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Editorial Board/Notes and Comments

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NOTES AND COMMENTS

Attorney and Client—Divorce—Effect of Reconciliation upon Attorney's Fees.

A wife instituted a suit for divorce and applied for temporary alimony and expenses of litigation. Before a hearing could be had, the wife's attorneys announced to the court her request that the suit be dismissed, and asked to be allowed to continue the action in their own behalf for the recovery of attorneys' fees. The trial court left the suit pending, and after a hearing on the question of fees, made an allowance. In the Supreme Court of Georgia this judgment was reversed as being an abuse of the trial judge's discretion in that such a procedure enabled the attorneys to parade the grievances of the parties before the court against their will.¹ The statutes of Georgia place the power of granting temporary alimony, including counsel fees, in the discretion of the court.²

¹ Williams v. Williams, 4 S. E. (2d) 195 (Ga. 1939).

² GA. CODE (Michie, 1933) §§2976, 2977, 2979.

The right of the wife, in a divorce action, to have her husband pay counsel fees usually depends upon the discretion of the trial court.³ Formerly, when the ownership of a separate estate by the wife was more limited, the request by the wife that her husband pay the fees was granted more or less as a matter of course; but now, enabling statutes have changed the situation so that the court must make a more thorough investigation in exercising its discretion.⁴ The wife, when plaintiff, is entitled to a reasonable allowance for counsel fees, which are included in alimony *pendente lite*, if she is without funds and her husband has sufficient means to stand the expense.⁵ However, a *prima facie* case for divorce must be established and good faith shown.⁶ The counsel fees are ordered to be paid to the wife as alimony and not to the counsel, although the order may be to the wife for the benefit of the attorney named.⁷

On the question of the privilege of an attorney for the wife, as plaintiff in a divorce action, to intervene for his fees, and thereby prevent the dismissal requested by the parties after they have become reconciled, the cases are in conflict. The public policy argument of the case under discussion is the principal one advanced in favor of denying the privilege of the attorney to continue the action. Other arguments are based on the legal effect of a reconciliation and on the nature of the award of counsel fees. Courts favoring the attorney's action attach greater importance to the relief of the attorney and to a different interpretation of the effect of a reconciliation.

The power to keep the suit open has been denied on the ground of public policy because it would have a tendency to break up the reconciliation⁸ and to allow the personal relations of the husband and wife to be paraded before the court after the parties had forgiven each other for past offences.⁹ For these same reasons, a reconciliation has been

³ 3 SCHOULER, MARRIAGE, DIVORCE, SEPARATION, AND DOMESTIC RELATIONS (6th ed. 1921) 1958. In North Carolina, the right to temporary alimony and counsel fees is a question of law, while the amount is a matter of judicial discretion. *Davidson v. Davidson*, 189 N. C. 625, 127 S. E. 682 (1925).

⁴ See *Bailey v. Bailey*, 22 N. D. 553, 556, 134 N. W. 747, 749 (1912).

⁵ Note (1909) 8 MICH. L. REV. 155.

⁶ *Tidd, When Should Alimony Pendente Lite be Allowed* (1912) 55 CENT. L. J. 383.

⁷ *Kowalsky v. Kowalsky*, 145 Cal. 394, 78 Pac. 877 (1904); *Garrison v. Garrison*, 150 Ind. 417, 50 N. E. 383 (1898); *Blakely v. Blakely*, 117 Minn. 482, 136 N. W. 3 (1912). The weight of authority is said to be that orders made payable directly to the attorney are void, although some courts say that this is merely irregular. See *Bailey v. Bailey*, 22 N. D. 553, 557, 134 N. W. 747, 749 (1912).

⁸ *Bell v. Bell*, 214 Ala. 573, 108 So. 375 (1926); *Overstreet v. Overstreet*, 144 Ga. 294, 87 S. E. 27 (1915); *Jones v. Jones*, 97 S. W. (2d) 949 (Tex. Comm. App. 1936).

