY AND PHILOSOPHY OF THE TOPIC

In spelling out the social policy and philosophy underlying the solution of the problem of distinguishing between not-yet-criminal attempts (hereafter called non-criminal attempts) and criminal ones, two things are important to be considered. One is the legal technique for distinguishing between that which is, admittedly, a criminal attempt and the major crime attempted. The other is the policy and philosophy of making that distinction itself.

For the view is here accepted that the task of distinguishing between non-criminal and criminal attempts is but a reflection of the similar task of distinguishing between criminal attempts and the major crimes attempted, and that the same considerations of policy and philosophy are applicable. In developing these points the elements of a typical crime and the conflicting theories of the purpose of punishment must be considered.⁴ The three elements of a typical crime are, respectively, the criminal result or *corpus delicti*; the defendant's conduct or *causa-*

²Because of the inter-relation of the two subjects, because of the need for treating the intervening cases and literature, and because subsequent reflection indicates some slight change in views and in terminology, considerable reference herein to the earlier paper may be necessary. For this a blanket apology is now offered.

³Supra n. 1, at 962.

⁴The writer has earlier developed the point of the inter-relation between the elements of guilt and the theories of punishment, with reference to attempts in the article cited supra n. 1, at 966-971, and with reference to crimes in general in another article, *Criminology and the Law of Guilt* (1936) 84 U. Pa. L. Rev. 491, 600.

tion; and the criminal intent or *mens rea*.⁵ The three conflicting theories of the purpose of punishment are, respectively, the vengeance theory of punishing so as to compensate for the result which has already occurred; the deterrence theory of punishing so as to discourage the future happening of socially dangerous conduct from men generally; and the recidivism theory of punishing as a means of coping with the immediate offender's own personal dangerousness to society if he be left unpunished.

Each of the three elements of criminality is correlated to one of the three theories of punishment. That of the *corpus delicti* or criminal result relates, historically, to the vengeance theory. The rules concerned with the requirement of causative conduct from the defendant exemplify the deterrence theory. The element of the *mens rea* or criminal intent purports to implement the recidivism theory of applying or withholding punishment according to whether that is necessary in order to protect society against a possible recurrence of the defendant's dangerous conduct.

When we analyze the distinction between completed crimes and admittedly criminal attempts, with a view to ascertaining just which element of criminality is involved, and which theory of punishment is applicable, it is disclosed that the difference is taken according to the extent of the *corpus delicti*, in pursuance of the vengeance theory of punishing according to the relative amount of the social harm *already caused* by the defendant's conduct. This is so because the second factor of the defendant's actual conduct *may*⁶ be the same for complete crime, criminal attempt, and non-criminal attempt. So too, with the third factor. There may be as much criminal intent for mere attempts (criminal or non-criminal) as for the complete crime. In fact, less intent will sometimes suffice for guilt of the complete crime than is usually required for a criminal attempt.⁷ The two elements of conduct and intent are,

⁵See, as dividing attempt crimes into the intent, the overt act, and the societal harm, Curran, *Criminal and Non-Criminal Attempts* (1931) 19 *Geo. L. J.* 185, 189, 316.

⁶Thus if one, with intent to steal, picks up an umbrella and moves it, he will be guilty of larceny if it be that of another and not chained down; of attempted larceny if it be chained to the wall; and of no crime if, unknown to him, it was his own umbrella.

⁷It is not planned herein to go into any extensive discussion of the intent element. By the orthodox rule there can be no guilt of an attempt without a specific intent to accomplish the major crime, although some courts will permit a mere intent to frighten to suffice for the assault type of attempt. Then, too, if a complete battery occurs, many courts will permit less than a specific intent, including gross negligence, intent merely to frighten, or violation of another criminal prohibition to suffice. On this, see Tulin, *The Role of Penalties in the Criminal Law* (1928) 37 *Yale L. J.* 1048. If

thus, constant; and no explanation of the difference between major crime and criminal attempt, nor of that between criminal attempt and mere preparation, may be made on either basis.

So, from the standpoint of the theories of the purpose of punishment, there would be no differences taken under the deterrence and recidivism theories. There is just as much need of deterring the unsuccessful conduct causing a criminal attempt as that which is completely successful because, from the standpoint of the one to be deterred, that conduct is the same. The one who tries and fails manifests as much personal tendency to repeat as the one who tries and is successful. Were either of these theories applicable in the attempt area, the same punishment would be given for attempts as for the major crimes. That there is usually a difference⁸ in the punishment for major crimes and criminal attempts thereat indicates that neither the deterrence nor the recidivism attitude is explanatory of how to distinguish the complete crime and the attempt.

The distinction between the major crimes and criminal attempts thereat is thus a matter of the extent of the *corpus delicti* which has resulted from the offender's conduct. To determine when the line between criminal attempt and major crime has been crossed, recourse must be had to the definition of the major crime and to the detail therein contained which is concerned with the *corpus delicti* element (as distinguished from that of the intent).⁹ The idea of assessing a lesser punishment for the criminal attempt is thus to be explained as concerning the application of the vengeance theory in making distinctions between greater and lesser criminal results. So long as this is so, it is submitted that the line between criminal and non-criminal attempts should be drawn in the same fashion, and subject to the same theory of the purpose of punishment.

Whether the preparation constitutes a criminal attempt thus is a matter of whether it has gone so far as to create enough of a *corpus delicti*—resembling and approaching, although not equalling that involved in the major crime itself—so as to be worthy of the law's notice.

there be lacking the requisite intent, then neither the preparation nor the impossibility problem can strictly arise.

⁸Occasionally the same punishment is provided for the attempt and for the complete crime. This was so for attempted rape in *Lewis v. State*, 35 Ala. 380 (1860), discussed *infra* n. 42; and is now the rule in Maryland, which provides the death penalty for both, Md. Code (1924) Art. 27, Sec. 17.

⁹As, for example, the question of the subject matter of larceny and the necessary taking into possession and asportation; those of night-time, dwelling house, breaking, and entering for burglary; and that of whether there was a burning in arson.

This process calls for a visualization of the essential components of the corpus delicti of the major crime itself whenever it is sought to spell out just what constitutes the corpus delicti of the attempt thereat, in order to solve a problem of "preparation or criminal attempt."

The basic philosophy of attempt law has been that of vengeance for an accrued criminal result, as may be observed from the majority of the decided cases. But occasionally one encounters, either in judicial opinions or in the other literature of the subject,¹⁰ the view that punishment as for a criminal attempt should also be used as a technique for implementing the deterrence and recidivism theories of the purpose of punishment. There is seen a demand for punishing for attempt, even when no discernible corpus delicti was created, if nevertheless the offender committed conduct unduly in need of deterrence or manifesting a high degree of personal tendency to commit crime.

The recent Pennsylvania case of *Commonwealth v. Johnson*¹¹ (which is an impossibility case rather than one of preparation) well illustrates, through the clash between the views of the majority of the court and the dissenting opinion, the conflicting attitudes concerning the purpose of punishment as for an attempt. In that case a conviction of attempted obtaining of money by false pretenses was upheld. Defendant physician, suspected of fraudulent practices, was approached by a detective posing as a private citizen. The detective pretended to be seeking medical advice for an absent relative. The defendant pretended to operate an electrical machine which was supposed to disclose the ailments of the absent patient. He then prescribed, and was paid some money by the detective. Under the law of the state, defendant could not have been prosecuted for the complete crime of false pretenses, as the "victim" had not believed the pretenses to be true. Despite this "legal impossibility"¹² the court concluded that a criminal attempt was present, rejecting the *Jaffe* case,¹³ and relying on the *Gardner* case,¹⁴ the empty pocket

¹⁰Statutes which provide the same punishment for attempt and complete crime reflect this view, too.

¹¹312 Pa. 140, 167 Atl. 344 (1933).

¹²Ibid 167 Atl. 346, where the majority opinion contended that there was no "legal impossibility" in the case. To which the question is: If this were not legal impossibility, what is? "Legal impossibility" is merely a name for the concept of the attempted act itself not being criminal. On this see the article cited supra n. 1, at 963, 986-991.

¹³People v. Jaffe, 185 N. Y. 497, 78 N. E. 169 (1906), which held it no criminal attempt to receive stolen goods where defendant endeavored to receive (and did receive) goods which had once been stolen but which had ceased to be stolen at the time defendant received them. The Jaffe case is discussed supra n. 1, at 988-991.

¹⁴People v. Gardner, 144 N. Y. 119, 38 N. E. 1003 (1894) which held it a criminal

cases,¹⁵ and some others,¹⁶ all of which appear to the present writer to be capable of being distinguished.

To the present writer the case seems definitely out of step with the trend of the attempt cases, which is to acquit when the attempted crime is legally impossible, because there is then no discernible *corpus delicti* present. And there was none present in this case. No one was put in danger of being deceived by false pretenses. Defendant did not get close to getting any money through false pretenses. The true *corpus delicti* of attempted false pretenses occurs when the victim is exposed to false pretenses, at least then believed by him to be true, and is tempted to surrender his money through them.¹⁷

The real philosophy of the majority opinion in the *Johnson* case can be gleaned from a statement in it:¹⁸

"If this were held to be no attempt because there was no deception, then criminals of this kind, committing this offense, which is a subtle form of larceny, could go on plying their illicit

attempt to extort where defendant obtained money from one who, unknown to him, was but a decoy, and was not in fear of the threats imposed on her by defendant. See, to the effect that the Gardner case was overruled by the later Jaffe case, *supra* n. 1, at 988-991.

¹⁵167 Atl. 346. I. e., those cases holding that there can be a criminal attempt at robbery by putting a hand into another's pocket, intending to steal the contents, even though the pocket turns out to be empty. These cases can be distinguished, of course, from the situation in the *Johnson* case, for in them, despite the pocket's being empty, a discernible *corpus delicti* or invasion of another's interest occurs, whereas none occurred on the facts of the *Johnson* case. For a discussion of the empty pocket cases, see *supra* n. 1, at 979.

¹⁶167 Atl. 345-6, citing *Regina v. Roebuck*, 7 Cox. C. C. 126 (1856); *Regina v. Ball*, 1 C. & M. 249, 174 Eng. Rep. 493 (1842); and *State v. Peterson*, 109 Wash. 25, 186 Pac. 264 (1919). All three of these cases can be distinguished on the ground that in them the victim did not become aware of the falsity of the pretenses until an appreciable time after their first being made to him, whereas in the *Johnson* case the "victim" was aware of the falsity of the pretenses from the very start. So there was no *corpus delicti* because the victim was never exposed to false pretenses.

¹⁷So, in *Rex v. Robinson*, [1915] 2 K. B. 342, where a jeweler pretended to have been robbed, in the hope of collecting his burglary insurance, and the fraud was discovered before he was able to report the loss to the insurance company, it was held no criminal attempt at false pretenses. This would be because the victim had not yet been exposed to false pretenses. See also *People v. Mayen*, 188 Cal. 237, 205 Pac. 435 (1922) holding that the attempt *had* occurred when the victim had heard the pretenses, had agreed to put up the money, had procured it and, with the money in possession, was en route with the swindler to the place where the deal was to be consummated when the latter was arrested. In *People v. Werblow*, 241 N. Y. 55, 148 N. E. 786 (1925) it was said that mailing a false pretense from New York to a victim abroad would constitute an attempt, but that sending an agent abroad to make the pretense there would not. This would also indicate that the *corpus delicti* occurs when the victim is exposed to false pretenses, not yet discovered by him to be false.

¹⁸167 Atl. 344, 347-

trade until they find a dupe,¹⁹ and would thus have a favored status in the law over other thieves."

Therein lies the tale, as it does in several of the minority cases. The idea is to use the attempt device primarily as a weapon to cope with potential recidivists, or to deter future criminals from offending, rather than merely to compensate for occurred social harm, as has customarily been the rule.

The dissenting opinion in the *Johnson* case apparently took the orthodox view that criminal attempts are punished because of the quantum of the social harm already occurred. The opinion well stated how the criminality of an attempt usually depends on the presence of enough of a corpus delicti resembling that for the major crime:²⁰

"To convict any one of an attempt to commit any crime, the elements present in the attempt must, *as far as they exist at all, be the same elements that are among those present in the completed crime.*"

The dissenting opinion stated that it should be for the legislature to decide whether to punish one for merely holding himself out as a medical miracle worker, and that the cases cited by the majority were those departing²¹ from the "logic" of the law of attempts in order to punish potential recidivists, regardless of any social harm's having occurred.²² It was suggested (and properly so) that the majority's logic could as soon support a conviction of one for "attempting" to kill by magic or incantations,²³ or for attempting to steal something itself not the subject of larceny, as a wild animal²⁴(or, we may add, one's own umbrella).

The *Johnson* case presents not only the clash of the older vengeance theory with the more modern deterrence and recidivism ones, but it also involves the conflicting emotions concerned, respectively, in the desire to enforce the criminal law efficiently by convicting swindlers, and the public distaste for "frameups" and "entrapment."²⁵ To permit of

¹⁹The question-begging of this statement should be obvious. How is the trade "illicit" prior to a dupe's being located?

²⁰167 Atl. 344, 349.

²¹To the present writer, these cases do not necessarily depart from the logic of orthodox attempt law, but can be distinguished from the situation in the *Johnson* case, as was done, herein supra n. 15 and n. 16.

²²167 Atl. 344, 347: ". . . cases in which this logic has been departed from in order to lay the lash of the law on those whose states of mind marked them as possible criminals."

²³167 Atl. 344, 348.

²⁴167 Atl. 344, 350.

²⁵See, concerning the function of the corpus delicti requirement to prevent "frame-ups," supra, n. 4, at 502.

conviction where the major crime planned is legally impossible is to run the risk of these latter distasteful events.²⁶

SOME OF THE PREPARATION CASES

In dealing with some of the leading cases on when preparation to commit a crime becomes a criminal attempt thereat the facts, decisions, and tests laid down will be treated with reference to the problem of whether the conduct, in the particular instances, created enough of a corpus delicti of the kind the crimes and their attempts involve to be worthy of punishment.

The principal cases selected deal with three typical crimes against the person (murder, rape, and robbery); with the two crimes against the habitation (burglary and arson); and with four crimes in which the interest invaded is purely a public one and which do not involve any injury to the person, property, or habitation of any other individual (sodomy, incestuous marriage, jail breaking, and liquor smuggling).

Murder

The salient difference between the corpus delicti of the major crime of murder (death by violence inflicted by another) and that of the criminal attempt thereat is, obviously, that in the latter case the victim shall not die, but shall survive either up to the time of trial or at least a year and a day after the blow.²⁷ The problem is, granting no death, what itself makes for that lesser corpus delicti, as it varies according to the type of means used. This will be discussed with reference to murder attempts by shooting, bombing, and poisoning.

In *People v. Miller*²⁸ a conviction for attempted murder by shooting was reversed where defendant approached his alleged victim, carrying a rifle, but at no time raised or aimed the rifle, and the victim kept a distance between them until defendant was disarmed. While the case as much goes off on the lack of proof of the necessary specific intent, as on the preparation point, yet the court also discussed it from the latter angle, all the while realistically recognizing the impossibility of formulating a general rule or definition on that point. The terminology of "direct ineffectual act," "direct movement," and "appreciable fragment of the crime committed" was used and the rule was stated (though ap-

²⁶Another attempt case departing as much as the Johnson case from the usual philosophy of attempt law is *Collins v. City of Radford*, 134 Va. 518, 113 S. E. 735 (1922) holding it a criminal attempt to transport liquor where defendant went to a haystack where he expected the liquor to be, groped for it, but did not get it, as it had previously been removed.

²⁷I. e., under the usual rule that the victim must die within that time after the blow in order to have criminal homicide.

²⁸2 Cal. (2d) 527, 42 P. (2d) 308 (1935).

parently qualified) that when the specific intent to commit the crime is clearly shown, slighter acts than otherwise will suffice.

It would seem, from this case, that we can spell it out that the corpus delicti of attempted murder by shooting arises, at the earliest, when the defendant starts to aim the weapon at the victim.²⁹ This is consistent with *Lee v. Commonwealth*³⁰ where the victim anticipated defendant's attack by jumping on him from behind and in the scuffle the defendant did his best to discharge the weapon. This was held a criminal attempt. Aiming, or otherwise trying to discharge the weapon at the victim does create a situation which, among others, brings into being a sufficient corpus delicti of attempted murder, i. e., a reasonable fear on the victim's part of being immediately shot at, which fear does not necessarily exist until the weapon be aimed or the effort be made to shoot it.³¹ The beginning of this fear seems a good place at which to draw the line for the corpus delicti of this kind of attempt.

Attempted murder by bombing was involved in *People v. Lanzit*.³² Defendant, desirous of killing his estranged wife, arranged with one skilled with explosives for the preparation of a bomb. This person pretended to assent, disclosed the plot to the authorities, actually prepared

²⁹Thus, in *Regina v. Duckworth*, [1892] 2 Q. B. 83, one who drew a revolver, pointed it at the victim, and was seized before he could discharge it was convicted of "attempting to discharge firearms." In *Burton v. State*, 109 Ga. 134, 34 S. E. 286 (1899), one was held not guilty of assault on murder who drew a weapon from his hip pocket, but did not aim it because it caught in the lining of his coat and fell to the floor. In *Ex Parte Turner*, 3 Okla. Cr. 168, 104 Pac. 1071 (1909) it was held no criminal attempt to shoot where one held a gun in his hand but neither pointed it nor made threats. In *State v. Wood*, 19 S. D. 260, 103 N. W. 25 (1905) it was held no assault with a deadly weapon where one went in search of a razor to carry out his threat to kill, but desisted before procuring the razor. In *Cornell v. Fraternal Accident Assoc.*, 6 N. D. 201, 69 N. W. 191 (1896) it was held that one, on an out of season hunting expedition, was not "attempting to kill" prairie chickens while climbing a bank with a gun in hand.

³⁰144 Va. 594, 131 S. E. 212 (1926).

³¹Thus, in *State v. Rains*, 53 Mont. 424, 164 Pac. 540 (1917) it was held no attempt to murder where a husband, possessed of two loaded weapons and a bottle of laudanum, met his wife, struck her, took her home, locked her in, and himself went for a pail of water and she escaped. In *State v. Davis*, 319 Mo. 1222, 6 S. W. (2d) 609 (1928) a conviction of attempt to murder was reversed where a hired killing was arranged and plotted, but the victim was taken into custody as he was about to depart on the trip on which defendant's agent was to kill him, and defendant was immediately thereafter himself arrested. On the other hand, in *Stokes v. State*, 92 Miss. 415, 46 So. 627 (1908) it was held criminal attempted murder where defendant requested R to do the killing, procured a gun, loaded it, and started with R and the gun to the ambush point and was arrested as he was handing the gun to R at that point. The victim had not arrived. The conviction was under an attempt statute calling for an "overt act."

³²70 Cal. App. 498, 233 Pac. 816 (1925).

an active bomb which would have exploded had it been allowed to remain, and, together with defendant, went to the wife's residence and placed the bomb in a room adjoining her bedroom, the defendant assisting in setting the clock-work mechanism. Defendant was arrested on the spot and, of course, the bomb never exploded. The appellate court affirmed a conviction of attempted murder, finding both an intent to murder and a direct, ineffectual act toward its commission. It was said that the acts for a criminal attempt did not have to include the last proximate act for completion, so long as they amounted to a commencement of the consummation.³³

From this we can take it that the corpus delicti of an attempt to murder by a bomb placed on the premises occurs (regardless of whether earlier events in the sequence might also constitute it)³⁴ when the bomb is placed on the intended premises, or when the offender, bearing the bomb, arrives at that spot for the purpose of so placing it. This is borne out by *Jambor v. State*³⁵ which affirmed a conviction of attempted murder where defendant placed a bomb on the victim's premises, and set it so as to explode when the victim drove into his driveway. The victim came in by another route and defendant returned to remove the bomb and was himself injured when it exploded while he was removing it. Spelling it out that the corpus delicti of attempted bombing occurs when the victim's premises are first invaded by the unexploded bomb is consistent with the impossibility cases which find it a criminal attempt to fire a bullet into the victim's bed when (unknown to the offender) he is absent,³⁶ or to fire in one direction at the victim when he is present, though situated in another direction.³⁷ There is a discernible, tangible criminal result when a lethal machine is deposited on victim's premises, as there is when his bed is invaded by a bullet, or his vicinity is similarly disturbed.

The case of *Stabler v. Commonwealth*³⁸ involved attempted murder by poisoning and it reversed a conviction for the attempt where de-

³³An impossibility problem is raised by the factor of the accomplice's disclosing the plot to the police and not intending to go through with it. The analogy is to the use of a firearm believed by the user to be loaded, when, in fact it is not. On this, see supra n. 1, at 973-976.

³⁴Thus, in *People v. Stites*, 75 Cal. 570, 17 Pac. 693 (1888), it was held a criminal attempt to place a bomb where defendant prepared a bomb, intended to be placed on a distant part of the street railway tracks, and left his home, situated within a few feet of the tracks and proceeded, with the bomb, toward the intended place, and was interrupted en route.

³⁵75 Wis. 664, 44 N. W. 963 (1890).

³⁶*State v. Mitchell*, 170 Mo. 633, 71 S. W. 175 (1902).

³⁷*People v. Lee Kong*, 95 Cal. 666, 30 Pac. 800 (1892).

³⁸95 Pa. 318 (1880).

fendant had done nothing more than ask a third person to put poison in the victim's spring and had put the poison in that third person's pocket, in the (vain) hope that he would place it. The court rejected the contention that putting the poison in the pocket of the person solicited was sufficient to constitute the attempt. It was said that the act did not approximate sufficiently near to the commission of murder.³⁹

From the negative implications of this, and from the actual decision in *Commonwealth v. Kennedy*,⁴⁰ which held it a criminal attempt to poison that defendant placed poison on the cross-bar of victim's "moustache cup," even though victim did not use the cup, we can take it that the corpus delicti of attempted murder by poison occurs when the poison first comes in contact with the receptacle, food, or water supply of the victim, regardless of whether it ever comes in contact with the victim's own body.⁴¹ But this corpus delicti has not yet occurred merely when a request is made or a plot laid, looking to the future contact of the poison with the receptacle, food, or water.

It is clear, of course, in the three types of attempted murder discussed, that the attempt would occur, respectively, when the gun was fired, when the bomb exploded, and when the poison actually came in contact with the victim's body. The cases discussed point out that the corpus delicti also can occur earlier than these, i. e., when the gun is aimed, when the bomb is placed, and when the poison is placed in receptacle, food, or water. In the first type there is an objective fear or danger, in the others, a tangible invasion of the victim's property.

Rape

The essential difference between the corpus delicti of rape and that of attempted rape is that penetration occurs in the former case and does not occur in the latter. Aside from this, both involve and include shock and terror to the female victim; in the former case, that arising from the actual undesired penetration; in the latter case, that arising from the fear or prospect of such undesired penetration in the imme-

³⁹In accord, that asking another to administer poison is not a criminal attempt, *Hicks v. Comm.*, 86 Va. 223, 9 S. E. 1024 (1889); and *Regina v. Williams*, 1 Car. & K. 589, 174 Eng. Rep. 950 (1844). Contra, *Collins v. State*, 3 Heisk. 14 (Tenn. 1870).

⁴⁰170 Mass. 18, 48 N. E. 770 (1897). Accord, *Rex v. White*, [1910] 2 K. B. 124, holding it attempted murder where defendant put poison in the victim's lemonade, but the victim did not partake of it, inasmuch as she actually died from syncope before tasting the poisoned lemonade.

⁴¹In the earlier article, *supra* n. 1, at 984-986, the present writer favored the view that the corpus delicti of attempted poisoning does not occur until there is actual contact of the poison with the victim. Subsequent reflection indicates a change of view to that advanced in the text herein above.

diate future. This shock and terror is what, essentially, constitutes the corpus delicti of attempted rape.

A preparation case of this sort was *Lewis v. State*.⁴² Defendant Negro slave, possessing (so the jury found under the instruction) an intent to commit forcible rape, accosted a passing white woman, who fled and was pursued by defendant for over a mile, defendant never getting any closer to her than ten steps, and she eluded him. He was held guilty of attempted rape⁴³ and, so it would seem, properly so. The court recognized the futility of generalizing, but said that if he "prosecuted his purpose so far as to put her in terror, and render flight necessary" the attempt was complete.

It would seem that from this we can say that the corpus delicti of attempted rape arises whenever the overt act of defendant, be it pursuit, detention, or actual touching or struggling with the intended victim reasonably puts her in fear of being presently raped.⁴⁴ His touching or not touching her is immaterial if, in either such event, he creates in her mind a state of terror arising from the fear or prospect of an actual rape.⁴⁵ There would be little dispute that an actual touching (with requisite intent) would suffice.⁴⁶

Robbery

The difference between the corpus delicti for completed robbery and that for attempted robbery is that, in the former case, the thief gets possession of and asportates the personal property sought to be stolen and, in the latter case, he does not. For both there must be the presentation of force or fear to the intended victim (or, at least, defendant and victim must be in each other's presence) with intent to deprive the victim of personal property through that means. Clearly, if there is such a presentation of fear, or actual use of force by so much as a touching of the victim (as witness the empty pocket cases),⁴⁷ the corpus delicti of the attempt is present.

⁴²35 Ala. 380 (1860).

⁴³Accord: *Burton v. State*, 8 Ala. App. 295, 62 So. 394 (1913).

⁴⁴In *State v. Lung*, 21 Nev. 209, 28 Pac. 235 (1891) one was held not guilty of attempted rape who mixed cantharides in a woman's coffee with the expectation of obtaining her consent to intercourse thereby.

⁴⁵In *Territory v. Keyes*, 5 Dak. 244, 252, 38 N. W. 440, 442 (1888) the court, in holding (unknown) impotency no defense to a charge of assault to rape, said: "The essence of the crime is the outrage of the person and feelings of the female."

⁴⁶So, in *People v. Stewart*, 97 Cal. 238, 32 Pac. 8 (1898) it was held attempted rape where defendant threw the woman to the ground, intending to rape her, but abandoned his purpose on the approach of a third party.

⁴⁷I. e., the line of cases, mentioned supra n. 15, which hold that one may be guilty of attempted robbery from a pocket, though the pocket be empty.

The preparation problem for robbery is brought into focus by *People v. Rizzo*.⁴⁸ Defendant and three others planned a "hold-up" of a payroll messenger and went in search of him and were arrested as one of them entered a building where they (erroneously)⁴⁹ believed the victim to be. A conviction for attempted robbery was reversed because their acts had not gone "so near its accomplishment that in all reasonable probability the crime itself would have been committed but for timely interference."

This case bears out the statement that the corpus delicti of attempted robbery does not happen until the intended victim's vicinity is reached or he is subjected to some physical contact or put in fear.⁵⁰ As these latter cannot happen until robber and victim get in the immediate vicinity of each other, the *Rizzo* case is perfectly correct⁵¹ under the orthodox theory of attempts, which is to punish in such a name only when the defendant, with intent, creates a discernible corpus delicti resembling, though not equalling that for the major crime.

The *Rizzo* case has been criticised,⁵² and, from the standpoints of the deterrence and recidivism theories of punishment, properly so. From those standpoints, *Rizzo* and his accomplices should have been punished, for such conduct (irrespective of their locating the victim) needs deterrence, and by it they show a most intensive personal anti-social

⁴⁸246 N. Y. 334, 158 N. E. 888 (1927). Contrast *People v. Gormley*, 222 App. Div. 256, 225 N. Y. S. 653 (1927), affirmed without opinion, 248 N. Y. 583, 162 N. E. 533 (1928), which involved practically the same fact situation as in the *Rizzo* case, where the defendants entered a plea of guilty and were denied permission to withdraw the plea.

⁴⁹Two cases holding that attempted robbery occurs when the would-be robbers come on the premises where the victim is actually present are *People v. DuVeau*, 105 App. Div. 381, 94 N. Y. S. 225 (1905) (victim on premises, but not aware of intended robbery until after officers, hiding in wait for robbers, had arrested them); and *People v. Moran*, 18 Cal. App. 209, 122 Pac. 969 (1912) (would-be robbers opened door of saloon, looked in, and were frightened away by excessive number of persons present).

⁵⁰So, in *State v. Lampe*, 131 Minn. 65, 154 N. W. 737 (1915) one was held not guilty of attempted extortion where he had hired another to "hound the money" from the victim, but the other had neither made contact with nor communicated with the intended victim.

⁵¹The writer reiterates the approval of the *Rizzo* case expressed earlier, *supra* n. 1, at 984, and this despite the intervening criticism from Professor Arnold for his having done so, Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction* (1930) 40 *Yale L. J.* 53, 73, n. 64.

⁵²Arnold, *supra* n. 51, at 72-3. Professor Llewellyn probably had the *Rizzo* case in mind when, at page xvii, n. 2 of his *Introduction to Hall, Theft, Law, and Society* (1935) he said: "It leads, second, to considering whether carrying sawed-off shotguns or tommy-guns in motor cars, and, especially, in *stolen* motor cars, is not properly placed on a par with bank robbery: occasionally the wolf-pack is picked up on the way to the hunt."

tendency. But the answer is that the orthodox law of attempts apparently does not exist for these purposes, but rather to compensate for occurred social harm of a certain defined sort, which had not yet occurred in the *Rizzo* case facts.

And, finally, there was available a legal device capable of coping with the social dangerousness of the conduct of *these* defendants, under the deterrence or recidivism theories, i. e., that of conspiracy. These dangerous offenders went free, not for any *lacuna* of the law, but because of the prosecutor's inept choice of crime for which to indict. Mere preparation to commit crime or even mere planning of it (when committed by two or more) constitutes conspiracy and is punishable under that device already on the books for coping with the social dangerousness of conduct regardless of the extent of the result which actually follows. Those who favor guilt for an attempt under the *Rizzo* case circumstances (and such a rule would apply even to an act committed by a lone offender) would, in effect, permit the conspiracy doctrine to extend to a single offender's activity. That is, in effect, what the criticism of the *Rizzo* case comes to.

Burglary

The principal difference between the *corpus delicti* of burglary and that for attempted burglary is that the entering is present in the former case and absent in the latter. For both there must be the same appropriate premises and time of day (either those under the common law—dwelling house and night-time—or whatever some statute may provide). For complete burglary, such premises at the proper time must be entered by means of a breaking. If such premises, at such time, are attempted to be entered through the means of a breaking (whether the breaking itself actually occurs or not) and the entry does not occur, this is criminal attempted burglary.⁵³

That which does not constitute the *corpus delicti* of attempted burglary was worked out in *People v. Youngs*.⁵⁴ The court reversed a conviction of attempted breaking and entering where two planned a burglary of a farm house, met in a town ten miles from it, loaded their revolvers, went in to a drug store to buy chloroform to use in the robbery, and were arrested as they left the drug store. The majority opinion very briefly arrived at the obvious conclusion under the orthodox law of at-

⁵³Neither an actual entry without breaking, nor an unsuccessful attempt to enter by means not involving a breaking would constitute a criminal attempt at burglary, under the doctrine of legal impossibility.

⁵⁴122 Mich. 292, 81 N. W. 114 (1899).

tempts that this attempt had not gone far enough to be criminal. The dissenting opinion, on the other hand, apparently influenced by considerations of the deterrence and recidivism philosophies, thought this enough to be a criminal attempt, and was able to spell out a “. . . direct movement towards the commission of the offense . . .”

In *Commonwealth v. Eagan*⁵⁵ both attempted burglary and attempted robbery were spelled out (in order to supply the constructive intent for first degree murder) under these facts: Defendants lay in wait at night outside a dwelling house, expecting presently to break and enter, in order to steal. While they were waiting, the owner appeared outside the house, and, to remove him as an obstacle, they attacked him in the barn and went back toward the house but were frightened away while still in the yard, without touching the house in any fashion. The court doubted that merely watching the house would have sufficed.

From these cases we can work it out that the corpus delicti of attempted burglary does not occur until, at least, the offender gets within a close distance⁵⁶ of the premises to be burglarized and, possibly, not even then, unless, further, there be some untoward act like assaulting a resident of the premises, or actually touching the building⁵⁷ as a first step in the physical effort to break and enter. But, for that matter, merely being on the real estate with intent to break and enter before leaving ought to suffice, for that is capable of creating terror and alarm to the incumbents of the dwelling. When we remember that the corpus delicti of complete burglary is stated the way it is (dwelling and nighttime, broken and entered) because of the resident's interest to be free from actual alarming invasion, it should be obvious that there is a partial and sufficient invasion of that interest when a stranger trespasses on the external premises with intent to break and enter in the immediate future and, thereby, creates a reasonable fear of such immediate breaking and entering.⁵⁸

⁵⁵190 Pa. St. 10, 42 Atl. 374 (1899).

⁵⁶In *State v. McCarthy*, 115 Kan. 583, 224 Pac. 44 (1924) defendants, who had conspired with a railroad official to have a train stopped at a certain place so that they could break into a car, drove to within 300 feet of the track, armed and equipped, and some of them went in search of the official. All were then arrested. The car did not arrive until the next morning. They were held guilty of attempted burglary.

⁵⁷As in *People v. Gilbert*, 86 Cal. App. 8, 260 Pac. 558 (1927) holding one guilty of attempted burglary who climbed on to a second story balcony adjoining a bed room.

⁵⁸A case spelling out the corpus delicti very remotely is *Griffin v. State*, 26 Ga. 493 (1858) holding it an attempt to commit larceny from a building where defendant took an impression of the key to the building and prepared a false key therefrom. A case spelling out the corpus delicti equally remotely is *Regina v. Roberts*, Dears. 539,

Arson

The difference between the corpus delicti for complete arson and that for the attempt is that, in the former situation, the building is actually burned, i. e., that some permanent part of it is charred so as to make a change in the fibre of the wood, and in the latter it is not. There seems no doubt that the corpus delicti of attempted arson occurs if the kindling materials are actually in flames, or if there is a smoking or scorching without charring. The problem is what, prior to these, will also constitute the corpus delicti of the attempt. What of the setting of a mechanism which never ignites? What of the setting of kindling materials with an intent to return later to ignite them?

This last-named set of facts was involved in *Commonwealth v. Peaslee*.⁵⁹ Defendant placed the combustible materials, went away, offered to pay another person to go and ignite them, was repulsed, himself started back to the premises to do the igniting, but, at a quarter-mile away, suffered a change of heart and desisted. The majority of the Massachusetts court thought it no criminal attempt merely to set the materials with intent later to burn, although it was indicated that the solicitation of the other might have sufficed had it been alleged. From the majority view we can take it that, if the kindling materials are not ignited, there must either be a placing of them with intent immediately to ignite, or a placing of them with intent that they shall later automatically ignite.

In *State v. Taylor*⁶⁰ the accomplices (on whose guilt that of defendant depended) were given combustible materials by defendant, instructed how to use them, and by him started toward the premises intended to be burned. At twenty feet away from the building to be burned they were frightened away when they noticed buggies in the yard. A conviction of attempted burning was affirmed. This would seem to make the test whether the offenders (with immediate intent) arrived in close proximity to the building to be burned. By analogy to the problem in burglary this would seem a better test. The mere presence of the offenders, appropriately equipped, on the real estate, or equally close

169 Eng. Rep. 836 (1855) holding it an attempt to counterfeit where the prisoner made and procured dies for the purpose of making coins, although other apparatus was necessary. On the other hand, *Ex Parte Floyd*, 7 Cal. App. 588, 95 Pac. 175 (1908) held it not an attempt to forge that defendant unauthorizedly place an order with a printer for engraving the certificates, but the printer neither printed nor intended to print them.

⁵⁹177 Mass. 267, 59 N. E. 55 (1901).

⁶⁰47 Ore. 455, 84 Pac. 82 (1906).

to the building,⁶¹ can reasonably create in the minds of the residents (whose interests are those protected by the major prohibition itself) a fear of having the premises burned. But as this may not be such an extensive or probable fear as that of burglary, it might be better to require some touching of the building⁶² to be burned by the placing of the kindling materials.⁶³

That the *Peaslee* case is overly strict in holding the mere setting of materials not enough when the intent is to burn later rather than immediately, is shown by the popularity of statutory reform of the subject to make it constitute attempted arson when the materials are placed, regardless whether the intent is to burn then or later.⁶⁴ The strictness of the *Peaslee* doctrine, on the other hand, avoids difficulties of proof of the specific intent to burn, which is an essential companion of the requisite corpus delicti in order to have an attempt. The *Peaslee* case might also be explained on an entirely different level than that of the corpus delicti, viz., that defendant's intent to burn was not formed until after his overt act and never (while it lasted) concurred with any act sufficient in its own right to constitute the corpus delicti.

Sodomy

In *Rex. v. Barker*⁶⁵ it was held a criminal attempt at sodomy where defendant accosted a boy, with intent that an act of sodomy should immediately occur between them, and proposed to the boy that he go with defendant to an adjoining place for "some good fun." It was said that the act was "res ipsa loquitur as to the criminal intent." Even aside from the question whether this proposal also could have been prosecuted as a criminal solicitation,⁶⁶ it would seem that the case is correct in calling it a criminal attempt, because there can be spelled out enough of a corpus delicti of attempted sodomy.

Sodomy itself is not a crime invasive of the individual interests of

⁶¹In *State v. Dumas*, 118 Minn. 77, 136 N. W. 311 (1912) it was held attempted arson where the defendants entered the building planned to be burned and were frightened before actually setting the fire.

⁶²As in *Weaver v. State*, 116 Ga. 550, 42 S. E. 745 (1902) where defendant threw oil on the building intended to be burned but refrained from lighting it because he saw he was watched. It was held attempted arson.

⁶³In *Regina v. Taylor*, 1 F. & F. 511, 175 Eng. Rep. 831 (1859) it was held a sufficient overt act for attempting to burn (although defendant was acquitted for lack of intent) that the defendant struck a match apparently in order to set fire to a hay stack and then blew it out when he saw he was watched.

⁶⁴This type of statute was applied in *Comm. v. Mehales*, 284 Mass. 412, 188 N. E. 261 (1933).

⁶⁵(1924) N. Z. L. R. 865.

⁶⁶In the concluding portion of this article there will be a discussion of the de-

any other human being—it is essentially a crime against society alone. The essence of the *corpus delicti* of the complete crime is that there happens an indecent occurrence. In the *Barker* case, so it is submitted, there was present a lesser, though discernible indecent occurrence, approaching, though not equalling that which would have been present for complete sodomy. This is that an immature boy was tempted to submit to an act of sodomy.⁶⁷ This itself is enough of an indecent occurrence resembling the greater one for complete sodomy to constitute a discernible *corpus delicti* and to permit of the punishment as for the attempt.

Incestuous marriage

In *People v. Murray*⁶⁸ defendant, intending to marry his niece in violation of statute, eloped with her and requested another to procure a magistrate to marry them. This was held not a criminal attempt at incestuous marriage, although it was intimated that it would have been had the magistrate been engaged and had the parties been standing before him, about to be married by him.

Under the orthodox theory of attempts it is clear that no criminal attempt had occurred on the actual facts of the case and the present writer is doubtful that even the parties' standing before the minister or magistrate ought to constitute an attempt. For this may be one of the crimes for which it is impossible to spell out any discernible criminal result deserving of societal notice, short of that which arises with the complete crime.⁶⁹

Why is the *corpus delicti* of completed incestuous marriage itself punished? Probably with the objective of preventing sexual relations between near relatives which, under the protection of a marriage ceremony, might occur where otherwise they would not. Does the danger of the happening of these relations increase perceptibly with the nearness of the marriage ceremony so as to make arise, at some time before the ceremony's completion, a *corpus delicti* worthy of the law's notice? Inasmuch as the complete crime itself merely involves the *danger* of incestuous relations, it is submitted that there is no perceptible lesser danger prior to that time to create a sufficient *corpus delicti*, nor can one be spelled out on any other basis.⁷⁰

sirability of breaking down the hard and fast line between solicitations and attempts.

⁶⁷On the other hand, *State v. Harney*, 101 Mo. 470, 14 S. W. 657 (1890) held that a verbal solicitation of a girl child under the age of consent to have intercourse was not a criminal attempt to commit rape.

⁶⁸14 Cal. 159 (1859).

⁶⁹See, to the same effect, Arnold, *supra* n. 51, at 77.

⁷⁰In *People v. Petros*, 25 Cal. App. 236, 143 Pac. 246 (1914) it was held a criminal

Jail breaking

While jail breaking is a crime not invasive of the individual interests of another, yet there can be spelled out for it a discernible corpus delicti. In *State v. Hurley*,⁷¹ however, that stage had not been reached on the facts of the case. Defendant, in jail and bored with the surroundings, arranged with a confederate to toss hack-saws up to his cell window, that he might use them to saw his way to freedom. He placed his arm out the window, caught the saws, was observed, ordered to drop the saws, and did so. The court quashed a conviction of attempting to break jail. Citing Stephen, it was held that, to have an attempt, there must be an act ". . . forming part of a series of acts which would constitute its actual commission if it were not interrupted."

When we visualize what makes for the corpus delicti of both jail breaking and attempted jail breaking, it seems clear that the court was correct in holding that no attempt had yet occurred. The corpus delicti of jail breaking requires that the offender cross to without the boundaries of the jail in which he is confined and it can be said that the corpus delicti for the attempt requires that the defendant in some fashion disturb his location in his particular appointed place within the boundaries of the jail, either by getting out of his cell and into the corridor, or, with the hack-saws in question, by actually cutting into the first bar with the saws. Short of some actual disturbance of his location or of the physical condition thereof, it is hard to spell out any sufficient criminal result or corpus delicti for attempted jail breaking.⁷²

Liquor smuggling

In *United States v. Stephens*⁷³ the defendant was accused of attempting to commit the crime of smuggling liquor into Alaska by having written and mailed a letter from Alaska to a liquor dealer in San Francisco, ordering the shipment of liquor from that latter place to Alaska, which order was never filled. This was held not a criminal attempt to

attempt at pandering where defendant, having seduced a girl, turned her over to a prostitute to be placed in a bawdy house, although she was never so placed.

⁷¹79 Vt. 28, 64 Atl. 78 (1906).

⁷²In *Patrick v. People*, 132 Ill. 529, 24 N. E. 619 (1890) where defendant tried to deliver saws to a prisoner, and failed, it was held not an "attempt to set at liberty," but rather should have been prosecuted for attempting the special statutory crime of conveying tools to a prisoner. In *State v. Thompson*, 118 Kan. 256, 234 Pac. 980 (1925) where defendant delivered guns to one who was employed as a painter at the jail, to be delivered to an inmate, although he never did, it was held to amount to an "attempt to assist a prisoner to escape" under a statute for the complete crime probably broad enough to cover the case.

⁷³12 Fed. 52 (C. C. D. Ore. 1882).

smuggle liquor. It was intimated that the attempt would not occur until at least the liquor was started on its way and, possibly, not until it had arrived very near the Territorial limits. The mailing of the order was regarded as a mere act of preparation and not an attempt.

The actual decision in the case would seem correct by the orthodox theory of attempts, as there had not happened any tangible event capable of being described as enough of a *corpus delicti* resembling that which is involved in the major crime. The *corpus delicti* of the major crime would not happen until the contraband liquor actually crossed the boundary line of Alaska. At best, the *corpus delicti* of the attempt would not happen until liquor got dangerously close to the boundary. Here, as for incestuous marriage, the idea may be suggested that it is practically impossible ever to have enough of a criminal result for an attempt. Perhaps if forbidden liquor was stored on a neighboring island, or just short of the boundary line, ready to be taken across, that might constitute an attempt. But, short of this, it is hard to spell out enough of a *corpus delicti* by writing a letter in Alaska, or even by earmarking—in San Francisco—liquor intended for Alaska. No Alaskan citizen gets perilously close to getting drunk in this manner.⁷⁴

THE RECENT LITERATURE OF ATTEMPTS

A decade ago⁷⁵ the literature of the field was relatively scanty. There were, in addition to the usual treatments in the extant text-books, two law review articles, by Beale⁷⁶ and Sayre,⁷⁷ dealing directly with criminal attempts, and two others, by Cook⁷⁸ and Tulin,⁷⁹ touching of mat-

⁷⁴In *Andrews v. Comm.*, 135 Va. 451, 115 S. E. 558 (1923) it was held neither an attempt to sell nor to transport liquor where defendant, with jars in his car, went to a still to secure the whiskey and was told to wait till a "run" was completed. He went to sleep and was awakened by officers raiding the still and thus never filled the jars. In *Collins v. City of Radford*, supra n. 26, on the other hand it was held a criminal attempt to transport liquor where defendant groped in a haystack where he expected the liquor to be, and did not get it because it had been earlier removed. In *Coffee v. State*, 39 Ga. App. 664, 148 S. E. 303 (1929) it was held no criminal attempt to make liquor where defendant was caught repairing a still that had already been erected. So, *State v. Addor*, 183 N. C. 687, 110 S. E. 650 (1922) held it no criminal attempt to make liquor that defendant had located a coffee mill and two empty barrels at the place where he expected to set up his still if and when he acquired one. *Powell v. State*, 128 Miss. 107, 90 So. 625 (1922) held the criminal attempt had happened where the defendants had transported the apparatus and supplies and were unloading it from their car to the place where it was to operate.

⁷⁵I. e., at the time when the writer was preparing his earlier article, *The Effect of Impossibility on Criminal Attempts* (1930) 78 U. Pa. L. Rev. 962.

⁷⁶Beale, *Criminal Attempts* (1903) 16 Harv. L. Rev. 491.

⁷⁷Sayre, *Criminal Attempts* (1928) 41 Harv. L. Rev. 821.

⁷⁸Cook, *Act, Intention and Motive in the Criminal Law* (1917) 26 Yale L. J. 645.

⁷⁹Tulin, *The Role of Penalties in the Criminal Law* (1928) 37 Yale L. J. 1048.

ters relevant to the attempt field, although dealing immediately with broader topics. Since then there have appeared two new text-books containing pointed treatments of the attempt problem, and five different law review articles (two of which each had two parts) devoted entirely to that topic.

An article by Mr. Turner⁸⁰ covers exhaustively the English law of attempts and reaches the conclusion that an attempt happens when the offender does an act towards the crime and "the doing of such act can have no other purpose than the commission of that specific crime."⁸¹ It might be remarked that this test hardly holds water when there are visualized the American cases of the hack-saws,⁸² the almost incestuous marriage,⁸³ and the order for the whiskey to be shipped to Alaska,⁸⁴ not to mention others.

A double article by Mr. Skilton⁸⁵ treated, in turn, of the "mental element" and the "requisite act" for criminal attempts. He argued that, in convicting one for attempt, the emphasis should not be so much on "ephemeral notions" of public policy but on the "surer foundation" of logic.⁸⁶ He would solve the preparation problems by inquiring whether the preparation had reached a point of "normal desistance," by the test that defendant's conduct must "pass that point where most men, holding such an intention as the defendant holds, would think better of their conduct and desist."⁸⁷ But consider that the would-be burglar who has broken the window can still desist from entering. Is he, therefore, not guilty of attempted burglary? Those in the *Eagan* case⁸⁸ did desist, after assaulting the owner, but were held guilty.

