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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.

JACK D. HEAD, Class of 1939

ROBERT F. HUTCHESON, JR., Class of 1939

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 therefore 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.

WILLIAM S. BURNS

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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