⁹ *Dicken v. Dicken*, 38 Ga. 663 (1869); *Hill v. Hill*, 47 Ga. 332 (1872); *Small v. Small*, 42 Iowa 111 (1875); *Litowich v. Litowich*, 19 Kan. 451 (1878).

held to preclude any later award of fees even where the motion for fees was made before the request for dismissal.¹⁰ This is because the court, in determining whether the wife had established a *prima facie* case for divorce and was acting in good faith, may inquire as to the pecuniary and social condition of both parties, their habits of living and previous conduct, and all circumstances affecting the complaint in the divorce case.¹¹ The theory of these cases, therefore, is that the raking over of those troubles which the parties wish to forgive and forget is not justified by the desirability of seeing that counsel fees are paid. As a practical matter, this view has its merits. Such an investigation and the resulting order on the husband might again revive the controversy, anger the husband, and result in another divorce action. The publicity that such an investigation might receive is also to be considered, even though it might occur only in unusual cases. On the other hand, if the attorney is denied the privilege, in the divorce action, to compel the reconciled husband to pay him his fees, an attorney may refuse to use his influence to reconcile other parties until he has an order awarding him his fees. By that time the action may have proceeded so far that reconciliation will be more difficult.

Other courts have held that when the wife requests a dismissal, jurisdiction to make any orders with respect to counsel fees is lost, because an allowance must be made to the wife, and she has no further cause of action.¹² But should not the court have jurisdiction of the matter until an order of dismissal is made by the court itself? It has also been held that the fact that attorney's fees are allowable to the wife for prospective services of an attorney forbids the granting of an application for fees at the time of dismissal for the reason that the award cannot be made for past services.¹³ These courts take the attitude that if the wife has proceeded thus far with the action, she does not need an award of the court granting her an allowance for that which she has already done. They do not seem to realize that the services of the attorney may have been rendered in expectation of an award of fees

¹⁰ *Kuntz v. Kuntz*, 80 N. J. Eq. 429, 83 Atl. 787 (Ch. 1912) (suit for separate maintenance); *Chase v. Chase*, 29 Hun 527 (N. Y. 1883).

¹¹ *Keefer v. Keefer*, 140 Ga. 18, 78 S. E. 462 (1913); *McCulloch v. Murphy*, 45 Ill. 256 (1867); *Petersen v. Petersen*, 76 Neb. 282, 107 N. W. 391 (1906).

¹² *Reynolds v. Reynolds*, 67 Cal. 176, 7 Pac. 480 (1885); *Ludin v. Ludin*, 28 Hawaii 487 (1925); *Dallas v. Dallas*, 222 Iowa 42, 268 N. W. 516 (1936); *Carden v. Carden*, 37 S. W. 1022 (Tenn. Ch. App. 1896).

¹³ *Lacey v. Lacey*, 108 Cal. 45, 40 Pac. 1056 (1895); *McCarthy v. McCarthy*, 137 N. Y. 500, 33 N. E. 550 (1893) (Statute provides that court could make order for attorney's fees "during pendency of action" and "when necessary to enable wife to carry on the action." The court said awards for past services were "not necessary to enable wife to carry on the action."); *Conklin v. Conklin*, 201 App. Div. 170, 194 N. Y. Supp. 685 (3d Dep't 1922); *Holt v. Carr*, 170 Misc. 32, 9 N. Y. Supp. (2d) 818 (Sup. Ct. 1939).

at a later date. Of course, the courts adopting these views hold that when the application for fees is made after the case has been dismissed, an order allowing such fees from the husband cannot then be made.¹⁴

There are jurisdictions, however, which allow the action to be continued, even after the parties have become reconciled and have asked for a dismissal, to permit attorney's fees to be adjudged, and, if allowed, collected from the husband. These courts do not discuss the public policy viewpoint, but maintain that it is contrary to the principles of honesty and equity for the attorney not to be paid.¹⁵ However, there would be cases where the wife would not be entitled to counsel fees at all. Then, the danger of rekindling the flame would be undergone with no benefit to the attorney.

When there has been a reconciliation without a request for a dismissal, it is held that the reconciliation is not the legal equivalent of a dismissal, and the court may make an order directing the payment of attorney's fees.¹⁶ A Kentucky court allowed an attorney to make a motion for his fees even after the suit had been dismissed, and permitted a recovery from the husband.¹⁷ This court maintained that the reconciliation and dismissal of the action did not relieve the husband of his liability for the fee of his wife's attorney.