The most recent article is by Dean Hitchler.⁸⁹ His definition of an attempt seems the most realistic of all and best visualizes (although inevitably vaguely) the underlying policy and the trend of the cases, viz., ". . . an act done in furtherance of a design to commit a crime, which falls short of the complete accomplishment thereof, but *which causes a sufficient social harm to be deemed criminal.*"⁹⁰ Both the italicized por-

⁸⁰Turner, *Attempts to Commit Crimes* (1934) 5 Camb. L. J. 230.

⁸¹*Id.*, at 236.

⁸²*State v. Hurley*, *supra*, n. 71.

⁸³*People v. Murray*, *supra*, n. 68.

⁸⁴*U. S. v. Stephens*, *supra*, n. 73.

⁸⁵Skilton, *The Mental Element in a Criminal Attempt* (1937) 3 U. Pitt. L. Rev. 181; and Skilton, *The Requisite Act in a Criminal Attempt* (1937) 3 U. Pitt. L. Rev. 308.

⁸⁶Skilton, *supra*, n. 85, 3 U. of Pitt. L. Rev. at 190.

⁸⁷Skilton, *supra*, n. 85, 3. U. of Pitt. L. Rev., at 309-10.

⁸⁸*Supra*, n. 55.

⁸⁹Hitchler, *Criminal Attempts* (1939) 43 Dick. L. Rev. 211.

⁹⁰*Ibid.* (Italics supplied).

tion of his definition and other parts of his text recognize that, in spelling out an attempt, recourse must be had to the definition of the crime attempted.

Almost the opposite view is taken in a double article by Professor Curran,⁹¹ who argues that the attempt has independent existence and does not relate to the crime attempted. The Curran article is written mainly from the historical view. He recognizes that, in working out the presence of an attempt, it is essential to dissect the attempt crime into the intent, the overt-act, and the societal harm.⁹²

Dean (now Justice) Miller's hornbook⁹³ on Criminal Law went into the attempt problem at length. The part of his definition of attempt which was concerned with the preparation problem requires an act which "goes beyond mere preparation and carries the project forward within dangerous proximity of the criminal end sought to be attained."⁹⁴

The recent revision of May's text-book by Professors Sears and Weihenstephan⁹⁵ gave unusual emphasis to attempts. In the course of discussing some of the leading cases and speculating about the judicial motives underlying the diverse decisions the authors make a rather puzzling classification of judges into those who "are impressed with the social consequences of human conduct" and those who "take a more sentimental view of criminal responsibility."⁹⁶ Throughout their treatment there is emphasis on the desirability of adjudicating the problems according to the relative harm to society of the offender's conduct, but the reader is left in the dark as to just what they mean by this. Do they mean the quantum of the damage already caused by the conduct, or the objective potentiality of the offender's conduct if imitation by others happens, or the subjective potentiality of the offender himself as indicated by his conduct? Before reforming the law of attempts in order to emphasize "social consequences" we ought to make clear specifically what is sought to be discovered. Perhaps the authors would be in favor of convicting if, from any one of the three angles mentioned, the conduct was socially bad.

Professor Thurman Arnold's article⁹⁷ was the first to appear in the

⁹¹Curran, *Criminal and Non-Criminal Attempts* (1931) 19 *Geo. L. J.* 185, 316.

⁹²*Id.*, at 189.

⁹³Miller, *Criminal Law* (1934) 96-105.

⁹⁴*Id.*, at 96.

⁹⁵May, *Law of Crimes* (4th Ed. 1938) 185-197.

⁹⁶*Id.*, at 186.

⁹⁷Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction* (1930) 40 *Yale L. J.* 53.

decade under discussion and, whether one agrees with his conclusions or not, it is certainly the most thought-provoking publication on attempt of that or any decade. He was quite impatient with the use of cases concerning attempts at one sort of crime to spell out the law of attempts at other types. He was particularly irritated at the excessive citation of the incestuous marriage case for attempts at crimes in general. His essential theme was that attempts cannot be understood, in fact that they have no existence, save with reference to the crime attempted. To him the attempt device should function to permit courts to extend the limits of the prohibitions against the major crimes. He would break down the distinction between solicitations and attempts.

The present writer agrees with Mr. Arnold that one can know nothing of the attempt without knowing what makes for the crime attempted, and he expressed such a view earlier⁹⁸ with reference to impossibility and now repeats it concerning preparation. But whether it is desirable to allow the courts to use the attempt device as a way of expanding the area of conduct coming within the various prohibitions, simply by expanding or contracting the corpus delicti of the attempt, is dubious. As will be pointed out below, the writer would prefer preserving (short of statutory change) the present confines of criminal conduct, and to make the reform by providing more flexibility in the administration of the prohibitions.

The important thing about Mr. Arnold's views on the subject is that he is impatient⁹⁹ with the elemental proposition of the Anglo-American criminal law that punishment is imposed only when defendant's conduct (accompanied by whatever intent is requisite) has created a certain stated criminal result or corpus delicti of the sort always involved in the named crime in the name of which he is prosecuted.¹⁰⁰ This idea has been particularly manifest in our traditional law of attempts, both in the impossibility and the preparation areas, and has resulted in imposing guilt as for the attempt only when there has been created enough of a corpus delicti or impairment of interest to be worthy of the law's attention.

This requirement of a stated corpus delicti is historically to be explained by the vengeance attitude of punishing according to the quantum of what has already occurred. The requirement remains in our law

⁹⁸Supra, n. 1, at 968-969, 971.

⁹⁹As witness his dissatisfaction with the Rizzo case's failure to convict for an attempt in a situation involving only a conspiracy, supra, n. 97, at 72-73.

¹⁰⁰On punishing for status, instead of for a particular act, see Hall, *Theft, Law, and Society* (1935) 217 et seq., and Llewellyn, *Introduction to Ibid.*, xxvii-xxviii.

today, although considerations of deterrence and recidivism are becoming more and more important, and properly so. Mr. Arnold's idea would, in effect, constitute the attempt device a "roving commission" to the courts to do that which has heretofore been primarily legislative,¹⁰¹ i. e., to create new named crimes for the express purposes of deterrence or curbing of recidivism.

Mr. Arnold's article must be understood as complementary to the earlier one of the late Professor Tulin.¹⁰² The two, taken together, present a "realistic" approach to the whole of attempts. Mr. Tulin was more concerned with the intent element. His thesis was that the courts have expanded or contracted the intent requirement in the aggravated assaults for the purpose of working out appropriate penalties for conduct actually causing injury.

Thus, he pointed out that a few jurisdictions have been able to spell out guilt for "assault with intent to kill" where an auto driver, without any specific intent to kill or injure, actually injured someone in the course of driving very recklessly or drunkenly. He showed that, in these jurisdictions, the penalty for reckless driving in such a name was relatively slight and that the one for "assault with intent to kill" was more severe and better calculated to deter actually dangerous conduct. Thus the courts seized upon this latter, through the device of allowing "constructive" intent to suffice, as a means of imposing a severer penalty for reckless driving than the legislatures had assessed in such a name.

Mr. Arnold, on the other hand, was concerned with another element of an attempt crime than that of intent—he dealt with that of the *corpus delicti*. His thesis was that the attempt device should give the courts a weapon for expanding the *corpus delicti* element of the major crime so as to include peripheral situations which the courts think ought to be punishable. Mr. Tulin was dealing with a fairly constant *corpus delicti*, physical injury.

THE HOPE FOR CLARIFICATION OF THE TOPIC

What possibility is there, through the drafting and enactment of clarifying legislation, of improving on the present law of attempts so as to obviate some of the difficulties? Is it possible, for instance, to draft a workable statute embodying Mr. Arnold's ideas? Or, can an acceptable

¹⁰¹For a treatment of those crimes already in the law for which the stated *corpus delicti* exists to punish conduct extraordinarily in need of deterrence, or to single out offenders with grave personal tendencies (solicitation, conspiracy, the liquor laws, the narcotic laws, the pure food laws, and the possession crimes, for examples) see the writer's article cited *supra* n. 4, at 500-1.

¹⁰²*Supra* n. 79.

rule be phrased which will permit the attempt device to be used, frankly, as a device for punishing either conduct worthy of deterrence or individuals possessed of recidivistic tendencies rather than merely as a method of compensating for occurred harm? Can, for that matter, the present law concerning preparation and impossibility be so codified as accurately to express in a single sentence, for all crimes, just when preparation becomes criminal and exactly when and when not impossibility of success excuses from the criminality of the attempt?

Taking the last stated question first, the answer to it is clearly "no". The writer despairs of the possibility of drafting a statutory jury-trial rule of law which will accurately summarize the orthodox law of attempts on the preparation and impossibility fronts and which can serve to guide in the decision of future cases for all crimes. For the only thing held in common by the different crimes under these problems is the idea that whether there is an attempt or not depends on whether there has occurred enough of a *corpus delicti*, approaching and resembling, though not equalling that involved in the crime attempted, to be worthy of the law's notice.

This type of phraseology would not do for jury-law. It is at best a type of language useful in the class-room and in analytical writing for rationalizing cases already decided, for making distinctions, for spelling out consistency, and for vaguely predicting the future courses of decision.

But despite the non-feasibility of stating a test for solving the preparation and impossibility cases as such, there is some possibility of statutory improvement elsewhere which would prevent much of the criticism of the functioning of the existing law of attempts, remove for many cases the necessity of determining whether there is sufficient preparation, go part of the way in the direction of Mr. Arnold's suggestions, and bring the law of attempts more in line with the deterrence and recidivism theories of the purpose of punishment.

Statutory reform of the attempt device to date has taken one or more of three general forms. One has been an attempt to codify the substantive law of attempts by stating, in lieu of the general common law doctrine, a description of what shall constitute an attempt for any and all crimes.¹⁰³ All that has usually followed from this has been that the courts have interpreted the statutes as enacting the common law of attempts, and all of the difficulties and interpretation problems thereunto

¹⁰³A typical example is the New York statute, applied in several of the New York cases, *supra*, reading as follows: "An act done with intent to commit a crime, and tending but failing to effect its commission, is 'an attempt to commit that crime'."

appertaining have been preserved. A second type consists of the selection of certain types of attempts for special treatment, usually under the heading of "aggravated assaults." Certain kinds of attempts, believed to be frequently recurring,¹⁰⁴ or perhaps arousing the ire of powerful pressure groups,¹⁰⁵ have thus been singled out, the punishment has usually been increased over that which would follow under the general doctrine, and the intent and corpus delicti elements have been specifically described, more or less. These, when getting too far away from mere specially described common law attempts at certain named crimes, have been earlier denoted by the present writer as "direct attempts,"¹⁰⁶ in order to distinguish them from the "relative" ones, those relating to other major crimes. For that matter, the common law crimes contain various specially described offenses which appear, on examination, to be specifically treated attempts, as for examples, perjury and burglary.

The third type of statutory reform consists of sporadic accomplishment of what is contained in the integrated program to be suggested. This suggested program is as follows: (1) a clear statement as to exactly what crimes come within the general attempt doctrine; (2) abolition of the merger doctrine; (3) permitting a conviction for either solicitation, conspiracy, or attempt under an indictment for the attempt alone; and, further, (4) permitting a conviction for attempt (including solicitation and conspiracy) under an indictment for the complete crime even though the attempt be not alleged.

What crimes are attemptable?

There should be clarification of just what crimes come within the general doctrine of criminal attempts. In some jurisdictions there is doubt whether it applies to all crimes, and occasional unsatisfactory tests are observed, such as the meaningless *malum prohibitum-malum in se*¹⁰⁷ test. Would it not be better to pick some stated period of imprisonment, say one year, and declare that attempts at crimes carrying a maximum sentence of less than this are not criminal while those at crimes punishable with more than one year are to receive, say, one half the maximum punishment as for the complete crime?

The idea behind this is that complete crimes carrying less than one year's maximum sentence, for that reason, involve criminal results them-

¹⁰⁴As in statutory "assault with intent to murder" or "assault with a deadly weapon."

¹⁰⁵As in the arson preparation statute mentioned supra, n. 64.

¹⁰⁶Supra, n. 1, at 964, 991-995.

¹⁰⁷On this, see *People v. Bauer*, 216 Mich. 659, 185 N. W. 694 (1921).

selves so slight and insignificant that the still lesser corpus delicti for the attempt thereat is beneath the law's notice. That, of course, is what underlies the present exclusion of some crimes from the attempt doctrine in various states.¹⁰⁸

Abolition of the merger doctrine

The merger doctrine at common law, as applied to criminal attempts, was that if the attempt succeeded, and the corpus delicti of the major crime occurred, the conviction could only be for the complete crime.¹⁰⁹ The jury had to be instructed that they could not, then, convict for the attempt, and if they did so, such a verdict would have to be set aside as against the evidence. As a result, the jury was deprived of a very useful device, that of convicting of the attempt as a compromise, in order to reach a conclusion, where they might be reluctant to convict for the major crime (although it actually had happened) and so expose the defendant to the greater maximum punishment.

The writer has the "half a loaf is better than none" attitude and is a believer in granting the jury this compromising power of convicting of a lesser degree of crime than actually happened. It is better to have a completely guilty person convicted of an attempt than to have him acquitted of everything. Hence abolition of the merger doctrine is an important step in "streamlining" the attempt device.¹¹⁰

Solicitation and conspiracy should be interchangeable with attempt

The writer submits that the law should be so changed and clarified that, on an indictment for attempt, even if the proof shows that no corpus delicti happened (i. e., that the preparation did not go far enough) yet, nevertheless, a conviction should be permitted on proof either that defendant solicited another to commit the crime, or that defendant and another plotted the crime, although they did not execute the plot.

Whether solicitation to commit crime, without more, constitutes a criminal attempt thereat has been a troublesome problem, although the answer at common law¹¹¹ seems to be that it does not. While solici-

¹⁰⁸There could also well be solved the difficult problem whether a crime itself in the nature of an attempt is subject to the general doctrine for attempts. On this, see *Wilson v. State*, 53 Ga. 205 (1874); *Burton v. State*, 8 Ala. App. 295, 62 So. 394 (1913); and *supra* n. 1, at 995.

¹⁰⁹On the element of "failure," see *Arnold*, *supra* n. 97, at 73-4; and *Graham v. People*, 181 Ill. 477, 55 N. E. 179 (1899).

¹¹⁰Of course, the merger doctrine should be abolished for conspiracy as well as for attempt.

¹¹¹On whether solicitation constitutes an attempt, see *Arnold*, *supra*, n. 97, at 66-8, 76-7.

tion, conspiracy, and attempt are customarily listed together in the books as "inchoate crimes" yet there is, actually, a sharp functional difference between solicitation and conspiracy, on the one hand, and criminal attempt on the other. Solicitation and conspiracy involve a rather extreme punishment of a very slight actual *corpus delicti*, because of the potential dangerousness of such conduct (encouragement of others) from men generally. This exemplifies the deterrence theory of punishment.¹¹²

Criminal attempts, on the other hand, emphasize the vengeance theory of punishing according to the extent of the actually occurred *corpus delicti*, and so are concerned with both a different element of criminality and a different theory of the purpose of punishment than for solicitation and conspiracy. Despite this functional and elemental difference, the writer would be quite content to see them combined and punished under a single procedural device. Doing this would obviate a great proportion of the "preparation" cases and, at the same time, would largely satisfy those who wish to see the attempt device used as a weapon for coping with dangerous conduct and dangerous individuals, rather than as merely a medium to compensate for occurred social harm.

Thus, of the sixteen preparation cases discussed earlier in the text of this article, five of them¹¹³ clearly included conspiracies, six¹¹⁴ involved solicitations without conspiracy, and only the remaining five¹¹⁵ lacked both solicitation and conspiracy. Of these last-named five, four found the defendant guilty of the attempt, and so in only one of them¹¹⁶ would the defendant have gone completely free under the proposal here advanced and that defendant, so it happens, was as much acquitted for lack of intent as for lack of *corpus delicti*.

Thus had the interchangeability of attempts with solicitations and conspiracies been in effect, the man who asked another to put poison in the victim's spring,¹¹⁷ the one who wanted the other to set fire to the

¹¹²For the present writer's earlier treatment of the functional aspects of solicitation and conspiracy, see *supra*, n. 4, at 507-8.

¹¹³*People v. Rizzo*, *supra*, n. 48; *People v. Youngs*, *supra*, n. 54; *Comm. v. Eagan*, *supra*, n. 55; *State v. Taylor*, *supra*, n. 60; and *State v. Hurley*, *supra*, n. 71.

¹¹⁴*People v. Lanzit*, *supra*, n. 32; *Stabler v. Comm.*, *supra*, n. 38; *Comm. v. Peaslee*, *supra*, n. 59; *Rex v. Barker*, *supra*, n. 65; *People v. Murray*, *supra*, n. 68; and *U. S. v. Stephens*, *supra*, n. 73.

¹¹⁵*People v. Miller*, *supra*, n. 28; *Lee v. Comm.*, *supra*, n. 30; *Jambor v. State*, *supra*, n. 35; *Comm. v. Kennedy*, *supra*, n. 40; *Lewis v. State*, *supra*, n. 42.

¹¹⁶*People v. Miller*, *supra*, n. 28.

¹¹⁷*Stabler v. Comm.*, *supra*, n. 38.

kindling materials,¹¹⁸ the one who tried to marry his niece,¹¹⁹ and the one who ordered the whiskey¹²⁰ would all have been punishable under the attempt accusations, for solicitations were present. So, too, Rizzo and his accomplices in search of a "hold-up" victim,¹²¹ the would-be burglars who were buying chloroform,¹²² and the man who caught the hack-saws (along with the tosser thereof)¹²³ could have been punished for what they did, viz., conspiracy, and that even though the prosecutor ineptly prosecuted for attempt. In the remaining cases treated above which involved either solicitation or conspiracy the parties were found guilty as for the attempt anyhow.

Thus it would seem that the phenomena which have aroused both the curiosity and ire of the writers on the subject, the acquittals of the offenders in these borderline cases, result not so much from any defect in the substantive law as from a combination of ineptness of prosecuting attorneys, their incapability of foreseeing how the proof will shape up, and a lack of flexibility in the procedure.¹²⁴ Is not the answer to remedy this last-named defect and to make the others harmless by permitting a conviction for attempt on proof of either attempt, solicitation, or conspiracy? It may not be a "scientific" suggestion to dodge the preparation difficulties by solving them on another score, but, at least, it will serve to quiet those who wish to use the attempt device for social purposes to do it in that way. For almost all of the cases discussed where the strict application of the orthodox law of attempts had resulted in the freeing of actually socially dangerous individuals, turn out to be cases where a proper prosecution of these persons for solicitation or conspiracy would have brought them within the law's purview.

Conviction of attempt on indictment for complete crime only

Apparently at common law there was doubt whether there could be a conviction for the attempt (when the proof showed that) when the indictment was for the complete crime alone. About half the states in this country have remedied this by statute so as to permit of conviction of the attempt on an indictment for the crime, and a few others reach the

¹¹⁸Comm. v. Peaslee, supra n. 59. In this case the court would have been willing to treat the solicitation as a sufficient overt act under the local attempt statute, had it but been properly averred in the indictment.

¹¹⁹People v. Murray, supra n. 68.

¹²⁰U. S. v. Stephens, supra n. 73.

¹²¹People v. Rizzo, supra n. 48.

¹²²People v. Youngs, supra n. 54.

¹²³State v. Hurley, supra n. 71.

¹²⁴On discretion in the administration of the criminal law, see Hall, Theft, Law, and Society (1935) 69-121.

same substantial result by allowing the major crime and its attempt to be charged in alternative counts of the same indictment. The problem is the converse of the merger one. It would seem that the statutory reform should be rather widely adopted, so that the prosecutor could merely charge the complete crime, without having to risk what the proof would disclose. At the same time, the parallel abolition of the merger doctrine, and the suggested interchangeability of attempts with solicitation and conspiracy would permit the jury to arrive at a verdict in accordance with their ideas of the maximum punishment which should be imposed under the facts of the case.

Summary

The program of statutory reform suggested above does not exactly agree either with Mr. Tulin's ideas or with those of Mr. Arnold. Both of those gentlemen emphasized the problems of appellate courts, the former that of spelling out an appropriate scheme of penalties for conduct likely to involve bodily harm, the latter that of developing the *corpus delicti* limits of specific crimes.

To the present writer the trend should be to satisfy three demands, first, dissatisfaction with the orthodox law of attempts, which lets slip through the net certain individuals who commit dangerous conduct and manifest personally dangerous qualities; second, the inclination of juries to compromise and to convict of a lesser crime in borderline cases; and, third, the practical problem of administration in the prosecutor's office, viz., what will the proof show after the case comes to trial—solicitation, conspiracy, attempt, or complete crime?

The writer feels that the attempt device is better adapted to being re-shaped to serve the needs of those on the firing line of criminal law administration, the jurors and prosecutors, than to serving strong-minded judges in their desires to legislate by extending the boundaries of specific crimes. Much of the complaining about the shortcomings of the attempt device would never have occurred but for the fact that, in the actual cases causing the complaint, the legal machinery was not adjusted to the human demands of jurors and prosecutors, and to the exigencies of the cases. What is needed is flexibility in prosecuting for specific crimes, as their boundaries now exist or may be changed by legislation, rather than any further judicial power to delimit the boundaries thereof.

PRICE COMPETITION AS AFFECTED BY THE ROBINSON-PATMAN ACT

EDWARD BURLING, JR.* AND WILLIAM DuBOSE SHELDON*

Price competition is an historic, orthodox, and, to judge by recent legislation, obsolescent desideratum. Replacing an earlier stressing of the beneficial fruits of free and open price competition, new concepts appear in the legal-economic vocabulary of the antitrust lawyer: price maintenance, price control, price stabilization, price fixing, price discrimination. These terms, in some instances, are merely the mirror image of price competition; but it is suggested that an important shift of emphasis has taken place in antitrust theory as the ill effects of price *discrimination* have become a focal point of thought and discussion in contrast with the previous dwelling on the desirable results of *price competition*. Indeed, it has been observed that the Robinson-Patman Price Discrimination Act of 1936 is "an anti-competition statute slipped into the anti-trust laws."¹

A summary of the history of federal antitrust legislation will reveal the novel departure of the Robinson-Patman Act from previous enactments. The 1880's witnessed the impetuous post-war rise of "the Standard Oil Magnates, Coal Barons, Railroad Kings, Sugar Trust Operators, Steel and Iron Combiners."² The farmers and laborers of the country demanded relief from the "oppression" of the gigantic manufacturing corporations which were a new feature of industrial civilization.³ At that time the sole interest of the supporters of antitrust legislation was the curbing of monopolies to avoid unnaturally enhanced or depressed prices. To meet this end the Sherman Anti-Trust Act of 1890 was passed; and, it might be added, in many respects this Act was merely a hasty sop to discontented rural and working classes with Congress giving very slight attention to the probable effect of this important statute.⁴

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¹Learned and Isaacs, *The Robinson-Patman Law: Some Assumptions and Expectations* (1937), 15 *Harv. Bus. Rev.* 137, 139.

²Thomas E. Watson, *The People's Party Campaign Book* (1892), 42.

³Thus a group of farmers in Mecklenburg County, Virginia, resolved: "We respectfully demand of our senators and representatives in Congress to use their best efforts to enact some laws to protect the farmers in the Bright Tobacco Belt from the oppression of the American Tobacco Company." *National Economist*, Washington, D. C., January 23, 1892.

⁴II Beard & Beard, *Rise of American Civilization* (1930), 327. There seems even to have been some doubt concerning the desire of the Senate committee to draft a

There followed a period of relative inactivity in the enforcement of the Sherman Act. Only nineteen antitrust suits were instituted by the federal government during the first decade after 1890.⁵ Setbacks at the hands of the court⁶ together with the long depression of the Nineties temporarily nullified the statute. Not until the early 1900's was there a sustained effort by the Department of Justice to segment monopolistic enterprises and to enforce price competition. In these years the

practicable statute. Bumphrey, Authorship of the Sherman Anti-Trust Law (Cincinnati 1912). Senator Sherman, nominal author of the Act, on March 21, 1890, revealed his interest in preventing the stifling of competition by combinations sufficiently powerful to control the price: "The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests, reduce price in a particular locality and break down competition and advance prices at will where competition does not exist." 21 Cong. Rec. 2457.

⁵The following table was submitted to the Temporary National Economic Committee by Wendell Berge, Special Assistant to the Attorney General. Hearing before a sub-committee of the Senate Committee on the Judiciary on S. 2719, 76th Congress, 1st Session, July 28, 1939, page 5.

ANTITRUST SUITS AND THE DEPARTMENT OF JUSTICE

<i>Calendar Year</i>	<i>Instituted</i>	<i>Terminated</i>	<i>Calendar Year</i>	<i>Instituted</i>	<i>Terminated</i>
1890.....	1	..	1915.....	8	10
1891.....	..	1	1916.....	2	10
1892.....	3	2	1917.....	23	19
1893.....	2	1	1918.....	11	18
1894.....	7	3	1919.....	3	8
1895.....	1	2	1920.....	10	12
1896.....	3	1	1921.....	26	15
1897.....	2	1	1922.....	22	9
1898.....	..	4	1923.....	12	25
1899.....	1	4	1924.....	15	11
1900.....	..	1	1925.....	15	22
1901.....	1926.....	12	24
1902.....	3	1	1927.....	14	18
1903.....	2	1	1928.....	21	11
1904.....	1	1	1929.....	13	6
1905.....	5	1	1930.....	11	12
1906.....	13	3	1931.....	3	19
1907.....	12	8	1932*.....	3	4
1908.....	8	3	1933.....	7	6
1909.....	3	4	1934.....	11	11
1910.....	16	9	1935.....	10	4
1911.....	25	10	1936.....	4	10
1912.....	22	66	1937.....	10	3
1913.....	26	26	1938.....	11	7
1914.....	11	16	1939.....	13	9
			1940.....	11	..

*1932-1939 figures are on fiscal year basis.

⁶E. g., *United States v. E. C. Knight Co.*, 156 U. S. 1. (1895).

"trust-busting" efforts of President Theodore Roosevelt were directed against the tobacco trust, the Standard Oil Company and other massive producers.

By 1914 demand had arisen for an amendment or for further legislation clarifying the generalities of the Sherman Act. Woodrow Wilson recognized this sentiment in a message to Congress on January 20, 1914:

"Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is."⁷

The Clayton Act was the outgrowth of this demand. In this Act the term "price discrimination" first appeared in the federal statutes. It is abundantly clear that the prohibition of certain discriminations in price was inserted to prevent the price cutting tactics used by many manufacturers to destroy competition in a particular area in order to obtain a monopoly in that area.⁸ A price discrimination was not illegal under the Clayton Act unless the effect of such discrimination was to establish a monopoly or substantially lessen competition.⁹ The emphasis still remained on the paramount importance of preventing monopolies or combinations in restraint of trade, first among producers and secondly

⁷51 Cong. Rec. 1963 (January 20, 1914). President Taft had also expressed this sentiment: "I am inclined to the opinion that the time is near at hand for an amendment of the Anti-Trust Law, defining in greater detail defaults against it, and its aim, and making clearer the distinction between lawful agreements, reasonably restraining trade, and those which are pernicious in effect." Quoted in (1930) 147 *Annals of American Academy of Political and Social Science* 33. Contrast the statement of Gilbert H. Montague in Handler, *The Federal Anti-Trust Laws: A Symposium* (1932) 29: "What embarrasses business is more frequently not the uncertainty of the law but the certainty that, as interpreted by the Supreme Court, the law stands squarely across the path of many greatly desired trade arrangements."

⁸Senator Reed, referring to the bill which became the Clayton Act and speaking on September 29, 1914: "What is section 2? It is brought forward here as a remedy for the existing evil of local price-cutting. The common practice indulged in by very great and wealthy concerns is to go into a trade territory where there is competition and drop the price of an article below the cost of production. In a little while its competitors have been absolutely driven into bankruptcy or forced to quit the field. Thereupon the great concern proceeds to advance the price on that same community and recoup itself for all losses. In the meantime, without the ultimate loss of a penny, it has established a monopoly in that country, State, or neighborhood by driving out all competitors." 51 Cong. Rec. 15857. The different meaning attached to "price discrimination" in the Clayton Act and in the Robinson-Patman Act makes somewhat misleading such a title as Hamilton and Loevinger, *The Second Attack on Price Discrimination* (1937), 22 *Wash. Univ. L. Rev.* 153. It is interesting to note that in 1914, Congressman Stevens of New Hampshire introduced a bill "To prevent discrimination in prices and to provide for publicity of prices to dealers and to the public." H. R. 13305, 63rd Congress, 2d Session.

⁹*Lipson v. Socony-Vacuum Corp.*, 76 F. (2d) 213, 218 (C. C. A. 1st, 1935).

among distributors. And the approved means of preventing monopoly appeared to be, broadly speaking, the requirement by law of price competition.

Also in 1914 the Federal Trade Commission Act¹⁰ was passed. There was no further federal antitrust legislation until 1936. Yet, during this period important interpretations of the Sherman and Clayton Acts were had from the courts.¹¹ These interpretations were necessarily limited in scope, however, and in many instances conflicting, so that throughout the entire field of antitrust application there still remained wide areas of doubt.¹² Only one situation could be said to be clearly illegal beyond any possibility of doubt: combination or agreement by competitors to fix or maintain prices.¹³ Price competition throughout the Twenties remained at least the verbal focal point of all antitrust activity, whatever deviations there may have been from this ideal in actual pricing policies.

As the depression of 1929 and subsequent years settled down, new attention was directed to the effect of antitrust laws on business policies. President Hoover suggested the need for further study, and implicit in his suggestion was a belief that possibly competition, through price and otherwise, was not an unqualified good.¹⁴ Under the National

¹⁰Act of September 26, 1914, 38 Stat. 717, 15 U. S. C. Sec. 41. The Federal Trade Commission Act was passed shortly before the Clayton Act. Henderson, *The Federal Trade Commission* (1924) 16-48, describes the interrelation of the two statutes.

¹¹E. g., the important series of cases dealing with the activities of trade associations. *American Column & Lumber Co. v. United States*, 257 U. S. 377 (1921); *Maple Flooring Mfrs. Assn. v. United States*, 268 U. S. 563 (1925); *Cement Mfrs. Protective Assn. v. United States*, 268 U. S. 588 (1925); *Sugar Institute, Inc. v. United States*, 297 U. S. 553 (1936). Nelson, *Open Price Associations* (1923); Federal Trade Commission, *Open-Price Trade Associations*, Sen. Doc. No. 226, 70th Cong., 2d Sess. (1929).

¹²"... the rule of reason, long considered essential in administering the Sherman Act, . . . makes sharply defined standards impossible." *United States v. Standard Oil Co.*, 23 F. Supp. 937, 938-939 (W. D. Wis. 1938). "It is evident that while the distinctions between lawful and unlawful activities may be quite clear in theory, it is not always easy in practice to determine whether the trader has kept within the bounds of his privilege." *United States v. Ethyl Gasoline Corp.*, 27 F. Supp. 959, 964 (S. D. N. Y. 1939).

¹³*United States v. Trenton Potteries Co.*, 273 U. S. 392 (1927). See also *Federal Trade Commission v. Pacific States Paper Trade Assn.*, 273 U. S. 52 (1926); *Lynch v. Magnavox Co.*, 94 F. (2d) 883, 891 (C. C. A. 9th, 1938). Compare *United States v. Socony-Vacuum Oil Co.*, 105 F. (2d) 809 (C. C. A. 7th, 1939), *infra* n. 72. Jaffe and Tobriner, *The Legality of Price-Fixing Agreements* (1932), 45 *Harv. L. Rev.* 1164.

¹⁴Speech by President Hoover in December, 1930, quoted in Note (1932) 45 *Harv. L. Rev.* 566: "The people have a vital interest in the conservation of our natural resources; in the prevention of wasteful practices; in conditions of destructive competition which may impoverish the producer and the wage earner, and they have an equal interest in maintaining adequate competition. I therefore suggest that an in-

Industrial Recovery Act¹⁵ the first clear legislative departure from the theory of the Sherman Act took place, for

“The N. R. A. expressed the change which had come over men’s thinking when it permitted corporations to combine in order to eliminate ‘unreasonable’ competition. The profit motive, which at one time was a respectable justification for any sort of price cutting, had become a somewhat immoral thing because of the competing symbol of cooperation.”¹⁶

Within the space of a very few weeks important industries adapted themselves to the new order of cooperation. Chiseling and price-cutting smacked of the illegal; and filed prices, with penalties for deviation from such prices, were encouraged.¹⁷ The economic desirability of industrial self-regulation of prices is a matter over which there will be argument for many years; but even before the *Schechter* decision there had come a widespread dissatisfaction with both the freedom and the restraints of the new order.¹⁸

Following the N. R. A., the return to the older system of enforced competition was perhaps somewhat gradual; but after May 25, 1935, in legal contemplation the Sherman and Clayton Acts again governed business policies.¹⁹ Again price competition was the legislative command.

quiry be directed especially to the effect of the anti-trust laws to determine if these evils can be remedied without sacrifice of the fundamental purpose of these laws.”

¹⁵Act of June 16, 1933, 49 Stat. 195.

¹⁶Arnold, *The Folklore of Capitalism* (1938) 227.

¹⁷Terborgh, *Price Control Devices in NRA Codes* (Brookings Institution 1934). In a suit involving the Code of Fair Competition for the Cleaning and Dyeing Trade Judge Knox wrote: “And who can rightly say, with assurance, that governmental price fixing, when confined to transactions in interstate commerce, is not a means reasonably adapted to the legitimate ends which Congress seeks to serve?” *United States v. Spotless Dollar Cleaners*, 6 F. Supp. 725, 732 (S. D. N. Y. 1934).

¹⁸For example, Charles A. Beard has recently attacked the revival of antitrust sentiment in *The Anti-Trust Racket* (Sept. 21, 1938), 96 *New Republic* 184: “We have the knowledge, the skills and the resources required for at least doubling the present annual output of wealth. To accomplish this speeding up there must be, at this stage of the development, close cooperation among those elements in the spheres of capital, labor, agriculture and government that recognizes the basic facts in the situation and the fundamental nature of the problem—the problem of raising our production of wealth to the highest possible level. If we can cast off the entanglements of the old anti-trust claptrap and get competent minds concentrated upon the solution of the problem, I am convinced we can find a way, not to Utopia but to a far higher standard of life and civilization than we now have.”

¹⁹Section 5 of the National Industrial Recovery Act, 48 Stat. 195, provided: “While this title is in effect (or in the case of a license, while section 4(a) is in effect) and for sixty days thereafter, any code, agreement, or license approved, prescribed, or issued and in effect under this title, and any action complying with the provisions thereof

In June, 1936, the Robinson-Patman Act²⁰ was placed on the statute books. The principal portion of this Act was in the form of an amendment to Section 2 of the Clayton Act, which prohibited certain forms of price discrimination. Its genesis lay in the hostility of independent wholesale and retail grocers and druggists to the chain store method of distribution. Yet the Act, on the naive assumption that universality is a prerequisite to constitutionality, was drafted to cover all business and industry affecting interstate commerce.²¹

Shortly thereafter the Miller-Tydings Fair Trade Law²² was enacted as a rider to other important legislation. A volte-face on the legality of resale price maintenance took place.²³ Under the protection afforded by

taken during such period, shall be exempt from the provisions of the anti-trust laws of the United States." This section seems to have been considered in only one judicial opinion where it was said that under the circumstances "It is idle also for the defendants to argue that the anti-trust laws are tolled by the N. I. R. A. . . ." *National Foundry Co. v. Alabama Pipe Co.*, 7 F. Supp. 823, 824 (E. D. N. Y. 1934). However, the Circuit Court of Appeals for the Seventh Circuit in *United States v. Socony Vacuum Oil Co.*, 105 F. (2d) 809 (C. C. A. 7th, 1939), placed considerable reliance on the effect of the Code of Fair Competition which governed the oil industry. It is interesting to note that the Secretary of the Interior, speaking in September, 1933, said, "Our task is to stabilize the oil industry upon a profitable basis."

²⁰Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. § 13 (Supp. 1937). Mr. H. B. Tee-garden, counsel for the United States Wholesale Grocers Association, drafted the bill introduced by Congressman Patman. Ellison, *Robinson-Patman Act: Its Political and Commercial Background*, Conference Proceedings on Robinson-Patman Anti-Discrimination Act, 4 (Trade Association Executives in New York City, 1936).

²¹Senator Logan, 80 Cong. Rec. 6429 (1936).

²²Act of August 17, 1937, 50 Stat. 693, 15 U. S. C. Sec. 1, as amended. Missouri, Texas and the District of Columbia do not have legislation legalizing resale price agreements.

²³The Miller-Tydings Act reverses the judicial policy as expressed in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 407 (1911); *Standard Sanitary Manufacturing Co. v. United States*, 226 U. S. 20 (1912); *Straus v. Victor Talking Machine Co.*, 243 U. S. 490 (1917). Cf. *United States v. Colgate*, 250 U. S. 300 (1919). See Legislative Note, *Resale Price Maintenance: The Miller-Tydings Enabling Act* (1937), 51 *Harv. L. Rev.* 336; Note, *The Amendment to the Federal Antitrust Laws* (1938), 26 *Geo. L. J.* 403. *Welch Grape Juice Co. v. Frankford Grocery Co.*, decided by Pennsylvania Court of Common Pleas, September 7, 1939, construed the Robinson-Patman Act not to invalidate differentials between wholesalers and retailers in resale price contracts protected by the Miller-Tydings Act: "It is evident that Congress did not contemplate a construction of the Robinson-Patman Act which would create an irreconcilable conflict between it and its contemporary enactment and defeat the primary objective of the Fair Trade laws." The argument in favor of resale price maintenance is well summarized in *Eli Lilly & Co. v. Saunders*, North Carolina Supreme Court, September 27, 1939: "The common law emphasis on forestalling, regrating, engrossing and conspiracy to raise prices must not lead us to infer that the sole objective of public policy was to obtain the lowest possible price to the consumer on every commodity. This is both an economic fallacy and a misconception of law. The public is more interested in fair and reasonable prices which preserve the economic balance in advantages to all those engaged in the trade, with due regard to the con-

this Act, all but two states have enacted statutes permitting resale price maintenance, and the manufacturer of a standard trade-marked article is now enabled to determine the price of that article throughout its subsequent history. With this vertical control in the hands of the producer, price competition among producers would appear of even greater public concern than formerly.

Price discrimination is the theme of the Robinson-Patman Act. But it is with a new purpose that the phrase is used. For the first time, interest is centered on the effect of price discrimination on "competition between rival methods of distribution,"²⁴ i. e., on the buyers. The effect of the Act upon competition among sellers was not considered by Congress and has not been fully considered at any subsequent time.²⁵ It is the purpose of this paper to suggest that the Robinson-Patman Act runs counter to traditional antitrust theories, and that the stressing of the harmful effects of price discrimination has resulted, and may further result, in an unintended but very real diminution of price competition. Economic data, pro and con, is lacking; so the lawyer's methods—logical analysis, precedent and authority—seem appropriate to the building and fortification of this suggestion.

It is believed that this subject is one which should properly be considered at the present time, not only because the judicial interpretation of the Robinson-Patman Act is still in the formative stage where a clear presentation of the effects of the Act may influence the clarity (and gloss) given by the judges to the vagueness of its language,²⁶ but also be-

suming public, than it is in securing the lowest obtainable prices, when the inevitable tendency is to degrade or drive from the market 'articles which it is assumed to be desirable that the public should be able to get.' "

²⁴The Robinson-Patman Act in Action (1937), 46 Yale L. J. 447, 449, a very helpful note. See also the following notes: The Robinson-Patman Act: Some Prospective Problems of Construction and Constitutionality (1936), 50 Harv. L. Rev. 106; The Legality of Discrimination under the Robinson-Patman Act (1936), 36 Col. L. Rev. 1285; Changes in Federal Price Discrimination Law Effected by the Robinson-Patman Act (1936), 23 Va. L. Rev. 201, 316; The Robinson-Patman Act (1937), 85 U. Pa. L. Rev. 306; Marketing under the Robinson-Patman Act (1937), 31 Ill. L. Rev. 907. Numerous books and articles have also been written on the Robinson-Patman Act, and will be cited from time to time. See especially The Robinson-Patman Act (The Washington Post, 1936); Zorn and Feldman, Business Under the New Price Laws (1937); Werne, Business and the Robinson-Patman Law: A Symposium (1938).

²⁵Probably the most extended and helpful treatment of this phase of the Act is found in the June, 1937, issue of Law and Contemporary Problems, which is devoted to Price Discrimination and Price Cutting.

²⁶The conflict which this article suggests exists between the Sherman Act and the Robinson-Patman Act, if properly presented to the courts, should raise interesting problems of construction and extent of application. Willenbacher, The Robinson-Patman Anti-Price Discrimination Act, (Washington 1937), 61. Landis, A Note on "Statutory Interpretation" (1930), 43 Harv. L. Rev. 886.

cause of the present study of the national economy being conducted by the Temporary National Economic Committee. The Committee was charged with the duty of making "A full and complete study and investigation with respect to . . . monopoly and the concentration of economic power in and financial control over production and distribution of goods and services . . ." The Committee was further directed to determine

"(1) the causes of such concentration and control and their effect upon competition; (2) the effect of the existing price system and the price policies of industry upon the general level of trade, upon employment, upon long-term profits, and upon consumption; and (3) the effect of existing tax, patent, and other Government policies upon competition, price levels, unemployment, profits, and consumption; . . ." ²⁷

There is also, at the present time, an almost feverish activity on the part of the Antitrust Division of the Department of Justice, with more antitrust suits instituted in the last six months than in any comparable period since the passage of the Sherman Act. To date the Department of Justice has rather cavalierly snubbed the Robinson-Patman Act;²⁸ but the Federal Trade Commission issues complaints almost daily charging violations of the Robinson-Patman Act and of the Federal Trade Commission Act (and not infrequently alleged infractions of the two Acts are joined in one complaint).²⁹

²⁷The Temporary National Economic Committee, established by a resolution of June 16, 1938, 52 Stat. 705, has heard very little discussion of the Robinson-Patman Act at its hearings, and the only specific mention of the Act on the agenda is under item 20—"Small Business." Statement by Senator O'Mahoney, August 10, 1939. One witness has told the Committee that the price of glass bottles increased about the time of the passage of the Robinson-Patman Act. I Verbatim Report of Temporary National Economic Committee (TNEC) 274. Dr. Ruth W. Ayres, an economist representing consumer interests, criticized the recent price legislation and regretted that there is "no adequate data to show how these laws are working." III TNEC 291. Mr. Robert L. Davison, an authority on housing, charged that the Robinson-Patman Act stood in the way of low-cost housing. IV TNEC 567. There have also been some references to the Act in the recent steel hearings. Judge Davis of the Federal Trade Commission explained to the Committee the method adopted by the Commission to answer inquiries regarding the application of the Act, II TNEC 278, and at another point said that the Commission had insufficient funds to enforce the Act. II TNEC 239.

²⁸No criminal prosecution has been instituted under Section 3 of the Robinson-Patman Act (the criminal section which was formerly the Borah-Van Nuys Bill), although the Antitrust Division of the Department of Justice makes extensive use of the criminal sections of the Sherman Act in its efforts to secure consent decrees. For a discussion of the effect of a consent decree in an antitrust case see Donovan and McAllister, *Consent Decrees in the Enforcement of Federal Anti-Trust Laws* (1933), 46 *Harv. L. Rev.* 885.

²⁹See Appendix to this article for a list of complaints issued under the Robinson-

The current "anti-monopoly" drive is marked not so much by the purely legalistic search for agreements in restraint of trade or efforts to break down bigness per se (as during the earlier periods referred to), but rather by an economic approach which seeks to penetrate to the root of the evil. There is a genuine desire in Washington today to find out what the restraints are which prevent prices of manufactured goods from fluctuating more widely in accordance with the law of supply and demand.³⁰ It is felt that in times of slack business, manufacturers, instead of reducing their prices to a point where they can maintain a satisfactory volume of sales, tend to hold up their prices and cut down drastically on production. This policy, according to the theory widely held in Washington, is highly deflationary and tends to accentuate and prolong periods of depression.³¹ If prices are held up and volume cur-

Patman Act. Complaints alleging a violation of Section 5 of the Federal Trade Commission Act, which declares unlawful "unfair methods of competition," have been issued under circumstances which seem also to involve a violation of the Sherman Act. Henderson in *The Federal Trade Commission (1924)* 322 questions the jurisdiction of the Commission to issue orders against a price-fixing combination: ". . . upon what theory a concerted movement to refrain from competing in certain respects is a method of competition at all, is not stated. None of these cases have found their way into the courts, and it does not seem that they are to be taken very seriously." Yet Chairman Robert E. Freer, addressing the annual convention of the National Wholesale Druggists' Association, on September 27, 1939, remarked: "The past year has also been important to the Commission because of the number and scope of proceedings involving combination to fix prices and restrain competition, in addition to the Robinson-Patman and Wheeler-Lea Act activities during the fiscal year, sixteen complaints were issued charging combinations and conspiracies to fix prices or eliminate competition." Perhaps greater clarification of the jurisdiction of the Commission and the Antitrust Division should be recommended by the TNEC.

³⁰Former Attorney General Homer Cummings in a letter to the President dated April 26, 1937 urged that "the time has come for the Federal government to undertake a restatement of the law designed to prevent monopoly and unfair competition. This proceeds from the conviction that the present laws have not operated to give adequate protection to the public against monopolistic practices." Solicitor General (then Assistant Attorney General) Jackson also discussed the problem in his annual report for 1937: "The antitrust laws have become theological tracts on corporate morality. . . . The attitude of seeking for a sinister intent rather than appraising the effect of combinations on prices has led to a procedure which makes antitrust prosecutions so cumbersome that only a few prosecutions are possible. . . . Correspondence, secret dealings, completely irrelevant from the point of view of the effect of the business activity under consideration, become the whole issue of the case."

³¹See e. g., the remarks of Chairman Freer of the Federal Trade Commission before the National Petroleum Association, April 13, 1939: "There has been much written recently about 'imperfect' competition. The classic concept of competition contemplates more or less sensitive prices, affected by the so-called laws of supply and demand. This concept contemplates no artificial controls either by government or by private individuals or groups of individuals. . . . In many industries, prices have become 'sticky' and tend to remain uniform and rigid in the face of changing demand and of improvements in the processes of manufacture and distribution." Industrial

tailed as demand dries up, men are thrown out of work, purchasing power destroyed, and a vicious deflationary cycle inaugurated. If, on the other hand, prices of manufactured goods are reduced as demand slackens, in most industries sales volume can be held up, not to boom-time levels, of course, but to normal proportions, and employment can be maintained.

The purpose of this article is to discuss the various factors which enter into the determination of prices of standardized manufactured goods, and to point out in what respects the Robinson-Patman Act, as one of such factors, tends to hold up such prices in times of slack business and also to produce price uniformity throughout an industry.

FACTORS DETERMINING PRICES

By way of introduction to a discussion of the factors entering into the determination of the prices of standardized manufactured articles, it would be well to consider the factors which determine commodity prices on an exchange, such as the Chicago Board of Trade. In the wheat pit of the Chicago Board of Trade there are a large number of buyers bidding for wheat and a large number of sellers seeking to sell wheat.³² Complete publicity attends all of their transactions. Their bid and asked prices are a matter of common knowledge, and when a buyer and a seller succeed in agreeing on a price, say of \$1.00, such price is immediately posted for all other buyers and sellers to see. As a result of such price publicity, at the moment of sale \$1.00 is *the* price of wheat in that market. At such a time no buyer is going to bid \$1.05, and no seller is going to ask 95c when they have just seen wheat sold at \$1.00. Of course, the price may ultimately reach \$1.05 if the buyers become convinced that no more wheat is going to be offered for less than that, or it may ultimately reach 95c if the sellers become convinced that no buyer is going to bid more than that. But at or about the time of sale *the* market price of wheat is \$1.00. This is known as the principle of the single price. Reduced to simple terms it means that in the case of an interchangeable article or commodity of the same quality, given complete publicity as to actual prices paid, as well as bid and asked prices, at any given time and in a single market there will be only one price for such

Prices and Their Relative Inflexibility, Sen. Doc. 13, 74th Cong., 1st Sess.; Humphrey, *The Nature and Meaning of Rigid Prices* (1937), 45 J. Pol. Econ. 651; Means, *Notes on Inflexible Prices* (1936) 26 Am. Econ. Rev. (Supp.) 23, 35; Galbraith, *Monopoly Power and Price Rigidities* (1936), 50 Q. J. Econ. 456.

³²Even on a commodity exchange the Sherman Act may be violated, an example being the cornering of the grain market of the Chicago Board of Trade, *Peto v. Howell*, 101 F. (2d) 353 (C. C. A. 7th, 1938).

article or commodity.³³ The principle operates perfectly, however, only under conditions of widespread knowledge. If, in the wheat pit, for example, little groups of men gather at different points, each bargaining privately for the purchase and sale of wheat, and keeping quiet afterwards about the prices reached, it is perfectly obvious that the price in one such group might be \$1.03, in another 98c, in another 95c, and so on, depending on how many groups there were.

The only type of market in which are found all of the factors necessary for the perfect operation of the single price principle is an exchange, such as the Chicago Board of Trade. In no other type of market is complete price information transmitted instantaneously to all buyers and sellers.³⁴

The same principle applies, although to a much more limited extent, in the sale of many types of standardized, interchangeable, manufactured articles. Most manufacturers of such articles put out a so-called list price for their products. This generally consists of a formal catalogue or a pamphlet, or sometimes simply a single sheet of paper, which is widely distributed throughout the industry to wholesale and retail customers, to trade periodicals, and often to competitors.³⁵ When manufacturers publish a list price it is usually their hope to sell their products at such price. A considerable portion of the time they are not successful in this regard, however, and normal competitive pressures tend to drive actual prices down from list prices. Because the list prices of various manufacturers of a standardized, interchangeable article are published, and hence widely known, the single price principle comes into operation (although not perfectly), and such list prices tend to be uniform.

³³This principle is sometimes known as Say's law.

³⁴In the Sugar Institute case the court was much interested in the "waiting period" during which information concerning price changes was circulated throughout the industry. *Sugar Institute, Inc. v. United States*, 297 U. S. 553 (1936) modifying 15 F. Supp. 817 (S. D. N. Y. 1934).

³⁵Under the N. R. A., price lists were not only published but also filed with the Code Authority. Many people viewed the Robinson-Patman Act as an invitation to return to such a system. Mr. Jacob K. Javits describes the effect of the Recovery Act: "The open publication of prices eliminated a great many inside buying advantages which had theretofore been enjoyed by some favored buyers, and served to stabilize the price for all sellers and all buyers at the economic level then necessitated by the market. The Robinson-Patman Act was considered when passed as likely again to encourage price publication; and it has had that effect. Manifestly a price list definitely indicates the price charged and may be submitted as evidence of what the price actually was. It saves the seller from the importunities of buyers as the seller may then state that he has broadcast his prices to the world and therefore cannot deviate in a particular sale. Price publication is really a hostage to compliance with the Robinson-

Take a hypothetical example of how the single price principle might operate in a freely competitive market to make uniform the list prices of different manufacturers of a standardized, interchangeable article. Let us say that the current market price of screwdrivers is \$1.00. Business is in a period of brisk demand and orders for screwdrivers are pouring in faster than they can be filled. Company A, one of the important members of the industry,³⁶ decides the opportunity is ripe to try to get a better return on its screwdrivers and raises its list and actual price to \$1.10. Thereupon, one of two things is bound to happen in the industry. Either A's competitors, eager to increase their profits, follow the lead of A, in which event a new price level is produced, or they refuse to follow such lead and A is forced to abandon its new price and fall back to its old one of \$1.00. In the latter event, A would either cancel its new list and return to its old, or would simply disregard it and sell at \$1.00. Sooner or later, however, if A's competitors did not raise their prices to \$1.10, A would revise its price list to \$1.00, the actual market price, and thus restore the uniformity.

In the converse situation, i. e., where Company A publishes a new price of 90c, there is no alternative open as to what happens in the screwdriver industry. All of the other manufacturers are compelled to meet A's price, or retire from the market. For A's competitors, as a matter purely of business survival, cannot and will not sit idly by and watch A take away their customers. Obviously no purchaser of screwdrivers is

Patman Act." Werne, *Business and the Robinson-Patman Law: A Symposium* (1938) 209.

³⁶The leadership principle in industrial pricing is a recognized economic fact. One economist terms it the "follow-the-leader" method of pricing. Holtzclaw, *The Principles of Marketing* (1935) 601. Assistant Attorney General (then Professor) Thurman Arnold has described the ordinary occurrence: "Thus the phenomenon known as 'price leadership' became the dominant factor in establishing control on the part of great organizations. If men refused to follow the practices of the recognized and respected members of their industry, they were regarded as 'chislers' ". Arnold, *The Folklore of Capitalism* (1937) 227. This practice is not illegal aside from any agreement to follow the leader, and Assistant Attorney General (now Solicitor General) Jackson in his 1937 report cites *United States v. International Harvester*, 274 U. S. 693, 709 (1927) for the proposition that, under the decisions, price leadership "does not establish any suppression of competition or any sinister domination. . . . Indeed, the maintenance of high prices by a combination which completely dominates the market may be held to be a sign of virtue. It was held to be a sign of merit that the International Harvester Company had not indulged in price cutting." Also in *Cement Manufacturers Protective Association v. United States*, 268 U. S. 588, 605 (1925) the Supreme Court recognized that "Variations of price by one manufacturer are usually promptly followed by variation throughout the trade." Yet price leadership may have the same effect as an agreement to fix and maintain prices, and this economic fact should be weighed in evaluating the Robinson-Patman Act and the impetus given by that Act to adherence to published prices set by an industry leader or leaders.

going to pay \$1.00 when he knows, and *ex hypothesi* he does know because A's price has been published and distributed throughout the trade, that he can buy screwdrivers for 90c.

Thus, we see that the tendency in the case of standardized, interchangeable manufactured articles is for published list prices to be uniform.³⁷ It is only a tendency, and not an inviolable rule, however, because knowledge of list prices is not distributed instantaneously to all buyers in the market, and because several factors in addition to price enter into the purchase and sale of manufactured articles.

The next question to be considered is whether, if the tendency is for list prices of standardized, interchangeable, manufactured articles to be uniform, a similar tendency exists in the case of actual prices. Not necessarily so. List prices do, of course, affect actual prices, particularly in times of good business, but so many other factors normally enter in to tend to make actual prices divergent that the tendency to conform is far weaker than in the case of list prices.³⁸ In this connection, it should be noted that there is a marked difference in the strength of the tendency in times of brisk demand and in times of slack demand. In times of brisk demand, bidding is active and actual prices tend to rise. No manufacturer can hope to sell above his list price, however, so the result is that the list price, so long as it remains unchanged, acts as a ceiling on rising prices. Thus, if the period of brisk demand is sufficiently active, or lasts long enough, actual prices will coincide with list prices and, because list prices tend to be uniform, will be substantially identical in any particular market.

In periods of slack demand, on the other hand, bidding is inactive and manufacturers are under compulsion to sell, even at a loss, in order to cover their overhead.³⁹ Buyers, aware of this compulsion, make tempting offers at prices below the list. Sooner or later a manufacturer yields to this pressure and starts shading his price. This shading does not, however, consist of a uniform cut of say 5% to all customers, because such a cut would be promptly known by the entire industry and

³⁷In view of this natural uniformity of list prices it may be questioned whether the mere juxtaposition of identical price lists is any evidence of a conspiracy or agreement to fix prices in an industry. Compare A Statement of the Substantive Law of Restraint of Trade, Monopoly, and Unfair Competition, prepared by the United States Treasury Department for the use of the Temporary National Economic Committee, page 22 (1939).

³⁸Till, *The Fiction of the Quoted Price* (1937) 4 *Law and Contemp. Prob.* 363.

³⁹The compulsion to grant a special price in order to augment the volume of business is especially acute in industries requiring a heavy capital investment. *Marketing under the Robinson-Patman Act* (1937), 31 *Ill. L. Rev.* 907, 920.

would defeat its own purpose by immediately bringing down the prices of all competing manufacturers by a like amount, thus preventing the particular manufacturer from gaining any advantage over his competitors.⁴⁰ What each manufacturer hopes to accomplish is to increase his own sales at the expense of his competitors by offering a more favorable price. In order to obtain and maintain this hoped for advantage, the manufacturer usually cuts his price only in individual situations, takes considerable pains to keep his lower price a secret and asks his customer not to divulge the deal they have made.

The result of this price cutting,⁴¹ in which, in the absence of legislative restrictions such as those imposed by the Robinson-Patman Act, substantially all manufacturers in most industries indulge in periods of bad business, is complete divergence of prices, both as between competing manufacturers and between different customers of the same manufacturer. Sooner or later, if the period of slack business continues and ripens into a depression, some manufacturer will decide that the deterioration of prices has proceeded so far, and the departure from list prices become so generally recognized and followed, that a new lower list price is in order and will publish one. This new price, if the cut is deep enough, will, according to the process outlined above, be met by the rest of the industry. Then, if the depression continues and deepens, the chiseling process will start all over again and sooner or later a still lower list price will be established.

It is this chiseling process, this whittling away at published prices, which provides flexibility in the price structure of standardized, interchangeable, manufactured articles. If this process is eliminated, either through agreement in violation of the Sherman Act or in any other manner, prices in times of slack business, are going to be much slower to come down along with falling demand.

PRICE LISTS AND THE ROBINSON-PATMAN ACT

Yet that is just the effect of the Robinson-Patman Act. This Act provides:

“That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indi-

⁴⁰In *Prairie Farmer Pub. Co. v. Indiana Farmers' Guide Pub. Co.*, 88 F. (2d) 979 (C. C. A. 7th, 1937) the court refers to “the conflict for advantage called competition.”

⁴¹Campaigned price cutting in order to destroy a rival and to establish a monopoly in a restricted area has been condemned by Congress in the original section 2 of the Clayton Act and by the courts in *United States v. American Tobacco Co.*, 221 U. S. 106 (1911) and *United States v. Corn Products Refining Co.*, 234 Fed. 964 (S. D. N. Y. 1916). This type of price cutting is not the same as the off-list selling or the categorizing of customers against which the Robinson-Patman Act seems directed.

rectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition . . ."⁴²

As administered by the Federal Trade Commission, in accordance with the expressions of Congressional intent contained in the legislative history of the Act, it is clear that any difference in price between two competing customers which is not affirmatively justifiable on one of the grounds stated in the Act, such as savings in the cost of doing business as between such customers, is illegal. In other words, stated in broad terms and without reference to any of the exemptions provided in the law, a manufacturer has to sell all of his customers who are in competition with one another at the same price. If a manufacturer obeys the law and sells to all of his competing customers at the same price, such price will be known by everybody throughout the trade, because no manufacturer could conceivably keep secret the price at which he sells all of his customers.⁴³ And as soon as the situation exists where competing sellers have a single price for all of their customers, with widespread knowledge as to such prices, the principle of the single price begins to operate, and prices throughout the industry tend to become uniform. Thus, in times of slack business, prices of standardized, interchangeable, manufactured articles, due to the operation of the Robinson-Patman Act, tend to remain at, or close to, the list price, rather than dropping away and pulling the list price down after them, as happens under normal, competitive conditions.⁴⁴

⁴²An important extension of the terms of the Clayton Act is the addition of the clause "where the effect of such discrimination may be substantially . . . to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." Cf. *Lipson v. Socony-Vacuum Corp.*, 76 F. (2d) 213, 218 (C. C. A. 1st, 1935); *S. S. Kresge Co. v. Champion Spark Plug Co.*, 3 F. (2d) 415 (C. C. A. 6th, 1925); *Van Camp Co. v. American Can Co.*, 278 U. S. 245 (1929).

⁴³In *Cement Manufacturers Protective Assn. v. United States*, 268 U. S. 588, 604 (1925) the court recognized the uniformity which results from a known price: "Nor, for the reasons stated, can we regard the gathering and reporting of information, through the cooperation of the defendants in this case, with reference to production, price of cement in actual closed specific job contracts and of transportation costs from chief points of production in the cement trade, as an unlawful restraint of commerce; even though it be assumed that the result of the gathering and reporting of such information tends to bring about uniformity in price."

⁴⁴Professor Arthur R. Burns, author of *The Decline of Competition* (1936), writes: "The obstruction of the development of large distributors and the elimination of secret price cutting is likely, however, to have the general effect of strengthening manufacturers in their efforts to maintain prices, thus reducing output and possibly intensifying depression." Burns, *The Anti-Trust Laws and the Regulation of Price Competition* (1937), 4 *Law and Contemp. Prob.* 301, 319.

To point up this fact, let us return to our old illustration of Company A and the screwdriver industry. Let us say that business has been good and the going price of screwdrivers throughout the industry is \$1.10, which happens also to be the published list price of most of the manufacturers. Then business slows up and demand falls off. Customers start dickering with the Company for price concessions. Company A points out to them, however, that any such concessions are illegal under the Robinson-Patman Act.⁴⁵ The only course open to the Company is to reduce its price level uniformly to all customers. This the Company is loathe to do, however, because such a reduction would be promptly met by its competitors and any possible price advantage would be lost. After such a cut Company A would find itself enjoying approximately the same volume of business as before, but at a lower profit margin, and there is no incentive in that. Thus, in situations where the Robinson-Patman Act is followed to the letter, no company cuts its price until sheer desperation drives it to do so. This comes only after business had dried up to such an extent that a company is willing to break the market in the effort to develop some new orders.

Let us examine some of the specific pressures resulting from the Robinson-Patman Act which tend to force adherence to published price lists:

1. *The requirement that competing purchasers of goods of like grade and quality be treated equally.* This requirement, which is the broad and therefore not altogether accurate essence of the Act, was intended by the original draftsman of the Act to result in a one-price system.

"The Act itself merely applied to wholesale distribution a principle that long has been effective and profitable throughout retail trade. Consumers immediately recognized the fairness and convenience of the one-price principle when it was introduced in the retail trade 50 years ago."⁴⁶

The difficulty of determining when purchasers are or are not competitors,⁴⁷ and of being certain that the various functional classifica-

⁴⁵See n. 35, *supra*.

⁴⁶H. B. Teegarden, *Don't Fear the Robinson-Patman Law* (April 1937), 25 *Nation's Business* 19. Mr. Teegarden prepared the original draft of the bill. See n. 20, *supra*.

⁴⁷Several Federal Trade Commission complaints have been directed toward a solution of the problem of what persons are in competition, but as yet there have been no helpful opinions by either the Commission or the courts. Certain earlier decisions will serve as guides. *Baran v. Goodyear Tire & Rubber Co.*, 256 Fed. 571, 574 (S. D. N. Y. 1919): "There is apparently no competition between the manufacturers of tires

tions of purchasers are not legally assailable,⁴⁸ together with the uncertainty as to the breadth of interpretation which will be given to the phrase "goods of like grade and quality"⁴⁹ all contribute to the establishment and maintenance of a single-price system.

2. *The vagueness and uncertainty of interpretation of the exculpatory provisions.* The Act contains a number of provisos which permit departure from a single-price system under particular circumstances. Thus, to mention one such proviso, price differentials are permissible if they "make only due allowance for differences in the cost of manufacture, sale, or delivery . . ." To determine what constitutes "only due allowance" in most situations is a problem which cannot be approached without the aid of accountants, and even then the experts are often in disagreement as to how certain cost factors should be allocated as between different methods of manufacture or distribution.⁵⁰ In fact, the Act has been termed "An Act to restore prosperity to . . . accountants";⁵¹

and the dealers, nor as it alleged that any exists. The differentiation in price would not therefore substantially lessen competition." Professor Fetter, in *Planning for Totalitarian Monopoly* (1937), 45 *J. Pol. Econ.* 95, 102, approves the definition given by Professor Burns in *The Decline of Competition* (1936), 273, but criticizes the application of the definition: "Price discrimination occurs wherever a seller sells a homogeneous commodity at the same time to different purchasers at different prices."

⁴⁸" . . . the philosophy of the Robinson-Patman Act is fundamentally incompatible with a realistic functional view of the marketing process." McNair, *Marketing Functions and Costs and the Robinson-Patman Act* (1937), 4 *Law and Contemp. Prob.* 334, 351. Wholesaler's discounts and other functional differentials were upheld under the Clayton Act. *Mennen Co. v. Federal Trade Commission*, 288 Fed. 774 (C. C. A. 2d, 1923) cert. denied 262 U. S. 759; *Great Atlantic Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46 (C. C. A. 2d, 1915); *National Biscuit Co. v. Federal Trade Commission*, 299 Fed. 733 (C. C. A. 2d, 1924) cert. denied 266 U. S. 613. It also seems clear that traditional functional differentials will be upheld under the Robinson-Patman Act in large measure. Smith, *The Patman Act in Practice* (1937), 35 *Mich. L. Rev.* 705, 724. Zorn and Feldman, *Business under the New Price Laws* (1937) 174. Mr. Allen C. Phelps, attorney for the Federal Trade Commission, speaking before the National Association of Retail Grocers, June 19, 1939: "It is generally considered that it recognizes the validity and propriety of functional discounts."

⁴⁹"It has been suggested that the "like grade and quality" proviso may accomplish a nullification of the Act. *The Legality of Discrimination under the Robinson-Patman Act* (1936), 36 *Col. L. Rev.* 1285, 1292.

⁵⁰"*Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." Harbeson, *Costs and Economic Control* (1939), 17 *Harv. Bus. Rev.* 257, 265 suggests, "There is great danger that, because of the difficulty of justifying price differentials on the basis of cost, the effect of this provision will be further to encourage one-price policies, price rigidity, and chronic excess capacity."

⁵¹Chairman Robert E. Freer of the Federal Trade Commission speaking on "Accounting Problems under the Robinson-Patman Act," March 24, 1938.

but even the most elaborate cost accounting analysis may fail to satisfy the Commission.⁵² The simplicity of the one-price system is made more inviting by the accounting difficulties which plague the adoption of an alternative.

Another exculpatory proviso permits price changes from time to time "in response to changing conditions affecting the market for or the marketability of the goods concerned."⁵³ It will take numerous decisions by the Commission and by the courts to explain the meaning of this clause.⁵⁴ Perhaps there can be changes in the market, even of manufactured articles, from hour to hour; but it is clear that the framers of the Act did not foresee such volatile market conditions and did not intend to permit so easy a defense. Already this clause has been involved in one case in which the court required the defendant to state in his answer the facts which the defendant claimed constituted changing conditions in the market.⁵⁵

⁵²In the Matter of Standard Brands, FTC Docket No. 2986.

⁵³It is said that this clause was included as "an added precaution." H. Rept. No. 2287, 74th Cong., 1st Sess., 11 (1936).

⁵⁴Congressman Celler: "The courts will have the devil's own job to unravel the tangle." 80 Cong. Rec. 9561 (June 15, 1936). In this connection there might be considered again the suggestion "that there should be established a Federal Agency with power to inquire into, consider, and determine in advance the legality of industrial consolidations, or trade agreements affecting competition." Donovan, *Some Practical Aspects of the Sherman Law* (1929), 3 Temp. L. Q. 343. The same proposal is made in Tobriner and Jaffe, *Revision of the Anti-Trust Laws* (1932), 20 Calif. L. Rev. 585, and by Mr. Thurlow M. Gordon in Werne, *Business and the Robinson-Patman Law: A Symposium* (1938) 65. Another writer has criticized this advance approval on the ground that it would "permit the cartels of Germany without the public control of industrial cartels which exists in Germany." Clark, *The Federal Trust Problem* (1931) 291. The history of the Sugar Institute illustrates the difficulties which may arise. See opinion of Judge Mack, *United States v. Sugar Institute, Inc.*, 15 F. Supp. 817 (S. D. N. Y. 1934). Judge Davis of the Federal Trade Commission described to the Temporary National Economic Committee the practice followed by the Commission in the wave of questions and inquiries after the passage of the Robinson-Patman Act. II TNEC 278 (March 3, 1939): ". . . as it was a new law, the Commission took the liberty and the responsibility of establishing a committee of some of its best lawyers and economists and accountants who had permission to informally discuss the problems with the innumerable members of industry who were pouring in there to try to get their bearings, and right in that connection, for several weeks, I think, the Secretary reported to us we received an average of four hundred letters a day, making inquiry about the Robinson-Patman Act, and so forth. So we authorized this committee to be as helpful as they could, not to get out on a limb or in deep water, because it was new to everybody and in the final analysis the courts had their say as to interpretation, and, in addition there, the Department of Justice had concurrent jurisdiction, and we had to proceed carefully and cautiously."

⁵⁵In *Huber Inc. v. Pillsbury Flour Mills Co.*, a suit for damages under the Robinson-Patman Act, Judge Goddard of the Southern District of New York, handed down a memorandum opinion on October 5, 1939: "Demand No. 1 is denied insofar

3. *The burden of proving justification which is imposed on the respondent.* There has been some doubt as to whether the proviso which allows a respondent to show that the lower price was "made in good faith to meet an equally low price of a competitor,"⁵⁶ is merely the right to put in rebuttal evidence or is a complete defense of any charge of illegality. In any event, the respondent must establish this defense, and the burden is not placed on the Commission or the complainant to show that the lower price was not given in order to meet bona fide competition.

4. *Industry control of prices through the Robinson-Patman provision in Trade Practice Rules.* It was early suggested that the courts would not permit (under the Sherman Act) an industry to require its members to live up to the Robinson-Patman Act, in other words, to act as an enforcement agency under the new Act.⁵⁷ Yet the Trade Practice Rules approved by the Commission in the case of more than a score of industries have contained a rule prohibiting price discrimination.⁵⁸

as it requires a statement of the sales made by defendant at prices lower than those paid by plaintiff. However, defendant should be required to state in general the market conditions prevailing at the time or times of the sales made to plaintiff, and the changing conditions which affected the marketability of the flour sold to the plaintiff and to the defendant's other customers at or between the times of such sales. If the defense is supplemented in this manner it will not be open to charge that it contains merely conclusions of law. But to require a statement of the actual sales made at lower prices than those paid by plaintiff would be to require the defendant to furnish the plaintiff with a *prima facie* case which otherwise defendant might never have had to rebut." Congressman Utterback expressed the views of the sponsors: "Whether price changes are of a character justified by the causes here described is a question of fact, and where that question comes to issue, the burden of proof is upon the offending party claiming its protection." 80 Cong. Rec. 9560 (June 15, 1936).

⁵⁶80 Cong. Rec. 9560 (June 15, 1936). The view of the Federal Trade Commission has been expressed in the Matter of the Goodyear Tire and Rubber Company, FTC Docket No. 2116: "A manufacturer may justify a discriminatory low price to a large purchaser on the ground of meeting competition only if his competitor has previously made an equally low and discriminating price to that purchaser." It has been suggested that the defense of meeting competition should be broadly construed in order to avoid the effect of *Fairmont Creamery Co. v. Minnesota*, 274 U. S. 1 (1927) and *Williams v. Standard Oil Co.*, 278 U. S. 235 (1929) which held state statutes prohibiting discrimination unconstitutional because this defense was not given the seller. *Changes in Federal Price Discrimination Law Effected by the Robinson-Patman Act* (1936), 23 Va. L. Rev. 316, 323. See *The Robinson-Patman Act* (The Washington Post 1936) 33.

⁵⁷"... it is extremely doubtful that the courts will hold that a trade association has powers of self-regulation coextensive with the broad and unexplored implications of the Robinson-Patman Act." Fly, *The Sugar Institute Decisions and the Anti-Trust Laws* (1936), 46 Yale L. J. 228, 247. Austern, *Book Review* (1938), 51 Harv. L. Rev. 1313.

⁵⁸See, for example, *Baby Chick Rule* 35, *Concrete Burial Vault Rule* 13, *Tomato Paste Manufacturing Rule* 13, *Wet Ground Mica Rule* 4.

5. *The sanction of the ever-menacing triple damage suit.* A realistic appraisal of the freezing effect of the Robinson-Patman Act on prices must include the threat of triple damage suits.⁵⁹ If no consequence worse than a Federal Trade Commission cease and desist order were involved, the determination of industrial price policy might not be seriously affected by the Act. A successful triple damage suit, however, is a very different matter, for just one such suit might easily bankrupt many a successful corporation. It is now suggested by Senator O'Mahoney, Chairman of the Temporary National Economic Committee, that the penalties for violation of the antitrust laws should be substantially increased. Heavy penalties against officers and directors are suggested, and S. 2719 proposes that any company violating the antitrust laws shall forfeit to the United States a sum equal to twice the total net income received by such company during each month within which any violation of the antitrust laws has occurred.⁶⁰ The chilling calm of a recent Trade Commission announcement concerning a Robinson-Patman complaint illustrates the efficacy of the present damage provisions:

"The facts were not developed because preliminary inquiries disclosed private litigation in which the party charged was being

⁵⁹The first triple damage suit under the Robinson-Patman Act was *English v. Nicholas Copper Co.*, filed on January 9, 1937, in the United States District Court for the Western District of Missouri on January 9, 1937. One writer has called the Act "an outrageous basis for a suit for triple damages." McLaughlin, *The Courts and the Robinson-Patman Act: Possibilities of Strict Construction* (1937), 4 *Law and Contemp. Prob.* 410, 413. The vagueness of the statute together with the fact that specific damages need not always be proved in antitrust cases seems to justify this comment. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555 (1931); *Hansen Packing Co. v. Swift & Co.*, 27 F. Supp. 364, 369 (S. D. N. Y. 1939). Cf. *Arthur v. Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824 (D. Md. 1938). It is recognized that a Federal Trade Commission order may have "serious practical results in the encouragement of litigation, though necessarily conceding the order not to control such litigation under the doctrine of *res judicata*." *Goodyear Tire & Rubber Co. v. Federal Trade Commission*, 92 F. (2d) 677, 681 (C. C. A. 6th, 1937). The Department of Justice is setting an example in suing for three-fold damages in cases involving identical bids to the government. *United States v. The Cooper Corporation*, filed in the United States District Court for the Southern District of New York on February 20, 1939. A Department of Justice press release on the same day contended that "A proceeding under Section 7 is the only form of antitrust proceeding whereby the government may recover the damages it believes it has sustained by reason of the defendants' alleged combination to fix the price of tires." It is interesting to note that the United States is a "person," according to the contentions of the Department of Justice, when it comes to suing for three-fold damages, but not a "person" under the Robinson-Patman Act. 38 *Opp. Atty. Gen.* 539 (1936). Probably the answer is that the government does not want to pay too much for the things it buys.

⁶⁰S. 2719, 76th Cong., 1st Sess. Hearings on this bill, introduced by Senator O'Mahoney, were held on July 28, 1939, before a subcommittee of the Senate Committee on the Judiciary.

sued for \$15,000,000 triple damages under the Robinson-Patman Act which suit involved the same issues. Hence the file was closed."⁶¹

6. *The possibility that an important contract may be held void for illegality because of violation of the Robinson-Patman Act.*⁶²

7. *The criminal penalties in Section 3 of the Act.*⁶³

The perfect defense of a seller to all charges of discrimination is un-failing adherence to a published price list. Of course, in actual litigation the seller may be able to establish justification for any departures from such list. But the establishment of such justification is burdensome, and it is often easier for the seller simply to adhere to his list price. Thus, the Robinson-Patman Act does tend to enforce compliance with published price lists. As one commentator remarked, a price list is the best possible evidence that prices have not been discriminatory, provided that the seller can show that he charged list prices to his customers.⁶⁴

Even the sponsors of the Robinson-Patman Act recognized the argument that the Act might be considered a price fixing bill. When asked whether such was the correct interpretation, Congressman Patman replied:

"No; it is opposed to price-fixing. Because a manufacturer will be compelled to sell to all his customers at the same price under the same conditions does not mean that his competitor across the street manufacturing the same quality of merchandise will be compelled to sell to his customers at the same price. It will merely mean that whatever price the competing manufacturer across the street sells for, he must treat his own customers fairly and sell to them at the same price basis."⁶⁵

⁶¹Federal Trade Commission, "A Brief Summary of 64 Robinson-Patman Cases," 2 (undated).

⁶²There has been one holding that a contract of sale which violates the Robinson-Patman Act is not void as the discrimination is only "collateral" to the contract. *Progress Corporation v. Green*, 163 Misc. 828, 298 N. Y. S. 154 (1937) noted in (1938) 38 Col. L. Rev. 192. Compare *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540 (1902); *A. B. Small v. Lamborn & Co.*, 267 U. S. 248 (1925).

⁶³The Borah-Van Nuys bill, which became Section 3 of the Robinson-Patman Act, has not yet been invoked by the Department of Justice. But these various points may not be dismissed as a parade of imaginary horrors for they must be considered by a careful lawyer and a cautious business man.

⁶⁴"The whole tendency of the Act is toward an open but not necessarily uniform price. The seller will best conform to the policy of the Act by publishing his price list, customer classification, and what services he stands ready to give or pay for." *Marketing under the Robinson-Patman Act* (1937), 31 Ill. L. Rev. 907, 941.

⁶⁵80 Cong. Rec. 7970 (May 21, 1936). In H. Rep. No. 2287, 74th Cong., 2d Sess., the same argument was made: "In conclusion, your committee wishes to correct some im-

Nearly every commentator on the Act has suggested that the Act in practice might result in substantial elimination of price competition among competitors on the same planes of production or distribution. Thus Mr. James Lawrence Fly, counsel for the government in the Sugar Institute case, pointed out that the Robinson-Patman Act may change the law, "perhaps even to the extent of requiring the kind of price uniformities which have previously been attacked as restraints of trade."⁶⁶ Another writer believed that the Act might compel by law the same rigidities of price which were objected to by critics of the NRA.⁶⁷ Mr. Blackwell Smith, who was General Counsel of the NRA, predicted that ". . . henceforth, price may be used as a weapon in competition only with the greatest circumspection."⁶⁸ He also suggests that the Act may result in

"rigid price structures in the case of large sellers who try to conform to the Act (Such price set-ups, because of the necessity of rigid interrelation of allowances, must be altered throughout, if at all, and would result in fixity. Such a price structure results also in uniformity between sellers, in that all must recognize and adjust to such a structure of any competing seller who is a big factor in the industry.)"⁶⁹

portant misapprehensions, and even misrepresentations, that have been broadly urged with regard to the probable effect of this bill. There is nothing in it to penalize, shackle, or discourage efficiency, or to reward inefficiency. There is nothing in it to fix prices, or enable the fixation of prices; nor to limit the freedom of price movements in response to changing market conditions." In Congress the bill was viewed almost entirely as a measure affecting methods of retail and wholesale distribution and not as affecting a manufacturer's prices. A dramatic illustration of the narrowness of the approach is the answer of the late Senator Logan, one of the chief sponsors of the bill in the Senate, to an inquiry by Senator Vandenberg as to whether the "provision was written entirely with the field of retail merchandising in mind." Senator Logan replied in the affirmative, and added, "but I had no idea, until the Senator from Michigan mentioned it, that it had anything to do with the automobile industry." 80 Cong. Rec. 6429 (1936). An all-inclusive, generalized act was passed without considering in any respect the variety of the problems which would result, except in regard to the distribution of food and drugs. Congress completely disregarded the advice that "The technologies of our various trades—meat packing, building, mining, retailing, and what not—have their own compulsions with which schemes of public control must come to grips. The simple uniformity of the older acts may have to give way to an accommodation of public oversight to the varying necessity of the different trades." Hamilton, *The Problem of Anti-Trust Reform* (1932), 32 Col. L. Rev. 173, 177.

⁶⁶Fly, *The Sugar Institute Decisions and the Anti-Trust Laws* (1936), 46 Yale L. J. 228.

⁶⁷Gordon, *Robinson-Patman Anti-Discrimination Act—The Meaning of Sections 1 and 3* (1936), 22 Am. Bar Assn. J. 593, 594.

⁶⁸Smith, *The Patman Act in Practice* (1937), 35 Mich. L. Rev. 705, 731.

⁶⁹*Ibid.*, 730. A similar view was expressed in *The Robinson-Patman Act in Action* (1937), 46 Yale L. J. 447, 481: "Although the issue was never clearly presented in these

Other writers have noted that "its general requirement that prices be nondiscriminatory is characteristic of measures designed to control the charges of public utilities";⁷⁰ and in the Congressional debates and reports on the Robinson-Patman bill, great reliance was placed on the views of the Supreme Court on discrimination as stated in *Interstate Commerce Commission v. Baltimore & Ohio Railroad*.⁷¹ A significant distinction, perhaps, is that rates and charges of public utilities are completely regulated; while the theory of previous antitrust legislation has been that the natural result of competition is a proper price level and that government regulation is a harmful and disrupting influence.

Soon after this article is printed, it is expected that the United States Supreme Court will render its decision in the *Socony-Vacuum* case,⁷²

terms, the Robinson-Patman Act amounts to a decision by Congress in favor of uniform prices against any alternative economic end. In many markets where the uniform prices to be enforced will be monopolistic prices, the decision amounts to a preference for one-price monopoly against discriminatory monopoly, an election to which there are serious objections, both economic and social." In *Changes in Federal Price Discrimination Law Effected by the Robinson-Patman Act* (1936), 23 Va. L. Rev. 316, 323, the author of the note says: "The right to discriminate in price and facilities to meet competition is, therefore, very limited. . . . This restriction gives the Robinson-Patman Act a much greater tendency to fix prices than Section 2 of the Clayton Act." See also McNair, *Marketing Functions and Costs and the Robinson-Patman Act* (1937), 4 Law & Contemp. Prob. 321, 337. The same view was expressed in *Shaw's, Inc. v. Wilson-Jones Co.*, 26 F. Supp. 713, 714 (E. D. Pa. 1939): "The 'one price' policy, although now generally accepted as sound, wise and just, is of comparatively recent adoption. It has, however, been written into the amendments to what we know as the Sherman Anti-Trust Act, 15 U. S. C. A. Sec. 1 et seq., and is now the statutory law." And in *Eli Lilly & Co. v. Saunders*, decided by the Supreme Court of North Carolina on September 27, 1939, reference is made to "the Second Section of the Robinson-Patman Amendment, standardizing prices by prohibiting discriminations."

⁷⁰McAllister, *Price Control by Law in the United States: A Survey* (1937), 4 Law & Contemp. Prob. 273, 290.

⁷¹145 U. S. 263, 276 (1892): "The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; . . . It was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons traveling over the road. In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable."

⁷²*United States v. Socony-Vacuum Oil Co.*, 105 F. (2d) 809 (C. C. A. 7th, 1939), certiorari granted by the United States Supreme Court on October 16, 1939. Justices Black, Douglas, Frankfurter and Reed will be taking part in the first major antitrust case since they were appointed to the Court. Judge Major in the opinion handed down on July 27, 1939, seemed to steer nearer the *Appalachian Coals* case (upon

a decision which should go far towards illuminating the present status of price competition under the Sherman Act. Some commentators have observed in the *Appalachian Coals* case⁷³ a disposition by the Court to depart from its previous inflexible denouncement, as expressed in the *Trenton Potteries*⁷⁴ decision, of any agreement by competitors to establish and maintain reasonable prices, and it will be enlightening to observe what stand the present Court takes with regard to these two precedents.

In the light of any new judicial expression and, more importantly, in the light of the adequate statistical data and expert testimony which should be presented to and considered by the Temporary National Economic Committee, the place of the Robinson-Patman Act in the legal chart which guides the national economy must be settled. Its relationship to the tradition and present value of the Sherman Act must be determined, for that was not done when it was passed. Perhaps price competition should be replaced by competition in Service and with a Smile,⁷⁵ as, exaggeratedly, appears to be the trend of the Robinson-Patman Act; but no such change was contemplated in its passage. The

which the defendants relied) than the Trenton Potteries case (upon which the government relied): "A study of the decisions of the Supreme Court convinces one that the criterion employed in determining whether concerted action is such as to come within the condemnation of the statute is the effect which the action has upon fair competition. If concerted action destroys competition, it is immediately branded as unlawful. In the Trenton Potteries case, as heretofore pointed out, competition was destroyed under facts there existing by reason of the price fixing agreement. Conceivably, however, a price fixing agreement is not unlawful under all circumstances . . ." See Jaffe and Tobriner, *The Legality of Price-Fixing Agreements* (1932), 45 *Harv. L. Rev.* 1164.

⁷³*Appalachian Coals, Inc. v. United States*, 288 U. S. 344 (1933). Judge Chase cites the *Appalachian* case for the following broad proposition: "And to determine whether there is, or is threatened, an unreasonable restraint the particular conditions of each case must be considered with care in the light of the circumstances shown and effect be given to realities." *Eastern States Petroleum Co. v. Asiatic Petroleum Co.*, 103 F. (2d) 315, 321 (C. C. A. 2d, 1939).

⁷⁴*United States v. Trenton Potteries Co.*, 273 U. S. 392 (1927). With the attitude of the Supreme Court in the Trenton Potteries case should be compared the English view in *Northwestern Salt Co., Ltd., v. Electrolytic Alkali Co., Ltd.*, [1914] A. C. 461, 469: "Unquestionably the combination in question was one the purpose of which was to regulate supply and keep up prices. But an ill-regulated supply and unremunerative prices may, in point of fact, be disadvantageous to the public."

⁷⁵Chairman Freer of the Federal Trade Commission addressing the National Petroleum Association, April 13, 1939: "In those industries which for one reason or another are characterized by this so-called 'imperfect competition,' differences in price and quality often become so minimized as factors in selling, that advertising ability and sales personality are practically the only factors which remain to influence a customer in placing his orders." See also "Preservation of Competition" Through Federal Antitrust Laws (1938), 51 *Harv. L. Rev.* 694.

pros and cons of price competition as affected by the Robinson-Patman Act should now be considered with the broad outlook, unprejudiced viewpoint and informed judgment not previously accorded. Government regulation of business, whether by the prohibitions of the Sherman Act or the permissions of the NRA, has been at best vague—but it should not also be aimless.

APPENDIX*

ROBINSON-PATMAN CASES

<i>Respondent</i>	<i>FTC Docket No.</i>	<i>Charges</i>	<i>Disposition</i>
1. Kraft-Phenix Cheese	2935	Quantity discounts; price discrimination.	Comp. dis. 7-17-37
2. Shefford Cheese Co.	2936	Quantity discounts; price discrimination.	Case Closed 10-30-37
3. Bird & Son, Inc.	2937	Discount discrimination.	Comp. dis. 7-17-37
4. U. S. Quarry Tile	2951	Discount discrimination; functional classification.	
5. Bourjois, Inc.	2972	Discounts; bonuses; advertising allowances; discrimination in paying demonstrators.	Test. reop. 9-12-39
6. Richard Hudnut	2973	Discounts; bonuses; advertising allowances; demonstrators discrimination; demonstrators hidden.	Test. reop. 9-5-39
7. Elmo, Inc.	2974	Demonstrators-hidden; demonstrators-discrimination.	Test. reop. 9-2-39
8. Coty, Inc.	2975	Quantity discounts; demonstrators discrimination; demonstrators hidden.	Test. reop. 9-5-39
9. Standard Brands	2986	Quantity discounts.	C&D 6-15-39 Reopened
10. Anheuser-Busch, Inc.	2987	Quantity discounts.	
11. Charles of the Ritz	3017	Demonstrators-hidden; demonstrators-discrimination; quantity discounts; bonuses; advertising allowances.	Test. reop. 9-2-39
12. Hollywood Hat Co.	3020	Price discrimination; misrepresentation of quality; spurious samples.	C & D Order 7-17-37
13. A. & P.	3031	Discounts discrimination; fictitious brokerage.	C&D 1-25-38 Appeal
14. Biddle	3032	Discounts discrimination; fictitious brokerage.	C & D Order 7-17-37

*Gordon W. Rule and James T. Ellison assisted in the preparation of this appendix.

<i>Respondent</i>	<i>FTC Docket No.</i>	<i>Charges</i>	<i>Disposition</i>
15. Primrose House, Inc.	3039	Price discrimination; discount discrimination; demonstrators discrimination; bonuses; advertising allowances discrimination; free goods discrimination; promotional sales discrimination; transportation allowances discrimination; hidden demonstrators.	Reopened 9-2-39
16. Christmas Club	3050	False claims as to trade marks, registration, and manufacturer; misrepresentation; advertising service discrimination; exclusive dealing contracts; price discrimination.	C & D Order 9-30-37
17. Procon	3076	Discounts discrimination; fictitious brokerage.	Case cld.
18. Oliver Bros., Inc.	3088	Discounts discrimination; fictitious brokerage.	C&D 12-31-37 Appeal
19. Cast Iron Soil Pipe	3091	Combination in restraint of trade; price discrimination; basing point; delivered price system; uniform trade discounts.	
20. Reeves, Parvin & Co.	3129	Discounts discrimination; fictitious brokerage.	C & D Order 4-15-39
21. Elizabeth Arden, Inc.	3133	Price discrimination; advertising allowances discrimination; demonstrators discrimination; demonstrators hidden; transportation allowance discrimination.	Reopened 9-5-39
22. Pittsburgh Plate Glass	3154	Combination in restraint of trade; combination to effect monopoly; price fixing; price discrimination; resale price maintenance; "white list"; uniform discounts; uniform terms of sale; refusal to sell; coercion; arbitrary buyers classification.	C & D Order 10-30-37
23. Golf Ball Mfgs.	3161	Price discrimination; royalties discrimination; price fixing; combination in restraint of trade; coercion; resale price maintenance.	C & D Order 2-25-38
24. Cement Institute	3167	Combination in restraint of trade; price discrimination; basing point; price fixing; collusive bids; uniform discounts; uniform terms of sale; arbitrary classification of buy-	

<i>Respondent</i>	<i>FTC Docket No.</i>	<i>Charges</i>	<i>Disposition</i>
		ers; espionage; refusal to permit diversion of shipments; boycott; intimidation by threats of boycott; false and misleading advertising.	
25. Webb Crawford Co.	3214	Discounts discrimination; fictitious brokerage.	C&D 10-20-38 Appeal
26. Quality Bakers of Am.	3218	Discounts discrimination; fictitious brokerage.	C&D 4-27-39 Appeal
27. United Buyers Corp.	3221	Discounts discrimination; fictitious brokerage.	
28. E. B. Muller & Co.	3224	Sales below cost; price discrimination; rebates discrimination; disparagement; misrepresentation as to quality and contents of freight shipments.	
29. American Optical Co.	3232	Price discrimination; rebates discrimination; discounts discrimination.	C & D Order 1-21-39
30. Bausch & Lomb Optical Co.	3233	Price discrimination; rebates discrimination; discounts discrimination.	C & D Order 1-21-39
31. Agricultural Laboratories	3263	Price discrimination; discount discrimination.	C & D Order 1-12-38
32. Hansen Inoculator Co.	3264	Price discrimination; discount discrimination.	C & D Order 1-12-38
33. Albert L. Whiting	3265	Price discrimination; discount discrimination.	C & D Order 1-12-38
34. Nitragin Company	3266	Price discrimination; discount discrimination.	C & D Order 1-12-38
35. H. G. Brill Co.	3299	Price discrimination; rebates discrimination; discounts discrimination.	C & D Order 2-10-38
36. United Fence Mfg. Association	3305	Restraint of trade; price discrimination; delivered price system; uniform discounts; uniform terms of sale; resale price maintenance; coercion; refusal to sell; secret apportionment of orders.	C & D Order 7-13-38
37. U. S. Hoffman Machinery Co.	3330	Price discrimination.	
38. Atlantic Commission Co.	3344	Discounts discrimination; fictitious brokerage.	

<i>Respondent</i>	<i>FTC Docket No.</i>	<i>Charges</i>	<i>Disposition</i>
39. Merck and Company	3373	Price discrimination.	
40. Miami Wholesale Drug Corporation	3377	Price discrimination.	C & D Order 2-9-39
41. Curtice Bros. Co.	3381	Price discrimination; advertising allowance discrimination.	
42. Master Lock Co.	3386	Price discrimination; discount discrimination; freight allowance discrimination.	C & D Order 9-14-38
43. American Flange and Mfg. Co.	3391	Exclusive dealing contracts; false claims of patents and exclusive rights; price discrimination; discounts discrimination; quantity rebates; reciprocity; rebates conditional on testimonials.	C & D Order 12-12-38
44. Mississippi Sales Co.	3511	Discounts discrimination; fictitious brokerage.	
45. Superior Ceramic Corp.	3546	Price discrimination; discount discrimination.	
46. Trent Tile Co.	3547	Price discrimination; discount discrimination.	
47. Mosaic Tile Co.	3548	Price discrimination; discount discrimination.	
48. Pardee Matawan Tile Co.	3549	Price discrimination; discount discrimination.	
49. Wenzel Tile Co.	3550	Price discrimination; discount discrimination.	
50. Wheeling Tile Co.	3551	Price discrimination; discount discrimination.	
51. Architectural Tiling Co.	3552	Price discrimination; discount discrimination.	
52. National Tile Co.	3553	Price discrimination; discount discrimination.	
53. Corn Products Refining Co.	3633	Delivered Price System; price discrimination; advertising allowance discrimination; services discrimination; exclusive dealing contracts.	
54. C. F. Sauer Co.	3646	Price discrimination; advertising allowance discrimination; transportation allowance discrimination.	