If the order for the payment of fees has been made before the reconciliation and dismissal of the suit, the husband is required to pay.¹⁸ In such a situation, the testimony concerning the grounds for divorce and the determination of and order for fees has already taken place before the reconciliation occurs and, therefore, would not have a tendency to break up the reunion of the parties.

There are a number of states, including Georgia, which hold that the attorney may recover from the husband in an independent action at law. The basis of such decisions is that attorney's fees are one of

¹⁴ *Welborn v. Welborn*, 47 Fla. 348, 36 So. 61 (1904); *Sims v. Davis*, 48 Neb. 720, 67 N. W. 765 (1896); *Thompson v. Thompson*, 3 Head 527 (Tenn. 1859).

¹⁵ *Taylor v. Taylor*, 33 Idaho 445, 196 Pac. 211 (1921) (Statute giving attorney a lien on the cause of action was held to govern this case); *Courtney v. Courtney*, 4 Ind. App. 221, 30 N. E. 914 (1892); *Burgess v. Burgess*, 62 Ky. 287 (1864); *Green v. Green*, 40 How. Pr. (N. Y. 1870); *Sumner v. Sumner*, 54 Wis. 642, 12 N. W. 21 (1882).

¹⁶ *Beaulieu v. Beaulieu*, 114 Minn. 511, 131 N. W. 481 (1911); *Fullhart v. Fullhart*, 109 Mo. App. 705, 83 S. W. 541 (1904); *Kiddle v. Kiddle*, 90 Neb. 248, 133 N. W. 181 (1911).

¹⁷ *Powell v. Lilly*, 24 Ky. L. Rep. 193, 68 S. W. 123 (1902).

¹⁸ *Weaver v. Weaver*, 33 Ga. 172 (1862); *Aspinwall v. Sabin*, 22 Neb. 73, 34 N. W. 72 (1887) (found settlement fraudulent as to attorney); *Yoder v. Yoder*, 105 Wash. 491, 178 Pac. 474 (1919) (action by husband against wife); see *Bovard v. Bovard*, 128 S. W. (2d) 274, 276 (Mo. App. 1939). Cf. *Johnson v. Gerald*, 216 Ala. 581, 113 So. 447 (1927); *Quinn v. Quinn*, 133 Misc. 266, 231 N. Y. Supp. 329 (Sup. Ct. 1928).

the "necessaries" for which the wife can pledge her husband's credit.¹⁹ The recovery in such a suit is for the reasonable value of the services rendered and not for the contract price.²⁰ The Texas rule is that the attorney must show that both he and his client acted in good faith and with probable cause,²¹ whereas Iowa requires the attorney to show that the prosecution of the divorce suit was necessary for the protection of the wife.²² However, the majority of the states do not permit a recovery by the attorney from the husband in an independent action,²³ it being said, with regard to the idea of counsel fees as "necessaries", that "necessaries" are such as to provide for the wife as such and not for her future condition as a single woman.²⁴

There remains to be considered, as the last alternative of the attorney, an independent action against the wife. It has been indicated that such an action may be instituted,²⁵ but the wife is usually without means, this being the reason she has requested counsel fees. Therefore, a recovery against the wife by the attorney in a separate suit would be of little avail.

The decisions of the Georgia court are inconsistent. While the attorney is denied the right to continue the divorce action to recover his fees, he may bring an independent action at law in that jurisdiction.²⁶ It would seem that practically the same considerations of public policy would impel the denial of the right to bring an independent suit, for the testimony as to the ground for divorce introduced in the separate action would be of the same character as that which prompted the court

¹⁹ *Sprayberry v. Merk*, 30 Ga. 81 (1860); *Maddy v. Prevulsky*, 178 Iowa 1091, 160 N. W. 762 (1917); *Gossett v. Patten*, 23 Kan. 340 (1880) (husband had sued wife for divorce); *Tullis v. Calhoun*, 184 La. 207, 165 So. 714 (1936); *Bord v. Stubbs*, 22 Tex. Civ. App. 242, 54 S. W. 633 (1899); *Hicks v. Stewart*, 53 Tex. Civ. App. 401, 118 S. W. 206 (1909); see *Parks v. Parks*, 126 Ga. 437, 438, 55 S. E. 176 (1906).