<i>Respondent</i>	<i>FTC Docket No.</i>	<i>Charges</i>	<i>Disposition</i>
55. General Baking Co.	3669	Price discrimination.	
56. United States Rubber Co.	3685	Price discrimination; rebates discrimination; discount discrimination; commissions discrimination.	C & D Order 4-25-39
57. Luxor, Ltd.	3736	Services discrimination.	
58. San Pedro Fish Exch. et al.	3739	Combination in restraint of trade; price fixing; cutting off of competitors' supply; combination to effect monopoly; coercion; boycott; intimidation; discount discrimination; fictitious brokerage.	
59. Metz Bros. Baking Co.	3740	Price discrimination.	
60. Lambert Pharmacal Co.	3749	Rebates discrimination.	
61. Nutrine Candy Co.	3756	Price discrimination; lottery-pushboards.	
62. Chilean Nitrate Sales Corp.	3764	Price discrimination; rebate discrimination; combination in restraint of trade; combination to effect monopoly; price fixing; resale price maintenance; basing point; uniform rebates; uniform freight charges; apportionment of territory; coercion; intimidation and threats; inducing uniform hauling charges; distributors' profits fixing; combination for selection of customers; credit discrimination.	
63. Fruit & Produce Exchange	3765	Discounts discrimination; fictitious brokerage.	
64. Modern Marketing Service, Inc., et al.	3783	Discounts discrimination; fictitious brokerage.	
65. Anheuser-Busch Inc.	3798	Price discrimination.	
66. Piel Bros. Starch Co.	3799	Price discrimination.	
67. Clinton Co.	3800	Price discrimination.	
68. The Hubinger Co.	3801	Price discrimination.	

<i>Respondent</i>	<i>FTC Docket No.</i>	<i>Charges</i>	<i>Disposition</i>
69. Penick & Ford Ltd., Inc.	3802	Price discrimination.	
70. A. E. Staley Mfg. Co.	3803	Price discrimination.	
71. Union Starch Co.	3804	Price discrimination.	
72. American Maize Products Co.	3805	Price discrimination.	
73. A. S. Aloe Co.	3820	Price discrimination; refusal to buy; coercion.	
74. C. R. Anthony et al.	3834	Discounts discrimination; fictitious brokerage.	C & D Order 9-12-39
75. Simmons Co.	3840	Price discrimination; discounts discrimination.	C & D Order 8-25-39
76. American Oil Co.	3843	Price discrimination.	
77. Williams & Wilkins Co.	3844	Price discrimination; discounts discrimination.	C & D Order 8-23-39
78. General Motors	3886	Exclusive dealing contracts; price discrimination; discounts discrimi- nation; price fixing; resale price maintenance; uniform terms of sale; intimidation-threats; coer- cion; coercion-purchase require- ments.	
79. National Numbering Machine Co.	3889	Price discrimination.	
80. National Grain Yeast Corp.	3903	Price discrimination; free goods discrimination; discounts discrimi- nation; bribery of employees and customers.	
81. P. Lorillard Co.	3912	Price discrimination; free goods discrimination; discounts discrimi- nation; bribery of employees and customers.	
82. Brown & Williamson Corp.	3913	Price discrimination; free goods discrimination; discounts discrimi- nation; bribery of employees and customers.	
83. R. J. Reynolds Tobacco Co.	3914	Price discrimination; free goods discrimination; discounts discrimi- nation; bribery of employees and customers.	

<i>Respondent</i>	<i>FTC Docket No.</i>	<i>Charges</i>	<i>Disposition</i>
84. Larus & Bro. Inc.	3915	Price discrimination; free goods discrimination; advertising allowances discrimination; time allowances discrimination.	
85. Charles V. Herron	3916	Discounts discrimination; fictitious brokerage.	
86. Phillip Morris & Co. Ltd., Inc.	3919	Price discrimination; advertising allowances discrimination; time allowances discrimination.	
87. Liggett & Myers Tobacco Co., Inc.	3921	Price discrimination; advertising allowances discrimination; time allowances discrimination; free goods discrimination.	
88. Stephano Bros.	3922	Advertising allowances discrimination.	
89. Federal Yeast Corp.	3926	Price discrimination; discounts discrimination; free goods discrimination.	
90. American Tobacco Co.	3927	Price discrimination; free goods discrimination; advertising allowances discrimination; time allowances discrimination.	

Washington and Lee Law Review

Volume I

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Number 1

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The Editors wish to express their appreciation to the following members of the Class of 1939 whose work qualified them for membership on the REVIEW and whose endeavors contributed to its establishment: J. D. Head, E. T. Cannon, P. M. Grabill, R. F. Hutcheson, Jr., W. W. Perkins, W. F. Woodward.

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The materials published herein state the views of the writers. THE REVIEW takes no responsibility for any statement made, and publication does not imply agreement with the views expressed.

THE LAW REVIEW

With this number the WASHINGTON AND LEE LAW REVIEW makes its appearance and takes its place, though a modest one, with the honorable company of law school publications. We express our thanks and appreciation to all of those whose cooperation has made its publication possible. It represents a great deal of hard work on the part of the students and faculty advisers. All those so participating feel that they are richly repaid for their work not only in the experience gained from the investigations made but in having this publication of their law school take its place before the public.

We are also grateful to our friends who contributed the leading articles in this number. It is our hope and our promise that each number of this review will represent the same sincere effort which made this publication possible.

W. H. MORELAND, *Dean*

THE LAW SCHOOL

The law school enrollment for 1939-1940 numbers 105 men. The past several years have witnessed little change in the size of the student body. To the teaching staff has been added Mr. T. A. Smedley, a graduate of the Northwestern University Law School, who serves as librarian and assistant professor of law. Mr. R. H. Gray of the Faculty of the School of Commerce and Administration continues to devote part of his time to teaching in the law school. This additional help, coupled with some rearrangement of courses, has made it possible to strengthen the work of the school to a very appreciable degree. The curriculum has been enlarged to include the following new courses: Security I, Debtors' Estates, Insurance, Security II, Administrative Law, Federal Procedure, Business Associations II, Taxation.

Work in the library has been greatly facilitated by the assistance rendered by the librarian. The most pressing need of the library at this time is additional codes. The cost of many of these is beyond the present budget. The appearance of the library has been much improved by the hanging of the portraits of John White Brockenbrough, John Randolph Tucker, Charles A. Graves, Henry St. George Tucker, and Martin P. Burks. These portraits were presented by friends of the law school and were received with appropriate ceremonies. It is hoped that the portraits of William Reynolds Vance and Joseph Ragland Long, former deans of the school, will be made available in the near future.

For the information of those who might be interested there is printed below the present course of study of the law school.

PRESENT CURRICULUM

FIRST YEAR

First Semester		Second Semester	
<i>Courses</i>	<i>Hours</i>	<i>Courses</i>	<i>Hours</i>
Civil Procedure I.....	3	Criminal Law and Procedure....	4
Contracts I.....	3	Contracts II.....	3
Property I.....	3	Property II.....	4
Torts I.....	3	Torts II.....	3
Legal Bibliography and Brief-Making	2		

SECOND YEAR

First Semester		Second Semester	
<i>Courses</i>	<i>Hours</i>	<i>Courses</i>	<i>Hours</i>
Constitutional Law.....	4	Bills and Notes.....	4
Equity I.....	3	Equity II.....	3
Agency.....	2	Wills and Administration.....	2
Domestic Relations.....	2	Insurance.....	2
Property III.....	2	Administrative Law.....	3
Sales.....	3	Public Utilities.....	3
Security I.....	3		

THIRD YEAR

First Semester		Second Semester	
<i>Courses</i>	<i>Hours</i>	<i>Courses</i>	<i>Hours</i>
Civil Procedure II.....	3	Evidence.....	4
Conflict of Laws.....	4	Property IV.....	3
Trusts.....	4	Federal Procedure.....	2
Business Associations I.....	3	Business Associations II.....	2
Debtors Estates.....	3	Municipal Corporations.....	2
		Security II.....	3
		Taxation.....	3

The enrollment record of the law school for the past fifteen years appears on the next page.

ENROLLMENT RECORD FOR FIFTEEN YEARS

<i>School Year</i>	<i>Total Enrollment</i>	<i>First Year</i>	<i>Second Year</i>	<i>Third Year</i>	<i>Virginia Students</i>	<i>Outside State</i>	<i>Jurisdictions Represented</i>
1925-26	93	47	29	17	25	68	27
1926-27	101	47	27	27	22	79	24
1927-28	114	52	39	23	31	83	26
1928-29	115	57	30	28	27	88	24
1929-30	102	41	36	25	29	73	27
1930-31	99	36	32	31	31	68	25
1931-32	82	29	22	31	30	52	24
1932-33	98	51	26	21	33	65	23
1933-34	84	24	36	24	24	60	24
1934-35	78	31	20	27	22	56	21
1935-36	96	52	24	20	32	64	24
1936-37	112	57	34	21	37	75	25
1937-38	109	34	40	35	37	72	25
1938-39	107	45	24	38	37	70	24
1939-40	105	52	33	20	32	73	26

NOTES

TAXATION OF SALARIES OF NATIONAL AND STATE GOVERNMENT
OFFICERS AND EMPLOYEES

On March 27, 1939, the Supreme Court of the United States administered a further blow to the doctrine of implied constitutional immunity from taxation. That day, in *Graves v. New York, ex rel. O'Keefe*,¹ the Court held that an employee of the Federal Home Owners' Loan Corporation was not immune from a non-discriminatory state income tax upon his salary. This case expressly overruled the sixty-nine year old precedent of *Collector v. Day*² and impliedly swept away its companion case, *Dobbins v. Commissioners of Erie County*.³ In order to understand better the Court's position, let us first examine the origin and development of the doctrine of reciprocal immunity.

Chief Justice Marshall, in the case of *McCulloch v. Maryland*,⁴ which invalidated a state tax upon United States Bank notes, set forth the rule that federal agencies and instrumentalities were free from state taxation. This decision was founded upon the reasoning that "the power to tax involves the power to destroy." The case held, also, that the power of the Federal Government to create governmental agencies necessarily carries with it as one important element the ancillary power to protect them from destruction by state taxation. It is interesting to note that the opinion contained no language from which we could infer that the Chief Justice believed the states to have a similar immunity from federal taxation. Indeed, from the following portion of his opinion it might easily be deduced that he definitely intended the subjection of state agencies to federal taxation:

"The people of all the States have created the general Government, and have conferred upon it the general power of taxation. The people of all the States and the States themselves are represented in Congress, and by their representatives exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But, when a State taxes the operations of the Government

¹59 S. Ct. 595, 83 L. ed. 577, 120 A. L. R. 1466 (1939). Hereafter referred to as *Graves v. O'Keefe*.

²11 Wall. 113 (U. S. 1870). Likewise specifically overruled was *New York ex rel. Rogers v. Graves*, 299 U. S. 401, 57 S. Ct. 269, 81 L. ed. 306 (1937).

³16 Pet. 435 (U. S. 1842).

⁴4 Wheat. 316 (U. S. 1819).

of the United States, it acts upon the institutions created, not by their own constituents, but by people over whom they claim no control."⁵

The holding in the case of *Dobbins v. Commissioners of Erie County*⁶ represented the first expansion of Marshall's doctrine. Aided by the Chief Justice's reasoning in the *McCulloch* case that the question of whether a state tax created an actual burden upon a Federal agency need not be inquired into,⁷ the Court proceeded to strike down a state tax nominally laid on the office of captain of a federal revenue cutter. Thus, because of the broad scope of the language in the *McCulloch* case, the tax immunity of federal agencies and instrumentalities⁸ was enlarged to include federal officers.

Still clinging to the theory of the magic phrase that "the power to tax involves the power to destroy," the Court stretched the immunity doctrine to its widest limits in the case of *Collector v. Day*.⁹ In this case the decision that a state judge's salary was immune from a federal tax was reached by the reasoning that under our dual system a state has the same power of self preservation as the Federal Government. Hence, its agencies and instrumentalities should be accorded the same protection that was enjoyed by federal instrumentalities. In reaching this conclusion the Court studiously ignored Marshall's carefully drawn distinction between the respective taxing powers of the Federal and State Governments,¹⁰ and by quoting the opinion in *Dobbins v. The Commissioners*¹¹ as authority again avoided the issue of whether the tax operated to burden the state materially in any of its proper functions.

The broad doctrine of reciprocal immunity advanced by this landmark case stood substantially unimpaired for nearly four decades until the case of *South Carolina v. United States*¹² marked its first limitation.

⁵4 Wheat. 316, at 435 (U. S. 1819).

⁶16 Pet. 435 (U. S. 1842).

⁷4 Wheat. 316, at 430: "We are not driven to the perplexing inquiry, so unfit for the judicial department, of what degree of taxation is the legitimate use, and what degree may amount to an abuse of the power. The attempt to use it or means employed by the Government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give."

⁸*McCulloch v. Maryland*, 4 Wheat. 316 (U. S. 1819), had dealt with the taxation of U. S. Bank notes, and *Weston v. City Council of Charleston*, 2 Pet. 449 (U. S. 1829), had invalidated a state tax upon federal bonds. Neither of these cases commented upon the possible immunity of a federal employee.

⁹11 Wall. 113 (U. S. 1870).

¹⁰*McCulloch v. Maryland*, 4 Wheat. 316 (U. S. 1819).

¹¹16 Pet. 435 (U. S. 1842).

¹²199 U. S. 437, 26 S. Ct. 110, 30 L. ed. 261 (1905).

In this instance the Supreme Court upheld a federal license tax upon dealers selling liquor in state dispensaries by ruling that not all activities engaged in by states were necessarily governmental. Hence, when a state engaged in a business which was normally a private enterprise, a tax upon such activity constituted no interference with a governmental function. As explained by the Court, this curtailment of the doctrine was prompted by the fact that the encroachments by the states upon private business were cutting off valuable revenues of the Federal Government. It was unfortunate, however, that the Court chose this particular method to justify the limitation, for it has caused much confusion and uncertainty due to the fact that no uniform standard was, nor perhaps could be, laid down to determine what is governmental and what is private.¹³

For a few short years the Court seemed again to favor the reciprocal immunity doctrine,¹⁴ but the beginning of its end was heralded by *Metcalf & Eddy v. Mitchell*,¹⁵ which held valid a federal tax on the income of independent contractors employed by the states. This was upon the theory that it was not a tax upon a state agency or instrumentality inasmuch as the contractors were not employees of the states. True, in this case *Collector v. Day*¹⁶ was reaffirmed, but the Court took a strong stand for limiting immunity strictly. But of more importance the Court examined the question of whether or not the tax imposed a burden upon the state itself.¹⁷ Thus it began to pave the way for the ultimate destruction of the holding of the case which it had cited with approval.

Even after this decision the Court was unwilling to abandon alto-

¹³As time went on the Court became increasingly strict as to what constituted a state governmental function. *Flint v. Stone Tracy*, 220 U. S. 107, 31 S. Ct. 342, 55 L. ed. 389 (1910), held that only the essential functions of the state were governmental. *Helvering v. Powers*, 293 U. S. 214, 55 S. Ct. 171, 79 L. ed. 291 (1934), decided that the usual functions of the states were governmental. *United States v. California*, 297 U. S. 175, 56 S. Ct. 421, 80 L. ed. 564 (1936), held that only those activities in which the states traditionally engaged were governmental.

¹⁴*Gillespie v. Oklahoma*, 257 U. S. 501, 42 S. Ct. 171, 66 L. ed. 338 (1922), held invalid a tax by Oklahoma upon the income derived by a lessee of the Federal Government's oil lands. This case cited and relied upon the similar cases of *Choctaw, Oklahoma, & Gulf R. R. v. Harrison*, 235 U. S. 292, 35 S. Ct. 27, 59 L. ed. 234 (1914) and *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U. S. 522, 36 S. Ct. 453, 60 L. ed. 779 (1916).

¹⁵269 U. S. 514, 46 S. Ct. 172, 70 L. ed. 284 (1926).

¹⁶11 Wall. 113 (U. S. 1870).

¹⁷269 U. S. 514, 526, 46 S. Ct. 172, 175, 70 L. ed. 384 (1926): ". . . we do not find that it [the tax] impairs in any substantial manner the ability of the plaintiffs in error to discharge their obligations to the state, or the ability of a state or its subdivisions to procure the services of private individuals to aid them in their undertakings."

gether the doctrine which struck down taxes without looking to their effect.¹⁸ But the arguments for the doctrine were beginning to grow weaker, and vigorous dissents were advanced repeatedly against each succeeding case which applied it. An examination of the arguments upon which these dissents were based is particularly interesting if it is borne in mind that these minority opinions were destined to form in part the very foundation upon which the case of *Graves v. O'Keefe*¹⁹ rests.

As an example, let us first set forth the case of *Indian Motorcycle Co. v. United States*.²⁰ In this the Court, upon the sole ground that the maintenance of police service is a governmental function, invalidated a federal tax levied against the Indian Motorcycle Company upon the sale of motorcycles by it to a municipal corporation. Mr. Justice Stone, with Mr. Justice Brandeis concurring, voiced a protest against this arbitrary opinion, stating that, ". . . it is not clear how a recovery by the taxpayer would benefit directly the Government supposed to be burdened; and the assumption of an indirect benefit in the case of a tax of this type necessarily rests upon speculation rather than reality."²¹

Another strong dissent was urged in *Burnet v. Coronado Oil and Gas Co.*²² in which the Court held invalid a federal tax upon the income of a lessee of oil and gas lands of the State of Oklahoma. Four of the justices maintained that the authorities upon which the majority relied²³ should be overruled. They argued with much merit that, even though the proceeds obtained by the state from the lease were to be used for the school fund, the tax was too remote to constitute a burden upon a state function.

*New York ex rel. Rogers v. Graves*²⁴ passed unnoticed by the defenders of the burden hypothesis. This case in effect merely reaffirmed

¹⁸The cases of *Indian Motorcycle Co. v. U. S.*, 283 U. S. 570, 51 S. Ct. 601, 75 L. ed. 1277 (1931), *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 52 S. Ct. 443, 76 L. ed. 815 (1932), *New York ex rel. Rogers v. Graves*, 299 U. S. 401, 57 S. Ct. 269, 81 L. ed. 306 (1937), *Brush v. Commissioner of Internal Revenue*, 300 U. S. 352, 57 S. Ct. 495, 81 L. ed. 691, 108 A. L. R. 1428 (1937) all reaffirm the doctrine.

¹⁹59 S. Ct. 595, 83 L. ed. 577, 120 A. L. R. 1466 (1939).

²⁰283 U. S. 570, 51 S. Ct. 601, 75 L. ed. 1277 (1931).

²¹*Indian Motorcycle Co. v. U. S.*, 283 U. S. 570, 580, 51 S. Ct. 601, 604, 75 L. ed. 1277 (1931).

²²285 U. S. 393, 52 S. Ct. 443, 76 L. ed. 815 (1932).

²³*Gillespie v. Oklahoma*, 257 U. S. 501, 42 S. Ct. 171, 66 L. ed. 338 (1922), *Choctaw, Oklahoma & Gulf R. R. v. Harrison*, 235 U. S. 292, 35 S. Ct. 27, 59 L. ed. 234 (1914), *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U. S. 522, 36 S. Ct. 453, 60 L. ed. 779 (1916).

²⁴299 U. S. 401, 57 S. Ct. 269, 81 L. ed. 306 (1937). This case was subsequently overruled by *Graves v. O'Keefe*, 59 S. Ct. 595, 83 L. ed. 577, 120 A. L. R. 1466 (1939).

*Collector v. Day*²⁵ by holding that the salary of the general counsel for the Panama Railroad Company was exempt from state taxes. But vigorous opposition was again expressed to the doctrine when *Brush v. Commissioner of Internal Revenue*²⁶ sanctioned the case of *Dobbins v. The Commissioners*.²⁷ In reply to the majority decision that the salary of the chief engineer of New York City's Bureau of Water Supply was immune from federal taxation, Mr. Justice Roberts stated:

"... an exaction by either Government which hits the means or instrumentalities of the other infringes the principle of immunity if it discriminates against them and in favor of private citizens or if the burden of the tax be palpable and direct rather than hypothetic and remote. Tested by these criteria, the imposition of the challenged tax in the instant case was lawful."²⁸

These dissents, based upon reason and actuality rather than mere precedent, soon exerted their influence and were largely adopted by the majority of the Court in the three cases which preceded and set the stage for the *O'Keefe* case.²⁹ The first of these, *James v. Dravo Contracting Co.*,³⁰ held by a five to four decision that the gross receipts of an independent contractor derived from contracts with the Federal Government were subject to state taxation inasmuch as it created no direct burden on the Government.

Reasoning in the same vein, the Court soon responded to the compelling logic of the dissenting opinion in *Burnet v. Coronado Oil and Gas Co.*³¹ and upon substantially the same facts as those involved in the *Coronado* case it overruled that case along with *Gillespie v. Oklahoma*,³² in the case of *Helvering v. Mountain Producers Corp.*³³ This holding was based upon the hypothesis that a tax upon the lessee from the state is not a tax upon an instrumentality of the state and does not constitute a direct and substantial burden upon it.

Following closely upon the heels of this case, the Court in *Helvering v. Gerhardt*³⁴ held that the income of individuals employed by the Port Authority, an agency created by the States of New York and New

²⁵11 Wall. 113 (U. S. 1870).

²⁶300 U. S. 352, 57 S. Ct. 495, 81 L. ed. 691, 108 A. L. R. 1428 (1937).

²⁷16 Pet. 435 (U. S. 1842).

²⁸300 U. S. 352, 375, 57 S. Ct. 495, 502, 81 L. ed. 691, 108 A. L. R. 1428 (1937).

²⁹*Graves v. O'Keefe*, 59 S. Ct. 595, 83 L. ed. 577, 120 A. L. R. 1466 (1939).

³⁰302 U. S. 134, 58 S. Ct. 208, 82 L. ed. 155 (1937), 114 A. L. R. 318 (1938).

³¹285 U. S. 393, 52 S. Ct. 443, 76 L. ed. 815 (1932).

³²257 U. S. 501, 42 S. Ct. 171, 66 L. ed. 338 (1922).

³³303 U. S. 376, 58 S. Ct. 623, 82 L. ed. 907 (1938).

³⁴304 U. S. 405, 58 S. Ct. 969, 82 L. ed. 1427 (1938).

Jersey for the purpose of regulating the harbors of those states and the traffic between them, was subject to federal taxation. This function was regarded as a governmental function by the states themselves and was specifically made immune from state taxation. As indicative of the Court's new attitude towards the doctrine, it paid little attention to this aspect of the case, concerning itself instead with the fact that the burden imposed by the tax was conjectural rather than substantial:

"Even though, to some unascertainable extent, the tax deprives the states of the advantage of paying less than the standard rate for the services which they engage, it does not curtail any of those functions which have been thought hitherto to be essential to their continued existence as states."³⁵

In view of the Court's changing position toward the reciprocal immunity doctrine, it was inevitable that an overruling, at least in part, would come. This eventuality was reached, as previously shown, in the case of *Graves v. O'Keefe*.³⁶ At the expense of repetition let us examine this case more closely in order to formulate some opinion as to what the future decisions may be. The relator was employed at an annual salary as an examining attorney for the Home Owners' Loan Corporation. This was a Government-owned corporation created pursuant to an Act of Congress, and for the purpose of the suit the Act of Congress authorizing the creation of this corporation was assumed to be constitutional. The relator claimed that, since he was employed by an instrumentality of the Federal Government, a state tax upon his salary would impose an unconstitutional burden upon that Government.

In holding the state tax constitutional, the Supreme Court freely cited, among others, the cases of *Helvering v. Gerhardt*,³⁷ *Metcalf & Eddy v. Mitchell*,³⁸ and *James v. Dravo Contracting Co.*³⁹ as authority for the proposition that immunity from a tax should not be established when the advantage to the Government would be merely "theoretical, speculative, and unsubstantial." But, in addition, the Court reverted to Marshall's theory that the Federal Government is supreme and hence has the power to grant or withhold immunity of federal agencies from state taxation. No attempt was made to define the limits of such power. Instead, the Court contented itself with setting forth the rule that when the Congress is silent the effect of the alleged burden should be consid-

³⁵304 U. S. 405, 420, 58 S. Ct. 969, 975, 82 L. ed. 1427 (1938).

³⁶59 S. Ct. 595, 83 L. ed. 577, 120 A. L. R. 1466 (1939).

³⁷304 U. S. 405, 58 S. Ct. 969, 82 L. ed. 1427 (1938).

³⁸269 U. S. 514, 46 S. Ct. 172, 70 L. ed. 384 (1926).

³⁹302 U. S. 134, 58 S. Ct. 208, 82 L. ed. 155 (1937), 114 A. L. R. 318 (1938).

ered and, if there is no ground for implying a constitutional immunity, there is also a lack of any ground for assuming an intention on the part of the Congress to create an immunity. It concluded that there was no basis for implying any such intention in this case.

Lastly, the Court settled a long-disputed question as to whether the holding in *South Carolina v. United States*⁴⁰ applied to federal agencies,⁴¹ by deciding that, since the Constitution is the sole source of federal powers, all constitutional actions of the Federal Government are governmental and are to be treated alike as to immunity from state taxation.

Recalling that the principal case overruled *Collector v. Day* in so far as the latter recognized "an implied constitutional immunity from income taxation of the salaries of officers or employees of the national or a state government," it can be deduced that all state employees can be made subject to non-discriminatory federal income taxation. Also, it seems to follow that in the silence of the Congress federal officers and employees will likewise be subject to state taxes upon their income, for it would be difficult to conceive of a non-discriminatory tax upon the income of a federal employee which would burden the Federal Government to such an extent that the Court could imply an intention on the part of the Congress to grant immunity with reference to that particular class of employees. Fortunately, however, it is not necessary to speculate about the possible holdings in this respect, for the Congress recently passed an Act⁴² by which it expressed an intention to tax the income of all state officers and employees, and in return consented to non-discriminatory state taxation of the compensation received by any officer or employee of the United States.⁴³

As indicative of the future treatment of the retreating doctrine of reciprocal immunity, let us next look at the likelihood of legislation which may require judicial construction and interpretation. In the discussion of the foregoing Act in the Senate,⁴⁴ Senator Clark, of Missouri,

⁴⁰199 U. S. 437, 26 S. Ct. 110, 30 L. ed. 261 (1905).

⁴¹See Note (1936) 49 Harv. L. Rev. 1323.

⁴²Pub. L. No. 32, 76th Cong., 1st Sess. (April 12, 1939), 26 U. S. C. A. Secs. 5-15, 22, 116 (Supp. May 1939).

⁴³The Act expressly provides that the term officer or employee includes a judge or officer of a court. It is not to be supposed that the Court will apply the prohibition of Article III of the Federal Constitution against salary diminution to the case of non-discriminatory state taxation of the salary of a federal judge. Cf. on federal taxation of the salary of federal judges, *Evans v. Gore*, 253 U. S. 245, 40 S. Ct. 550, 64 L. ed. 887 (1920) and *Miles v. Graham*, 268 U. S. 501, 45 S. Ct. 601, 69 L. ed. 1067 (1925) with *O'Malley v. Woodrough*, 59 S. Ct. 838 (1939).

⁴⁴Cong. Rec., 76th Cong., 1st Sess., at 5147.

stated that at that time there was a bill, providing for the mutual taxation of state and federal bonds by the respective governments, pending before the House Ways and Means Committee. If such a bill was confined to taxation of the income and interest on the governmental bonds, and the discussion indicated that such was the case, it seems highly probable that it would receive the sanction of the Supreme Court. This view is based upon the fact that in the main the income from these bonds is individual and not governmental property, and for this reason such taxation would not seem to create a substantial burden upon the State or Federal Governments or any of their agencies and instrumentalities.⁴⁵ It has been previously pointed out in the discussion of the recent cases that it is not enough to establish immunity to show merely that the tax might impose some indirect and hypothetical burden upon the State or Federal Government. Instead, there must be a showing of some actual interference with a governmental function, and a tax upon an individual's income from governmental bonds surely would not impede or materially hinder the Government in the issuance or sale of such bonds.

Using this same line of reasoning, we may also surmise that the case of *Indian Motorcycle Co. v. United States*⁴⁶ might eventually be overruled, for at best the immunity of the manufacturer from a federal tax relieves the state of only an indirect and speculative burden. Indeed, if we can follow but partially Mr. Justice Butler's statement in his dissent to the *O'Keefe* case, "Safely it may be said that presently marked for destruction is the doctrine of reciprocal immunity that by recent decisions here has been so much impaired,"⁴⁷ we may conclude that all sellers to and buyers from State or Federal Governments will be subject to a non-discriminatory tax by the opposite Government upon the proceeds of such transaction unless a showing is made of a clear cut burden upon the Government allegedly affected.

It does not follow, however, that Mr. Justice Butler's ominous prediction of the complete destruction of the doctrine will come to pass, for the increasingly liberal cases have dealt with taxes levied upon individuals, not the Governments themselves. For instance, the Court was careful to point out in the *O'Keefe* case that the tax was to be paid from private funds and not from the funds of the Government either directly or indirectly. In the same case Mr. Justice Frankfurter in his

⁴⁵Mr. Justice Thompson advanced this reasoning in his dissent in *Weston v. City Council of Charleston*, 2 Pet. 449 (U. S. 1829).

⁴⁶283 U. S. 570, 51 S. Ct. 601, 75 L. ed. 1277 (1931).

⁴⁷59 S. Ct. 595, 604, 63 L. ed. 577, 120 A. L. R. 1466, 1477 (1939).

concurring opinion stated, "The arguments upon which *McCulloch v. Maryland* rested had their roots in actuality. But they have been distorted by sterile refinements unrelated to affairs."⁴⁸ In fact, all of the opinions limiting the doctrine have pointed out while so doing that, because of the very nature of our dual system, there must be no actual burden upon or impairment of one Government's agencies and instrumentalities by the other. It may be stated, then, with a comparative degree of safety that for the most part the principles of *McCulloch v. Maryland*⁴⁹ still prevail, and a tax which is levied directly upon a governmental agency will be held invalid.

Regardless of the outcome of the foregoing speculations, we may definitely assert that the *O'Keefe* case has taken a long step in the direction of clarifying the law of intergovernmental immunities. Gone is the involved procedure of determining whether an individual is an employee or an independent contractor. Dead is the perplexing problem of whether a function is governmental or private when taxation of governmental employees is involved.

Finally, the decision forces a previously privileged class of employees to bear their share of the burdens of the Governments as well as enjoy the benefits and protection. As far as employees alone are concerned, there never has been any reason for this exemption. Its removal adds substantial income to both State and Federal Governments at a time when such is needed, yet without placing any material burden or impediment upon the Governments themselves or the operation of their agencies.

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MULTI-STATE TAXATION OF INTANGIBLE PROPERTY: BACKGROUND AND RECENT DEVELOPMENTS

The constitutional problem involved in the double taxation of intangible property has again come in for consideration by the Supreme Court of the United States in three cases decided during the last term. In *Curry v. McGanless*,¹ a power of disposition exercised in Tennessee disposing of a trust fund established and administered in Alabama was held taxable in Tennessee, although Alabama had previously imposed

⁴⁸59 S. Ct. 595, 602, 63 L. ed. 577, 120 A. L. R. 1466, 1474 (1939).

⁴⁹4 Wheat. 316 (U. S. 1819).

¹59 S. Ct. 900 (1939).

a death tax on the trust. The second case, *Graves v. Elliott*,² held that the non-exercise of a power of revocation by a decedent domiciled in New York was taxable in that state even though the trust fund was established in Colorado and had already been subjected to a death tax there. The third case, *Newark Fire Insurance Co. v. State Board of Tax Appeals*,³ involved the question of allowing the state of incorporation to tax intangibles which had acquired a business situs elsewhere.

Strictly speaking, the taxation of the same property by two or more states is not "double taxation".⁴ In the interests of accuracy, the term multi-state taxation will hereafter be employed. There is perhaps no other country in the world where the problem of multi-state taxation is so pertinent, or where the unlimited possibilities of such taxation exist.⁵ It is necessary, therefore, to be familiar with the constitutional background of the problem in order that the implications of the recent Supreme Court decisions may be more fully comprehended.

Before dealing with the taxation of intangible property it will be helpful to indicate the condition of the law upon the multi-state taxation of realty and tangible personal property. It has long been recognized that no state has power to tax *lands* which are outside the state.⁶ At common law the fiction *mobilia sequuntur personam* was applied to *tangible personalty* making it taxable at the domicile of the owner.⁷ This fiction has been abandoned to the extent that if the chattel acquires a situs elsewhere, the place of situs and not the domicile of the owner has jurisdiction to levy a property tax.⁸ If, however, the tangible personalty is removed from the state and acquires no situs elsewhere,

²59 S. Ct. 913 (1939).

³59 S. Ct. 918 (1939).

⁴"To constitute double taxation, objectionable or prohibited, the two or more taxes must be (1) imposed on the same property, (2) by the same state or government, (3) during the same taxing period, and (4) for the same purpose. There is no double taxation, strictly speaking, where (a) taxes are imposed by different states . . ."
1 Cooley, *Taxation* (4th ed. 1924) § 223, p. 475.

⁵Wickersham, *Double Taxation* (1926) 12 Va. L. Rev. 85.

⁶*State Tax on Foreign-Held Bonds*, 15 Wall. 300 (U. S. 1872); *Louisville and Jeffersonville Ferry Co. v. Kentucky*, 188 U. S. 385, 23 S. Ct. 463, 47 L. ed. 513 (1903). A mortgage is an interest in land and may be taxed by the state where the land is situated even if the mortgagee resides in another state. *Savings Society v. Multnomah County*, 169 U. S. 421, 18 S. Ct. 392, 42 L. ed. 803 (1898); cf. *Senior v. Braden*, 295 U. S. 422, 55 S. Ct. 800, 79 L. ed. 1520 (1935).

⁷Story, *Conflict of Laws* (8th ed. 1883) 537.

⁸*Union Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36, 50 L. ed. 150 (1905). Tangible chattels, such as tank cars, which have an average situs may be taxed in the state where the average situs exists. *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876, 35 L. ed. 613 (1891); *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 54 S. Ct. 152, 78 L. ed. 238 (1933).

the state of the owner's domicile may continue to levy a property tax.⁹ The situs rule has been extended to the field of inheritance taxation with the effect that the domiciliary state of the decedent is precluded from imposing an inheritance tax on chattels which have acquired a situs elsewhere.¹⁰ The jurisdiction to levy either property or inheritance taxes on tangible chattels resolves itself into a determination of the question of physical situs of the property.¹¹

The decisions of the United States Supreme Court dealing with multi-state taxation of *intangible* property show two clearly discernible periods.¹² In the earlier period there was no objection to such taxation; in the later period there was a partial prohibition of it. During the period in which multi-state taxation of intangibles was permitted the multi-state property taxation of shares of stock was quite definitely allowed; both the state of incorporation,¹³ and the domiciliary state of the owner could tax.¹⁴ In the field of *inheritance* taxation both the domiciliary state of the decedent creditor and the state of the debtor could impose transfer taxes,¹⁵ but in the case of stock held in a foreign

⁹New York Central & Hudson River R. R. v. Miller, 202 U. S. 584, 26 S. Ct. 714, 50 L. ed. 1155 (1906); Southern Pacific Co. v. Kentucky, 222 U. S. 63, 321 S. Ct. 13, 56 L. ed. 96 (1911).

¹⁰Frick v. Pennsylvania, 268 U. S. 473, 45 S. Ct. 603, 69 L. ed. 1058 (1925), in which the decedent died domiciled in Pennsylvania owning certain pictures which were located in Massachusetts and New York. Pennsylvania attempted to levy a transfer tax on these pictures, but the Court refused to allow it to do so on the ground that the states of situs had plenary power over the pictures and could regulate the transfer as well as tax it. Pennsylvania in no way contributed to the succession of the property since any recognition of Pennsylvania laws of succession was by way of comity.

¹¹For such a determination see, City Bank Farmers Trust Co. v. Schnader 293 U. S. 112, 55 S. Ct. 29, 79 L. ed. 228 (1934).

¹²Tappan v. Merchants National Bank, 19 Wall. 490 (U. S. 1873) (the Court recognized that personal property included not only tangible personalty, but also intangible personalty).

¹³Tappan v. Merchants National Bank, 19 Wall. 490 (U. S. 1873); Corry v. Baltimore, 196 U. S. 466, 25 S. Ct. 297, 49 L. ed. 556 (1905).

¹⁴Kidd v. Alabama, 188 U. S. 730, 23 S. Ct. 401, 47 L. ed. 669 (1903). The right of the state of domicile to tax the stock cannot be attacked by claiming it violates the Commerce Clause. Darnell v. Indiana, 226 U. S. 390, 33 S. Ct. 120, 57 L. ed. 267 (1912). Neither does the taxation of shares of stock of a foreign corporation by the state of domicile of the owner of the stock fail because it is a tax on real or tangible property not within the jurisdiction of the domiciliary state. Hawley v. Malden, 232 U. S. 1, 34 S. Ct. 201, 58 L. ed. 469 (1914). In the absence of re-incorporation within the taxing state, no inheritance tax can be levied on non-resident stockholders just because the corporation has property within the state. Rhode Island Trust Co. v. Doughton, 270 U. S. 69, 46 S. Ct. 256, 70 L. ed. 475 (1926).

¹⁵Blackstone v. Miller, 188 U. S. 189, 23 S. Ct. 277, 47 L. ed. 439 (1903); Wheeler v. Sohmer, 233 U. S. 434, 34 S. Ct. 607, 58 L. ed. 1930 (1914) (note sent into another state can be subjected to a transfer tax in that state); cf. Blodgett v. Silberman, 277 U. S. 1, 48 S. Ct. 410, 72 L. ed. 749 (1928) (stocks, bonds, and an interest in a partner-

corporation, the domiciliary state of the decedent could only levy a transfer tax on the difference between the value of the stock and the transfer tax collected by the state of incorporation.¹⁶ Transfer taxes on powers of appointment or revocation could be imposed by the domiciliary state of the donee of the power even though a transfer tax had also been levied by the state in which the trust fund of intangibles was located.¹⁷ In the field of *property* taxation the Court by applying the fiction *mobilia sequuntur personam* recognized the right of the domicile of the owner to tax intangibles.¹⁸ When certain intangibles had acquired (what the court termed) a "business situs" in another state, the right of such state to impose a property tax was likewise conceded.¹⁹ The mere fact that the intangibles had acquired such situs elsewhere did not prevent the domiciliary state from imposing a property tax on the same intangibles,²⁰ but the question of whether the state of domicile and the

ship are all intangible property and may be taxed by the domiciliary state of the decedent even though located and already subjected to a transfer tax in another state).

The term "transfer tax" as used herein is limited to succession, death, estate and inheritance taxes.

¹⁶*Frick v. Pennsylvania*, 268 U. S. 473, 45 S. Ct. 603, 69 L. ed. 1058 (1925).

¹⁷*Bullen v. Wisconsin*, 240 U. S. 625, 36 S. Ct. 473, 60 L. ed. 830 (1916) (for purposes of taxation a general power of appointment or revocation may be treated as equivalent to a fee). But if under the laws of the state in which the trust is created and administered, the title is treated as passing directly from the donor of the power to the appointee, the state in which the donee of the power is domiciled has no jurisdiction to impose a transfer tax on the exercise of the power because that state does not aid in vesting title. *Wachovia Trust Co. v. Doughton*, 272 U. S. 567, 47 S. Ct. 202, 71 L. ed. 413 (1926).

¹⁸*Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558 (1879).

¹⁹*New Orleans v. Stempel*, 175 U. S. 309, 20 S. Ct. 110, 44 L. ed. 174 (1899) (notes kept in Louisiana by an agent of a non-resident owner); *Bristol v. Washington County*, 177 U. S. 309, 20 S. Ct. 585, 44 L. ed. 701 (1900) (the fact that the notes are sent out of the state until time for collection does not destroy the business situs); *State Board of Assessors v. Comptoir National D'Escompte*, 191 U. S. 388, 24 S. Ct. 109, 48 L. ed. 232 (1903) (checks taken in place of notes as evidence of the debt); *Metropolitan Life Insurance Co. v. New Orleans*, 205 U. S. 395, 27 S. Ct. 499, 51 L. ed. 841 (1907); *Liverpool Globe Insurance Co. v. Board of Assessors*, 221 U. S. 346, 31 S. Ct. 550, 55 L. ed. 762 (1911) (the fact that no evidence of the indebtedness is taken does not destroy the business situs); *Rogers v. Hennepin County*, 240 U. S. 184, 36 S. Ct. 265, 60 L. ed. 594 (1916) (membership in a grain exchange is intangible property and may be subjected to a tax by the jurisdiction in which the exchange is located). In these business situs cases it appears to be necessary that there be some continued protection given to the credit by the taxing state; thus, merely sending a note into a state for safekeeping is not sufficient. *Buck v. Beach*, 206 U. S. 392, 27 S. Ct. 712, 51 L. ed. 1106 (1907).

²⁰*Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 38 S. Ct. 40, 62 L. ed. 128 (1917) (property tax by domiciliary state of owner on a bank deposit located outside the state); *Cream of Wheat Co. v. Grand Forks*, 253 U. S. 325, 40 S. Ct. 558, 64 L. ed. 931 (1920) (property tax levied by state of incorporation on corporate intang-

state of business situs could both levy property taxes on the same intangibles at the same time had not yet been decided.²¹

The prohibition of multi-state taxation of intangibles was first evidenced in the field of *inheritance* taxation.²² The Court took the view that the Due Process Clause of the Fourteenth Amendment forbade two or more states from imposing transfer taxes on the same intangible property. In the Court's estimation, intangibles were entitled to the same immunity enjoyed by tangibles against multi-state taxation. The fiction *mobilia sequuntur personam* was invoked in order to give the decedent's domiciliary state the sole power to levy an inheritance tax,²³ and to prevent the state in which bonds,²⁴ notes,²⁵ bank deposits,²⁶ and open book accounts²⁷ were located from also imposing a transfer tax. This prohibition against multi-state taxation was extended so as to prevent the state of incorporation from imposing a testamentary transfer tax on the stock held by a non-resident decedent, although the Court specifically indicated that an ordinary stock transfer tax could be imposed.²⁸ It was not a unanimous Court which held that the Fourteenth Amendment forbade multi-state taxation of intangibles. In all of these cases

ibles with a business situs in another state); *Citizens National Bank v. Durr*, 257 U. S. 99, 42 S. Ct. 15, 66 L. ed. 149 (1921) (membership in N. Y. Stock Exchange taxed by domicile of the member).

²¹In both *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 38 S. Ct. 40, 62 L. ed. 128 (1917) and *Cream of Wheat Co. v. Grand Forks*, 253 U. S. 325, 40 S. Ct. 558, 64 L. ed. 931 (1920), the court said by way of dicta that the state where the intangibles had acquired a business situs might also tax, there being no constitutional prohibition against multi-state taxation of intangible property.

²²*Farmers Loan and Trust Co. v. Minnesota*, 280 U. S. 204, 50 S. Ct. 98, 74 L. ed. 371 (1930). The decision in this case was foreshadowed by the following dicta in *Safe Deposit and Trust Co. v. Virginia*, 280 U. S. 83, 84, 50 S. Ct. 59, 61, 74 L. ed. 180 (1929): "It would be unfortunate, perhaps amazing, if a legal fiction originally invented to prevent personalty from escaping just taxation should compel us to accept the view that the same securities were within two states at the same instant and because of this to uphold a double and oppressive assessment."

²³The case of *Blackstone v. Miller*, 188 U. S. 189, 23 S. Ct. 277, 47 L. ed. 439 (1903) was expressly overruled by the Court in *Farmers Loan and Trust Co. v. Minnesota*, 280 U. S. 204, 50 S. Ct. 98, 74 L. ed. 371 (1930).

²⁴*Baldwin v. Missouri*, 281 U. S. 586, 50 S. Ct. 436, 74 L. ed. 1056 (1930) (decedent died domiciled in Illinois with bonds, notes, and bank deposits in Missouri).

²⁵*Baldwin v. Missouri*, 281 U. S. 586, 50 S. Ct. 436, 74 L. ed. 1056 (1930).

²⁶*Baldwin v. Missouri*, 281 U. S. 586, 50 S. Ct. 436, 74 L. ed. 1056 (1930).

²⁷*Beidler v. South Carolina Tax Commission*, 282 U. S. 1, 51 S. Ct. 54, 75 L. ed. 131 (1930).

²⁸*First National Bank of Boston v. Maine*, 284 U. S. 312, 52 S. Ct. 174, 76 L. ed. 313 (1932). This case completely reversed that part of the decision in *Frick v. Pennsylvania*, 268 U. S. 473, 45 S. Ct. 603, 69 L. ed. 1058 (1925) which had given the state of incorporation the right to levy a transfer tax in full, and limited the state of decedent's domicile to a transfer tax on the difference between the value of the stock and the transfer tax collected by the state of incorporation.

there were vigorous dissenting opinions which argued that there was nothing in that amendment to prohibit multi-state taxation.²⁹ The minority pointed out that the attempt to ascribe a situs to intangible property by use of the fiction *mobilia sequuntur personam* resulted from the failure of the Court to realize that an intangible is not a thing, but a relationship between two or more persons which gives rise to certain rights, privileges, and powers to which a situs cannot be attributed.³⁰ Instead of attempting to give intangible property a situs, it was thought better to make the jurisdiction to tax depend on whether the state attempting to tax gave any protection to these rights, privileges, and powers incident to the intangible property.

Since the Court had decided that the Fourteenth Amendment precluded multi-state *inheritance* taxation of intangible property, the question next to be considered was whether the prohibition should likewise be extended to *property* taxation of intangibles.³¹ In the business situs cases³² during this period, the Court had no occasion specifically to ex-

²⁹Mr. Justice Holmes in his dissent in *Baldwin v. Missouri*, 281 U. S. 586, 596, 50 S. Ct. 436, 439, 74 L. ed. 1056 (1930) said: "Very probably it might be good policy to restrict taxation to a single place, and perhaps the technical conception of domicile may be the best determinant. But it seems to me that if that result is to be reached it should be reached through understanding among the states, by uniform legislation or otherwise, not by evoking a constitutional prohibition from the void of 'due process of law' when logic, tradition and authority have united to declare the right of the state to lay the now prohibited tax."

³⁰Mr. Justice Stone dissenting in *First National Bank of Boston v. Maine*, 284 U. S. 312, 332, 52 S. Ct. 174, 179, 76 L. ed. 313 (1931) summarized this thought in the following statement: "Such want of logic as there may be in taxing the transfer of stock of a non-resident at the home of the corporation results from ascribing a *situs* to the shareholders intangible interests which, because of their very want of physical characteristics, can have no situs, and again in saying that the rights, powers and privileges incident to stock ownership and transfer which are actually enjoyed in two taxing jurisdictions, have situs in one and not the other. Situs of an intangible, for taxing purposes, as the decisions of this court, including the present one, abundantly demonstrate, is not a dominating reality, but a convenient fiction which may be judicially employed or discarded, according to the result desired."