²⁰ *Sprayberry v. Merk*, 30 Ga. 81 (1860); *Benton v. Losavio*, 176 So. 676 (La. App. 1937).

²¹ *Neblett v. Goukas*, 40 S. W. (2d) 1113 (Tex. Civ. App. 1931).

²² *Wick v. Beck*, 171 Iowa 115, 153 N. W. 836 (1915).

²³ *Kincheloe v. Merriman*, 54 Ark. 557, 16 S. W. 578 (1891); *Meaher v. Mitchell*, 112 Me. 416, 92 Atl. 492 (1914); *Coffin v. Dunham*, 8 Cush. 404 (Mass. 1851); *Grimstad v. Johnson*, 61 Mont. 18, 201 Pac. 314 (1921); *Ray v. Adden*, 50 N. H. 82 (1870); *Humphries v. Cooper*, 55 Wash. 376, 104 Pac. 606 (1909); *Clarke v. Burke*, 65 Wis. 359, 27 N. W. 22 (1886). The New York rule allows an action to be maintained for services rendered in a separation proceeding in certain cases, but not in an action for absolute divorce. *Hays v. Ledman*, 28 Misc. 575, 59 N. Y. Supp. 687 (Sup. Ct. 1899).

²⁴ *Grimstad v. Johnson*, 61 Mont. 18, 201 Pac. 314 (1921); *Kuntz v. Kuntz*, 80 N. J. Eq. 429, 83 Atl. 787 (Ch. 1912).

²⁵ *Humphries v. Cooper*, 55 Wash. 376, 104 Pac. 606 (1909); see *Keefer v. Keefer*, 140 Ga. 18, 26, 78 S. E. 462, 465 (1913); *Ludin v. Ludin*, 28 Hawaii 487, 492 (1925).

²⁶ *Sprayberry v. Merk*, 30 Ga. 81 (1860); see *Parks v. Parks*, 126 Ga. 437, 438, 55 S. E. 176 (1906); *Keefer v. Keefer*, 140 Ga. 18, 26, 78 S. E. 462, 465 (1913).

to forbid the attorney to continue the divorce action. Where such an independent action is permitted, the court should determine the fees in the original divorce action, thus avoiding multiplicity of suits.

North Carolina has not passed on the exact question presented in the instant case nor on the right of an attorney to bring an independent action.²⁷ There seems to be no solution which would obviate the danger of undoing the reconciliation and at the same time permit the attorney to collect his fees from the husband.

W. O. COOKE.

Conflict of Laws—Bigamy—Validity of Foreign Marriages.

On appeal from a decision of the Industrial Commission of Virginia denying the claim of the appellant for compensation for the death of her alleged husband, it appeared that the claimant was formerly married in West Virginia to one J. M. Lawson, from whom she subsequently separated. Four years later, believing in good faith that her husband was dead, she married the deceased, still in West Virginia, and that same year they came to Virginia where the fatal accident occurred. Evidence was presented at the hearing before the Commission to prove that the claimant's first husband was still living. The court affirmed the decision of the Commission on the ground that her status as lawful widow of the deceased must be determined by the law of Virginia, which declared such second marriage bigamous and void *ab initio*, rather than by the law of West Virginia, where the marriage, although prohibited, would be void only from the time it was so declared by a decree of nullity.¹

With the natural abhorrence of all Christian nations for the crimes of bigamy and polygamy, the Anglo-American courts have adhered more or less closely to the famous English description of the marriage status as being "the voluntary union for life of one man and one woman to the exclusion of all others."² The effect of the crime of bigamy on the marriage status is evidenced by a brief review of the applicable principles of law. At common law, the civil disability of a prior undissolved marriage of one of the parties renders a subsequent marriage by

²⁷ N. C. CODE ANN. (Michie, 1939) §1666.

¹ Toler v. Oakwood Smokeless Coal Corp., 4 S. E. (2d) 364 (Va. 1939).