³¹For articles which discuss the possibility of this extension, see: Brown, *Multiple Taxation By the States—What Is Left of It?* (1935) 48 Harv. L. Rev. 407; Brown, *Domicile Versus Situs As a Basis of Tax Jurisdiction* (1936) 12 Ind. L. J. 87; Lowndes, *The Passing of Situs—Jurisdiction To Tax Shares of Corporate Stock* (1932) 45 Harv. L. Rev. 777; Merrill, *Jurisdiction To Tax—Another Word* (1935) 44 Yale L. J. 582.

³²*Wheeling Steel Corporation v. Fox*, 298 U. S. 193, 56 S. Ct. 773, 80 L. ed. 1143 (1936) (accounts and notes receivable and bank deposits are taxable at the principal office and place of business situs, even though located in other states); *New York ex. rel. Whitney v. Graves*, 299 U. S. 366, 57 S. Ct. 237, 81 L. ed. 289 (1937) (membership in the New York Stock Exchange is intangible property which is so localized as to acquire a business situs for purposes of taxation); *First Bank Stock Corp. v. Minnesota*, 301 U. S. 234, 57 S. Ct. 677, 81 L. ed. 1061 (1937) (holding company of bank stock may be taxed on the stock of subsidiary banks it holds at its principal office and place of business).

tend the prohibition to property taxation. It continued to hold that the fiction *mobilia sequuntur personam* did not prevent the state of the business situs from taxing the intangibles. It refused to extend the prohibition to property taxation of stock, and allowed the state of incorporation to tax stock owned by a non-resident despite the fact that the stock might also be a taxable subject in the domiciliary state of the owner.³³ Likewise, there was no indication that the prohibition of multi-state taxation would be extended to the field of income taxation.³⁴ Such was the status of the law on the subject of multi-state taxation when the Court rendered its decisions in the three cases forming the subject of this discussion.

The case of *Curry v. McCanless*,³⁵ involved a trust fund of stocks and bonds established in Alabama by a citizen of Tennessee to be administered by an Alabama trustee. The settlor reserved the right to remove the trustee, direct the sale of the trust property and the investment of the proceeds, and the power to dispose of the trust estate by will. The income of the trust was to be paid to the settlor during her lifetime. From the time of the creation of the trust until the settlor's death at her domicile in Tennessee, the trust was administered by the Alabama trustee and the documentary evidences of the intangibles held by the trustee were at all times located in Alabama. The settlor, by her last will and testament, bequeathed the trust property to the same Alabama trustee, in trust for the benefit of her husband, son, and daughter, in different amounts and estates than those provided for in the original instrument in case of default. The settlor further provided for the remainder interests to pass to the children of her son and daughter, and to his wife and her husband. She named a Tennessee executor for her Tennessee property, and an Alabama executor for her Alabama property. Upon her death, and after the probate of the will in both states, Alabama levied a transfer tax on the trust property passing under the will. Tennessee claimed the right to levy a transfer tax, and by agreement the State Tax Commission of Alabama consented to be sued by the Tennessee Commissioner of Finance and Taxation in a Chancery Court of Tennessee. The Tennessee Chancery Court held that only Ala-

³³*Schuykill Trust Co. v. Pennsylvania*, 302 U. S. 506, 58 S. Ct. 295, 82 L. ed. 392 (1938).

³⁴*Lawrence v. State Tax Commission*, 286 U. S. 276, 52 S. Ct. 556, 76 L. ed. 1102 (1932) (income arising without as well as within the domiciliary state may be taxed); *N. Y. ex. rel. Cohn v. Graves*, 300 U. S. 308, 57 S. Ct. 466, 81 L. ed. 666 (1937) (income derived from the rent of lands and from mortgages on lands located in another state may be taxed by the domiciliary state of the recipient of the income).

³⁵59 S. Ct. 900 (1939).

bama could tax. This decision was reversed by the Supreme Court of Tennessee³⁶ which held that Tennessee and not Alabama had power to levy the transfer tax. On appeal, the United States Supreme Court, by a five to four decision, held that both states could impose such a tax.

Mr. Justice Stone, who wrote the majority opinion, pointed out that while rights in land and chattels were taxable only in the state where the land or chattels were located, yet very different considerations applied to the taxation of intangibles since the protection which a state affords is not to a right in a thing, but rather to a relationship between persons. He explained that in the past, when the owner of intangibles confined his activities to the state of his domicile, the Court, by ascribing a situs to the intangibles, or by invoking the maxim *mobilia sequuntur personam*, had given his domicile the jurisdiction to tax; but that when the owner of intangibles extended his activities, so as to invoke the protection of the laws of other states, the rule of a single place for taxation no longer existed. He made the point that the Court has never denied the trustee's domicile the power to subject the intangibles in a trust fund to property taxation, and that if it could levy a property tax it could also levy a transfer tax. It was argued that the power of the settlor to dispose of the intangible property in the hands of the trustee was a potential source of wealth protected by the laws of Tennessee, and for that protection the settlor could be made to contribute to the support of the government if, as in the present case, the exercise of that power was made a taxable event by the state. It was noted that a general power of appointment had for purposes of taxation been regarded as equivalent to the ownership of the property subject to the power. The conclusion was reached that since the settlor invoked the aid of Alabama in creating, maintaining, and transferring the trust, and the aid of Tennessee in providing for succession and transfer of the property, both states had a right to contribution for the benefits conferred by them and that under circumstances like those in the present case, there was nothing in the Fourteenth Amendment which required the ascribing of a situs for taxation to a single state, nor which prohibited both states from imposing the transfer tax.³⁷

³⁶Nashville Trust Co. v. Stokes, 118 S. W. (2d) 228 (1938).

³⁷Mr. Justice Black, Mr. Justice Frankfurter and Mr. Justice Douglas joined Mr. Justice Stone in this opinion. Mr. Justice Reed concurred with all of the opinion except the statement that "... taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles."

Mr. Justice Butler, in writing the dissenting opinion, said that the Due Process Clause of the Fourteenth Amendment prevented both states from imposing transfer taxes, and that only Alabama had the right to impose the tax. He argued that the power of disposition of the trust estate was not an estate or interest which would give Tennessee jurisdiction to tax and that if it were assumed that, in addition to this power of appointment, the settlor also had an interest in the trust property, still Tennessee could not tax. He contended that intangibles in a trust fund could acquire a business situs on the same basis as intangibles used in commercial enterprises, and that since the intangibles had acquired such business situs in Alabama, Tennessee was without jurisdiction to tax because the intangibles had no situs there.³⁸

The second case under consideration was that of *Graves v. Elliott*,³⁹ in which the decedent, while domiciled in Colorado, had created a trust fund consisting of corporate bonds to be administered by a Colorado trustee. The trust provided for the payment of the income to the decedent's daughter for life, and after her death to her children, until they reached the age of twenty-five years when the principal of the trust fund was to be paid to them. In default of such children, the principal was to pass under the will of the decedent. The decedent reserved the right to change beneficiaries, change trustees, and to revoke the trust and re-vest herself with title to the property. The decedent, after creating the trust, became and remained domiciled in New York, where she died without ever having exercised the power of revocation. Colorado levied and collected a transfer tax on the trust funds. New York also levied a transfer tax based on the interest the decedent had because of the non-exercise of the power of revocation. The Court of Appeals of New York held that New York could not tax because it would amount to taxing property outside the state.⁴⁰ On appeal, the United States Supreme Court, by a five to four decision, held that both New York and Colorado could impose the transfer tax.

Mr. Justice Stone, in the majority opinion,⁴¹ said that the non-exercise of the power of revocation was as appropriate a subject of taxation as was the power of disposition in the *McCanless* case,⁴² and that on the principles announced in that case it could not be said that the

³⁸Mr. Chief Justice Hughes, Mr. Justice McReynolds and Mr. Justice Roberts joined Mr. Justice Butler in this opinion.

³⁹59 S. Ct. 913 (1939).

⁴⁰In re Brown's Estate, 274 N. Y. 10, 8 N. E. (2d) 42 (1937).

⁴¹Mr. Justice Black, Mr. Justice Reed, Mr. Justice Frankfurter and Mr. Justice Douglas joined Mr. Justice Stone in the majority opinion.

⁴²59 S. Ct. 900 (1939).

intangibles held in trust in Colorado were so dissociated from the person of the decedent as to be beyond the taxing jurisdiction of the state of domicile. He stated that the duty of the decedent to contribute to the support of the government of her domicile afforded an adequate constitutional basis for imposition of a tax measured by the value of the intangibles transmitted or relinquished by her at death.

Mr. Chief Justice Hughes, who wrote the dissenting opinion,⁴³ objected that the majority opinion pushed the fiction *mobilia sequuntur personam* to an unwarranted extreme and produced an unjust result. His position was that while there was no specific provision in the Constitution of the United States against multi-state taxation, the Constitution did impose limitations on the taxing power of a state. He argued that intangible property like tangible property might be so localized as to withdraw the power to tax from the domiciliary state of the owner, and that here the intangibles were effectively localized in Colorado. He denied that power of disposition and its relinquishment at death were appropriate subjects of taxation by states, and stated that no analogy could be drawn to the right of the Federal Government to tax such powers because in federal taxation state boundaries need not be considered. He pointed out that in the case of tangible property a power of disposition did not give the state the power to levy a transfer tax when the tangibles had a situs elsewhere, and that the fundamental question in this case was whether intangibles were in all circumstances subject to a different rule from that applied in the case of tangible property. His conclusion was that there was no sound basis for an invariable distinction between the two types of property, and in this case the same rule which applied to tangible property should be applied to intangibles, and that the power of New York State to impose the transfer tax should be denied.

The third and last case under consideration is that of *Newark Fire Insurance Co. v. State Board of Tax Appeals*.⁴⁴ An insurance company, a New Jersey corporation, maintained an office in Newark, New Jersey. The executive offices were located in New York, where the general accounts of the company were kept, and where the executives of the company had their offices. All cash and securities of the company were located in New York or states other than New Jersey, with the exception of a small sum on deposit in New Jersey banks. No personal property tax was paid in New York, but the insurance company did pay a

⁴³Mr. Justice McReynolds, Mr. Justice Butler and Mr. Justice Roberts joined Mr. Chief Justice Hughes in this dissent.

⁴⁴59 S. Ct. 918 (1939).

franchise tax there based on premiums. The City of Newark, under authority of the New Jersey tax laws,⁴⁵ assessed a tax on the full amount of capital stock paid-in and on the surplus, less certain specified exempted assets. The insurance company resisted this tax on the ground that its intangibles had acquired a business situs in New York, and hence were not taxable by the state of incorporation. The tax was upheld by the Court of Errors and Appeals of New Jersey⁴⁶ in a per curiam opinion which adopted the ruling of the Supreme Court of New Jersey⁴⁷ that the state of domicile might impose a personal tax on intangibles which had acquired a business situs in another state. On appeal to the United States Supreme Court, the decision of the Court of Errors and Appeals of New Jersey was affirmed. Two concurring opinions were delivered in each of which four justices participated.

Mr. Justice Reed,⁴⁸ in delivering one opinion, said that a corporation was domiciled in the state of its incorporation and under the fiction *mobilia sequuntur personam* its intangibles were taxable by that state, but that there were occasions when a business situs might be ascribed to such intangibles so as to make them taxable in the state where they had acquired the business situs. He pointed out that the question of whether the state of domicile of the owner and the state where the business situs has been acquired might both tax had theretofore been reserved by the Court, and that it was unnecessary to answer the question in this case because the insurance company had failed to prove that the intangibles had acquired a business situs in New York. It was argued that in order to overcome the presumption of domiciliary location, the proof of business situs must definitely connect the intangibles as an integral part of local activity, and that the mere fact that the general affairs of the corporation were conducted in a foreign state was not enough to ascribe a business situs to intangibles in that state, especially where there was no showing as to where insurance contracts were made, moneys collected, or the lending activities of the company were conducted.

Mr. Justice Frankfurter,⁴⁹ in delivering the other opinion, held that

⁴⁵N. J. S. A. 54:4-22.

⁴⁶Newark Fire Insurance Co. v. State Board of Tax Appeals, 120 N. J. L. 224, 198 Atl. 837 (1938).

⁴⁷118 N. J. L. 525, 193 Atl. 912 (1937).

⁴⁸Mr. Chief Justice Hughes, Mr. Justice Butler and Mr. Justice Roberts concurred with Mr. Justice Reed in this opinion. Mr. Justice McReynolds did not express an opinion in the case.

⁴⁹Mr. Justice Stone, Mr. Justice Black and Mr. Justice Douglas concurred with Mr. Justice Frankfurter.

the case of *Cream of Wheat Co. v. Grand Forks*⁵⁰ and the cases that have followed it offered an adequate basis for affirming the judgments below. The justice made the following observation:

"Wise tax policy is one thing; constitutional prohibition quite another. The task of devising means for distributing the burdens of taxation equitably has always challenged the wisdom of the wisest financial statesmen. Never has this been more true than today when wealth has so largely become the capitalization of expectancies derived from a complicated network of human relations. The adjustment of such relationships, with due regard to the promotion of enterprise and to fiscal needs of different governments with which these relations are entwined, is peculiarly a phase of empirical legislation. It belongs to that range of the experimental activities of government which should not be constrained by rigid and artificial legal concepts. Especially important is it to abstain from intervention within the autonomous area of the legislative taxing power where there is no claim of encroachment by the states upon powers granted to the national government. It is not for us to sit in judgment on attempts by the states to evolve fair tax policies. When a tax appropriately challenged before us is not found to be in plain violation of the Constitution our task is ended."⁵¹

It has been noted that in the cases of *Curry v. McCanless*⁵² and *Graves v. Elliott*⁵³ the Court refused to extend the prohibition of multi-state inheritance taxation of intangibles⁵⁴ to powers of appointment or revocation given to a person domiciled in a state other than that in which the trust fund was located. This would seem to indicate that the case of *Bullen v. Wisconsin*,⁵⁵ which permitted both the state where the trust fund of intangibles was located, and the domiciliary state of the donee of the power to levy transfer taxes, remains unimpaired. While the cases which prohibited multi-state inheritance taxation of intangibles are still technically the law,⁵⁶ it is doubtful, in view of Mr. Justice

⁵⁰253 U. S. 325, 40 S. Ct. 558, 64 L. ed. 931 (1920) (state of incorporation could impose a tax on the intangibles even though they had acquired a business situs elsewhere).

⁵¹59 S. Ct. 918, 922, 923 (1939).

⁵²59 S. Ct. 900 (1939).

⁵³59 S. Ct. 913 (1939).

⁵⁴Announced in *Farmers Loan and Trust Co. v. Minnesota*, 280 U. S. 204, 50 S. Ct. 98, 74 L. ed. 371 (1930).

⁵⁵240 U. S. 625, 36 S. Ct. 473, 60 L. ed. 830 (1916).

⁵⁶*Farmers Loan and Trust Co. v. Minnesota*, 280 U. S. 204, 50 S. Ct. 98, 74 L. ed. 371 (1930); *Baldwin v. Missouri*, 281 U. S. 586, 50 S. Ct. 436, 74 L. ed. 1056 (1930); *Beidler v. South Carolina Tax Commission*, 282 U. S. 1, 51 S. Ct. 54, 75 L. ed. 131 (1930); *First National Bank of Boston v. Maine*, 284 U. S. 312, 52 S. Ct. 174, 76 L. ed. 313 (1932).

Stone's opinion in *Curry v. McCanness*,⁵⁷ whether they represent the final position of the Court. The basis of the majority opinion in those cases was that a single situs must be attributed to intangibles for purposes of inheritance taxation, and that it would violate the Fourteenth Amendment to allow the taxation of intangibles by more than one state. As we have seen, the reasoning of the majority opinion in *Curry v. McCanness*⁵⁸ was that it is impossible to ascribe a situs to intangibles since they are not physical things, but merely a relationship between persons; that, when a person uses these intangibles in more than one state, and is thus dependent on the protection of the laws of more than one state, he can be compelled to contribute to the cost of the government which gives the protection; and that there is nothing in the Fourteenth Amendment to prohibit multi-state taxation of intangibles. The majority opinion written by Mr. Justice Stone expresses the same views he has expressed in his dissenting and concurring opinions in cases dealing with multi-state inheritance taxation of intangibles from the case of *Safe Deposit and Trust v. Virginia*⁵⁹ down to the present time. Whether or not the other four justices who joined Mr. Justice Stone in his opinions in the *McCanness*⁶⁰ and *Graves*⁶¹ cases will agree with him that there is nothing in the Fourteenth Amendment which prohibits multi-state inheritance taxation when the fact situation involved intangibles merely located in another state (rather than intangibles held in trust in a state different from that in which the power of appointment is exercised) cannot be definitely known, but it is reasonable to suppose that they will.⁶²

The Court, until the case of *Newark Fire Insurance Co. v. State Board of Tax Appeals*,⁶³ had not decided whether the state of the domicile of the owner and the state in which a business situs of intangibles had been acquired could both levy a property tax on the intangible property, and, as we have seen, four of the justices felt that the question was not presented there, while four other justices were willing to allow the state of incorporation to tax even though the intangibles had acquired a business situs elsewhere. Mr. Justice Reed, who wrote the opinion in the *Newark Fire Insurance* case which held that the question

⁵⁷59 S. Ct. 900 (1939).

⁵⁸59 S. Ct. 900 (1939).

⁵⁹280 U. S. 83, 50 S. Ct. 59, 74 L. ed. 180 (1929).

⁶⁰59 S. Ct. 900 (1939).

⁶¹59 S. Ct. 913 (1939).

⁶²This holds good even taking in account Mr. Justice Reed's opinion in *Newark Fire Insurance Co. v. State Board of Tax Appeals*, 59 S. Ct. 918 (1939).

⁶³59 S. Ct. 918 (1939).

need not be decided because not presented, refused to concur with that portion of the majority opinion in the *McCanless* case⁶⁴ which said:

"But taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles."⁶⁵

The reason why Mr. Justice Reed refused to concur with that statement is known only to himself, but it may be suggested, first, that he was not in harmony with the idea of allowing this form of multi-state property taxation, and secondly, that in view of the fact that the decisions in the *McCanless* and *Newark Fire Insurance* cases were handed down on the same day, he felt he could not logically agree with that statement, and at the same time take the position in the *Newark Fire Insurance* case that the question of this form of multi-state property taxation was still open because not fairly presented. Of these two reasons, the latter seems the better. It must be kept in mind that Mr. Justice Reed agreed to the other language in the *McCanless* majority opinion, and the reasoning behind this language would be ample basis for allowing multi-state property taxation of intangibles which had acquired a business situs in a state other than the state of incorporation. It seems reasonable to predict that when the question is presented, Mr. Justice Reed will join the other four justices with whom he agreed in the *McCanless* case, and allow both the state of incorporation and the state of business situs to tax.

It will be noted that Mr. Justice Frankfurter in his opinion in the *Newark Fire Insurance Company* case⁶⁶ said that *Cream of Wheat Co. v. Grand Forks*⁶⁷ was controlling. The *Cream of Wheat* case was cited in *Curry v. McCanless*⁶⁸ for the proposition that taxation of intangibles by the state in which a business situs has been acquired does not preclude the state of incorporation from levying a tax on all the intangibles.⁶⁹ Would the state of the domicile still be allowed to tax if the owner were a natural person rather than a corporation, or would a

⁶⁴59 S. Ct. 900 (1939).

⁶⁵59 S. Ct. 900, 909 (1939).

⁶⁶59 S. Ct. 918 (1939).

⁶⁷253 U. S. 325, 40 S. Ct. 558, 64 L. ed. 931 (1920).

⁶⁸59 S. Ct. 900, 906 (1939).

⁶⁹A close reading of the decision in this case will show that the question of the business situs imposing a tax was not presented. The question was whether the domicile could tax even though the intangibles had acquired a business situs elsewhere. It is significant, therefore, to note the new and extended interpretation of the case made by the Court.

distinction be made? In view of *Fidelity & Columbia Trust Co. v. Louisville*,⁷⁰ which allowed the domiciliary state of a natural person to levy a property tax on bank deposits which had acquired a business situs elsewhere, and in which the Court by way of dictum said that both place of domicile and business situs could tax, there would seem to be no basis for making any distinction between a natural person and a corporation. In addition, the language in the *McCanless* case would seem to be broad enough to cover the case of a natural person as well as a corporation, since both receive the protection at the place of domicile, of the ownership of rights in intangible property. Such protection is an adequate basis for requiring contribution to the government of the domiciliary state.

The prohibition against multi-state inheritance taxation of intangible property seems to have ended. In the future the jurisdiction to tax will depend on whether the Court feels that the taxing state is giving protection to the rights, privileges, and powers incident to intangible property. The prohibition against multi-state taxation was never extended to property taxation of intangibles, and in view of the recent cases any possibility of such an extension seems remote, if not altogether improbable. If there is to be any relief from the burden of multi-state taxation of intangibles, it must come from the states in the form of reciprocal legislation. In the absence of that legislation, the only safe way to avoid such taxation is for the individual to confine his business activities to one state. In view of our economic structure that does not seem practicable.

WILLIAM F. SAUNDERS

TORT ACTIONS BETWEEN PERSONS IN DOMESTIC RELATIONS

The problem of legal redress in tort actions between members of the same family, is again engaging the attention of American courts. Recently the Supreme Court of Appeals of Virginia, rejecting the more conventional view, allowed an unemancipated child to recover against her father for a personal tort.¹ And, the Court of Errors and Appeals of New Jersey has just allowed a wife to sue her husband's employer for an injury which she received while riding in an automobile negligently driven by the husband.² Against the trend represented by these

⁷⁰245 U. S. 54, 38 S. Ct. 40, 62 L. ed. 128 (1917).

¹Worrell v. Worrell, 4 S. E. (2d) 343 (Va. 1939).

²Hudson v. Gas Consumer's Ass'n., 8 A. (2d) 337 (N. J. 1939).

decisions, there stands considerable authority for the proposition that no actions between persons in domestic relations will be permitted.

In considering the divergent authorities and the theories back of them the following classification suggests itself: (1) Suits between husband and wife, (2) Suits between parent and minor child, and (3) Suits between unemancipated brother and sister.

Husband and Wife

At common law neither spouse is liable to the other, either during coverture or after divorce, for wrongful acts committed during coverture. In the case of *Phillips v. Barnet*,³ where a wife after being divorced from her husband brought an action against him for an assault committed upon her during coverture, the court in denying relief said:

"I was at first inclined to think, having regard to the old procedure and the form of pleas in abatement, that the reason why a wife could not sue her husband was a difficulty as to parties; but I think that when one looks at the matter more closely, the objection to the action is not merely with regard to the parties, but a requirement of the law founded upon the principle that husband and wife are one person."⁴

The leading American case is *Abbott v. Abbott*,⁵ which also involved a suit by the wife against the husband for an assault committed upon her during coverture. The court followed the reasoning of the *Phillips* case and added that the married woman has remedy enough in the criminal courts which are open to her. Also, she could have prosecuted an action for divorce, and compensation in the nature of alimony would have been allowed, which would include compensation for any injuries suffered.

Even since the passage of the Married Women's Property Acts, the majority of jurisdictions have retained the common law rule. In *Freethy v. Freethy*,⁶ after the enactment of a statute allowing "any married woman to bring and maintain an action in her own name, for damages against any person, or body corporate, for any injury to her person or character, the same as if she were sole," it was held in a suit by a wife against her husband for damages for slander, that the legislature did not intend to change the common law rule as to the disability of husband and wife to sue each other at law. Thus, in the case of *Thompson*

³1 Q. B. D. 436 (1876).

⁴1 Q. B. D. 436, 438 (1876).

⁵67 Me. 304, 24 Am. Rep. 27 (1877).

⁶42 Barb. 641 (N. Y. 1865).

v. Thompson,⁷ involving a provision "authorizing a wife to sue as if she were unmarried," the Supreme Court of the United States held that the wife was not given a right of action against her husband for assault. The Court said that the statute only intended to allow the wife, in her own name, to maintain actions of tort which at common law must be brought in the joint names of herself and husband.⁸ Other jurisdictions have reached the same result in cases of negligence,⁹ assault and battery,¹⁰ slander,¹¹ and false imprisonment.¹² The courts in denying actions between husband and wife have most frequently advanced the reasoning that to permit them, might involve the husband and wife in perpetual controversy and litigation, and open the door to law suits between them for every real or fancied wrong.¹³

When the wife is injured by the negligence of the husband while he is acting as agent of another, the authorities are in conflict as to whether the wife may sue the husband's principal, the general rule being that the principal is not liable under *respondet superior* unless the agent is liable. The courts in refusing to allow an action usually give as the reason, that it is in reality a suit by the wife against the husband, inasmuch as the employer can recover over from the employee.¹⁴ In *Emerson v. Western Seed & Irrigation Co.*,¹⁵ the court observed that if the wife was allowed to recover from the employer, and the employer could in turn recover from the husband, the ultimate result would be merely to diminish the family wealth by the expenses of litigation. The courts of some jurisdictions have denied that an action by the wife against the employer of the husband in reality amounts to a suit by the wife against

⁷218 U. S. 611, 31 S. Ct. 111 (1910), 30 L. R. A. (N. S.) 1153 (1911).

⁸218 U. S. 611, at 616, 31 S. Ct. 111, at 112 (1910).

⁹*Harvey v. Harvey*, 239 Mich. 142, 214 N. W. 305 (1927); *Woltman v. Woltman*, 153 Minn. 217, 189 N. W. 1022 (1922); *Ackerson v. Kibler*, 138 N. Y. Misc. 695, 246 N. Y. S. 580 (1931); *Tobin v. Gelrich*, 162 Tenn. 96, 34 S. W. (2d) 1058 (1931).

¹⁰*Peters v. Peters*, 156 Cal. 32, 103 Pac. 219 (1909), 23 L. R. A. (N. S.) 699 (1910); *Peters v. Peters*, 42 Iowa 182 (1875); *Dishon v. Dishon*, 187 Ky. 497, 219 S. W. 794 (1920), 13 A. L. R. 625 (1921); *Libby v. Berry*, 74 Maine 286, 43 Am. Rep. 589 (1883); *Bandfield v. Bandfield*, 117 Mich. 80, 75 N. W. 287, 40 L. R. A. 757 (1898); *Lillienkamp v. Rippetoe*, 133 Tenn. 57, 179 S. W. 628 (1915), L. R. A. 1916B 881; *Keister v. Keister*, 123 Va. 157, 96 S. E. 315 (1918), 1 A. L. R. 439 (1919).

¹¹*Clark v. Clark*, 11 F. (2d) 871 (1925); *Freethy v. Freethy*, 42 Barb. 641 (N. Y. 1865).

¹²*Rogers v. Rogers*, 265 Mo. 200, 177 S. W. 382 (1915).

¹³*Bandfield v. Bandfield*, 117 Mich. 80, 75 N. W. 287, 40 L. R. A. 757 (1898); *Longendyke v. Longendyke*, 44 Barb. 367 (N. Y. 1863).

¹⁴*Maine v. James Maine & Sons Co.*, 198 Iowa 1278, 201 N. W. 20 (1924), 37 A. L. R. 161 (1925); *David v. David*, 161 Md. 532, 157 Atl. 755, 81 A. L. R. 1100 (1932); *Riser v. Riser*, 240 Mich. 402, 215 N. W. 290 (1927).

¹⁵116 Neb. 180, 216 N. W. 297 (1927), 56 A. L. R. 327 (1928).

the husband. A leading case on this position is *Schubert v. August Schubert Wagon Company*¹⁶ and in *Poulin v. Graham*,¹⁷ the court held that the right to proceed against the master was in no sense subordinate or secondary to a right against the servant; that it was a primary and independent right. This same result was reached in the recent New Jersey case, *Hudson v. Gas Consumers Ass'n.*,¹⁸ mentioned at the beginning of this note.

A strong and increasing minority view allows the wife to sue the husband for personal torts. The first case found allowing the recovery was *Brown v. Brown*,¹⁹ where the wife sued the husband under a Married Woman's Act, for false imprisonment and assault. The court held that the Act had the effect of abolishing the common law unity of husband and wife, and that therefore such an action was not against the public policy of the state. The court reasoned that it was in the public interest that personal differences should be adjusted by the court rather than left to the parties to settle according to "the law of nature."²⁰ The same result has been reached in other jurisdictions in cases of negligence,²¹ as well as in cases of intentional aggression.²²

Within certain limitations, it is believed that personal tort actions should be allowed between the husband and wife. The courts should permit suit where the injury is intentionally inflicted. Suit should also be allowed where serious discord in the family circle already exists before the suit is brought, which is true in a majority of suits between spouses. Under the above circumstances, the argument of danger to the family peace and tranquility breaks down and is overemphasized by the courts.²³

In cases in which the suit is brought by the wife against the husband's employer, grave injustice is often worked by a denial of a legal

¹⁶249 N. Y. 253, 164 N. E. 42 (1928), 64 A. L. R. 293 (1929).

¹⁷102 Vt. 307, 147 Atl. 698 (1929).

¹⁸8 A. (2d) 337 (N. J. 1939).

¹⁹88 Conn. 42, 89 Atl. 889, 52 L. R. A. (N. S.) 185 (1914).

²⁰89 Atl. 889, 892 (1914).

²¹*Bennett v. Bennett*, 224 Ala. 335, 140 So. 378 (1932); *Rains v. Rains*, 97 Colo. 19, 46 P. (2d) 740 (1935); *Bushnell v. Bushnell*, 103 Conn. 583, 131 Atl. 432 (1925), 44 A. L. R. 785 (1926); *Roberts v. Roberts*, 185 N. C. 566, 118 S. E. 9 (1923), 29 A. L. R. 1479 (1924); *Fitzmaurice v. Fitzmaurice*, 62 N. D. 191, 242 N. W. 526 (1932); *Wait v. Pierce*, 191 Wis. 202, 209 N. W. 475 (1926), 48 A. L. R. 276 (1927).

²²*Johnson v. Johnson*, 201 Ala. 41, 77 So. 335 (1917), 6 A. L. R. 1031 (1920); *Fitzpatrick v. Owens*, 124 Ark. 167, 186 S. W. 832 (1916); *Crowell v. Crowell*, 181 N. C. 66, 106 S. E. 149 (1921); *Gilman v. Gilman*, 78 N. H. 4, 95 Atl. 657 (1915), L. R. A. 1916B 907; *Fiedeer v. Fiedeer*, 42 Okla. 124, 140 Pac. 1022 (1914); *Prosser v. Prosser*, 114 S. C. 45, 102 S. E. 787 (1920).

²³*Harper, Law of Torts* (1933) § 288.

remedy. The wife is refused relief in most instances because the employer may have an action over against the husband. The answer to this in a majority of such suits would be that the husband has nothing from which the employer could enforce his claim. And further, it is believed to be better policy to distribute among a large group the losses which are inevitable in carrying on industry, than to throw the loss upon a few. Since the employer usually carries insurance, his burden is measured by the amount of the premium, and he can distribute his part of the loss to his customers by raising the price of his product. The insurance companies are very alert and will protect their interest from fraud and collusion, if such he present in the case.

Parent and Minor Child

It has long been held that no action will be allowed by either the parent or the child against the other for a personal tort. The first clear case is *Hewellette v. George*,²⁴ in which a minor child brought an action against her mother for false imprisonment when the mother wrongfully confined her in an insane asylum. The court held that the mother was not liable, and declared that the peace of society, and a sound public policy, forbade to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. A like result has been reached in cases of negligence,²⁵ and intentional aggression.²⁶ In *Roller v. Roller*,²⁷ where a daughter brought an action for damages against her father who had been convicted of rape upon her, and the argument was advanced that the family relations had already been disturbed, and that therefore the reason for the rule failed, the court said:

“There seems to be some reason in this argument, but it overlooks the fact that courts, in determining their jurisdiction or want of jurisdiction, rely upon certain uniform principles of

²⁴68 Miss. 703, 9 So. 885 (1891).

²⁵*Mesite v. Kirchstein*, 109 Conn. 77, 145 Atl. 753 (1929); *Bulloch v. Bulloch*, 45 Ga. App. 1, 163 S. E. 708 (1932); *Elias v. Collins*, 237 Mich. 175, 211 N. W. 88 (1926); *Taubert v. Taubert*, 103 Minn. 247, 114 N. W. 763 (1908); *Small v. Morrison*, 185 N. C. 577, 118 S. E. 12 (1923), 31 A. L. R. 1135 (1924); *Mannion v. Mannion*, 3 N. J. Misc. 68, 129 Atl. 431 (1925); *Sorrentino v. Sorrentino*, 248 N. Y. 626, 162 N. E. 551 (1928); *Matarese v. Matarese*, 47 R. I. 131, 131 Atl. 198 (1925); *Securo v. Securo*, 110 W. Va. 1, 156 S. E. 750 (1931); *Wick v. Wick*, 192 Wis. 260, 212 N. W. 787 (1927), 52 A. L. R. 1113 (1928).

²⁶*Smith v. Smith*, 81 Ind. App. 566, 142 N. E. 128 (1924); *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S. W. 664 (1903), 64 L. R. A. 991 (1904); *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788, 68 L. R. A. 893 (1905).

²⁷37 Wash. 242, 79 Pac. 788, 68 L. R. A. 893 (1905).

law, and, if it be once established that a child has a right to sue a parent for a tort, there is no practical line of demarkation which can be drawn, for the same principle which would allow the action in the case of a heinous crime, like the one involved in this case, would allow an action to be brought for any other tort."²⁸

So, in *Matarese v. Matarese*,²⁹ an automobile negligence case in which the son was riding on the running board with the permission of the father who was operating the automobile, the court held that the father was not liable. The court was of the opinion that any proceeding tending to bring discord into the home was contrary to the common law, and that the state by criminal proceedings would punish the father for the gross abuse of his power of control and discipline resulting in injury. And again in *Wick v. Wick*,³⁰ where a child was injured in an automobile which was negligently driven by his father, the court held that it was better public policy that occasional injuries of this kind go unrequited than that proceedings so repugnant to the natural sentiments concerning family relations be encouraged. Further reasoning for denying recovery to an unemancipated minor in a negligence action against the father is given in the case of *Bulloch v. Bulloch*,³¹ where the court said that if the child was allowed to recover, the family dwelling house in which the child was sheltered with the other members of the family could be sold under a judgment against the father.

Similarly, when the suit is brought by the parent against an unemancipated child, recovery is denied on grounds of public policy.³² In *Schneider v. Schneider*,³³ an automobile negligence case, in which the mother sued the child to recover damages for injuries, the reasoning of the court in denying relief was that maintenance of the suit would be "inconsistent with the parent's status or office, and the dependence of the minor upon her, and also with the dependence of the law upon her, for the fulfillment of necessary legal and social functions. . . ."³⁴

Only one case is found where the parent has recovered against the unemancipated child for a personal tort, and that is the Missouri case of *Wells v. Wells*.³⁵ The court recognized that a tort action might in-

²⁸37 Wash. 242, 79 Pac. 788, 788-9 (1905).

²⁹47 R. I. 131, 131 Atl. 198 (1925).

³⁰192 Wis. 260, 212 N. W. 787 (1927), 52 A. L. R. 1113 (1928).

³¹45 Ga. App. 1, 163 S. E. 708 (1932).

³²*Schneider v. Schneider*, 160 Md. 18, 152 Atl. 498 (1930); *Duffy v. Duffy*, 117 Pa. Super. 500, 178 Atl. 165 (1935).

³³160 Md. 18, 152 Atl. 498 (1930).

³⁴160 Md. 18, 152 Atl. 498, 499 (1930).

³⁵48 S. W. (2d) 109 (Mo. App. 1932).

roduce discord and contention into the home, but said that it was equally true that an action involving a right in property would cause dissension in the family, yet the law does not forbid such action. This argument seems to be unanswerable, yet few courts even recognize its relevancy to the question of tort actions among family members.

On the other hand, there are three cases where the unemancipated child has been allowed to sue the parent for personal tort. The first is *Dunlap v. Dunlap*,³⁶ where the child was negligently injured by the collapse of staging while employed by the father who carried liability insurance. The court remarked:

"As often stated before, the sole debatable excuse advanced for the denial of the child's right to sue is the effect a suit would have upon discipline and family life. If, therefore, the situation is such that the suit will not affect those matters at all, the reason for the theory fails, and it should not be applied. There is such a situation here."³⁷

The same result was reached in *Lusk v. Lusk*,³⁸ on a third party beneficiary contract, where a pupil injured in transportation was allowed to sue her father in assumpsit, as operator of the bus, for breach of his contract with the board of education. The father was protected by indemnity insurance. The court said that when the reason for a rule ceases, the rule itself ceases to be applicable.

The most recent case allowing recovery by the unemancipated child against the parent is the Virginia case of *Worrell v. Worrell*,³⁹ mentioned in the introductory paragraph to this note. The father was the owner and the operator of a public motor vehicle carrier service. The infant was twenty years of age and the father had furnished her with a ticket over his line and a connecting line, the ticket being paid for by him. The injury occurred as a result of a collision between defendant father's bus, operated by an employee, and a truck operated by a third person. The defendant carried compulsory liability insurance. Speaking through Mr. Justice Spratley, the court said:

"In the instant case, the action was brought against the father, in his vocational capacity, as a common carrier, not against the father for the violation of a moral or parental obligation in the exercise of his parental authority. The injuries were occasioned in the performance of the duties of a common carrier, not in the parental relation. As a common carrier, he

³⁶84 N. H. 352, 150 Atl. 905 (1930).

³⁷84 N. H. 352, 150 Atl. 905, 912 (1930).

³⁸113 W. Va. 17, 166 S. E. 538 (1932).

³⁹4 S. E. (2d) 343 (Va. 1939).

owed a fixed duty to persons occupying the status of passengers. For the protection of such passengers, in the event of the violation of his duty, the State required him to carry liability insurance. Can it be that his duties to other passengers are higher than his obligation to his own child, when his interest, her interest and the interest of the State all require the preservation and protection of her rights?"⁴⁰

It appears that the decision is limited to those cases in which the father has compulsory insurance for the protection of every person's interest, or where the circumstances show a duty owed other than by reason of the parental relation. It is to be hoped that this case represents the first step by the Virginia court in breaking away from the whole doctrine, and that suits will be allowed in the future where it is reasonably clear that the child will suffer an injustice by the denial of a remedy.

It is well settled that when a child is fully emancipated, either the child or the parent can sue the other for a personal tort.⁴¹ The general rules denying a recovery are declared inapplicable because domestic unity has either ceased to exist or lost much of its importance.

It is believed that the view taken in *Dunlap v. Dunlap*,⁴² allowing the unemancipated child to sue the parent, is the better view. The action should also be allowed where the parent intentionally inflicts an injury upon the child or where it clearly appears to the court that the family peace and tranquility have been disturbed to a point which is beyond repair.⁴³

The cases which deny a civil action to the minor child give as a reason the discord which such action would bring into the family. Yet they admit that the child may seek the aid of the criminal courts. This admission seems to involve an inconsistency since a criminal action would have a greater tendency to produce dissension in the family than would a civil action for damages.

Unemancipated Brother and Sister

Only two cases are found where recovery was allowed by an unemancipated child against his unemancipated brother or sister for a personal tort. The first case was *Munsert v. Farmer's Mutual Insurance*

⁴⁰4 S. E. (2d) 343, 349 (Va. 1939).

⁴¹*Mesite v. Kirchenstein*, 109 Conn. 77, 145 Atl. 753 (1929); *Taubert v. Taubert*, 103 Minn. 247, 114 N. W. 763 (1908); *Dunlap v. Dunlap*, 84 N. H. 352, 150 Atl. 905 (1930), 71 A. L. R. 1055 (1931); *Crosby v. Crosby*, 230 App. Div. 651, 246 N. Y. S. 384 (1930); *Lo Galbo v. Lo Galbo*, 138 N. Y. Misc. 485, 246 N. Y. S. 565 (1930).

⁴²84 N. H. 352, 150 Atl. 905 (1930).

⁴³*Harper*, Law of Torts (1933) § 285.

Co.,⁴⁴ in which an unemancipated minor, driving his father's automobile, negligently caused the death of his six year old brother. Suit was brought under a wrongful death statute against the brother and his father's insurance company, on a liability policy which by statutory requirement insured to the benefit of anyone driving the automobile with the owner's consent. The death statute limited recovery to those situations in which the deceased could have recovered had he survived. It is to be noted that Wisconsin does not allow a suit by a child against its father for a personal tort,⁴⁵ but allows a suit by the wife against the husband for a personal tort.⁴⁶ In allowing a recovery in this case, that court had to approve a suit by a mother against her minor son and also one between minor brothers. The court concluded that there was no sound reason nor case precedent for not allowing a minor brother to sue a minor brother for a tort committed upon him.

The latest case on this subject is *Rozell v. Rozell*,⁴⁷ in which the plaintiff, a boy twelve years of age, was a passenger in an automobile being driven by his sister, the defendant, sixteen years of age. A collision occurred between the car in which they were riding and another car, due to the negligence of the defendant in the operation of the car. The defendant answered by saying that both infants were living with their father and mother at the time of the accident and were being supported by their father, and that neither had any separate property. The court in allowing a recovery said:

"Persons who are not members of the family when injured through the tortious negligence of minors may recover damages against them by way of compensation for injuries sustained. . . . No logical reason nor reported authority exists to indicate that the rule of liability should be changed when brothers and sisters are involved."⁴⁸

It is believed that such suits should be allowed because resort to the courts in these cases is very infrequent unless ultimate payment is to be made by an insurance company, in which case there is very little danger of disrupting the family unity. And in so far as collusive suit is concerned, the astuteness of the courts as well as the alertness of the insurance companies can be relied upon as a preventive.

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⁴⁴281 N. W. 671 (Wis. 1938).

⁴⁵Wick v. Wick, 192 Wis. 260, 212 N. W. 787 (1927), 52 A. L. R. 1113 (1928).

⁴⁶Wait v. Pierce, 191 Wis. 202, 209 N. W. 475 (1926), 48 A. L. R. 276 (1927).

⁴⁷22 N. E. (2d) 254 (N. Y. 1939).

⁴⁸22 N. E. (2d) 254, 255 (N. Y. 1939).

THE VIRGINIA DOCTRINE OF CONSTRUCTIVE FRAUD

The Supreme Court of Appeals of Virginia in the recent case of *Union Trust Co. v. Fugate*¹ emphatically committed itself to the proposition that "constructive fraud"² is a basis for liability in an action at law for fraud and deceit. The case involved a transaction whereby certain promissory notes were alleged to have been sold upon "false and untrue" representations that they were secured by a deed of trust which constituted a first lien upon real estate. As a matter of fact the deed of trust had never been recorded. In imposing liability the court said:

"The right to recover in this case is based upon constructive fraud rather than actual fraud. It is conceded that there was no intentional misrepresentation. The question of intention is immaterial if the representation was false and resulted in damage to one who relied upon it as being true."³

The principle underlying the holding in this case represents the culmination of a development in progress in Virginia since 1879.⁴ The transposition from equity to law appears in vague implications in the decisions from 1879 until 1912.⁵ More pronounced indications of the adoption of the principle are evident⁶ in the language of the court in

¹172 Va. 82, 200 S. E. 624 (1939).

²"Constructive fraud" was defined in the case of *Moore v. Gregory*, 146 Va. 504, 523, 131 S. E. 692, 697 (1925) (a case in equity for the rescission of a division of property agreement) as "a breach of legal or equitable duty which irrespective of the moral guilt of the fraud feisor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidences, or to injure public interests. Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud. The presence or absence of such an intent distinguishes actual fraud from constructive fraud."

³172 Va. 82, 91, 200 S. E. 624, 627 (1939). Cited to sustain this proposition were the cases of *Chandler v. Russell*, 164 Va. 318, 180 S. E. 313 (1935); *Mears v. Accomac Banking Co.*, 160 Va. 311, 168 S. E. 740 (1933); *Chandler v. Satchell*, 160 Va. 160, 168 S. E. 744 (1933); *Trust Company v. Fletcher*, 152 Va. 868, 148 S. E. 785 (1929); *Moore v. Gregory*, 146 Va. 504, 131 S. E. 692 (1925); *Schmelz Brothers v. Quinn*, 134 Va. 78, 113 S. E. 845 (1922); *Lowe v. Trundle*, 78 Va. 65 (1883); *Grim v. Byrd*, 32 Gratt. (73 Va.) 293, 300 (1879).

⁴The principle upon which liability was imposed in the *Fugate* case has its earliest authority in equity. *Grim v. Byrd*, 32 Gratt. (73 Va.) 293, 300 (1879).

⁵*Grim v. Byrd*, 32 Gratt. (73 Va.) 293, 300 (1879); *Linhart v. Foreman*, 77 Va. 540 (1883); *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243 (1895); *Max Meadows Land Improvement Co. v. Brady*, 92 Va. 71, 22 S. E. 845 (1895); *Guarantee Co. v. First National Bank*, 95 Va. 480, 28 S. E. 909 (1898).

⁶*Cerriglio v. Pettit*, 113 Va. 533, 75 S. E. 303 (1912); *Jordan v. Walker*, 115 Va. 109, 78 S. E. 643 (1913); *Schmelz Brothers v. Quinn*, 34 Va. 78, 113 S. E. 845 (1922); *Moore v. Gregory*, 146 Va. 504, 131 S. E. 692 (1925); *Chandler v. Satchell*, 160 Va. 160, 168 S. E. 744 (1933); *Mears v. Accomac Banking Co.*, 160 Va. 311, 168 S. E. 740 (1933); *Chandler v. Russell*, 164 Va. 318, 180 S. E. 313 (1935).

1912 and thereafter. *Grim v. Byrd*,⁷ the earliest decision cited as authority for the rule of the *Fugate* case, and the one which appears to be the starting point in the line of authorities resulting in that decision, was a case in equity. The bill was filed to set aside a contract and conveyance of real estate on the grounds of false and fraudulent misrepresentations of the value of stock traded therefor. In setting aside the contract and conveyance the court said "that a false representation of a material fact constituting an inducement to the contract, on which the purchaser had the right to rely, is a ground for rescission by a court of equity, although the party making the representation was ignorant as to whether it was true or false; and the real inquiry is not whether the vendor knew the representation to be false, but whether the purchaser believed it to be true, and was misled by it in entering into the contract."⁸ This statement fairly represents the usual rule of equity, relative to the rescission of contracts for fraud.⁹

Although *Lowe v. Trundle*¹⁰ was cited as authority in the *Fugate* case for the holding imposing liability at law for constructive fraud, the case actually seems to refute rather than to sustain the principle upon which the recent holding was based. The *Lowe* case involved a petition in equity to cancel an assignment of two collectible judgments amounting to \$1,300, which by fraudulent misrepresentations Lowe had procured from the petitioner for \$200. Mr. Justice Hinton, in quoting Kerr on *Fraud and Mistake* said:

"If a man represent as true *that which he knows to be false*, and makes representations in such a way or under such circumstances as to induce a reasonable man to believe that it is true, and is meant to be acted upon, and the person to whom the representation has been made, believing it to be true, acts upon the faith of it, and by so acting sustains damages, there is fraud to support *an action of deceit at law*, and to be grounds for the rescission of the transaction in equity."¹¹

The meaning of this statement would appear to be that an intent to deceive is necessary for an action of deceit at law.¹² The court then

⁷32 Gratt. 300 (1879).