² Hyde v. Hyde & Woodmansee, L. R. 1 P. & D. 130, 133 (1866). This definition has been necessarily qualified by the divorce laws of both England and the United States. The English courts have adhered much more rigidly to this view than have the American courts. Brook v. Brook, 9 H. L. 193 (1861); *In re Bethell*, 38 Ch. D. 220 (1887); *Nachimson v. Nachimson*, P. 217 (1930); *cf.* *Pourier v. McKinzie*, 147 Fed. 287 (D. Mont. 1906); *Wall v. Williamson*, 8 Ala. 48 (1845); *Royal v. Cudahy Packing Co.*, 195 Iowa 759, 190 N. W. 427 (1922); *Kobogum v. Jackson Iron Co.*, 76 Mich. 498, 43 N. W. 602 (1889); *Johnson v. Johnson's Adm'r*, 30 Mo. 72 (1860); *Kalyton v. Kalyton*, 45 Ore. 116, 78 Pac. 332 (1904); *Morgan v. McGhee*, 5 Humph. 13 (Tenn. 1844).

either party void *ab initio*, regardless of good faith.³ Most of the states in this country have incorporated this common law doctrine into express statutes.⁴ Likewise, if the dissolution of the prior marriage is invalid,⁵ or if remarriage occurs within a prohibitory period after divorce,⁶ the second marriage may be considered void. Where a marriage in fact has been proved, there is a presumption that it is valid, though it may be rebutted by proof of a prior legal marriage which continues to exist.⁷ Nor at common law did the long absence of one of the parties give rise to a presumption of death which would allow the other party to remarry.⁸ This situation has also been changed by statutes in the great majority of the states, some of which give the injured spouse the benefit of the good faith of his action and create a valid defense to a bigamy action,⁹ while statutes in other states give at least voidable status to the second marriage.¹⁰

Virginia, in accord with the great majority of the states, has, by statute, adopted the common law rule that a bigamous marriage contracted before the lapse of the statutory period giving rise to a presumption of death is void *ab initio*, regardless of the good faith of the parties; and the party contracting such a marriage is criminally liable for bigamy.¹¹ Although there is English authority¹² to support the view

³ *Evatt v. Miller*, 114 Ark. 84, 169 S. W. 817 (1914); *Irving v. Irving*, 152 Ga. 174, 108 S. E. 540 (1921); *Duenser v. Supreme Council*, 262 Ill. 475, 104 N. E. 801 (1914); *Davis v. Green*, 91 N. J. Eq. 17, 108 Atl. 772 (1919); *MADDEN, PERSONS AND DOMESTIC RELATIONS* (1931) §18; note L. R. A. 1916C 711.

⁴ The following statutes embody provisions typical to most states: GA. CODE (1933) §26-5601 *et seq.*; N. C. CODE ANN. (Michie, 1939) §2495; PA. STAT. (Purdon, 1936) tit. 23 §12.

⁵ *Simmons v. Simmons*, 19 F. (2d) 690 (App. D. C. 1927); *State v. Westmoreland*, 76 S. C. 145, 56 S. E. 673 (1906); *Hilton v. Roylance*, 25 Utah 129, 69 Pac. 660 (1902).

⁶ *Loughran v. Loughran*, 292 U. S. 216, 54 Sup. Ct. 684, 78 L. ed. 1219 (1934); *Rhodes v. Miller*, 189 La. 288, 179 So. 430 (1938); *Fisher v. Fisher*, 250 N. Y. 313, 165 N. E. 460 (1929).

⁷ *Walker v. Walker*, 218 Ala. 16, 117 So. 472 (1927); *Crysler v. Cryslar*, 330 Ill. 74, 161 N. E. 97 (1928); *Turner v. Williams*, 202 Mass. 500, 89 N. E. 110 (1909); *Doertch v. Folwell Engineering Co.*, 252 Mich. 76, 233 N. W. 211 (1930); *Bentley v. Frenger*, 158 Wash. 683, 291 Pac. 1089 (1930); I BISHOP, *MARRIAGE AND DIVORCE* (6th ed. 1881) §13; TIFFANY, *PERSONS AND DOMESTIC RELATIONS* (2d ed. 1909) §28.

⁸ *Matter of Kutter*, 79 Misc. 74, 139 N. Y. Supp. 639 (1913); 2 SCHOULER, *MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS* (6th ed. 1921) §1129; *Feit, The Enoch Arden: A Problem in Family Law* (1937) 6 BROOKLYN L. REV. 423.

⁹ ALA. CODE ANN. (Michie, 1928) §3441; ILL. REV. STAT. (Cahill, 1937) c. 38 §75; MASS. ANN. LAWS (1933) c. 207 §17; MICH. COMP. LAWS (1929) §16821; N. C. CODE ANN. (Michie, 1939) §4342; PA. STAT. (Purdon, 1936) tit. 23, §12; VA. CODE ANN. (Michie, 1936) §§4538, 4539; W. VA. CODE ANN. (Michie, 1937) §6057.

¹⁰ ARK. DIG. STAT. (Pope, 1937) §3294; CAL. PEN. CODE (Deering, 1937) §282; N. Y. DOM. REL. LAW §7a; S. C. CODE (1932) §8568.

¹¹ VA. CODE ANN. (Michie, 1936) §§5087, 4538, 4539.

¹² *Regina v. Tolson*, 23 Q. B. D. 168 (1889).

that the commission of the crime of bigamy without *mens res* is not against public policy, the Virginia legislature has shown strong disapproval of this view.¹³ These rules are declaratory of the rigid public policy which refuses to recognize that a marriage status ever existed. It is a stringent measure, but the wisdom of it is apparent as a means of protection against the dire results which might otherwise result from evasion of the law.

West Virginia, on the other hand, has taken a different stand on the question. In *Sledd v. State Compensation Commission*,¹⁴ a domestic case analogous to the principal case, the claimant was allowed recovery under the Workman's Compensation Act for the death of her second husband although it was assumed that her husband by a prior undissolved marriage was still living. The court held that such a marriage was not void until it was declared so by a court decree, and, further, that it could not be collaterally attacked after the death of one of the parties. It must be assumed that West Virginia has as strong a distaste for bigamy as have her sister states, yet, since the adoption of the Code of 1868, it has been the policy of West Virginia not to declare such marriages void until after a judicial decree of nullity.¹⁵ This radical change from the common law rule has the effect of keeping the marriage status practically valid until such a decree is issued, although there can be a prosecution for bigamy before issuance of this decree.¹⁶ It has been said, however, that when the law so forbids a marriage, the parties are deemed to be under the duty of making restitution by having the marriage annulled as soon as they discover it to be bigamous, and a court of equity will take jurisdiction regardless of the "clean hands" doctrine.¹⁷ The West Virginia Court strongly intimated¹⁸ in the *Sledd* case that the marriage could have been validly attacked in a direct action before a court, though this right was denied in a collateral proceeding before an administrative body. The obvious purpose of this rule is to insure a thorough judicial investigation of all the facts before the marriage is declared void. This type of legislation expresses the thoroughly justifiable policy of West Virginia in fostering the marriage

¹³ See note 11, *supra*.

¹⁴ 111 W. Va. 509, 163 S. E. 12 (1932).

¹⁵ *Stewart v. Vandervort*, 34 W. Va. 524, 12 S. E. 736 (1890); *Martin v. Martin*, 54 W. Va. 301, 46 S. E. 120 (1903) (incest is treated in the same manner); *Sledd v. State Compensation Comm.*, 111 W. Va. 509, 163 S. E. 12 (1932); W. VA. CODE ANN. (Michie, 1937) §4701.

¹⁶ See *Sledd v. State Compensation Comm.*, 111 W. Va. 509, 163 S. E. 12 (1932).

¹⁷ See *Martin v. Martin*, 54 W. Va. 302, 303, 46 S. E. 120 (1903); *Emmerglick, "Clean Hands" v. Public Policy in the Nullity of Bigamous Marriages* (1932) 4 DAK. L. REV. 3.