⁸32 Gratt. 300, 110 (1879). This statement of the equitable principle also appears in *Linhart v. Foreman*, 77 Va. 540, 544-545 (1883).

⁹McClintock on Equity (1936) 134-135: "A misrepresentation entitles a party to avoid a contract into which he was thereby induced to enter, whether it was known by the one who made it to be false or not. . . . Courts of equity frequently speak of innocent misrepresentations as a form of fraud."

¹⁰78 Va. 65 (1883).

¹¹78 Va. 65, 67 (1883) (italics supplied).

¹²Although the fraud necessary to support an action of deceit at law, and fraud

quoted from *Grim v. Byrd*¹³ to the effect that in suits in equity for cancellation and rescission the real inquiry is not whether the vendor knew the representation to be false, but whether the purchaser believed it to be true, and was misled by it in entering into the contract.¹⁴ Upon the authority of this and a later case¹⁵ the cancellation was allowed in *Lowe v. Trundle*.¹⁶

The first implication that an innocent misrepresentation might be a ground for an action of deceit at law appears in the case of *Max Meadows Land and Improvement Co. v. Brady*,¹⁷ decided in 1895. The case was one in equity for the rescission of a contract for the sale of realty on the ground of fraudulent misrepresentations by the vendor in the procurement of the contract. The court said that the cases "show that the misrepresentation which will sustain an *action of deceit or a plea at law*, or a bill for the rescission of the contract, must be positive statements of fact, made for the purpose of procuring the contract; that they must be untrue; that they are material; and that the party to whom they were made relied upon them and was induced by them to enter the contract."¹⁸ The statement is ambiguous, in that the word "misrepresentation" stands alone unmodified by "innocent" or "intentional." Furthermore, the cases cited¹⁹ to support the statement involved suits in equity and did not allude to the possibility of an action at law for innocent misrepresentations.

In *Cerriglio v. Pettit*,²⁰ seventeen years later, a more pronounced indication of the trend toward the *Fugate* holding is evident. In this case plaintiff brought an action at law to recover damages resulting from fraud and deceit alleged to have been practiced upon him by the defendant in an exchange of properties. The defendant, in effect, admitted the fraud and deceit and sought to defend by showing that the plaintiff was negligent in not taking proper steps to discover the truth

to be a ground for rescission in equity, are spoken of alternatively, the fact that an innocent misrepresentation will also be a ground for rescission in equity was settled in *Grim v. Byrd*, 32 Gratt. 300 (1879).

¹³32 Gratt. 300 at page 110 (1879).

¹⁴*Lowe v. Trundle*, 78 Va. 65, 68 (1883).

¹⁵*Grim v. Byrd*, 32 Gratt. 300 (1879); *Linhart v. Foreman*, 77 Va. 540 (1883).

¹⁶*Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243 (1895), further sustains the equitable principle that an innocent misrepresentation will be ground for rescission of a contract.

¹⁷92 Va. 71, 22 S. E. 845 (1895).

¹⁸92 Va. 71, 77, 22 S. E. 845, 847 (1895) (italics supplied).

¹⁹*Grim v. Byrd*, 32 Gratt. 300 (1879); *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243 (1895).

²⁰113 Va. 533, 75 S. E. 303 (1912).

of defendant's representations. The court held, however, that the party to whom the misrepresentation was made was entitled to rely upon the word of the maker without additional inquiry. This holding would appear to dispose of the case, but the court used the following additional languages in the opinion:

"If one represents as true *that which he knows is false*, in such a way as to induce a reasonable man to believe it, and the representation is meant to be acted upon, and he to whom the representation is made, believing it is true, acts on it, and thereby sustains damage, there is fraud to support an action of deceit at law, and to found a rescission of the contract in equity. *Whether the representation is made innocently or knowingly, if acted on, the effect is the same. In the one case the fraud is actual; in the other constructive.*"²²

One of the clearest indications of the imminence of the rule of the *Fugate* case is perceptible in *Trust Co. v. Fletcher*.²³ It is the first of the cases cited in the *Fugate* case, chronologically speaking, which was at law rather than in equity. In it an action was brought to recover damages for the sale of worthless stock, sold to the plaintiff by the defendant. In imposing liability the court relied strongly on *Schmelz Bros. v. Quinn*.²⁴ The court observed that, "It is true that the *Schmelz* case was in equity, but we perceive no difference in the principle involved in an action at law for damages, and a suit in equity for rescission."²⁵ The trend progresses further in *Chandler v. Satchell*.²⁶ This was an action at law against the defendant for fraudulent misrepresentations relied on by the plaintiff in regard to certain bonds purchased by him. An instruction which purported to be expressive of the law of the *Schmelz*

²¹113 Va. 533, 544, 75 S. E. 303, 308 (1912).

²²113 Va. 533, 544, 75 S. E. 303, 308 (1912) (italics supplied). Inasmuch as the court seemed to be persuaded that the defendant knew his representation to be false the last italicized portion of the statement would appear to be dicta. The language quoted up to that portion is substantially the same as that of Kerr on Fraud and Mistake set out in the review of *Lowe v. Trundle*, 78 Va. 65 (1883). The italicized portion seems to represent holdings by courts of equity in matter of rescission, and in view of the authorities it would seem reasonable to conclude that it was intended to modify only that part of the immediately preceding sentence, referring to rescission of contracts in equity. This statement again appears in the case of *Jordan v. Walker*, 115 Va. 109, 78 S. E. 643 (1913), which is closely parallel to the *Cerriglio* case both as to action and defense. So again it would appear to be dicta. No authority was cited in its support.

²³152 Va. 868, 148 S. E. 785 (1929).

²⁴134 Va. 78, 113 S. E. 845 (1922). This case was in equity, and represents the usual rule of rescission in equity. It was, however, cited for the *Fugate* holding.

²⁵152 Va. 868, 882, 148 S. E. 785, 788 (1929).

²⁶160 Va. 160, 168 S. E. 740 (1933).

case was sustained, although the case was remanded on other grounds. The trial court charged, in effect, that an innocent misrepresentation or constructive fraud, if relied on and acted on, would support an action of deceit at law.²⁷ This view was again taken in the case of *Mears v. Accomac Banking Co.*,²⁸ which was an action at law against a bank for fraud in the sale of bonds to the plaintiff. The fraud consisted of alleged misrepresentations concerning the value of the bonds. The court held that these representations, if relied and acted upon, were actionable at law, whether knowingly or innocently made.²⁹ Mr. Justice Epes, dissenting in the case, indicated that he thought the language used on the point of constructive fraud was too broad as a general statement of the law, although it may have been applicable to the facts of the particular cases in which it had previously been employed.³⁰ *Chandler v. Russell*³¹ coming to the Supreme Court for a second time³² in 1935, restates the strengthening proposition that a defendant is liable in an action of deceit at law for an innocent misrepresentation, if the plaintiff had relied thereon to his detriment.³³

As it now stands, Virginia has lined up with a minority of jurisdictions.³⁴ But even in those jurisdictions, two principles qualifying the rule may claim some support in authority or reason.³⁵ One principle would confine liability to cases in which the misrepresentation was made to induce another to enter into the contract. This would be consistent with the modern law of sellers' warranties, and indeed would

²⁷This instruction appears in 160 Va. 160, 172, 168 S. E. 744, 748 (1933). The holding in the Schmelz case is hardly as broad as the instruction. Also, the Schmelz case was in equity and the Chandler case was at law.

²⁸160 Va. 311, 168 S. E. 740 (1933).

²⁹160 Va. 311, at 321, 168 S. E. 740, at 743 (1933). To sustain this holding a whole line of equity cases were cited, together with some law cases previously shown to have their authority in equity decisions dealing with rescission. *Trust Co. v. Fletcher*, 152 Va. 868, 148 S. E. 785 (1929); *Moore v. Gregory*, 146 Va. 504, 131 S. E. 692 (1925); *Jordan v. Walker*, 115 Va. 109, 78 S. E. 463 (1913); *Guarantee Co. v. First National Bank*, 95 Va. 480, 28 S. E. 909 (1898); *Lowe v. Trundle*, 78 Va. 65 (1883); *Griff v. Byrd*, 32 Gratt. 300 (1879).

³⁰160 Va. 311, 324, 168 S. E. 740, 744 (1930).

³¹164 Va. 318, 180 S. E. 313 (1935).

³²This case is a sequel to *Chandler v. Satchell*, 160 Va. 160, 168 S. E. 744 (1933), which was remanded on grounds other than the instruction which has been discussed dealing with the question of constructive fraud. It was, of course, also at law.

³³164 Va. 311, 325, 180 S. E. 313, 315 (1935). The proposition was stated as a settled principle and no authority was cited.

³⁴The weight of authority would deny recovery unless the defendant's statement was made either with knowledge that it was false or at least without reasonable grounds for believing it to be true. *Williston on Contracts* (rev. ed. 1937) §1509. See *Restatement, Torts* (1938) §526.

³⁵*Williston on Contracts* (rev. ed. 1937) § 1511.

find its chief support in the law of sales.³⁶ The other principle would restrict the rule, to the extent that no liability should exist if there were reasonable grounds, on the part of the person making the statement, for believing that it was true. This amounts to denying liability, except for statements negligently made, though the action is not in its terms, at least, one on the case for negligence for carelessly spoken words.³⁷ The facts of the Virginia cases might very well bring them within the first principle indicated.³⁸ With these qualifications, the rule of the *Fugate* case seems fundamentally just. Unrestricted, the rule seems unduly severe since it might well operate harshly upon an innocent and non-negligent defendant making a statement concerning some transaction in which he was neither directly nor indirectly interested, and in which he acted but in a casual advisory capacity.

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A NEW DEVELOPMENT IN THE LAW OF RADIO DEFAMATION

The problem of defamation by radio and the liability imposed upon the broadcasting company therefor is again raised in the recent case of *Summit Hotel Co. v. National Broadcasting Company*.¹

A commercial advertising company rented the facilities of a broadcasting company for the purpose of transmitting its own programs (sponsored by a petroleum corporation) over the broadcasting company's network of twenty-six stations. All of the performers, including the announcer, were paid by, and were subject to, the orders of the advertising company. A script for the program was submitted to the broadcasting company in advance and a rehearsal was held in the studio in which this script was followed verbatim by the performers. Both the script and the rehearsal were approved by the broadcasting company for publication over its network. During the program, without warning, one of the comedians interjected a short, extemporaneous remark which was not in the script and which was defamatory of the plaintiff

³⁶*Aldrich v. Scribner*, 154 Mich. 23, 117 N. W. 581 (1908); *Rosenberg v. Cyrowski*, 227 Mich. 508, 198 N. W. 905 (1924).

³⁷*Tate v. Bates*, 118 N. C. 287, 24 S. E. 482 (1896); *Houston v. Thornton*, 122 N. C. 365, 373, 29 S. E. 827 (1898); *James v. Piggott*, 70 W. Va. 435, 74 S. E. 667 (1912).

³⁸*Union Trust Co. v. Fugate*, 172 Va. 82, 200 S. E. 624 (1939); *Chandler v. Satchell*, 160 Va. 160, 168 S. E. 740 (1933); *Mears v. Accomac Banking Co.*, 160 Va. 311, 168 S. E. 744 (1933); *Trust Co. v. Fletcher*, 152 Va. 868, 148 S. E. 785 (1929). These cases all relate to sales by defendants to plaintiffs, induced by representations of the defendants.

¹8 A. (2d) 302 (Pa. 1939).

hotel company (or assumed to be so by the court for the purpose of settling the case on other grounds). The broadcasting company had no reasonable chance to anticipate, or prevent, or intercept the remark.

In an action of trespass for defamation brought against the broadcasting company by the hotel company, the court refused to allow a recovery, stating:

“... a broadcasting company that leases its time and facilities to another, whose agents carry on the program, is not liable for an interjected defamatory remark where it appears that it exercised due care in the selection of the lessee, and, having inspected and edited the script, had no reason to believe an extemporaneous defamatory remark would be made.”²

The Pennsylvania court, in adopting this rule, has apparently departed from the authority existing to date. Heretofore, the rule applied in the cases of communication of defamation by radio, insofar as liability imposed upon the broadcasting company is concerned, has been that of liability without fault, a result reached by use of an apparent analogy to the so-called absolute liability imposed upon the newspaper publisher.³

The tort of defamation is the unprivileged publication of false matter concerning another which tends to harm the other's reputation so as to lower him in the estimation of the community or deter third persons from associating or dealing with him.⁴ Publication is the negligent or intentional communication of the defamatory matter to one other than the person defamed.⁵ Publication may be effected by libel or by slander. Although broadly, libel has been considered written communication, and slander, spoken communication,⁶ a publication is said to be a libel if it is an oral reading from a written paper,⁷ or if, though oral, it is widely disseminated, premeditated, persistent, or in any form

²8 A. (2d) 302, 312 (Pa. 1939).

³Coffey v. Midland Broadcasting Co. et al., 8 F. Supp. 889 (W. D. Mo. 1934); Sorenson v. Wood et al., 123 Neb. 348, 243 N. W. 82 (1932), 82 A. L. R. 1098 (1933), appeal dismissed, 290 U. S. 599, 54 S. Ct. 209, 78 L. ed. 527 (1933); Miles v. Louis Wasmer, Inc. et al., 172 Wash. 466, 20 P. (2d) 847 (1933).

⁴Restatement, Torts (1938) §§ 558 and 559; Harper, Torts (1933) § 235.

⁵Rumney v. Worthley, 186 Mass. 144, 71 N. E. 316, 1 Ann. Cas. 189 (1904); Weidman v. Ketcham, 278 N. Y. 129, 15 N. E. (2d) 426 (1938); Hedgepeth v. Coleman, 183 N. C. 309, 111 S. E. 517 (1922), 24 A. L. R. 232 (1923); Powell v. Gelston, [1916] 2 K. B. 615; Restatement, Torts (1938) § 577; Harper, Torts (1933) § 236.

⁶Restatement, Torts (1936) § 568, comment b.; Harper, Torts (1933) § 236.

⁷McCoombs v. Tuttle, 5 Blackf. 431 (Ind. 1840); Snyder v. Andrews, 6 Barb. 43 (N. Y. 1849); Ohio Pub. Serv. Co. v. Myers, 54 Ohio App. 40, 6 N. E. (2d) 29 (1934); Forrester v. Tyrell [1893] 9 T. L. R. 257; John Lamb's Case [1610] 9 Co. 59b, 6 Eng. Rep. 822; Restatement, Torts (1938) § 568, comment e; note (1938) 23 Wash. U. L. Q. 262, 263.

which has the potentially harmful qualities characteristic of written or printed words.⁸ If the publication is by libel, the plaintiff may recover for the defamation without proving special harm.⁹ If it is by slander, the plaintiff, to recover, must prove special harm or else show that the words fall into one of several special classes—imputing criminal conduct, a loathsome disease, and so on.¹⁰ While there is said to be no publication unless the act of communication is intentional or negligent, the general rule is that, as far as the defamatory meaning of the words is concerned, a publisher is absolutely liable for a defamatory communication whether he knew what his words meant or not.¹¹ Although this absolute liability as to the defamatory character of the communication is imposed upon an original publisher, it is not imposed upon one who circulates defamation created or originated by a third person. Such a disseminator is not considered an original publisher, and if he exerts reasonable care to see that what he disseminates is not defamatory, he is not subject to liability.¹²

The problem encountered in applying these rules to radio is mainly that of publication. The speaker before the microphone says the words, the broadcasting company converts the words into electrical impulses, sends them out over the ether, and almost at the instant of speaking, they are reconverted into words by the individual receiving radios. Who has published; the speaker, the broadcasting company, or both? Is the broadcasting company a mere disseminator? As a publisher, would either be subjected to the more extensive liability for libel; or since the words are spoken words, only for slander?

⁸*Schultz v. Frankfort Marine Accident & Plate Glass Ins. Co.*, 152 Wis. 537, 139 N. W. 386, 43 L. R. A. (N. S.) 520 (1913); *Monson v. Tussauds, Ltd.*, [1894] 1 Q. B. 671; Restatement, Torts (1938) § 568; Harper, Torts (1933) § 236.

⁹Restatement, Torts (1938) § 569.

¹⁰Restatement, Torts (1938) § 570.

¹¹*Washington Post Co. v. Kennedy*, 3 F. (2d) 207 (App. D. C. 1925), 41 A. L. R. 483 (1926); *Ladwig v. Heyer*, 136 Iowa 196, 113 N. W. 767 (1907); *Interstate Co. v. Garnett*, 154 Miss. 325, 122 So. 373 (1929); *Walker v. Bee-News Publ. Co.*, 122 Neb. 511, 240 N. W. 579 (1932); *Laudati v. Stea*, 44 R. I. 303, 117 Atl. 422 (1922), 26 A. L. R. 450 (1923); *Nash v. Fisher*, 24 Wyo. 535, 162 Pac. 933 (1917); *Jones v. E. Hulton & Co.*, [1909] 2 K. B. 444; *Morrison v. Ritchie & Co.*, [1902] 39 Scot. L. R. 432; Restatement, Torts (1938) §§ 579 and 580; Harper, Torts (1933) § 237.

It is important to note in interpreting the *Summit Hotel* case that this general rule of absolute liability as to the defamatory character of the publication does not appear to be followed in Pennsylvania even as to newspapers. "A close examination of Pennsylvania law will show that our rule is not one of absolute liability, but rather of a very strict standard of care to ascertain the truth of the published matter." 8 A. (2d) 302, 307.

¹²8 A. (2d) 302, 310 (Pa. 1939).

As Chief Justice Kephart notes in the *Summit Hotel* case:

"Radio broadcasting presents a new problem, so new that it may be said to be still in a state of development and experimentation. It was not conceived nor dreamed of when the law of libel and slander was being formulated."¹³

The problem has evoked much legal comment, but the writers have not agreed in their conclusions. While heretofore the broadcasting company, like a newspaper company, has been considered a publisher under any situation and therefore liable at peril for a defamatory communication, there has been little agreement in the decisions as to whether the publication is by libel or slander.¹⁴ In the principal case, the Pennsylvania court did nothing toward settling the libel-slander problem, but on the issue of publication, it departed from the only precedents established—*Sorenson v. Wood*, *Miles v. Louis Wasmer*, and *Coffey v. Midland Broadcasting Company*¹⁵—and applied rules which seem to be consistent with the present law of defamation. The case should become a leading one in the correct application of defamation law to radio. The reasoning, however, is not such as will be conducive to a final solution of the problem.

The opinion is centered upon the element of publication; the unexpected, uncontrollable character of the extemporaneous remarks concerned. Evidencing a decided disinclination to extend the principle of absolute liability, the court is willing to recognize liability in a fact sit-

¹³*Grisham v. Western Union Telegraph Co.*, 238 Mo. 480, 142 S. W. 271 (1911) (telegraph company); *Street v. Johnson*, 80 Wis. 455, 50 N. W. 395 (1891) (newspaper vendor); *Vizetelly v. Mudie's Select Library, Ltd.*, [1900] 2 Q. B. 170 (library); *Emmens v. Pottle*, [1885] 16 Q. B. 354 (newspaper vendor); *Restatement, Torts* (1938) § 581; *Harper, Torts* (1933) § 236.

¹⁴*Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889 (W. D. Mo. 1934) (question not decided, but in the words of the opinion at p. 890: "The owner of the radio station 'prints' the libel on a different medium just as widely or even more widely 'read'." than the newspaper.); *Sorenson v. Wood*, 123 Neb. 348, 243 N. W. 82 (1932), 82 A. L. R. 1098 (1933) (held to be libel); *Locke v. Gibbons*, 299 N. Y. Supp. 188, 164 N. Y. Misc. 877, 881 (1937) ("The extemporaneous interpolations by the defendant in this case, if actionable as defamation at all, must be considered as slander."); *Irwin v. Ashurst*, 158 Ore. 61, 74 P. (2d) 1127 (1938) (question not settled); *Weglein v. Golder*, 317 Pa. 437, 177 Atl. 47 (1935) (technical publication of a libel because the script of the speech had been given to the newspapers before it was spoken over the radio, even though there had been no actual publication in the newspaper); *Miles v. Louis Wasmer*, 172 Wash. 466, 20 P. (2d) 847 (1933) (assumed to be slander); *Singler v. The Journal Co.*, 218 Wis. 263, 260 N. W. 431 (1935) (recognized a serious question as to whether the case was governed by the law of libel or by that of slander, but made no decision as to which it was in the case).

¹⁵123 Neb. 348, 243 N. W. 82 (1932), 82 A. L. R. 1098 (1933); 172 Wash. 466, 20 P. (2d) 847 (1933); 8 F. Supp. 889 (W. D. Mo. 1934).

uation like that concerned, only where the broadcasting company was negligent in controlling the act of publication. In answer to the plaintiff's argument for the application of the supposedly absolute liability rule adopted in the earlier radio cases on the basis of the newspaper analogy,¹⁶ the Pennsylvania court undertakes to refute the validity of this radio-newspaper comparison, insofar as publication is concerned.¹⁷ It also refuses to recognize as applicable possible analogies from the dissemination field, and so, ostensibly, does not apply rules imposed in that field.¹⁸ The *Sorenson*, *Miles*, and *Coffey* cases are not directly disputed, but are cited merely as examples of holding a broadcasting company liable where it has been negligent in controlling the publication.¹⁹

¹⁶*Sorenson v. Wood*, 123 Neb. 348, 243 N. W. 82, 86 (1932), 82 A. L. R. 1098, 1105 (1933): "It has often been held in newspaper publication, which is closely analogous to publication by radio, that due care and honest mistake do not relieve a publisher from liability for libel."; *Miles v. Louis Wasmer*, 172 Wash. 466, 20 P. (2d) 847, 849 (1933): "As to the appellant [radio company] it seems to us that there is a close analogy between the words spoken over a broadcasting station and libellous words contained in a paid advertisement in a newspaper."; *Coffey v. Midland Broadcasting Co.* 8 F. Supp. 889, 890 (W. D. Mo. 1934): "I conceive there is a close analogy between such a situation and the publication in a newspaper of a libel under circumstances exonerating the publisher of all negligence."

¹⁷8 A. (2d) 302, 308-309 (Pa. 1939): ". . . the analogy itself has been properly subjected to criticism by almost every legal commentator. . . . In these circumstances [where an employee of an independent lessee is speaking] the analogy between the radio broadcaster and the newspaper publisher is demonstrably weak, considering not only the practical differences between the two media of communication, but the different conditions under which the industries operate. . . . where the circumstances like those now presented are such that the defamation occurs beyond the control of the broadcaster, it is perfectly clear that the analogy between newspapers and broadcasting companies collapses completely. The superior control of the newspaper publisher is self evident."

¹⁸In the proceedings of the American Law Institute, there was controversy as to whether the broadcasting company should be considered an original publisher or merely a disseminator. Three proposals were submitted in the Tentative Draft of the Restatement, Torts (1935) No. 12. The first, § 1020, comment g', provided that a broadcasting company was an original publisher of matter that was broadcast over its facilities, and was therefore subject to absolute liability as to the character of the defamatory matter. Comment f (page 128) to § 1024 suggested that the radio company was only a disseminator, and therefore not liable if it could prove that it neither knew nor should have known of the defamatory character of the proposed broadcast. The third proposal (alternative to comment f, beginning on page 129, line 10) was a caveat, making no choice between the two positions. The caveat was finally adopted (Restatement, Torts (1938) § 577, p. 196): "The Institute expresses no opinion as to whether the proprietors of a radio broadcasting station are relieved from liability for a defamatory broadcast by a person not in their employ if they could not have prevented the publication by the exercise of reasonable care, or whether, as an original publisher, they are liable irrespective of the precautions taken to prevent the defamatory publication."

¹⁹Although the court insists that the situations in the above cases differ from those

It is difficult to determine whether this case, by refusing to apply the newspaper analogy as to the act of publication, also rejected the principle of absolute liability imposed upon the newspaper as to the defamatory character of the communication, and applied a reasonable care standard throughout. As noted in the opinion, the Pennsylvania standard imposed upon the newspaper publisher as to the defamatory nature of the publication is not that of absolute liability, but merely "a very strict standard of care to ascertain the truth of the printed matter." The court did not specifically state its conception as to the standard to which the radio might be held in jurisdictions where an absolute liability is imposed upon a publisher. This aspect of incompleteness may leave the case open to such ambiguous construction in those jurisdictions as will imperil the universal adoption of its major decision.

The Newspaper Analogy

It appears that the newspaper analogy, if correctly used, might furnish a satisfactory clue to the application of defamation law to the radio situation and a guide to the actual holding in the *Summit Hotel* case. The court here made a correct appraisal of the analogy and clearly showed that it could not properly be used in the situation involved. The *Sorenson*, *Miles*, and *Coffey* cases in their dicta professed to apply the analogy completely, and left a false impression which the *Summit Hotel* case, if rightly interpreted, should correct.

Fundamentally, both newspaper and radio are products of large commercial enterprise, and are engaged in the same general type of endeavor. Both are communicatory devices addressing from a central point a large and, in the main, the same public. Both are potential instrumentalities for widespread publication of defamation. It is evident that neither should be favored in the application of law that of its very nature must be applied to both.²⁰

in the instant case, the fact remains that the holdings in these cases were predicated upon an absolute liability. As stated in *Coffey v. Midland Broadcasting Co.* at p. 890: "While those cases [*Sorenson v. Wood* and *Miles v. Louis Wasmer*] might perhaps have been decided on the ground of negligence, they were [in fact] decided on the ground of absolute liability for the broadcasting of defamation."

²⁰*Sorenson v. Wood*, 123 Neb. 348, 243 N. W. 82, 86 (1932), 82 A. L. R. 1098, 1105 (1933): "Radio advertising is one of the most powerful agencies in promoting the principles of religion and of politics. It competes with newspapers, magazines and publications of every nature. The fundamental principles of the law involved in publication by a newspaper and by a radio station seem to be alike. There is no legal reason why one should be favored over another nor why a broadcasting station should be granted special favors as against one who may be a victim of a libellous publication." Also see Vold, *The Basis for Liability for Defamation by Radio* (1935) 19 Minn. L. Rev. 611, 646-648.

As far as the broadcasting company is concerned, there are two situations in which it may become involved in litigation for defamation. One is analogous to the newspaper situation and one is not.

The broadcasting company, when it uses its own apparatus to broadcast its own material, is in very much the same situation as a newspaper company. Thus where the employees and agents of the broadcasting company are speaking, it is clear that the broadcasting station is like a printing shop as far as control over what is published is concerned. In both cases, an agent or employee is doing the actual physical labor of publishing. If defamatory material is published, it is by the companies themselves through their agents, and since they have published, they must bear the liability.²¹ The court in the instant case arrived at this conclusion in the following words: "Where the broadcasting station's employe or agent makes the defamatory remark, it is liable, unless the remarks are privileged and there is no malice."²² The broadcasting company, without a doubt, is a publisher under these circumstances and no matter what is communicated, the rule of liability as to the inherent meaning of the defamation should apply to it just as it applies to a newspaper publisher.

On the other hand, the most cursory consideration of the radio defamation problem reveals situations in which a radio company is clearly not a publisher in the accepted legal meaning of that word and is not in a situation analogous to the newspaper company. Compared with the newspaper, radio's chief functional variation is its capability of being used by independent renters possessing no technical skill in the use of the instrument. When this peculiar aspect of radio use is involved in the settlement of a radio defamation question, the analogy to newspapers is not a fair one.

The radio owner rents time to an independent lessee who either speaks, or hires others to speak, over the leased facilities. The radio company has no reason to believe that the speaker is likely to deviate into defamation; but warns the speaker against this very thing, examines the script for defamation, and may even delete remarks tending to be defamatory. The speaker goes before the microphone, speaks or reads from the corrected manuscript, and without warning, makes a sudden

²¹A corporation is responsible for a libel published by its employee in the course of duty although the employee violates instructions. *Fogg v. Boston & L. R. Co.*, 148 Mass. 513, 20 N. E. 109 (1889); *Lee v. McCrory Stores Corp.*, 117 S. C. 236, 109 S. E. 111 (1921); Restatement, Agency (1933) § 247; Note (1933) 46 Harv. L. Rev. 133, 135; (1922) 70 U. of Pa. L. Rev. 138.

²²8 A. (2d) 302, 312 (Pa. 1939).

extemporaneous defamatory remark. Since the words are published the instant they are spoken, and the statement is made too quickly for a monitor to shut off the current, the broadcaster has no control over those defamatory words. It could not reasonably foresee their inclusion, could not prevent their utterance, and could not stop their publication after they were spoken.²³ If the newspaper company was placed in a situation similar to this, it is not likely that the ordinary newspaper rules as to publication of defamation would be so stringently applied. That situation applied to a newspaper would be somewhat as follows: the newspaper company would lease its presses and technical manual labor to some advertiser who wished to publish a single issue of a newspaper of his own. All employees or agents of the newspaper company who ordinarily compose, write, typeset, proof-read, or in any manner see what is printed or are in a position to control what is said, would be replaced by the new agents and employees of the lessee. The newspaper company would be allowed to exercise supervisory control; warn the lessee-publisher, inspect what the lessee wished to print, and perhaps take out words tending to be defamatory. Completely applying the analogous situation, the lessee would then have the power to reinsert or add other defamatory words without the lessor's consent and print them. The newspaper company-lessor would have no power to stop its lessee from adding the words, no power to stop the presses from printing them, and no power to prevent the newspapers being delivered to the readers. Would "absolute liability" be imposed upon the newspaper company here?

²³One of the "analogy" arguments for holding the radio company to the same liability as the newspaper company in all situations is expressed by Vold, *The Basis for Liability for Defamation by Radio* (1935) 19 *Minn. L. Rev.* 611, 625: "By the current operations of modulation readjustment as the speech proceeds the broadcaster so selects and reshapes the sounds uttered into the microphone as to render the sounds transmitted intelligibly and continuously audible to the far-flung radio audience. By his operations the radio broadcaster is thus an active transmitter of the speaker's utterances to the understanding of radio listeners."

In the light of how little the radio company actually acts upon the words spoken other than by automatic operations, such straining of the idea that the physical manipulations of radio employees indicate physical publication is result-getting, and not in any sense acceptance of the fact that we are faced with a new instrumentality to which old rules of law must be sensibly applied. Scientific developments have not ceased. Complete automatic control of modulation etc. weakens Mr. Vold's technical argument. The problem should be solved in a manner comprehending the functional operation of radio, in a manner which does not turn upon small technicalities, and which assures fairness and justness, according to accepted standards, to those who are concerned. Farnum, *Radio Defamation and the American Law Institute* (1936) 16 *B. U. L. Rev.* 1, 7-8; Newhouse, *Defamation by Radio: A New Tort* (1938) 17 *Ore. L. Rev.* 314, 316-317.

According to the law of defamation in regard to publication, where there has been neither an intentional nor negligent act of communication, there has been no publication. This rule assumes that there has been control over the facilities of communication. It can readily be seen that there are situations in which the radio company cannot possibly exert a final control over words that go out over its facilities. As in the *Summit Hotel* case, words were suddenly published by an outside speaker without warning. The broadcasting company not only had no chance to check over those particular words for defamation, but could not stop the words themselves being communicated. The broadcasting of such words, without fault, is not a legal publication of them by the broadcasting company and the company, therefore, should not be liable for them.²⁴ The normal newspaper publishing transaction presents no such possibility of complete loss of control over words published. If such had been in the normal course of the newspaper business, it is not likely that the so-called "absolute liability on newspapers" would have developed to include the thought that the newspaper company is always a legal publisher of what appears in its paper.²⁵

In the radio leasing situations, the lessee-speaker is the primary publisher. He has final control of the actual words that go out. The publishing is his act.²⁶ Since, however, the radio company affords the facili-

²⁴Farnum, *Radio Defamation and the American Law Institute* (1936) 16 B. U. L. Rev. 1, 2: "A preliminary question arises as to whether in any event proprietors of radio stations can be deemed the publishers of defamatory broadcasts. This depends primarily upon the character and degree of their participation, which in turn is substantially a question of the nature and extent of control mechanically possible, practically feasible and in normal operation actually exercised."

²⁵The liability imposed upon newspapers is said to be "absolute". *Peck v. Tribune Co.*, 214 U. S. 185, 189, 29 S. Ct. 554, 555, 53 L. ed. 960, 16 Ann. Cas. 1075 (1909): "As was said of such matters by Lord Mansfield, 'Whatever a man publishes, he publishes at his peril'." *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392 (1895); *Walker v. Bee-News Publ. Co.*, 122 Neb. 511, 240 N. W. 579 (1932); *Cassidy v. Daily Mirror Newspapers, Ltd.*, [1929] 2 K. B. 331; *Jones v. E. Hulton & Co.*, [1909] 2 K. B. 444.

The absolute character of the liability, however, in all these cases is for the defamatory meaning of the communication. The question of publication itself seems not to be an issue. Since the newspaper companies publish their papers under control of their agents and employees, the legal publication is assumed, and the liability as to the defamatory character of the words published is held to be absolute. Quoting from the instant case (8 A. (2d) 302, 309): "Newspaper matter is prepared in advance, reviewed by members of the various staffs, set into type, printed, proof read and then 'run off' by employes of the publisher; at all times opportunity is afforded the owner to prevent the publication of the defamatory statement up to the time of the delivery of the paper to the news-vendor. The defamation thus may be said to be an intentional publication, or at least one published without due care."

²⁶*Miles v. Louis Wasmer, Inc.*, 172 Wash. 466, 20 P. (2d) 847, 849 (1933): "There can be no question about the individual liability of Castner who prepared the article,

ties for the actual communication abroad, it is a participant in the immediate act of publication and should be legally considered a publisher of whatever is communicated actually by reason of its own intentional or negligent act. It must exercise due care, therefore, in the selection of the person to use its facilities, it must require manuscripts of what is to be said or printed, and must warn the speaker-lessee-publisher against making remarks not in this script.²⁷ It has control over these aspects of the publication, and if it fails in the performance of this control so that defamation occurs, it is a publisher of that which thus goes out over the air. If material goes out subject to actual control, the company, as publisher will not be allowed to show a lack of intent to defame, or mistake as to what the words published meant.²⁸

The Pennsylvania court closely approached the above conclusion. It refused to apply the newspaper analogy as to the act of publication, fully realizing the discrepancy in the power of control. In a leasing situation where due care is used in selecting the speaker, and the broadcasting company has no reason to believe this speaker will make a defamatory remark outside an approved script, the company is not liable as a publisher for defamation so communicated over its facilities. The court did not need to clarify its position as to the affirmative situations where the radio company actually does exert control and is therefore a

paid for the time over the broadcasting station, and employed Lantry to read it. Lantry likewise would be liable because he not only spoke the words over the station, but assisted in editing the article which was thus read."

²⁷It is of interest to note in this connection that there are other reasons why the broadcasting company need exercise care in supervising the words it broadcasts. Radio broadcasting has been held to be interstate commerce. *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U. S. 650, 56 S. Ct. 608, 80 L. ed. 956 (1936); *Federal Radio Commission v. Nelson Bros. Bond and Mortgage Company*, 289 U. S. 266, 53 S. Ct. 627, 77 L. ed. 1166 (1933); *Pulitzer Publ. Co. v. Fed. Communications Commission*, 94 P. (2) 249 (App. D. C. 1937). For other cases see *McDonald and Grimshaw, Radio Defamation* (1938) 9 Air L. Rev. 328, 341.

Quoting from the *Pulitzer Publ. Co.* case, *supra* at p. 251: "We have said. . . that the regulatory provisions of the act [Communications Act 1934, 47 U. S. C. A.] are a reasonable exercise by Congress of its powers and that one who applies for and obtains a license receives it subject to the right of the government in the public interest to withdraw it without compensation." Also see 9 Air L. Rev. 328, 331, 332: "The right to broadcast exists only as long as the service meets the demands of 'public interest, convenience, and necessity'."

²⁸*McDonald and Grimshaw, Radio Defamation* (1938) 9 Air L. Rev. 328, 331: "As to programs of this kind, [commercial programs paid for by advertisers and built by an advertising agency which engages the artists and produces the performance] the broadcaster is not averse to being subjected to the newspaper rule of liability, except where the advertiser deviates from the continuity and utters defamatory matter. In that instance the advertiser alone should be responsible." This article was written in June 1937 by two of the Attorneys for the National Broadcasting Co.

publisher—as where it did not discover defamatory words contained in the script and allowed the speaker to publish those words. That situation did not arise, and if it had, the liability upon a publisher in Pennsylvania attaches only for failure to measure up to a high standard of care.

It is to be hoped that courts which are bound to follow the absolute liability rule for what is published will not be prejudiced by the present court's seemingly complete rejection of the newspaper analogy. Rather, they should recognize the complete feasibility of applying the rule of the principal case on the question of publication, and their own rule of strict liability on the question of defamatory meaning.

Libel or Slander?

The court's position on the question of whether defamation by radio is libel or slander is not conclusive. Noting that aspects of both libel and slander are present in radio defamation, it suggests that perhaps a new form of trespass on the case for this tort should be recognized. It would seem that nothing is to be gained by recognizing a third type of defamation. Whatever new law might be created would apply rules differing only slightly from the present rules of defamation. This is especially true in the light of the present trend toward distinguishing between libel and slander on the basis of potentiality for harm rather than on strictly mechanical considerations—whether one publication is the object of sight and the other the object of hearing. Following the analogy of newspapers for the purpose of achieving an equal measure of responsibility, it would seem that to both newspapers and radio the more extensive rule of libel should be applied. There is nothing essentially unjust in imposing upon the radio publisher such a liability. Manifestly a publication over the radio, though physically it communicates by the spoken word, is just as widely disseminated as is the publication by newspaper. It seems unduly hidebound to apply to radio publication a rule that is applicable to a person who orally defames others in the usual course of conversation, just because the communication comes to the publishee by words. When one speaks over the radio, he knows and intends that he should be heard far and wide. He knows that his words are more significant than if he were merely speaking to someone in the broadcasting room, and by the same token, any defamation spoken over the radio cannot help but convey a meaning to the listener that the communication was premeditated and planned.²⁹

²⁹Vold, *The Basis of Liability for Defamation by Radio* (1935) 19 Minn. L. Rev. 611, 643: "Libel was at the outset regarded as a more serious wrong than slander

One who reads from a manuscript is said to have published a libel, although the communication is by the spoken word. This same rule applies when a manuscript is read in front of a microphone and its contents are thus communicated to the public.³⁰ Obviously, however, to the radio listener it makes no difference whether the publisher is reading or not; he has no way of knowing what the speaker is doing. If there is publication of libel by reading over the radio, there is no reason why speaking the words extemporaneously should not also be libel.

Summary

What is the effect of such conclusions when applied to various situations of radio defamation?

In the cases where the radio company is itself the original publisher through its agents, it should be subject to the same liability as its competitor, the newspaper; and its competitor has not failed to thrive under rules currently applied to it. Both agencies can become powerful weapons for defamation. It is the purpose of the rule of liability imposed upon newspapers to protect the public, and for exactly the same reasons, no less strict a rule should be applied to the radio when it is in a situation similar to the newspaper. If, like Pennsylvania, a jurisdiction wishes to relax the stringency of this rule as to its newspaper publishers, then it should likewise be relaxed for the broadcasting company.

As to the rules applied where the broadcasting company is not the primary publisher, but the lessor of facilities, equipment, and technical labor, it is to be noted that the primary publisher-lessee is absolutely liable in the same manner as are the newspaper or radio companies when primary publishers. As stated in the *Summit Hotel* case, "A rule should be applied which will not impose too heavy a burden on the industry, and yet will secure a high measure of protection to the public or those who may be injured."³¹ The rule as to publication adopted in the principal case would seem adequately to serve the interests of the public in protecting its members from defamation. To avoid liability, the broadcasting company must adopt measures to see that no defamation is broadcast; it cannot afford to be negligent. It must be careful even when others use its facilities. Such careful conduct on the part of

partly by reason of the greater damage from wider diffusion and greater permanence of the written word. Similarly defamation by radio is manifestly an even more serious wrong than ordinary libel by reason of its immeasurably wider diffusion. To this must be added the far greater power of the understood human voice to stir the emotions of listeners."

³⁰Restatement, Torts (1938) § 568, comment f.

³¹8 A. (2) 302, 310 (Pa. 1939).

the broadcaster to protect itself cannot help but put the lessee-publisher on notice that he must be careful, and that if he is not careful, he will become involved in a suit for which he is absolutely liable in defamation. Thus is afforded a preventive of harm. And inasmuch as the person defamed has recourse against the speaker regardless of his fault and against the broadcasting company for defamation occurring in the inspected script (and published) regardless of its fault, or for negligence in controlling the act of publication, there is also a reasonable remedy for harm actually inflicted.

It is noted that the *Summit Hotel* case is the first one to modify a rule which has been applied to radio by a false use of analogy. In holding the broadcasting company, when not a primary publisher, to a standard of reasonable care in the controlling of the publication, the court has correctly applied to radio the present rules of defamation. Although the court insisted that its own measure of liability differed from that applied to newspapers, it would seem, after a just consideration, that it actually does not.

It is hoped that the court's evident disposition to moderate the rule of absolute liability for the particular situation concerned—as evidenced by its deprecation of the principle of absolute liability in general, by its abandonment of all analogy, and by its refusal to classify radio defamation as specifically slander or libel, suggesting the idea of new forms—will not weaken the case as a sound authority for its major proposition: that a broadcasting company is not liable as a publisher of defamation where it had no reasonable control over the publication of defamatory words spoken by a lessee or by the lessee's agent.

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RECENT CASES

"ATTRACTIVE NUISANCE" DOCTRINE—NEGLIGENCE. [Federal]

In a recent California case, *Kataoka v. May Department Stores*,¹ the plaintiff, a child of four, accompanied by his mother, entered defendant's store and gained access to the upper floor by means of an escalator. While the mother was talking to a salesman, plaintiff wandered off to play on the steps of the escalator. As the steps revolved his fingers were caught between their tread and the protective plate at the top of the landing. Defendant's manager, unable to pull plaintiff's hand out, reversed the escalator. Plaintiff suffered the partial loss of two fingers. In an action to recover damages, plaintiff relied on the character of the escalator as an attractive nuisance, and on the alleged negligence of defendant's manager in the manner in which he extricated plaintiff's hand. Recovery was denied on the grounds that the escalator had none of the characteristics of an attractive nuisance; that, without impairing its operation, the escalator could not have been constructed in such a manner that the small fingers of a child of four could not be stuck into the openings; and that the defendant's manager, acting in an emergency, was guilty of no negligence.

Plaintiff urged the court's reliance upon a Missouri case, *Hillbrand v. May Mercantile Co.*,² which allowed recovery on a similar fact situation. In that case, while playing on an escalator in the defendant's store, plaintiff, a child of three who had accompanied her mother to the store, got her arm caught between the revolving banister and the floor box from which the protective covering had been left. The court held that while the escalator was not dangerous to adults, considering the ways of children it was very likely that some child would be attracted into playing with the rail and thus getting its hand caught in the floor box; that a person of ordinary prudence should have anticipated and guarded against the risk thus created.

In order to evaluate the principal case, it is necessary to examine the principles upon which the doctrine of attractive nuisances was founded.

Prior to the decision of the United States Supreme Court in *Railroad Co. v. Stout*³ little impetus was given by the courts of this country

¹28 F. Supp. 3 (S. D. Cal. 1939).

²141 Mo. App. 122, 121 S. W. 326 (1909).

³*Sioux City & P. Rd. v. Stout*, 17 Wall. 657, 21 L. ed. 745 (U. S. 1874).

to the theory propounded by the English case of *Lynch v. Nurdin*,⁴ the pioneer case in the field.⁵ In the *Stout* case, the Court, applying general negligence principles, established the so-called turntable doctrine, by which liability was imposed upon the owner of an improperly guarded turntable in an action brought by a child who was injured while playing thereon. The defendant, reasoned the Court, should have anticipated the plaintiff's presence and should have taken the simple precaution of locking the turntable.

It has been the effort to bring the humane doctrine announced in the early cases⁶ into harmony with the common law rule that land owners owe trespassers only the duty of refraining from wilful and wanton acts of aggression, that has led to confusion and misinterpretation by the courts in establishing the attractive nuisance doctrine. An inability satisfactorily to define and delimit it has induced many courts to abandon the doctrine entirely,⁷ or to seek fictional and tenuous bases for its maintenance.⁸

⁴1 Q. B. 29 (1841).

⁵For a criticism of the basis of the case see *Bottum v. Hawks*, 84 Vt. 370, 79 Atl. 858 (1911); cases collected (1925) 36 A. L. R. 49.

⁶Harper, *The Law of Torts* (1933), § 93: "... risks that are particularly dangerous to life and limb which are incidental to artificial structures on the land and which are likely to attract children thereto and the dangerous character of which are not likely to be recognized, must be reasonably guarded to protect children actually attracted thereby, although they may be trespassers on the land."

⁷*Van Almen v. Louisville*, 180 Ky. 441, 202 S. W. 880 (1918); *Friedman v. Snare & Triest Co.*, 71 N. J. L. 605, 61 Atl. 401, 403 (1905): "... there are fundamental, and, as we think insuperable, difficulties standing in the way of adopting the rule that the mere attractiveness of private property gives to the person attracted rights against the owner. One difficulty is that the rule pro tanto ignores the distinction between meum and teum. . . . Another and very practical difficulty that confronts the attempt to lay down any legal rule that depends for its limitations upon the attractiveness of objects to children of tender years lies in the extreme improbability that any man, however prudent, will be able to foresee what may or what may not be attractive to children."; *Dobbins v. Missouri, K. & T. Ry. Co. of Texas*, 91 Tex. 60, 41 S. W. 62 (1897), 38 L. R. A. 573 (1898). The doctrine has been abandoned in the following jurisdictions: *Rastorello v. Stone*, 89 Conn. 286, 93 Atl. 529 (1915); *Nelson v. Burnham & M. Co.* 114 Maine 213, 95 Atl. 1029 (1915); *Baltimore v. DePalma*, 137 Md. 179, 112 Atl. 277 (1920); *Holbrook v. Aldrich*, 168 Mass. 16, 46 N. E. 115 (1897); *Ryan v. Tower*, 128 Mich. 463, 87 N. W. 644 (1901); *Devost v. Twin State Gas & Elec. Co.*, 79 N. H. 411, 109 Atl. 839 (1920); *Turess v. N. Y., S. & W. Rd.*, 61 N. J. L. 314, 40 Atl. 614 (1898); *Walsh v. Fitchburg Rd.*, 145 N. Y. 301, 39 N. E. 1068 (1895); *Thompson v. B. & O. Ry.*, 218 Pa. 444, 67 Atl. 768 (1907); *Bishop v. Union Rd.*, 14 R. I. 314, 51 Am. Rep. 386 (1884); *Bottum v. Hawks*, 84 Vt. 370, 79 Atl. 858 (1911); *Walker v. Potomac, F. & P. Rd.*, 105 Va. 226, 53 S. E. 113 (1905); *Ritz v. Wheeling*, 45 W. Va. 267, 31 S. E. 993 (1898).