¹⁸ See *Sledd v. State Compensation Comm.*, 111 W. Va. 509, 511, 163 S. E. 12, 13 (1932). But see *Hastings v. Douglass*, 249 Fed. 378, 379 (N. D. W. Va. 1918).

status, in which the state is vitally interested, until the marriage is proved, beyond all doubt, to be against the law and public policy of the state and, therefore, void.¹⁹

The court in the instant case, however, is faced with a delicate problem in the consideration of a bigamous marriage contracted under the laws of a foreign state, prohibited by the laws of both states, but with different effects attaching thereto in each. It is necessary to make a choice between the universal desire to make the marriage valid and, on the other hand, the required observance of the strong public policy of the forum.²⁰ There is little doubt that the most desirable result would contemplate that a marriage ceremony would have everywhere the same operative effect, and, with that in view, the general rule has been adopted by Anglo-American courts that the validity of the marriage is governed by the law of the place of celebration.²¹ A recognized exception to this general rule is applicable when the foreign marriage conflicts with a prohibitory statute or the expressed public policy of the forum, as in the case of a polygamous or an incestuous marriage. This exception is to be invoked only when recognition of the foreign marriage would prejudice vital interests of the forum, and the extent to which such interest may be affected will depend on the circumstances of each case.²² However, there is no way to compel a state to give effect to a foreign marriage since every sovereign state has the absolute power, limited only by the Federal Constitution, to govern the status of those people over whom it has jurisdiction.²³ Therefore, even granting the validity of the marriage at the place of celebration, still the question remains whether the law of the forum will predicate a status of marriage upon the relationship. It seems that the problem ultimately to be determined is whether, under the circumstances presented to the court, sound policy will demand that the forum apply as its conflict of laws rule in this situation the same rule which it would apply to like situations of a purely domestic origin.

Admitting the power and privilege of Virginia to decide which law it will apply as its own law in this new situation, it is suggested that the court should, without assuming any facts, look more particularly to the

¹⁹ *Hall v. Baylous*, 109 W. Va. 1, 153 S. E. 293 (1930); *Sledd v. State Compensation Comm.*, 111 W. Va. 509, 163 S. E. 12 (1932).

²⁰ *Beale, Marriage and the Domicil* (1931) 44 HARV. L. REV. 501.

²¹ *Great Northern Ry. v. Johnson*, 254 Fed. 683 (C. C. A. 8th, 1918); *Royal v. Cudahy Packing Co.*, 195 Iowa 759, 190 N. W. 427 (1922); *Commonwealth v. Lane*, 113 Mass. 458 (1873); 2 BEALE, TREATISE ON THE CONFLICT OF LAWS (1935) §§666-669; GOODRICH, CONFLICT OF LAWS (2d ed. 1938) §116; STORY, COMMENTARIES ON CONFLICT OF LAWS (3d ed. 1846) §110; STUMBERG, CONFLICT OF LAWS (1937) §255.

²² See note 21, *supra*.

²³ *Cook, The Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE L. J. 457.

merits and circumstances of the case at bar. Following the general rule, it has recognized the first marriage of the claimant as valid under West Virginia law, the *lex loci contractus*, but it now refuses to look to the law of that state as governing the validity of the second marriage. The court gives no indication of having seriously weighed the position of the parties at the time of the marriage with relation to their future domicile. Nor did the court consider the possibility that the parties had merely established their residence temporarily in Virginia, without actually abandoning the West Virginia domicile. Under such circumstances it is submitted that, in spite of the public policy of the forum, the court was not justified in proceeding to a decision without a consideration of all the possibilities of the case, and the effects which would, in reality, result to their own citizens. Further, since the Virginia statute²⁴ forbidding bigamous cohabitation within the state was admittedly designed to guard the state against acts of evasion by their own citizens, it need not stand in the way of the adoption of the West Virginia domestic law in this case. Would not a decision more in accord with the *bona fide* situation of the parties be reached by the adoption of the domestic law of West Virginia, where the parties were married and evidently intended to remain, there being no showing to the contrary, as the applicable conflict of laws rule for this particular case? There is no justifiable reason to pigeon-hole this unusual case into an existing groove of decisions because of a policy designed to govern domestic situations.

While the action which would be taken by a West Virginia court presented with this same fact situation in reverse is entirely a matter of conjecture, it is most probable that the general rule would be invoked to the effect that a marriage invalid at the place of celebration is invalid everywhere.²⁵ Thus, we may justifiably assume that such a marriage would be declared void, since it is doubtful if the policy of that state would be distinctive enough to override the fact that the parties were not married legally when they entered the state. It is submitted that if the Virginia court had consistently followed this more logical reasoning and refused to be blinded by the most obvious policy objection, not only would a more uniform and equitable result have been reached but a more tenable basis would have been laid for future cases involving this conflict of laws problem.