⁸Bases that have been adopted: (1) Implied invitation. *United Zinc & Chem. Co. v. Britt*, 256 U. S. 268, 42 S. Ct. 299, 66 L. ed. 615 (1922), 36 A.L.R.28 (1925); *Wilmes v. Chicago G. W. Rd.*, 175 Iowa 101, 156 N. W. 877 (1916), L. R. A. 1917F, 1024 (1917);

English law refuses to regard children as a class separate from contractors, invitees, licensees or trespassers:⁹

"They must be reckoned under one or another of these. The only respect in which a child differs from an adult is that what is reasonably safe for an adult may not be reasonably safe for a child, and what is a warning to an adult may be none to a child."¹⁰

The attractive nuisance doctrine should not be conceived of as an exception to the rule concerning trespassers, but rather part and parcel of that rule. Immunity is not granted the landowner, upon whose premises an adult trespasser has been injured, because the trespasser is a wrongdoer, but because his presence is not to be anticipated and hence, there is no duty to take precautions for his safety.¹¹ Liability should be imposed upon the landowner for an injury to a child when the child's presence in the neighborhood together with his inclination to pry into and intrude upon objects there found, is or should be recognized; and the landowner, as a reasonable man, should realize that such ac-

Morrison v. Phelps Stone Co., 203 Mo. App. 142, 219 S. W. 393 (1920); Fuselman v. Yellowstone Valley Land & Irrigation Co., 53 Mont. 254, 163 Pac. 473 (1917). For criticism see notes and cases collected (1925) 36 A. L. R. 116.

(2) Sic utere tuo ut alienum non laedas. Polk v. Laurel Hill Cemetery Ass'n., 37 Cal. App. 624, 174 Pac. 414 (1918); Gandy v. Copeland, 204 Ala. 366, 86 So. 3 (1920). But see: Walker v. Potomac, F. & P. Rd., 105 Va. 226, 233, 53 S. E. 113, 115 (1905): "There is one conclusive answer to the argument based on that maxim, and that is, that it refers only to acts of the landowner, the effects of which extend beyond the limits of his property."; Holmes, Privilege, Malice, and Intent (1894) 8 Harv. L. Rev. 1, 3; Smith, Liability of Landowners to Children Entering Without Permission (1898) 11 Harv. L. Rev. 349, 434 at 440.

(3) Trap or pitfall. Faylor v. Great Eastern Quick Silver Mining Co., 45 Cal. App. 194, 187 Pac. 101 (1919); Kelly v. Benas, 217 Mo. 1, 116 S. W. 557 (1909).

⁹Hardy v. Central London Ry., [1920] 3 K. B. 459, 36 T. L. R. 843, 150 L. T. J. 71; Defendant owned a station in which was located an escalator. Children of the neighborhood frequently played upon it while the station guard was attending other duties. Plaintiff, a child of five, one of such a group, stuck his hand upon an unguarded drive belt of the escalator and was injured. Recovery was denied upon the ground that the plaintiff was a trespasser. "Alurement," said the court, "is a material element in considering whether under all of the circumstances leave and license is to be inferred. . . . where leave and license is distinctly negatived the fact ceases to be relevant." Had a license or an invitation been made out it was thought that recovery would have been allowed since the defendant failed to protect the plaintiff from a temptation to play with the moving machinery; but inasmuch as the plaintiff was a trespasser there was no liability upon the landowner for an injury caused by an object legitimately upon his land and used in the course of his business.

¹⁰Winfield, A Text Book of the Law of Tort (1937) § 170.

¹¹Johnson v. Atlas Supply Co., 183 S. W. 31, 33 (Tex. 1916): "The law will not imply anticipation by the owner of an appearance or presence of a trespasser upon his premises and hence he owes no duty to care for his protection, and where no duty exists negligence cannot arise."; Restatement, Torts (1934) § 333, comment b.

tivity will result in bodily harm to the intruder unless due care be taken to insure its safety.¹²

Lack of agreement as to the instrumentalities to which the doctrine is applicable has been as widespread as the lack of agreement upon the principles which underlie the doctrine. The courts have widely held that it should not be extended to objects naturally upon the land,¹³ or to common objects used in the ordinary course of business,¹⁴ but only to those objects which the landowner knows, or ought to know, to be dangerous and attractive to children and located in a place where children usually gather, provided the utility of the dangerous condition does not outweigh the risk to the children.¹⁵

Inadvisedly, statements have crept into some opinions to the effect that the attractive nuisance doctrine is applicable to child licenses and

¹²Restatement, Torts (1934) § 339: "The duty which the rule stated in this section imposes on the possessor of land is based on the well known tendency of children to trespass upon the land of others and the necessity of protecting them, even though trespassers, from their childish lack of attention and judgment."; 1 Street, Foundations of Legal Liability (1906) 160: "Liability in the turntable cases is frequently put upon the ground of implied invitation to children to come upon the premises in order to play there, the invitation being supposed to arise from the attractive nature of these dangerous engines. This hypothesis is hatched up to evade the obstacle which arises from the fact that the plaintiff is a trespasser. But it is as unnecessary as it is inadequate and artificial. Liability is to be ascribed to the simple fact that the defendant, in maintaining a dangerous agent from which harm may, under particular conditions, be expected to come, has the primary risk, and must answer in damages unless a counter assumption of risk can be imposed upon those who go there to play."; (1936) 22 Wash. U. L. Q. 141; (1934) 9 Wis. L. Rev. 431.

¹³Beeson v. City of Los Angeles, 115 Cal. App. 122, 300 Pac. 993 (1931); Peters v. Bowman, 115 Cal. 349, 47 Pac. 113, 598, 46 Am. St. Rep. 106 (1896); Smith, Liability of Landowners to Children Entering Without Permission (1898) 11 Harv. L. Rev. 349, 434.

¹⁴Salomon v. Red River Lumber Co., 56 Cal. App. 742, 206 Pac. 498 (1922); Shea v. Gurney, 163 Mass. 184, 39 N. E. 996 (1895); Holbrook v. Aldrich, 168 Mass. 15, 46 N. E. 115, 36 L. R. A. 493, 60 Am. St. Rep. 364 (1897): Plaintiff, an infant who had accompanied her father to the defendant's store, stuck her finger in a coffee grinder. In denying recovery for the lost finger Justice Holmes reasoned that, at the moment of the accident, plaintiff was not within the scope of the defendant's implied invitation, hence she was entitled to no protection against such possibilities of harm to herself. "As the common law is understood by most competent authorities, it does not excuse a trespass because there is a temptation to commit it, or hold property owners bound to contemplate the infraction of the property right because the temptation to untrained minds to infringe them might have been foreseen."

¹⁵McKiddy v. Des Moines Electric Co., 206 N. W. 875 (Iowa 1926), and the cases therein cited; Raeside v. Sioux City, 229 N. W. 216 (Iowa 1930); Wilmes v. Chicago, G. W. Rd., 175 Iowa 101, 156 N. W. 877 (1916), L. R. A. 1917F, 1024 (1917); Union Light, Heat & Power Co. v. Lunsford, 189 Ky. 785, 225 S. W. 741 (1920); O'Malley v. St. Paul, M. & M. Rd., 43 Minn. 289, 45 N. W. 440 (1890); Chicago, B. & Q. Rd. v. Krayenbuhl, 65 Neb. 889, 91 N. W. 880 (1902), 59 L. R. A. 920 (1903); Restatement, Torts (1934) § 339, comment f; Hudson, The Turntable Cases in Federal Courts (1923) 36 Harv. L. Rev. 826, 843-853.

invitees.¹⁶ A careful consideration will show that this is an undersirable tendency. The doctrine had for its purpose the desire of some courts to recognize that a trespassing child, who because of his childish instincts was injured upon the premises in a foreseeable manner, was owed the duty of due care. Courts which hold that the doctrine is applicable to invitees and licensees apparently fail to distinguish a very elementary consideration. If a child invitee be injured by an improperly guarded "attractive" instrumentality, under circumstances in which, were he a trespasser, the attractive nuisance doctrine might well be invoked, recovery should be allowed on the basis that the landowner has failed to exercise due care towards the plaintiff invitee.¹⁷

In view of the principles set out above, the decision in the *Kataoka* case¹⁸ is a desirable one, although the court has apparently gone out of its way to deny the applicability of the attractive nuisance doctrine.¹⁹ The defendant violated no duty which it owed the plaintiff; due care had been taken to construct and maintain the escalator as safely as was practicable. It is in this particular that the case is differentiated from the *Hillerbrand* decision²⁰ upon which the plaintiff based his claim. In the latter case there had been a violation of the duty to take reasonable precautions for the infant plaintiff's safety.²¹ It cannot be said that the

¹⁶*Central Coal and Coke Co. v. Porter*, 170 Ark. 498, 280 S. W. 12 (1926). *Contra*: *Capp v. City of St. Louis*, 251 Mo. 345, 158 S. W. 616 (1913).

¹⁷*Branan v. Wimsatt*, 298 Fed. 833 (App. D. C. 1924); *Alabama By-Products Corp. v. Cosby*, 217 Ala. 144, 115 So. 31 (1927); *Hayko v. Colorado & Utah Coal Co.*, 77 Colo. 143, 235 Pac. 373 (1925); *Ramsey v. Tuthill Building Material Co.*, 295 Ill. 395, 129 N. E. 127 (1920), 36 A. L. R. 23 (1925); *Swan v. Riverside Bathing Beach*, 132 Kan 61, 294 Pac. 902 (1931); *Jones Savage Lumber Co. v. Thompson*, 233 Ky. 198, 25 S. W. (2d) 373 (1930); *Gulf Refining Co. v. Moody*, 172 Miss. 377, 160 So. 559 (1935); *Garis v. Eberling*, 18 Tenn. App. 1, 71 S. W. (2d) 215 (1934); *Armstrong v. Adair*, 112 Tex. 439, 247 S. W. 843 (1923); *Restatement, Torts* (1934) § 341.

In establishing the standard of care one must bear in mind that the tender age of the child necessitates a greater exercise of precaution. *Hillerbrand v. May Mercantile Co.*, 141 Mo. App. 122, 121 S. W. 326, 328 (1909): "This doctrine is but one phase of the wider doctrine that an owner must keep his premises reasonably safe for the use of people whom he invites to come on them—an application of the general doctrine with special reference to the nature of children, and in accordance with the principle that what constitutes due care in a given instance depends upon the degree of danger to be apprehended."

¹⁸*Kataoka v. May Department Stores*, 28 F. Supp. 3 (S. D. Cal. 1939).

¹⁹The infant plaintiff is a business visitor. *Restatement, Torts* (1934) § 332, comment d.

²⁰*Hillerbrand v. May Mercantile Co.*, 141 Mo. App. 122, 121 S. W. 326 (1909).

²¹*Hillerbrand v. May Mercantile Co.*, 141 Mo. App. 122, 121 S. W. 326, 328 (1909): "This criticism [of the attractive nuisance doctrine] does not concern us in the present case, as the plaintiff was in the store by invitation, and it is the unquestioned law that a person who invited children on his property is liable if he has not used due care to provide for their safety."

two decisions represent divergent interpretations of the doctrine under discussion.

Unfortunate is the previously mentioned conflict regarding the interpretation and applicability of the attractive nuisance doctrine²² for this leads to its present delimitation and rejection.²³ A better understanding will obtain only by a recognition of its real basis. The attractive nuisance doctrine should not be regarded as an exception to any general rule which could be formulated to describe the duty of a landowner to others. Liability should be imposed in those cases where there has been a failure to use due care for the safety of trespassing children, recognizing, in defining the standard of care: (1) the probability of the child's presence; (2) the probability that his childish instincts will lead him to use this potentially dangerous object in a manner threatening injury; (3) the degree to which adequate precautions will impair the utility of the dangerous instrumentality, together with the total economic benefits which might arise from its maintenance; (4) the duty of the child's guardians to teach him to understand and avoid common dangers.

EMERY COX, JR.

EMINENT DOMAIN—RIGHT OF RESTRICTIVE COVENANTEE TO COMPENSATION FOR TAKING OF PROPERTY OF COVENANTOR. [Georgia]

The recent case of *Anderson v. Lynch*¹ involved a suit in equity by owners of lots in a residential subdivision against another lot owner and county authorities for an injunction to restrain the defendants from violating certain covenants and building restrictions. Property owners in this area held under deeds in which the following covenants were included: (1) the property was not to be used in any manner which would constitute a nuisance, or injure the value of any of the neighboring lots; (2) the property was not to be used for store, cemetery, hospital, or sanitarium purposes, but for residential purposes only; (3) the grantor reserved the right to lay and maintain or to authorize property improvements and public utilities, without compensation to any lot owner; (4)

²²This can be explained as arising in part from the opinions of the various courts as regards the liberality with which such a rule should be applied, which liberality in turn is influenced by the wide variations of the several fact situations, and the industrial practicability of increasing burdens upon the landowners.

²³Notes: (1925) 36 A. L. R. 34; (1925) 39 A. L. R. 486; (1926) 45 A. L. R. 98; (1928) 53 A. L. R. 1344; (1929) 60 A. L. R. 1444.

¹3 S. E. (2d) 85 (Ga. 1939).

the grantor, or assigns, and any lot owner was to have the right in event of violation of any of the restrictions, to enforce full compliance therewith by legal proceedings, costs to be borne by the violating party. The county, under its right of eminent domain, was about to take a lot in this residential subdivision for the construction of a public road. These proceedings were instituted to prevent such action.

The court refused to grant injunctive relief and decided further that the adjoining owners had no such property interest in the lot condemned as would entitle them to compensation. In arriving at this conclusion it was held that the restrictive covenants conveyed no property interest;² and that the covenants, if construed as restricting the right of the county to acquire and use any of the property for the purpose of establishing a public road, would be contrary to public policy.³

The Fourteenth Amendment of the Constitution of the United States, declaring that no state shall deprive any person of his property without due process of law, has been construed to prevent the taking of private property for public use without just compensation;⁴ and most state constitutions contain a clause requiring that compensation be paid for any private property taken for public use.⁵ Admittedly there was a taking in the principal case, for which the defendant, who was owner of the lot actually to be used for the road, received ample recompense. But the first issue before the court was whether or not the plaintiffs, the adjoining property owners holding under the restrictive covenants, had such property interest in the condemned lot as would entitle them to compensation.

According to an early view, only a personal interest was created by the restrictive covenant.⁶ While there is a difference of opinion on the issue, the majority of the courts appear to hold that the covenants create

²In *Hancock v. Gumm*, 151 Ga. 667, 107 S. E. 872, 16 A. L. R. 1003 (1921), restrictive agreements were called reciprocal negative easements or covenants.

³The court also held that no emergency, as the complainants had contended, was necessary to give the county authority to establish the public road. This contention was decided by an earlier Georgia case, *Barnard v. Durrence*, 22 Ga. App. 8, 95 S. E. 372 (1918), which held that the proposed alteration need not be a public necessity, as it was sufficient to show the improvement to be of public utility.

⁴*Chicago, B. & Q. Ry. v. City of Chicago*, 166 U. S. 266, 17 S. Ct. 581, 41 L. ed. 979 (1879).

⁵For example, Ill. Const. Art. II, § 13: "Private property shall not be taken or damaged for public use without just compensation." Similar provisions appear in Conn. Const. Art. First, § 11; Fla. Const. Art I, § 14; Mass. Const. Part First, § X; Va. Const. Art. I, § 6, and Art. IV, § 58.

⁶*Tulk v. Moxhay*, 2 Ch. 774 (1848); Pound, *The Progress of the Law* (1919) 33 *Harv. L. Rev.* 813.

such an interest in land as comes under the Statute of Frauds.⁷ By the weight of American authority in eminent domain cases a property right is acquired, and owners of land for whose benefit the restrictions were imposed are entitled to receive remuneration.⁸ The English rule similarly grants compensation for property taken under the Land Clauses Consolidation Act.⁹

Yet the decision of the Georgia court in the present instance has an imposing body of authority in support of it. The court relied to a large extent upon the federal case of *United States v. Certain Lands*.¹⁰ But

⁷*Marsh v. Cheeseman*, 221 Ala. 390, 128 So. 796 (1930); *Scheuer v. Britt*, 217 Ala. 196, 115 So. 237 (1928); *Sprague v. Kimball*, 213 Mass. 380, 100 N. E. 622, Ann. Cas. 1914A 431, 45 L. R. A. (N. S.) 962 (1913); *Pepper v. West End Development Co.*, 211 N. C. 166, 189 S. E. 628 (1937); *Moore v. Shore*, 206 N. C. 699, 175 S. E. 117 (1934); *Davis v. Robinson*, 189 N. C. 589, 127 S. E. 697 (1925); *Miller v. Babb*, 263 S. W. 253 (Tex. Comm. App. 1924), 3 Tex. L. Rev. 101; *Florsheim v. Reinberger*, 173 Wis. 150, 179 N. W. 793 (1920). Contra: *Thornton v. Schobe*, 79 Colo. 25, 243 Pac. 617 (1925); 24 Mich. L. Rev. 854; *Hall v. Solomon*, 61 Conn. 476, 23 Atl. 876 (1892); *Hegna v. Peters*, 199 Ia. 259, 201 N. W. 803 (1925). Some cases enforce the oral covenants without noticing the possibility of a Statute of Frauds question: See *Allen v. City of Detroit*, 167 Mich. 464, 133 N. W. 317 (1911) 36 L. R. A. (N. S.) 890 (1912).

⁸*Town of Stamford v. Vuono*, 108 Conn. 359, 143 Atl. 245 (1928) (complainant's property was adjacent to that condemned by the city for construction of a school; court held that a governmental agency might use the land in violation of the restrictive covenant, but that the complainant was given a right to compensation); *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 242, 117 N. E. 244 (1917), L. R. A. 1918B 55; *Ladd v. City of Boston*, 151 Mass. 585, 24 N. E. 858 (1890) (adjoining owner was entitled to damages from the city for the taking of property subject to the easement and erecting buildings thereon near his lot, contrary to the provisions of the agreement); *Johnstone v. Detroit, G. H. & M. Ry.*, 245 Mich. 65, 222 N. W. 325 (1928) (owners of property in subdivision where property was restricted to residences of certain requirements, were qualified for recompense on the taking of part of such subdivision for railroad purposes); *Allen v. City of Detroit*, 169 Mich. 464, 133 N. W. 317 (1911), 36 L. R. A. (N. S.) 890 (1912) (building of fire station on restricted lots entitled adjoining owners to compensation); *Peters v. Buckner*, 288 Mo. 618, 232 S. W. 1024 (1921), 17 A. L. R. 543 (1922) (where lots were sold subject to building restrictions, the rights conferred by such restrictions were property rights which could not be taken without just compensation being paid therefor); *Hayes v. Waverly & P. Ry.*, 51 N. J. Eq. 345, 27 Atl. 648 (1893) (owners were granted an injunction for restraint of prohibited use by railroad); *Flynn v. New York, W. & B. Ry.*, 218 N. Y. 140, 112 N. E. 913, 914-915 (1916) (court held: "These restrictive covenants create a property right and make direct and compensational the damages which otherwise would be consequential and noncompensational. . . . The right of a property owner is measured by the depreciation in value which his land sustains, including such depreciation as will be sustained by reason of the use to which the railroad puts its property, the difference in value between his land with and without the railroad in operation.")

⁹*Warr & Co. v. London City Council* [1904] 1 K. B. 713; *Long Eaton Recreation Grounds Co. v. Midland Ry. Co.* [1902] 2 K. B. 574, 18 T. L. R. 743; *Kirby v. School Board for Harrogate* [1896] 1 Ch. 437. These cases indicate that in England a restrictive covenant is regarded as a right in land.

¹⁰112 Fed. 622 (C. C. D. R. I. 1899). Lots were conveyed by deeds containing pro-

the Circuit Court in that case did not definitely negative the majority view that the adjoining land owners are possessed of a property interest. It merely stated that the use for which the government condemned the land was not contrary to the restriction imposed, conceding that the adjoining owners had a right in the nature of an easement.¹¹ California courts have assumed a more rigid stand concerning equitable servitudes than did the federal court, denying that a building restriction is a positive easement or right in land, and defining it merely as a right enforceable in equity as between the parties to the contract.¹² In like manner courts in Texas have said that the restrictions conveyed no affirmative rights.¹³ There is other authority in accord with the principal case, supporting the view that no property interest is created.¹⁴

In some cases the courts have avoided the necessity of taking a definite position on the question of property interest, by holding that the use to which the condemning party intended to put the property was not really in conflict with the covenant.¹⁵

In the light of these conflicting authorities, the formation of a uniform rule concerning the nature of the interest involved appears un-

hibitions of their use for certain purposes, such as the maintenance of a slaughter house, smith shop, steam engine, distillery, brewery, saloon, etc. The United States condemned a portion of such lots as a site for a sea coast fortification. The court was of the opinion that the future possibility of the government's erecting any slaughter house or steam engine did not constitute a present invasion of any rights of the other lot owners, whose property was not taken. It further held that such restrictive conditions could be construed as applying only to the use of property by private individuals for private purposes.

¹¹New Jersey, in *Hayes v. Waverly & P. Ry.*, 51 N. J. Eq. 345, 27 Atl. 648, 650 (1893), held that the restriction "is the right of amenity in the land . . . in the nature of an easement or servitude, appurtenant to the remaining land." Missouri has likewise identified the interest as an easement: *Peters v. Buckner*, 288 Mo. 618, 232 S. W. 1024 (1921), 17 A. L. R. 543 (1922).

¹²*Werner v. Graham*, 181 Cal. 174, 183 Pac. 945 (1919); *Friesen v. City of Glendale*, 79 Cal. 498, 288 Pac. 1080 (1930), 19 Cal. L. Rev. 58.

¹³*City of Houston v. Wynne*, 279 S. W. 916 (Tex. Civ. App. 1926). It is interesting to note that the same court two years earlier had held that the restrictive covenants raised an interest in land within the meaning of the Statute of Frauds. See *supra*, note 7.

¹⁴*Hazen v. Moses*, 69 F. (2d) 842 (App. D. C. 1934); *Sackett v. Los Angeles School District*, 118 Cal. App. 254, 5 P. (2d) 23 (1931); *Cook v. Murlin*, 202 App. Div. 552, 195 N. Y. S. 793 (1922); *Ward v. Cleveland Short Line Ry.*, 92 Ohio St. 471, 112 N. E. 507 (1915); *Doan v. Cleveland Short Line Ry.*, 92 Ohio St. 461, 112 N. E. 505 (1915); *Raleigh Court Corp. v. Faucett*, 140 Va. 126, 124 S. E. 433 (1924).

¹⁵*United States v. Certain Lands*, 112 Fed. 622 (C. C. D. R. I. 1899) (possibility that the government might in the future erect and maintain some forbidden structure did not constitute a present invasion); *Friesen v. City of Glendale*, 79 Cal. 498, 288 Pac. 1080 (1930) (construction of a city street was not inconsistent with "residential purposes").

likely. But it does seem only just, regardless of whether he acquires a so-called "property interest" or not, that the covenantee-owner of property should be recompensed for the taking of an interest (and clearly there is an interest of some sort) that he has in the land of another by reason of such covenants. The power of eminent domain is said to authorize the taking of "property" for public use. If it also covers rights in land not technically considered "property," the portion of eminent domain power authorizing "just compensation" should similarly extend to those rights.

For present purposes, it seems clear that the interest created by restrictive covenants is similar to that acquired in easements for light or air. Concerning the latter, the Supreme Judicial Court of Massachusetts in *Ladd v. City of Boston* said:

"The right to have land unbuilt upon for the benefit of light, air, etc., of neighboring land, may be made an easement, within reasonable limits, by deed."¹⁶

Such an easement may be created by words of covenant as well as by words of grant.¹⁷ *Allen v. City of Detroit*¹⁸ held a building restriction to be in the nature of an easement, building on a city as well as an individual. The Michigan court's position is made clear by the following language:

"Building restrictions are private property, an interest in real estate in the nature of an easement, go with the land, and a property right of value, which cannot be taken for public use without due process of law and compensation therefor; the validity of such restriction not being affected by the character of the parties in interest."¹⁹

As is indicated, owners of air and light easement rights in land are concededly entitled to compensation when the servient estate is taken under an eminent domain power. In view of the recognized similarity of the rights of the easement holder and of the restrictive covenantee, the latter should be accorded the same protection.

The second issue before the court was that of public policy and its relation to the issues. In the opinion rendered, a covenant burdening the free right of the county to acquire and use the property was said to be contrary to public interest and void. As far as acquiring the prop-

¹⁶151 Mass. 585, 24 N. E. 858, 859 (1890).

¹⁷Hogan v. Barry, 143 Mass. 538, 10 N. E. 253 (1887).

¹⁸167 Mich. 464, 133 N. W. 317 (1911), 36 L. R. A. (N. S.) 890 (1912).

¹⁹Allen v. City of Detroit, 167 Mich. 464, 133 N. W. 317, 320 (1911), 36 L. R. A. (N. S.) 890, 894 (1912).

erty is concerned, a government's absolute right of eminent domain is well established, and no covenant can overcome it.²⁰ Covenants are valid as between the parties holding under them, but cannot bar the sovereign's power. However, they may make condemnation utterly impracticable by materially increasing the damages, if damages be allowed. Yet, if value may be added by improvements even to the point of hindering the operation of eminent domain, it would logically follow that this may also be done by covenants. The authority as to whether public policy demands a refusal of compensation to covenantees is varied and conflicting.²¹ In reason, however, in contradiction to the present construction, a holding denying one compensation when he has been damaged in the use of his own property by the actual taking of his covenantor's land would seem not only contrary to policy but also to both federal and state constitutions. For one to acquire, through additional expenditure, land in a restricted area and then have the value of his property decreased by condemnation proceedings giving rise to a subsequent forbidden use on nearby lots, appears to be a violation of the protection which the constitutions afford.

Aside from the technical controversy of whether or not a property interest is created by restrictive covenants, it is conceivable that the courts which are in accord with the instant decision have refused to admit the creation of a property interest because of the additional burden which would be placed upon both the condemning governmental agency and also the court. Undoubtedly a holding to the contrary would produce an increasing number of compensatory demands for the taking of other supposed interests. However, if the constitutions demand that every kind of right in land must be compensated for, the courts should as far as possible assume the numerous administrative difficulties which arise in the deciding of eminent domain cases.

FRANK C. BEDINGER, JR.

²⁰All property is subject to eminent domain. *United States v. Land in Pendleton County, W. Va.*, 11 F. Supp. 311 (D. W. Va. 1935); *In re Forsstrom*, 44 Ariz. 472, 38 P. (2d) 878 (1934); *Brimmer v. City of Boston*, 102 Mass. 19 (1869).

²¹*United States v. Certain Lands*, 112 Fed. 622 (C. C. D. R. I. 1899) (decision refusing compensation was largely founded on public policy; but the case was reviewed by the Circuit Court of Appeals in *Wharton v. United States*, 153 Fed. 876 (C. C. A. 1st, 1907), which ignored the public policy ground completely); *Sackett v. Los Angeles School District*, 118 Cal. App. 254, 5 P. (2d) 23, 25 (1931) ("Public policy has been denominated as a vague and uncertain guide at best, . . . but instances arise that call for its application"). *Flynn v. New York, W. & B. Ry.*, 218 N. Y. 140, 112 N. E. 913 (1916) (restrictive building covenants are not invalid as against public policy). *Doan v. Cleveland Short Line Ry.*, 92 Ohio St. 461, 112 N. E. 505 (1915).

INSURANCE—CONSTRUCTION OF TERMS “PARTICIPATE IN AVIATION OR AERONAUTICS” AND “ENGAGE IN AVIATION OR AERONAUTICS” IN INSURANCE POLICIES. [Federal]

In *Massachusetts Protective Association v. Bayersdorfer*,¹ the insured was killed in the crash of a commercial plane in which he was a passenger. An insurance policy had been issued to him in 1933 containing a clause which read: “This policy does not cover death . . . sustained as the result of participation in aviation, aeronautics. . . .” In a suit upon the policy the District Court² rejected the insurance company’s contention that decedent’s death resulted from participation in aviation or aeronautics and held that the company was liable. On appeal the decision was affirmed, the Circuit Court of Appeals holding that “participation in aviation or aeronautics” meant having something to do with controlling the flight of the plane, and that the insured as a passenger had no such part in the flight.

The first cases in this field were decided early in the 1920’s before the growth of commercial aviation.³ In each of these the policy sued on contained a clause which provided that it did not cover death “sustained as a result of participation in aeronautics or aviation.” Contrary to the view adopted in the principal case the courts held that the clause prevented recovery by the beneficiary of a person who had been killed while a passenger in the plane.⁴ Any person flying in a plane was said to be participating in aeronautics or aviation, whether he exercised any control over the plane or not. This must have been the insurer’s intention, the courts concluded, because even the casual rider was in such danger that he was too great a risk for insurance. During the later 1920’s, however, a different result was reached in several suits upon policies which exempted from coverage “death sustained while the insured was engaged in aviation or aeronautics.”⁵ In allowing the beneficiary to

¹105 F. (2d) 595 (C. C. A. 6th, 1939).

²20 F. Supp. 489 (S. D. Ohio 1937).

³*Travelers Ins. Co. v. Peake*, 82 Fla. 128, 89 So. 418 (1921); *Meredith v. Business Men’s Acc. Asso. of America*, 213 Mo. App. 688, 252 S. W. 976 (1923); *Bew v. Traveler’s Ins. Co.*, 96 N. J. L. 533, 112 Atl. 859, 14 A. L. R. 983 (1921).

⁴See cases cited supra, n. 3. See *Vance on Insurance* (2d ed. 1930) 901: “If the policy excepts the risk of the insured, ‘while participating in aeronautics,’ his injury or death on account of riding as a passenger in an airplane is generally held to be within the exception, but not so if the language of the exception is ‘while engaged in aviation.’”

⁵*Gits v. N. Y. Life Ins. Co.*, 32 F. (2d) 7 (C. C. A. 7th, 1929), cert. denied, 280 U. S. 564, 50 S. Ct. 24, 74 L. ed. 618 (1927); *Benefit Ass’n. of Railroad Employees v. Hayden*, 175 Ark. 565, 299 S. W. 995 (1927), 57 A. L. R. 622 (1928); *Price v. Prudential Life*

recover in these latter cases, the courts held that to engage in aviation involves something more than riding as a passenger in an airplane. A person is not "engaged in aviation," they reasoned, unless he is taking an active part in the operation of the plane, or unless there is an indication of an intended continuous and occupational relationship.

Again during the present decade there have been several cases in which the beneficiary has been denied recovery for the insured passenger's death or injury in an airplane crash. In one of these cases⁶ the policy contained a clause which exempted the insurer from payment if the loss resulted from "participation in aeronautics." The court, in this case, was content to rely on the authority of the earlier cases.⁷ Recovery was denied in three other cases⁸ on the basis of the additional policy phrase "as a passenger or otherwise." Properly enough it was said that this provision clears up the ambiguity and shows that the exemption was intended to exclude from coverage one who was a passenger as well as one who takes an active part in the operation of the plane.

In the middle of the 1930's, the courts, however, made an abrupt about-face. Thus, in 1935 a federal court allowed the beneficiary to recover double indemnity on a policy which contained the provision that the company should not be liable for double indemnity for death resulting from "participation in aeronautics."⁹ The court said:

"Aeronautics is defined in the New Century dictionary as 'the science or art of aerial navigation'. . . . But one who rides in the plane for the sole purpose of going some place, of being transported by it as a passenger, is not, we think, in the absence of specific words requiring such construction, participating in aeronautics. . . . Now, one may know nothing of the science or art, have no interest in the mechanism, and no control over it, but may utilize it as a means of transportation. The terms must be

Ins. Co. of America, 98 Fla. 1044, 124 So. 817 (1929); Masonic Acc. Ins. Co. v. Jackson, 200 Ind. 472, 164 N. E. 628, 61 A. L. R. 840 (1929); Flanders v. Benefit Ass'n. of Railroad Employees, 226 Mo. App. 143, 43 S. W. (2d) 973 (1931); Peters v. Prudential Life Ins. Co., 133 N. Y. Misc. 780, 233 N. Y. S. 500 (1929).

Italics in quoted policy provision were supplied.

⁶Sneddon v. Mass. Protective Ass'n., 39 N. M. 74, 39 P. (2d) 1023 (1935).

⁷Travelers Ins. Co. v. Peake, 82 Fla. 128, 89 So. 418 (1921); Bew v. Travelers Ins. Co., 95 N. J. L. 533, 112 Atl. 859 (1921).

⁸Goldsmith v. N. Y. Life Ins. Co., 69 F. (2d) 273 (C. C. A. 8th, 1934), cert. denied, 292 U. S. 650, 54 S. Ct. 860, 78 L. ed. 1500 (1933); Head v. N. Y. Life Ins. Co., 43 F. (2d) 517 (C. C. A. 10th, 1930); Beveridge v. Jefferson Standard Life Ins. Co., 197 S. E. 721 (W. Va. 1938).

⁹Gregory v. Mutual Life Ins. Co. of N. Y., 78 F. (2d) 522 (C. C. A. 8th, 1935), cert. denied, 296 U. S. 635, 56 S. Ct. 157 (1935).

considered in the light of these known revolutionary changes and developments in the art."¹⁰

The conclusion reached was that the insurance company, by failing to make a clear expression as to whether a passenger was intended to be covered, left an ambiguity in the policy, which must be construed most strongly against the insurer. The preceding year the Supreme Court of Arkansas decided this question in the same manner.¹¹ In five later cases, involving the same issue ¹² the clause in the policy denied recovery for "participation in aeronautics," and in all of these cases the beneficiary was allowed to recover. Four of these cases either expressly or in effect followed *Gregory v. Mutual Life Ins. Co. of N. Y.*,¹³ the decision representing the first change of opinion in the federal courts, thus resting their holdings on the proposition that "participation in aeronautics" involves some control over the operation of the plane. The other decision laid more stress on the reasoning that the clause was an artificial one of ambiguous content, the court proceeding to resolve the ambiguity in favor of the insured.¹⁴ The court pointed out that since the number of persons who navigate planes is very few in comparison to the number of passengers carried, and since it is reasonable to believe that the insurance companies will solicit the potential passengers for insurance, the insurer may very well not have meant to exclude passengers from coverage.¹⁵ The court deemed it significant that the word "passenger" was left out of the policy, as this omission was indicative of a desire of the companies not to cut down the number of persons to whom they could sell insurance. If the word "passenger" had been present, the court would have known that the company did not want to insure any people who use planes as passengers and thus the present ambiguity would have been removed.

¹⁰78 F. (2d) 522, 523-524 (C. C. A. 8th, 1935), cert. denied, 296 U. S. 635, 56 S. Ct. 157 (1935).

¹¹Missouri State Life Ins. Co. v. Martin, 188 Ark. 907, 69 S. W. (2d) 1081 (1934); Martin v. Mutual Life Ins. Co. of N. Y. 189 Ark. 291, 71 S. W. (2d) 694 (1934).

¹²Mutual Ben. Health & Acc. Ass'n. v. Bowman, 99 F. (2d) 856 (C. C. A. 8th, 1938); Marks v. Mutual Life Ins. Co. of N. Y., 96 F. (2d) 267 (C. C. A. 9th, 1938); Swasey v. Mass. Protective Soc., 96 F. (2d) 265 (C. C. A. 8th, 1938); Mutual Ben. Health & Acc. Ass'n. v. Moyer, 94 F. (2d) 906 (C. C. A. 9th, 1938); Chappell v. Commercial Casualty Ins. Co., 197 S. E. 723 (W. Va., 1938).

¹³78 F. (2d) 522 (C. C. A. 8th, 1935), cert. denied, 296 U. S. 635, 56 S. Ct. 157 (1935).

¹⁴Mutual Ben. Health & Acc. Ass'n. v. Moyer, 94 F. (2d) 906 (C. C. A. 9th, 1938).

¹⁵The same general idea appears more casually in *Gregory v. Mutual Life Ins. Co. of N. Y.*, 78 F. (2d) 522, at 524 (C. C. A. 8th, 1935), cert. denied, 269 U. S. 635, 56 S. Ct. 157 (1935), wherein the court makes mention of the fact that nearly a million passengers were then being carried yearly in commercial planes, and that insurance companies know that the policy holders will be included among person so carried.

A comparative consideration of the policy phrases "participate" or "engage" in "aeronautics" or "aviation" reveals no true distinction between the meanings of the terms.¹⁶ In the Arkansas case of *Missouri State Life Ins. Co. v. Martin*, already mentioned, a concurring justice expressed a sound opinion as to the meaning of these words when he said:

"The distinction thought by the court to exist between 'engage in aeronautics' and 'participation in aviation' may be apparent to, and approved by, those learned in the niceties of the language and accustomed to its precise use, but it is to be doubted whether these hairsplitting and subtle distinctions would occur to, or be understood by, the majority of the thousands of persons who seek insurance against the many hazards to life and limb which are likely to occur to the most prudent and fortunate. Words and phrases used in insurance policies should be construed by their meaning as used in the ordinary speech of the people and not as understood by scholars."¹⁷

Thus, whichever words the policy happens to use, the process of interpretation and the result reached should be the same.

Before the 1920's, because flying was so dangerous, the insurance companies did not want to take the risk of insuring people riding in planes in any capacity. Therefore the words "participate" and "engage" were not ambiguous, as the companies must have meant to exclude everybody hazarding airplane riding in any manner, and the public should have so understood. By the 1930's, however, flying had become so much safer that the companies were no longer required to take materially greater risks in insuring people merely riding occasionally in planes. Thus, whether in the policies issued during this era the insurers intended to exclude passengers from coverage is doubtful, and the words "participate" and "engage" become ambiguous. The terms in the policies being ambiguous, the courts following general insurance law should construe them against the insurers. This interpretation works no great hardship on the companies for if they want to exclude passengers, the policies should expressly so provide.¹⁸ In fact, since 1934 the

¹⁶See discussion in *Swasey v. Massachusetts Protective Ass'n.*, 96 F. (2d) 265 at 266 (C. C. A. 9th, 1938). This conclusion is further borne out by the fact that the late cases interpret "participate" to include some measure of control or operation of the plane, which is the same meaning attached to "engage" by the earlier cases, cited *supra*, n. 5.

¹⁷188 Ark. 907, 69 S. W. (2d) 1081, 1084 (1934). This was dictum when first delivered, but was later adopted verbatim in *Martin v. Mutual Life Ins. Co. of N. Y.*, 189 Ark. 291, 71 S. W. (2d) 694, 695 (1934). See *Recent Cases* (1939) 28 Ky. L. J. 92, n. 9.

¹⁸Many insurance companies are now using clauses which specifically state that a

results reached by the courts accord with this reasoning, but the above proposed rationale for arriving at the conclusion has not been clearly recognized. For the courts appear to take the time of suit as determinative of whether the terms used should include passengers or not, whereas the proper time standard for determining the meaning of the words would seem to be the date of issuance of the policy.¹⁹ In many of the opinions, the date of policy is not even mentioned. What the company intended by the insertion of words in a policy in 1920 can only be deduced by considering the meaning of those words under 1920 conditions. Where such a rapidly developing activity as aviation is concerned, the application of 1939 concepts to 1920 statements can, to say the least, hardly be regarded as sound judicial interpretation. G. MURRAY SMITH, JR.

LIBEL AND SLANDER—PRIVILEGE—WORDS SPOKEN TO PLAINTIFF, OVERHEARD BY PERSON HAVING NO INTEREST. [England]

The overwhelming majority of cases, both in this country and in England, hold that even though a qualifiedly privileged defamatory remark be unavoidably or incidentally communicated to a third person, the privilege is not lost, provided such transmission is made without malice and as an incident of the ordinary course of business.¹

passenger is covered by the policy only when: (1) he is riding as a paying passenger, (2) he rides in a licensed plane, (3) the plane is owned by an incorporated passenger carrier, (4) the plane is operated by a licensed pilot, and (5) the plane is operated over routes between definitely established airports. See *Recent Cases* (1939) Ky. L. J. 92, n. 10.

¹⁹In *Marks v. Mutual Life Ins. Co. of N. Y.*, 96 F. (2d) 267 (C. C. A. 9th, 1938), the defendant Insurance Company apparently proposed some such basis for a decision in its favor. However, the court, while considering the argument, decided against the insurer because the policy was issued in 1928, at which date "the time for reconsideration of the earlier views [denying liability under 'participate in aeronautics' clauses] had already arrived." The court's reasoning, though not entirely clear of expression, seems to approximate the approach to the issue recommended by this recent case discussion.

In the closing paragraph of the opinion in the principal case, the progress of modern aviation is pointed out at some length, but the writing judge does not make plain just what significance this fact has in the decision at hand. The concluding observation, "Words, after all, are but labels whose content and meaning are continually shifting with the time", is of course indisputable. But the court is apparently well satisfied to place the current meaning on the words, regardless of whether the contract of the parties which uses the words was entered into recently or remotely. The court's own parting truism is a conviction of such a procedure.

¹*Kroger Grocery and Baking Co. v. Yount*, 66 F. (2d) 700 (C. C. A. 8th, 1933); *Montgomery Ward and Co. v. Watson*, 55 F. (2d) 184 (C. C. A. 4th, 1932); *Walgreen*

The case of *White v. J. and F. Stone Lighting and Radio, Limited*,² decided in 1939 by the English Court of Appeal, however, makes a radical departure from this rule. One of the defendant's directors accused the plaintiff, a manager of a branch office, of taking funds belonging to the company thereby causing a shortage in his accounts. This accusation was overheard by an employee. Later, the director was also heard by another employee to accuse the plaintiff of a shortage. The plaintiff brought an action for wrongful dismissal and slander. The court denied the defendant the right to set up the defense of qualified privilege. The ruling was based upon the proposition, that to be privileged, the publisher must have a legal, social, or moral interest or duty in making the defamatory statement and the person to whom it is made must have a corresponding interest or duty to receive it. Since neither of the employees who overheard the remarks had an interest or duty to receive them, a qualified privilege, it was held, did not exist.

Such a holding does violence to more soundly reasoned decisions. The Court of Appeal based its holding upon the necessity of reciprocity of interest or duty, and required that this reciprocity exist between the publisher and anyone who might hear the defamatory statement, thus making it unnecessary to decide the question whether there was a privilege between the plaintiff and defendant. Other cases, however,

v. Cochran, 61 F. (2d) 357 (C. C. A. 8th, 1932); New York and Porto Rico S. S. Co. v. Gracia, 16 F. (2d) 734 (C. C. A. 1st, 1926); Parr v. Warren—Lamb Lumber Company, 58 S. D. 389, 236 N. W. 291 (1931); Toogood v. Spyring, 1 Cr. M. & R. 181, 193-4, 149 Eng. Rep. 1044, 1050 (1834): "If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits. . . . I am not aware that it was ever deemed essential to the protection of such a communication that it should be made to some person interested in the inquiry, alone, and not in the presence of a third person. If made with honesty of purpose to a party who has any interest in the inquiry . . . the simple fact that there has been some casual bye-stander cannot alter the nature of the transaction. The business of life could not well be carried on if such restraints were imposed upon this and similar communications, and if, on every occasion in which they were made, they were not protected unless strictly private. In this class of communications is, no doubt, comprehended the right of a master bona fide to charge his servant for any supposed misconduct in his service, and to give him admonition and blame; and we think that the simple circumstance of the master exercising that right in the presence of another, does by no means of necessity take away from it the protection which the law would otherwise afford."; Edmondson v. Birch and Co. Ltd. and Horner [1907] 1 K. B. 371; Roff v. British and French Chemical Mfg. Co. and Gibson [1918] 2 K. B. 677; Osborn v. Thomas Boulter and Son [1930] 2 K. B. 226; Harper, Torts (1933) § 252; Salmond, Torts (8th ed. 1934) § 113; Restatement, Torts (1938) § 604, comment c. Notes: (1909) 20 L. R. A. (N. S.) 364; L. R. A. 1915 E. 131, (1922) 18 A. L. R. 776.

²White v. J. and F. Stone Lighting and Radio Limited, 55 T.L.R. 949 (C.A. 1939).

seem not to hold that reciprocity must exist between the publisher and the casual auditor, but that it is sufficient if such is found between the publisher and the person directly addressed.³

In reaching the novel result of the principal case, the court attempted to distinguish the earlier case of *Toogood v. Spyring*,⁴ decided by the Court of Exchequer. It will be remembered that in the *Toogood* case, the defendant, the Earl of Devon's tenant, charged the plaintiff with breaking open a cellar door with a chisel, and with getting drunk. The accusation was made in the presence of a person named Taylor. The court held that the statement made to the plaintiff, though in the presence of Taylor, fell within the class of communications called privileged. The Court of Appeal in the instant case seems to distinguish the earlier decision on the ground that the principle set out in that case did not apply to its facts; and while the principle was sound, neither did it govern in the case at bar on similar facts.⁵ It is exceedingly difficult to follow the court's attempted distinction. The decision is in fact a departure from *Toogood v. Spyring*, although the opinion expressly states that ". . . it would need more than this occasion to overrule so famous a case as that. . . ."⁶

It is difficult to reconcile the decision in the principal case with the demands of normal business practice. In fact the court in the *Toogood* case must have had such considerations in mind when it said that: "The business of life could not well be carried on if such restraints were im-

³*Montgomery Ward and Co. v. Watson*, 55 F. (2d) 184 (C. C. A. 4th, 1932); *Walgreen v. Cochran* 61 F. (2d) 357 (C. C. A. 8th, 1932); *New York and Porto Rico S. S. Co. v. Gracia*, 16 F. (2d) 734 (C. C. A. 1st, 1926); *Edmondson v. Birch and Co., Ltd. and Horner*, [1907] 1 K. B. 371; *Roff v. British and French Chemical Mfg. Co. and Gibson*, [1918] 2 K. B. 677; *Osburn v. Thomas Boulter and Son*, [1930] 2 K. B. 226.

⁴*Toogood v. Spyring*, 1 Cr. M. & R. 181, 149 Eng. Rep. 1044 (1834).

⁵*White v. J. and F. Stone Lighting and Radio Limited*, 55 T. L. R. 949, 950 (C. A. 1939): "The only reason for suggesting that 'the person to whom it is made' can include the plaintiff rests on the facts of the old case of *Toogood v. Spyring*. . . . I do not think that it has ever been pointed out, as Mr. Gallop has pointed out to us here, that, in fact, so far as one can see, the person to whom one of the statements complained of was published in that case was not the person to whom the speaker had a duty to communicate or the person who had an interest in receiving that communication, and it may be that the only person who had such an interest was the plaintiff who was complaining of the words used. For that reason it may be—I do not say that it is, because it would need more than this occasion to overrule so famous a case as that—that the general statement of the law, which has been approved over and over again in subsequent cases, when applied to the actual facts of that case on the question of privileged occasion did not, upon those facts, arise. That does not make the general statement of the principle of law any less accurate or any less deserving than it has been found to be by subsequent quotation and approval."

⁶*White v. J. and F. Stone Lighting and Radio Limited*, 55 T. L. R. 949, 950 (C. A. 1939).

posed upon this and similar communications, and if, on every occasion in which they were made, they were not protected unless strictly private."⁷ Further, it would seem that sufficient protection is presently accorded the employee's interest by the rule which imposes a liability upon the employer if he gives undue notoriety to his remarks.⁸ For these reasons, it is unlikely that the principal case will be followed by other courts.

FORREST WALL

NEGOTIABLE INSTRUMENTS—EFFECT OF CONFESSION OF JUDGMENT CLAUSE ON NEGOTIABILITY. [Federal]

In the case of *United States v. Nagorney*,¹ the Federal District Court held a note negotiable which contained an acceleration clause, and a clause authorizing confession of judgment. This last provision read: "And to secure payment of said amount, we . . . authorize, irrevocably, any attorney of any court of record to appear for us in such court, in term time or vacation, at any time hereafter and to confess a judgment without process in favor of the holder of this note for such amount as may appear to be unpaid thereon, together with costs and reasonable attorney's fees. . . ." It was contended that this clause authorizing confession of judgment, "any time hereafter," rendered the note non-negotiable because the Kansas Negotiable Instruments Law² only authorized a confession of judgment after maturity. The court, however, by a process of judicial construction held the note negotiable. The theory of the ruling was that the words, "for such amount as may appear to be unpaid thereon" so qualify the words, "at any time hereafter and to confess a judgment," that the clause, as a whole, constitutes a power to confess judgment only upon condition that it is not paid at maturity, the provisions thus falling within the express approbation of the Kansas statute.

⁷*Toogood v. Spyring*, 1 Cr. M. & R. 181, 194, 149 Eng. Rep. 1044, 1050 (1834).

⁸*Sheftall v. Central of Ga. Ry.*, 123 Ga. 589, 51 S. E. 646, 648 (1905): "To make the defense of privilege complete in an action of slander or libel, good faith, an interest to be upheld, a statement properly limited in its scope to this purpose, a proper occasion and publication in a proper manner and to proper parties only, must appear. The absence of any one or more of these constituent elements will, as a general rule prevent the party from relying upon the privilege."; *Ivins v. Louisville & N. R. Co.*, 37 Ga. App. 684, 141 S. E. 423 (1928); Restatement, Torts (1938) § 604, comment a.

¹28 F. Supp. 298 (D. Kan. 1939).

²Kan. Gen. Stat. (Corrick, 1935) c. 52 § 205 (2). This subsection of the Kansas statute is identical with subsec. 5 (2) of the Negotiable Instruments Law set out hereafter.

Some few courts have held, as did this one, that a clause authorizing confession of judgment "at any time hereafter" does not defeat negotiability,³ but the general holding has been that such a provision destroys the negotiability of the instrument.⁴ The courts have reached the latter conclusion by a literal interpretation of section 5 (2) of the Uniform Negotiable Instruments Law. Section 5 reads:

"An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which (1) authorizes the sale of collateral securities in case the instrument be not paid at maturity; or (2) authorizes a confession of judgment if the instrument be not paid at maturity; or (3) waives the benefit of any law intended for the advantage or protection of the obligor; or (4) gives the holder an election to require something to be done in lieu of payment of money. But nothing in this section shall validate any provision or stipulation otherwise illegal."

This strict interpretation of section 5 (2) proceeds on the theory that any promise to do anything in addition to the payment of money renders the note non-negotiable unless the additional promise falls within the expressed exceptions authorized by section 5 of the Act. It is submitted that this strict interpretation of section 5 has led either to a destruction of the negotiability of many otherwise negotiable notes or to a questionable process of construction in order to uphold the negotiable character of the instruments. Unless the courts are obliged to adhere absolutely to the literal wording of a declaratory statute, without regard to the purposes of the Act as disclosed by reading the whole statute together, it is believed that the unfortunate results flowing from such a construction can be obviated. Realizing the obvious need in our commercial world for paper that moves without impediment it is believed that section 5 should be interpreted with the broad general purposes of the Act in view. The types of additional promises which are expressly approved by that section should be taken as examples of permissible "luggage" rather than as an exclusive list of valid promises. In other words, promises which are not foreign to the object of the note but which are incidental to its normal life and tend to make its payment

³Stewart v. Public Industrial Bank, 85 Colo. 546, 277 Pac. 782 (1929); Jones v. Turner, 249 Mich. 403, 228 N. W. 796 (1930); McDonald v. Mulkey, 32 Wyo. 144, 231 Pac. 662 (1924). In Beard v. Baxter, 258 Ill. App. 340 (1930) such a clause was held not to defeat negotiability under a peculiar wording of the Illinois statute.

⁴For collected cases see Brannon, Negotiable Instruments Law (Beutel's ed. 1938) 151; note (1938) 117 A. L. R. 673.

more certain should be approved under section 5. Although it would be absurd to hold negotiable a promise to pay money which carries an additional promise to paint a fence, plow a garden, or deliver cotton, because such promises are completely unrelated to the main purpose of the note, yet promises to deposit additional security if original security depreciates, or to pay taxes, costs, or attorney's fees are all ancillary obligations which are inherent in a note and facilitate its collection. The latter type of promises should be held to be impliedly approved by section 5. Their omission should not be held to imply disapproval. By such an interpretation it would make no difference in the question of negotiability whether the confession of judgment was to take place "at any time hereafter" or only in case of default. Such a view does not insinuate that all jurisdictions should hold all confession of judgment clauses to be enforceable. The negotiability of the note having been saved, the courts could treat the confession of judgment clauses as they see fit in each case, as is done with the provisions to pay attorney's fees.⁵ If a particular clause is found to be objectionably harsh to the debtor, it can be held either wholly or partially unenforceable, the negotiability of the note at the same time being upheld. This matter should be recognized as going to the question of *legality* rather than *negotiability*.

The federal court in the case under consideration has arrived at a desirable conclusion in upholding the negotiability of the instrument, but the result has proceeded from a questionable and roundabout mode of construction. The court made its own difficulty by a narrow construction of section 5 (2). It would seem that the same result could have been reached by simply interpreting section 5 as setting forth an exemplary rather than an exclusive list of permissible promises.

EDWIN J. FOLTZ

PARENT AND CHILD—TORT ACTION BY ADOPTED CHILD AGAINST ADOPTIVE PARENT. [Arkansas]

The case of *Brown v. Cole*,¹ decided recently by the Arkansas Supreme Court, presents a situation in which an adopted son is suing his

⁵The following cases have held void stipulations for attorney's fees but have upheld the negotiability of the note: *Bank of Holly Grove v. Sudbury*, 121 Ark. 59, 180 S. W. 470 (1915), Ann. Cas. 1917D 373; *Leach v. Urshel*, 112 Kan. 629, 212 Pac. 111 (1923); *Commerce Trust Co. v. Snelling* 113 Kan.-272, 214 Pac. 882 (1923); *Commercial Credit Co. v. Nisen*, 49 S. D. 303, 207 N. W. 61, 51 A. L. R. 287 (1926).

The following cases have upheld reasonable attorney's fees: *Adolph Ramish Inc. v. Woodruff*, 2 Cal. (2d) 190, 40 P. (2d) 509, 96 A. L. R. 1146 (1934); *National Park Bank of New York v. American Brewing Co.*, 79 Mont. 542, 257 Pac. 436 (1927).

¹129 S. W. (2d) 245 (Ark. 1939).

adoptive father (both through their administrators) for injuries resulting from a tort inflicted upon the son by the father. In the case it appeared that on the death of his mother, the boy was adopted by his step-father. Some six years after his adoption, the boy began suffering intense pain and a few days later died of strychnine poisoning. An administrator appointed for his estate brought an action against the adoptive father for pain and suffering endured by the son as a result of the poisoning. A few days after the suit was filed the father committed suicide. The court concluded that sufficient evidence had been introduced to prove that the father was guilty of poisoning his son, and despite the relationship of adoptive parent and child, allowed recovery of damages from the father's estate.

The general rule is that a natural child may not maintain an action to recover damages from a parent for a tort inflicted by the parent upon the child.² Although this view has been departed from occasionally in the last few years,³ it is still adhered to by the majority of courts.⁴ The rationale of the principle denying tort liability is to be found in the conviction of the courts that to hold otherwise would promote dissension within the family:

"The family is a social unit. . . . The family fireside is a place of repose and happiness. . . . [Society] has a deep interest in maintaining in its integrity and stability the natural conception of the family unit. This imputes authority to the parent and requires obedience of the child. To question the authority of the parent or to encourage the disobedience of the child is to impair the peace and happiness of the family and undermine the wholesome influence of the home. To permit a child to maintain an action in tort against the parent is to introduce discord and con-

²Trudell v. Leatherby, 212 Cal. 678, 300 Pac. 7 (1931); Mesite v. Kirchenstein, 109 Conn. 77, 145 Atl. 753 (1929); Bulloch v. Bulloch, 45 Ga. App. 1, 163 S. E. 708 (1932); Elias v. Collins, 237 Mich. 175, 211 N. W. 88, 52 A. L. R. 1118 (1926); Lund v. Olson, 183 Minn. 515, 237 N. W. 188 (1931); Reingold v. Reingold, 115 N. J. L. 532, 181 Atl. 153 (1935); Canen v. Kraft, 41 Ohio App. 120, 180 N. E. 277 (1931); Matarese v. Matarese, 47 R. I. 131, 131 Atl. 198, 42 A. L. R. 1360 (1925); Kelly v. Kelly, 158 S. C. 517, 155 S. E. 888 (1930); Roller v. Roller, 37 Wash. 242, 79 Pac. 788, 68 L. R. A. 893 (1905). See, Tort Actions Between Persons in Domestic Relations (1939) 1 Wash. & Lee L. Rev. 89.

³Niemi v. Boston & Maine Ry., 87 N. H. 1, 175 Atl. 245 (1934); Dunlap v. Dunlap, 84 N. H. 352, 150 Atl. 905, 71 A. L. R. 1055 (1930). See, Tort Actions Between Persons in Domestic Relations (1939) 1 Wash. & Lee L. Rev. 89.

⁴Madden, Persons and Domestic Relations (1931) 449.

Of course, parents are criminally liable for injuries inflicted upon their children. Johnson v. State, 2 Humph. 283, 36 Am. Dec. 322 (Tenn. 1837); Commonwealth v. Coffey, 121 Mass. 66 (1876); State v. McDonie, 96 W. Va. 219, 123 S. E. 405 (1924).

tion where the laws of nature have established peace and obedience."⁵

In the principal case the Arkansas court was bound by a statute which provided that: "An adopted child is invested with every legal right, privilege, and obligation . . . as if born to the adopting parents in legal wedlock."⁶ But the court refused to hold that the statute compelled it to apply the general rule forbidding suit for personal injuries between parent and child, saying:

" . . . in these statutes no attempt is made to invest either the child or the adopting parents with natural affections existing between blood relations, so the reason for the rule that prevents natural children from suing natural parents for voluntary torts committed upon them does not exist between adopted children and adoptive parents. We, therefore, hold that an adopted child may sue an adoptive father for torts committed upon it which causes him suffering and pain."⁷

Cases considering the situations of adopted children in other respects, however, do not make such a distinction, for it has been generally held that adopted children occupy exactly the same position in the family as natural children.⁸ Thus, in matters of inheritance the Arkansas court treats adopted children no differently from natural children.⁹ Courts of other states assume the same attitude.¹⁰ In regard to maintenance and duty to support, no difference of obligation is found.¹¹ And as regards services due from a child to his parent, no distinction is made between adopted and natural children.¹² In the words of one court:

" . . . it is just as much the duty, under the law, of an adopting parent to protect, educate, and maintain his adopted child as if

⁵Wick v. Wick, 192 Wis. 260, 212 N. W. 787, 52 A. L. R. 1113, 1114 (1927).

⁶Brown v. Cole, 129 S. W. (2d) 245, 247 (Ark. 1939).

⁷Brown v. Cole, 129 S. W. (2d) 245, 248 (Ark. 1939).

⁸Shaver v. Nash, 181 Ark. 1112, 29 S. W. (2d) 298, 73 A. L. R. 961 (1930); In Re Johnson's Estate, 200 Cal. 299, 252 Pac. 1049 (1927); Scott v. Peters, 87 Ind. App. 1, 158 N. E. 490 (1927); Calhoun v. Bryant, 28 S. D. 266, 133 N. W. 266 (1911); Rogers v. Baldrige, 18 Tenn. App. 300, 76 S. W. (2d) 655 (1934); Stickle v. Reichardt, 203 Wis. 579, 234 N. W. 728 (1931). See cases collected in 2 C. J. S. 446.

⁹Shaver v. Nash, 181 Ark. 1112, 29 S. W. (2d) 298, 73 A. L. R. 961 (1930).

¹⁰In Re Biehn's Estate, 41 Ariz. 403, 18 P. (2d) 1112 (1933); Church v. Lee, 102 Fla. 478, 136 So. 242 (1931); Eggimann-Eckard v. Evans, 220 Iowa 762, 263 N. W. 328 (1935); Bakke v. Bakke, 175 Minn. 193, 220 N. W. 601 (1928); Brown v. Shwinogee, 128 Okla. 149, 261 Pac. 920 (1927).

¹¹In Re Ballou's Estate, 181 Cal. 61, 183 Pac. 440 (1919); Commonwealth v. Kirk, 212 Ky. 646, 279 S. W. 1091, 44 A. L. R. 816 (1926); Wertz v. Wertz, 125 Ore. 53, 263 Pac. 911 (1928).

¹²Buttrey v. West, 212 Ala. 321, 102 So. 456 (1924); Rogers v. Baldrige, 18 Tenn. App. 300, 76 S. W. (2d) 655 (1934).

he were the natural parent, and as a corollary, he is entitled, under the law, just as the natural parent is, to the custody, control, and services of the child."¹³

In the principal case the court bases its result on the premise that an adopted child does not have the same status as a natural child within the family unit. But a search of the cases fails to reveal any precedents for such a holding. Surely an adopted child is an integral part of the family that adopted him. It is beyond belief that the Arkansas court intends to maintain that, though the policy of the courts under the general rule is to encourage family harmony between a child and his natural parent, the law is not interested in this aim whenever the adoptive status exists. Yet it is not difficult to carry the reasoning of *Brown v. Cole* to this conclusion.

In view of the shocking fact situation in the principal case which shows clearly that the family solidarity had been disrupted beyond repair prior to the suit, the court was justified in allowing the adoptive child to recover from the parent. However, in such a situation, recovery should be allowed by a natural child as well. Therefore, the court's reasoning, based on a distinction between natural and adoptive children, seems unsound. Undoubtedly the court was influenced by the realization that in this instance the family unit was not merely disrupted but actually destroyed and thus beyond any possible need of legal protection. Recovery should be allowed both where the family is actually destroyed by the death of the members who are the parties to the suit, and where the parties are alive but the family unit is completely disrupted.

STANFORD SCHEWEL

PROCEDURE—DISMISSAL FOR FAILURE TO PROSECUTE. [Rhode Island]

The plaintiff in the case of *Sayles v. McLaughlin*,¹ brought an action of trespass *quare clausum fregit* in 1914 against the defendant. After the pleadings were completed, plaintiff demanded a jury trial which was set for January, 1915. However, the case was not tried at that time, nor was it tried subsequently. The defendant died testate in 1917 and executors were appointed the same year. The plaintiff's claim of pending action was filed against the estate in 1918 and was disallowed. The executors of the defendant's estate resigned, and an administrator was

¹³McDonald v. Texas Employers' Insurance Association, 267 S. W. 1074, 1075 (Tex. Civ. App. 1924).

¹⁷A. (2d) 779 (R. I. 1939).

appointed. The plaintiff in October, 1938, filed a motion demanding that the administrator be summoned to defend the action. The administrator then moved to dismiss the action for want of prosecution. This motion was granted in the Superior Court, and the case came to the Supreme Court of Rhode Island upon the plaintiff's exception to the dismissal. There, the plaintiff's exception was sustained, the court holding that since the defendant himself could have forced the case to a trial but had been content to let it remain untried, the plaintiff could not properly be penalized for a lack of diligence in prosecuting the action.

At early common law, actions at law were not dismissible, the term "dismiss" being applied to suits in equity alone. It was according to the equitable doctrine of laches that suits were dismissible if the plaintiff failed to prosecute with diligence.² The term has been borrowed from equity and is now used in common law proceedings.³ By statute and under the codes, as well as by rule of court, the power to dismiss is now recognized in law and equity. In England and in many American states the power is exercised for failure to prosecute,⁴ and rests in the inherent discretion of the court,⁵ independent of statute or rule of court.

In the principal case there was no statute granting the power to dismiss, nor had there been an amalgamation of law and equity which would permit the use of the doctrine of laches, and the Rhode Island court saw only the one possibility—to decide against the dismissal. Other courts have taken the same position.⁶ The Rhode Island court based its conclusion on a District of Columbia case,⁷ in which jurisdiction, as in Rhode Island, neither statute nor rule of court dealt with the subject of dismissal. The position taken by the District of Columbia court was that, if the defendant himself could have forced the case to trial, but

²Gray v. Times-Mirror Co., 11 Cal. App. 155, 104 Pac. 481, 484 (1909): "It is the policy of the law to favor and to encourage a prompt disposition of litigation. . . . The doctrine of laches as a bar to the assertion of stale claims and statutes of limitations rests upon the same reasons or principle."

³Bullock v. Perry, 2 Stew. and P. 319 (Ala. 1832).

⁴Mowry v. Weisenborn, 137 Cal. 110, 69 Pac. 971 (1902); McAuley v. Orr, 97 S. C. 214, 81 S. E. 489 (1914); Robinson v. Chadwick, 7 Ch. D. 878 (1876). See collected cases, 18 C. J. 1191.

⁵Colorado E. Ry. v. Union Pac. Ry., 94 Fed. 312 (C. C. A. 8th, 1899); Wisnom v. McCarthy, 48 Cal. App. 697, 192 Pac. 337 (1920). See Epley v. Epley, 328 Ill. 582, 160 N. E. 113, 114 (1928); Waring v. Pennsylvania R. Co., 176 Pa. 172, 35 Atl. 106, 107 (1896). See cases cited in 18 C. J. 1192; 17 Am. Jur. 88.

⁶Carter's Heirs v. Cooper, 111 Va. 602, 69 S. E. 944 (1911) (in Virginia the equitable doctrine of laches has never been applied to common law actions; the practice is to require that the defendant file a motion to speed the cause before a dismissal).

⁷Meloy v. Keenan, 17 App. D. C. 235 (1900).

was content to let the matter rest, he could not complain if the plaintiff finally took steps toward prosecuting his action.

On the other hand, in the absence of statute many courts have granted dismissals, relying on their "inherent" power to do so.⁸ In California, the practice of dismissing actions at law for failure to prosecute diligently is well established. Although dismissals are provided for by code in that state, it has been held that the power exists independently of statute.⁹ It would appear, therefore, that the California cases would have been adequate authority for the Rhode Island court to rely upon had it dismissed the action because of plaintiff's inactivity.

There is merit in the rule of the District of Columbia case and in the court's argument to support it.¹⁰ Especially where there has been no prejudice to the defendant by the delay, there seems to be a fair basis for denying the motion to dismiss.¹¹ The defendant's long continued failure to seek dismissal of the prosecution may be said to show acquiescence in the plaintiff's delay. However, the California decisions are based on what appears to be the better rule. This would postulate that it is the plaintiff alone of whom initiative is to be expected, since he is the originator of the suit and the cause of the defendant's presence in court. The defendant's position is an involuntary one; he is put to a defense only, and can be charged with no neglect for failing to do more than to meet the plaintiff step for step. The plaintiff is the party charged with diligence in prosecuting the action.¹²

As a practical matter the decision in the principal case would seem to be correct, because a dismissal would not bar a subsequent action by the plaintiff. It is generally held in the absence of statute that *res adjudicata* would not be a bar to a subsequent action since a dismissal is

⁸*Daly v. Chicago*, 295 Ill. 276, 129 N. E. 139 (1920). See *Kubli v. Hawsett*, 89 Cal. 638, 27 Pac. 57 (1891) and cases therein cited.

⁹*People ex rel. Stone v. Jefferds*, 126 Cal. 296, 58 Pac. 704 (1899); *Hassey v. South San Francisco Association*, 102 Cal. 611, 36 Pac. 945 (1894).

¹⁰*Meloy v. Keenan*, 17 App. D. C. 235 (1900); *Carter's Heirs v. Cooper*, 111 Va. 602, 69 S. E. 944 (1911) (an inactive defendant is not given the privilege of a dismissal when the plaintiff fails to prosecute seasonably).

¹¹*Overholt v. Matthews*, 48 App. D. C. 482 (1919); *Wright v. Howe*, 46 Utah 588, 150 Pac. 956 (1915), L. R. A. 1916 B., 1104; accord *Sayre v. Detroit, G. H. and M. Ry.*, 199 Mich. 414, 165 N. W. 859 (1917) (even though the delay had caused harm to defendants and rendered them less ready for trial, their motion for dismissal was not allowed to stand).

¹²*Mowry v. Weisenborn*, 137 Cal. 110, 69 Pac. 971 (1902); *Oberkotter v. Spreckels*, 64 Cal. App. 470, 221 Pac. 698 (1924); *Yampa Valley Coal Co. v. Velotta*, 83 Colo. 235, 253 Pac. 717 (1928); *Biddle v. Girard Bank*, 109 Pa. 349 (1885). See *Farbstein v. Woulfe*, 265 Pac. 973, 975 (Cal. App., 1928) (dissenting opinion).

not an adjudication on the merits.¹³ In Virginia, provision is made by statute to insure the plaintiff another day in court after his suit has been dismissed for want of prosecution.¹⁴ Although the result achieved may be practical, because upon dismissal plaintiff would have started a new suit, it does not follow that justice has been done in the principal case. Over the years the original defendant has died, witnesses may have died or removed from the jurisdiction, and evidence may have been lost. Inasmuch as the courts are not able to prevent such unfairness, remedial legislation¹⁵ should be passed which would make dismissal for want of prosecution an absolute bar to future action.¹⁶

JOHN E. PERRY

TORTS—PERMISSIBLE CHARACTER OF CONDUCT OF CREDIT AGENCY TOWARD DEBTOR; PLEADING—SCOPE OF DEMURRER. [District of Columbia]

In the case of *Clark v. Associated Retail Credit Men of Washington D. C.*,¹ the plaintiff, owner and operator of a dry-cleaning establishment in the District of Columbia, sued the defendant, an incorporated credit agency, to recover for injuries allegedly sustained by reason of letters²

¹³*Pueblo De Taos v. Archuleta*, 64 F. (2d) 807 (C. C. A. 10th, 1933); *Colorado E. Ry. v. Union Pac. Ry.*, 94 Fed. 312 (C. C. A. 8th, 1899); *Jernigan v. Pfiefer Bros.*, 177 Ark. 145, 5 S. W. (2d) 941 (1928); *McDonough v. Blosson*, 109 Maine 141, 83 Atl. 323 (1912); *Philpott v. Brown*, 16 Neb. 387, 20 N. W. 288 (1884).

¹⁴Va. Code Ann. (Michie 1936) § 6172: "Any court in which is pending a case wherein for more than two years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket; and it shall thereby be discontinued. . . . Any such case may be reinstated, on motion, within one year from the date of such order, but not after. . . ."

¹⁵See Federal Rules of Civil Procedure (1938) Rule 41 (b): ". . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

¹⁶It may be interesting to speculate whether in Rhode Island a subsequent action would be barred by a statute of limitations objection. See *Pesce v. Mondare*, 30 R. I. 247, 74 Atl. 913 (1910); *Sullivan v. White and Son*, 36 R. I. 488, 90 Atl. 738 (1914); 18 C. J. 1191-2.

¹105 F. (2d) 62 (App. D. C. 1939).

²Letters are as follows:

October 2, 1937

Dear Mr. Clark: The member of this Association whose name is shown above, has reported your account to us with the information that he has not been able to collect it.

We are members of a nation-wide organization, owned and operated by the retail interests of the country, with members and branch credit bureaus in every locality in the United States. In its files are kept accurate up-to-date credit reports of the millions of customers of its members.

Probably you haven't realized that this unpaid account may jeopardize your

sent to the plaintiff in an attempt to collect a debt. The complaint alleged that plaintiff was suffering from arterial hypertension and had lost

credit standing. We do not want to enter it against your record if we can help it—so before taking other steps, we are giving you this opportunity to keep your credit record clear by paying this bill within the next ten days.

If it is not paid within that time, we will have to proceed with collection, according to our member's instructions.

But we earnestly suggest that you protect your credit and avoid needless expense by making immediate arrangements with our members or prompt and definite settlement of his account.

Sincerely,

P. S. To avoid delay, make all payments and address all communications direct to the member whose name is shown above. Use the enclosed addressed envelope.

October 12, 1937

Dear Mr. Clark: Your failure to respond to our last letter about the above account is disappointing. You have had the utmost consideration and leniency from our member and from us, and yet you have not responded to his requests, nor to ours, for a settlement.

Do You Realize How Your Continued Neglect of This Account is Going to Affect Your Credit Standing?

As we told you in our last letter, we are members of a mutual, nation-wide Association, owned and operated by the retail credit grantors throughout the country. Its purpose is to give our members full protection against credit losses—protection backed by law and the power and prestige of our entire membership.

At the same time it is our desire to protect you, too, against the embarrassment that follows a "poor pay" record. But you must do your part!

Remember your credit record is the measuring line by which all merchants—all credit grantors—judge you. Wherever you go, whatever you do, a bad credit record will follow you like a shadow. Isn't it important for you, then, to keep your record clear?

Your future credit standing depends on your prompt payment of this account. Further neglect on your part will necessitate drastic action by the member. Mail your payment now—direct to the member whose name is shown above—in the addressed envelope enclosed.

Yours very truly,

October 23, 1937

Dear Mr. Clark: We've been lenient with you—but we haven't even received the courtesy of a reply to our letters. Now it's up to you!

This is your final notice!

This Account Must be Paid by Saturday, October 30th.

You are hereby given our Last and Final Notice that Unless this account is paid or satisfactorily adjusted on or before the above date, we will return the claim to the creditor who will no doubt refer it to their attorney, who will take action to secure judgment, with lawful interest together with all costs and disbursements of the action.

The said attorneys then, without delay, will resort to whatever remedies are offered creditors, such as garnishment or attachment of any salary, funds or property that may belong to you or that may be due you.

Yours truly,

P. S. Time, expense and trouble will be avoided by making immediate payment to the member whose name is shown above, using the addressed envelope enclosed.

but was slowly regaining his sense of sight, and that it was necessary to its recovery that he avoid excitement and worry; that the defendant had knowledge of plaintiff's illness; that the letters were sent to the plaintiff "without any right or color of right, and without justification, . . . for the purpose and with the intent of injuring his business and rendering him unable to conduct it properly"; that by reason of the letters plaintiff's condition was aggravated and he was caused to suffer a severe attack of arterial hypertension and "mental and physical agony."

The Court of Appeals for the District of Columbia overruled the demurrer to the complaint, and sent the case back for a trial on the merits. The majority of the court confined the case to the single proposition that since defendant by its demurrer admitted that it sought to cause not merely mental harm but physical harm as well, and since physical harm actually resulted, a case of intentional aggression was made out. The dissenting justice, however, pointed out that the case contained another point essential to the decision which the majority had overlooked, namely, a consideration of the proper scope of a demurrer—what was admitted by defendant when the demurrer was interposed. The statement in the declaration that the letters were written "without any right or color of right, and without justification," the dissent pointed out, was a pleader's conclusion of law, and its correctness was not admitted by demurrer. Therefore, the dissenting justice thought it necessary that the court on demurrer examine the letters to see "whether, in any event, they were sufficient to cause actionable injury to the plaintiff."³

The text authorities,⁴ as well as the cases,⁵ indicate that the dissent-

³Though the precise grounds for the holding of the dissent are not clearly defined, the approach employed seems to represent common sense and business expediency. In the first part of the dissenting opinion, Mr. Justice Vinson said that the problem presented involved a determination of whether the letters were written "without any right or color of right, and without justification," thus posing the problem as one of intentional aggression but of a privileged nature because of the proper character of the letters. However, there is language elsewhere in the dissent which seems to show that it was not believed that there was any intent to cause harm at all, but merely an intent to collect a debt. For in the last paragraph of the opinion, the dissent states that an agency may send these letters to collect a debt in a proper manner, "though perchance, the debtor may have high blood pressure and that fact is known to the creditor or his agent."

⁴Williams, *Burks Pleading and Practice* (3rd ed. 1934) § 197, p. 323: "That a demurrer does not admit the pleader's inferences or conclusions of law, such as an allegation that the defendant's acts are 'without right.' . . . The court will determine for itself the effect of the facts alleged." 1 Chitty, *Pleading* (16th Am. ed. 1883) 963 (e), 964: "It should, however, be remembered that the demurrer admits facts pleaded, (i. e. well pleaded) and merely refers the question of their legal sufficiency to the de-

ing judge had the proper approach in considering what was admitted by the demurrer. The allegation that the letters were sent without any right or color of right, and without justification, is merely the plaintiff's conclusion of law and thus not conceded by defendant. The demurrer admits only facts well pleaded: that the letters were written intentionally for the purpose of collecting the debt; that an unfavorable credit report would be turned in against the defendant if the debt was not paid; that suit by the creditor would probably be maintained if the bill was not paid. Even knowledge of the plaintiff's condition would be admitted, but the demurrer would not admit that the letters were of such a nature as to have caused the injury, or to have been written without any right or color of right, or without justification.

The majority opinion, having concluded that the defendant had confessed being an intentional aggressor without right, then examined his legal responsibility in such position. Mr. Justice Edgerton, for the court, adopted the view that while a creditor need not use care to avoid shocking his debtor, and may intentionally cause him some worry and concern, nevertheless, he should refrain from conduct intended or likely to produce physical illness. On this point the majority cited and discussed a number of cases. The cases referred to, however, support the rule as stated only because the conduct of the defendants therein was clearly without right or color of right, or without justification, and was intended and very likely to cause physical illness. For example, in *Barrett v. Collection Service Co.*,⁶ the defendant knew that the widow's wages were exempt, yet he sent her a series of threatening letters promising to "bother" plaintiff's employer, "until he is so disgusted with you he will throw you out the back door." The plaintiff was allowed recovery for mental pain and suffering because defendant had no legally enforceable claim and was merely trying to frighten plaintiff into making payment, conduct which the law has never tolerated. Again, in *La-Salle Extension University v. Fogarty*,⁷ defendant over a period of two years sent plaintiff some thirty-seven letters which varied from moderate

cision of the court." 6 Ency. of Pleading and Practice (1896) p. 336, b., "While a demurrer admits traversable facts, it does not admit inferences from them, or conclusions of law."

⁶St. Louis K. & S. E. R. Co. v. United States, 267 U. S. 346, 45 S. Ct. 245, 69 L. ed. 649 (1925); *Hobson v. McArthur*, 3 McLane (Fed.) 241, Fed. Cas. No. 6, 554 (1843); *Johnson v. Roberts*, 102 Ill. 655 (1882); *Minnesota Rd. v. Hiams*, 53 Iowa 501, 5 N. W. 703 (1880); *Williams v. Mathewson*, 73 N. H. 242, 60 Atl. 687 (1905); *Pratt v. Lincoln County*, 61 Wis. 62, 20 N. W. 726 (1884).

⁷214 Iowa 1303, 242 N. W. 25 (1932).

⁸125 Neb. 457, 253 N. W. 424, 91 A. L. R. 1491 (1934).

reminders of an unpaid balance to accusations of dishonesty and moral turpitude. Since the debt was wholly void by virtue of a specific statutory provision, the defendant's conduct was unjustified, and the plaintiff was allowed recovery for worry, humiliation, and loss of sleep. Further, in *Wilkinson v. Downton*,⁸ the famous English case relied on by the majority, the defendant well knowing the true facts and realizing that his statement was of the grossest type of practical joke and easily calculated to cause extreme shock and worry, told the plaintiff that her husband had been injured in an accident. Plaintiff recovered for the shock because defendant's action was intentional and was knowingly based on a complete falsehood. The court discussed a number of other cases, but in none could the conduct of the defendant be compared in degree with that of the defendant in the instant case, since the acts of the defendants in the cases cited were unwarranted and of a reprehensible nature.⁹

On the other hand the dissent asserted that the pleading in this case does not show as a matter of law that the letters violated any legal right of the plaintiff. Comparing the actions of the instant defendant with what the cases hold regarding the propriety of other methods of collec-

⁸[1897] 2 K. B. 57.

⁹Great Atlantic & Pacific Tea Company v. Roch, 160 Md. 189, 153 Atl. 22 (1931) (a dead rat was placed by defendant in a wrapper supposed to contain bread, and the sight of such shocked the plaintiff greatly; recovery was allowed for the shock as it was intentional and without right); Johnson v. Sampson, 167 Minn. 203, 208 N. W. 814 (1926), 46 A. L. R. 772 (1927) (defendant in a violent outburst, accused plaintiff of being unchaste, the statement being false, as defendant knew; plaintiff was allowed recovery for mental anguish and nervous shock, with resulting impairment of health); Gadbury v. Bleitz, 133 Wash. 134, 233 Pac. 299 (1925), 44 A. L. R. 425 (1926) (defendant unjustifiably refused to cremate the plaintiff's son, in order to induce the plaintiff to pay for the previous funeral of a son-in-law; recovery was allowed for the shock and worry caused the plaintiff by defendant's unlawful conduct); Engle v. Simmons 148 Ala. 92, 41 So. 1023 (1906), 7 L. R. A. (N. S.) 96 (1907), 121 Am. St. Rep. 59, 12 Ann. Cas. 740 (defendant, after being requested by plaintiff not to do so, unlawfully entered plaintiff's house to collect a debt from plaintiff's husband in his absence; threats were made by the defendant which threw plaintiff into a state of nervous excitement, and resulted in a premature child-birth with physical disability, for which recovery was allowed); Stockwell v. Gee, 121 Okla. 207, 249 Pac. 389, 390 (1926) (defendant, landlord of the plaintiff, came to the premises and in a loud and threatening manner demanded possession; recovery was allowed, because the acts of the defendant were "unwarranted, unauthorized, and unlawful"); Patapsco Loan Company v. Hobbs, 129 Md. 9, 98 Atl. 239 (1916) (defendant, while unlawfully on property of plaintiff made such emphatic and threatening demands on the plaintiff for payment of a debt, that plaintiff was frightened and suffered physical illness for which recovery was allowed); May v. Western Union Telegraph Company, 157 N. C. 416, 72 S. E. 1059 (1911), 37 L. R. A. (N. S.) 912 (1912) (though defendant had a right to enter the land of the plaintiff, he acted in such a boisterous and lewd manner that plaintiff was made ill and recovery was allowed for the illness).

tion applied by creditors and their agencies, the conclusion of the dissenting justice seems sound. Because the methods employed in attempting to collect debts vary to a great extent, both in their nature and in their general effect upon the debtor, it is difficult to formulate a general rule that will cover the cases. It is rather generally held that a method used in attempting to obtain payment of a debt, which tends publicly to impute dishonesty to the debtor,¹⁰ or to expose him to disgrace or ridicule,¹¹ or to invade his right of privacy,¹² gives the debtor a right of action for damages against the person employing such a method. But a mere threat¹³ to sue on a note and foreclose a lien, on the maker's failure to perform the obligation, would not amount to duress to support an action. And in *McCreavy v. Schneer's*,¹⁴ where a creditor sent a letter to his debtor demanding payment of money or a return of merchandise, the court said: "A creditor still has the right to ask his debtor to pay what he owes without being subject to any action for libel." Both opinions in the principal case quoted with approval the following statement by Professor Magruder:

"We would expect then the gradual emergence of a broad principle somewhat to this effect: That one who, without just cause or excuse and beyond all bounds of decency, purposely causes a disturbance of another's mental and emotional tranquility of so acute a nature that harmful physical consequences might be not unlikely to result, is subject to liability in damages for such mental and emotional disturbance even though no demonstrable physical consequences actually ensue."¹⁵

It would appear difficult to put the letters in the principal case in any milder terms and still hope to get any response from the debtor. There was nothing vindictive in these letters as in the *Barrett* case.¹⁶ Neither was there a charge of dishonesty or moral turpitude, as in *Bur-*

¹⁰*Ferdon v. Dickens* 161 Ala. 181, 49 So. 888 (1909); *Tyres v. Chambers*, 144 La. 723, 81 So. 265 (1919); *McClain v. Reliable Ins. Co.*, 150 S. C. 459, 148 S. E. 478 (1929); *Burton v. O'Neill*, 6 Tex. Civ. App. 613, 25 S. W. 1013 (1894); *Wolfenden v. Giles*, (1892) 2 B. C. 279; *Green v. Minnes*, 22 Ont. Rep. 177 (1891).

¹¹*Thompson v. Adelberg & Breman*, 181 Ky. 487, 205 S. W. 558 (1918), 3 A. L. R. 1594 (1919); *Axton Fisher Tobacco Company v. Evening Post Company*, 169 Ky. 64, 183 S. W. 269 (1916), L. R. A. 1916E. 667, Ann. Cas. 1918B 560; *Zier v. Hoffin*, 33 Minn. 66, 21 N. W. 862, 55 A. L. R. 973, 53 Am. Rep. 9 (1885).

¹²*Gault v. Babbitt*, 1 Ill. App. 130 (1890); *Brent v. Morgan*, 22 Ky. 765, 299 S. W. 967 (1927), 55 A. L. R. 964 (1928). Note (1928) 41 Harv. L. Rev. 1070. On improper methods of collecting debts, see notes: (1928) 55 A. L. R. 971; (1937) 106 A. L. R. 1453.

¹³*Shelton v. Lack* (Tex. Civ. App.) 19 S. W. (2d) 124 (1929).

¹⁴47 Ga. App. 703, 171 S. E. 391, 392 (1933).

¹⁵Magruder, *Mental Disturbances in Torts* (1936) 49 Harv. L. Rev. 1033, 1058.

¹⁶214 Iowa 1303, 242 N. W. 25 (1932).

ton v. O'Niell.¹⁷ The only statement savoring of threat was the one regarding the report to the creditor as to "poor pay" if the debt were not paid. This, however, violates no right of the plaintiff since "such agencies are privileged to supply their customers with what is believed to be an accurate credit rating of mercantile houses."¹⁸ As to the merits of plaintiff's claim, the problem of the principal case may be reduced to the following: May one who is employed to collect a debt for another and who has knowledge of the condition of the debtor's health, request payment even though such request causes physical injury to the debtor, if the manner in which the request is made is within the "bounds of decency"¹⁹ because not vindictive nor defamatory nor invasive of privacy? Recognition of such a privilege to include the principal case has much to commend it, for it unquestionably accords with good business practice fortified by common sense.

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¹⁷6 Tex. Civ. App. 613, 25 S. W. 1013 (1894).

¹⁸Bohlen, *Law of Torts* (1933) § 249, p. 536 and n. 90.

¹⁹Magruder, *Mental Disturbances In Torts* (1936) 49 *Harv. L. Rev.* 1033, 1058.

BOOK REVIEW

THE TREE OF LIBERTY. By Elizabeth Page. New York and Toronto: Farrar and Rinehart. 1939. Pp. 385, bibliography. \$3.00.

The following extract from a letter to the Editor from Professor Thomas Reed Powell is published with his permission and at the suggestion of the writer of the review:

"I have a suggestion that might interest you, and that is this: I read with great interest 'The Tree of Liberty' and am amazed at the accuracy with which the author reports or refers to many minor as well as major matters in the early constitutional history of Virginia. I thought that I had caught her in one mistake when she had people voting in Washington at the time of the first election of Jefferson, but a friend who looked up the matter in various histories, particularly local histories about the capital, found that the District of Columbia was not formally established until sometime shortly after Jefferson's election. I read the novel with great interest, particularly in view of my having gone carefully through Elliott's Debates on the Virginia ratifying convention before my visit with you. You might get one of your historians to write a review of it solely from the standpoint of its historical value."

Miss Page, born in Vermont and educated at Vassar with a post-graduate course in history at Columbia, became acquainted with the last American frontier of Oklahoma Territory late in the last century. Here, as a girl of eleven, she chanced upon some old letters written during the gold rush days of 1849. These appealed powerfully to her imagination which as she grew older was fertilized by reading Parkman and resulted in her first book: *Wagons West*, a tale of the old Oregon Trail. About five years ago Miss Page began work on the novel under review dealing with an earlier American frontier, upland Virginia in the eighteenth century.

The bibliography appended testifies to the thoroughness of her study. Her acknowledgments reveal extensive travel to and research in great source collections such as the Library of Congress. She personally visited many Virginia courthouses, examined their records and absorbed local atmosphere. She significantly acknowledges the inspiration and influence of Stephen Vincent Benet who read the manuscript entire and offered valuable criticism. The avowed purpose of the novel is to "make vivid the processes by which modern America developed out of the colonial conditions of the eighteenth century."

In time the novel covers the period from 1754 to 1806 and she has chosen Thomas Jefferson as the individual about whom the story is woven. She has created two families, the Howards and Peytons, and the story revolves about three generations. Matthew Howard, an upland Virginia youth, goes from a cabin in the Blue Ridge to school where he meets and becomes a lifelong friend of Thomas Jefferson. Young Howard marries aristocratic Jane Peyton of Tidewater and against the wishes of her family they move to the wild West of the Shenandoah Valley. The aristocratic Jane is no admirer of Thomas Jefferson. She regards his ideas as being treason to his class. She is fundamentally Hamiltonian in philosophy, standing for order, tradition, quality and the established order. Matthew, however, true to his frontier background is an ardent Jeffersonian, hating standing armies, creditors and privilege.

And so a domestic argument begins which continues to the final pages. The debate runs through three generations. One son, Peyton, marries the daughter of a French philosopher and becomes an ardent Jeffersonian; another son, James, marries into the New York aristocracy as Alexander Hamilton had done and becomes an ardent Hamiltonian; a daughter, Mary, repeats her mother's "mistake" and marries a rough frontiersman of Virginia's new frontier of the Northwest Territory. The story closes in 1806 with Matthew and Jane visiting their grandchildren in Ohio and proudly inspecting a great-grandson.

Miss Page manages to deal with much of the constitutional history of the period. She finds the "roots" of American liberty in the "fertile soil" of pre-Revolutionary Virginia. The "hot-bed" is the period of the Revolution. During the Confederation, the plant grows into an "untrimmed tangle." This is "pruned" at the Federal Convention and early Federalist period and "mutilated" during the last days of the administration of John Adams. Jefferson rescues liberty and sets it to "symmetrical growing" again. Essentially all this is true, but not entirely so.

The tree of liberty was, in fact, already a fair-sized sapling by 1754. Its roots run as far back as sixteenth century Calvinism and New England shares in its birth on American soil. The roots of liberty are also found in the constitutional conflicts and political theory of Stuart England and in the conditions of American life in the seventeenth century. It reached its highest growth, of course, in the period of the novel—in Jefferson's great Declaration, in the Virginia and Massachusetts Bills of Rights, in the first ten amendments and in Jefferson's first inaugural. But it is well to remember that "property," omitted from the Declara-

tion, was specifically recognized in the various bills of rights. And liberty was not identical with "democracy" in its modern sense. As late as 1821 Chancellor Kent said that universal suffrage jeopardized "the principles of liberty." And it is just as well to recall that liberty was not always the same as "liberalism." Oliver Cromwell, the father of Anglo-Saxon liberty, had Charles I convicted on an *ex post facto* statute before a political court appointed by a purged Parliament. The Virginia Bill of Rights did not prevent the Patriots from torturing the Tories and Thomas Jefferson would gladly have hanged Aaron Burr for treason on inconclusive evidence. Even so it is still true that the men of that day did most profoundly believe in something which they called "liberty"—a vague term which, somehow, they came romantically to accept as the symbol of America enlightening the world.

The conflict between Matthew and Jane is the grand debate of American history; the one hating standing armies, taxation, creditors and special privilege; the other, standing for order, tradition, quality and the established order. It is the conflict between the words in the Preamble of the Constitution—"justice" and "domestic tranquility," between creditor and debtor, between agrarian Virginia and maritime and industrial New England. In short it is the conflict between Jefferson and Hamilton. It was a conflict won by neither. Modern America, like the great-grandson of Matthew and Jane has some of the good qualities of both.

As Matthew and Jane looked upon their great-grandson there is the suggestion that the conflict would continue into succeeding generations. Here is a chance for a sequel, another novel about the great-grandson of the great-grandson. In time it should cover the period from 1885 to 1939. Matthew Howard, IV, of Albemarle Hall—what will be his views on universal suffrage in Virginia, on the income tax, free silver, Wilson's "New Freedom," and the Sedition Act of the World War? What will he think of Mr. Justice Holmes' dissenting opinions in *Lochner v. New York* and *Abrams v. United States*, of Wilson's first inaugural, of Hoover's speech on rugged individualism? There is room here for another novel with a penetrating satire.

Dr. Dryasdust, that estimable fellow whom Allan Nevins has described as head of the pedantic school of history—a man with an enormous reputation as a scholar based largely on talk about his forthcoming *magnum opus* which never came forth, will probably wag his learned head and say Miss Page's novel is "popular fiction." The present reviewer is prepared to defy the erudite Dryasdust and pronounce

this a remarkably good, accurate and interesting study. He can not presume to call it a great novel. Indeed, some of the critics have said there is nothing in it which would make a maiden blush or a Daughter of the Revolution protest. But it is in the main good history and considerably more significant than much of the deadly monographs that pass as history. Dumas Malone has suggested that the historian might well begin to write something that somebody would read besides himself. Miss Page has done this.

The only criticism the present reviewer has to offer is that Miss Page should have sent some of the Howards and Peytons to Liberty Hall Academy. Finally, in traveling up and down the Valley it seems logical to suppose that some of the characters might have passed through Lexington, already a no mean city "thirteen hundred feet long and nine hundred feet wide" according to the modest dimensions of *Hening's Statutes*.

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