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²⁴ VA. CODE ANN. (Michie, 1936) §4538.

²⁵ Schaffer v. Krestovnikow, 88 N. J. Eq. 192, 102 Atl. 246 (1917); DeFur v. DeFur, 156 Tenn. 643, 4 S. W. (2d) 341 (1928); 2 BEALE, TREATISE ON THE CONFLICT OF LAWS (1935) §670; TIFFANY, PERSONS AND DOMESTIC RELATIONS (2d ed. 1909) §30.

Contracts—Implied Conditions—How Far a Party or Parties Must Go in an Endeavor to Secure the Sanction of a Disinterested Third Party.

Under an option contract for the sale of a transportation business, subject to the approval of the Interstate Commerce Commission, plaintiff exercised his option and, with the defendants, made an application to the commission for approval. The application was refused because it was not signed in accordance with the rules and regulations of that body. Defendants refused to make further application in correct form, and plaintiff brought suit to compel specific performance. *Held*,¹ it was the duty of the defendants at least to join in a proper application to the commission in furtherance of the purpose of their contract.

Although there may be no express provision in a contract that either party will seek the necessary sanction of some disinterested third party, still there may be implied such a condition. Where the court concludes that, either expressly or by implication, one or the other of the contracting parties has undertaken to endeavor to secure such sanction, or that the parties have undertaken to coöperate in securing such sanction, the question arises as to how far the party or parties so obligated must go in such endeavor.

The principal case partially answers this question, for in the absence of an express controlling provision the court held that there was an implied condition that the defendant make proper application.

In a North Dakota case,² plaintiff and defendant entered into a written agreement whereby defendant gave plaintiff an option to purchase an electric distribution system. Plaintiff exercised the option, paid the agreed purchase price, and received a bill of sale from defendant. Later, upon discovering that defendant had made the sale without having obtained the authorization of the board of railroad commissioners, as required by the state public utilities act, and upon defendant's refusal to apply for such authority, plaintiff instituted an action to compel defendant to make such an application. *Held*, although it is the duty of the vendor to make application to the commissioners for authority to sell a public utility, when that is the only thing wanting to consummate the contract, the vendee under the contract is vested with sufficient interest to make the application himself. The application of this case to the problem lies in the inference by the court that the vendor could be forced, by a decree of specific performance, to make the application if the vendee could not do so.

¹ *Lennon v. Habit*, 216 N. C. 141, 4 S. E. (2d) 339 (1939).

² *Otter Tail Power Co. v. Clark*, 59 N. D. 320, 229 N. W. 915 (1930).

A Kentucky case³ held that where a manufacturing company located on defendant's railroad in consideration of defendant's agreement to maintain a certain rate on fuel and raw material shipments, and a subsequent change in law made it unlawful for a foreign corporation to operate a railroad in the state without first incorporating under the laws of Kentucky, defendant was liable for a breach of contract when it ceased to operate in the state, for, with some inconvenience, it could have complied with the law and continued to operate the road. This case appears to be an expansion of the principle set forth in the principal case, for here the implied condition to do everything necessary to the performance of the contract was held to include the doing of acts essential to performance which arose after the execution of the contractual agreement, and which could not possibly have been contemplated by the parties prior to the change in the law.

From a slightly different angle comes a New York case⁴ holding that where a contract for the sale of a franchise contemplated the payment of an additional sum by the vendee if a legislative ratification of the franchise were validated in the New York Court of Appeals within five years, defendant was obligated under an implied covenant to exercise the franchise so that proceedings could be maintained to test the validity of such legislation, and that failure to do so was a breach of contract for which defendant was answerable in damages. Thus, this court's attitude suggests that defendant must do everything necessary to enable the other party to determine the approval or disapproval of the judiciary.⁵

Of course, if either party has undertaken to secure the sanction, as distinguished from endeavoring to secure it, then a different problem is presented, and it might be held that nothing short of actually securing the sanction would constitute performance. In a New York case,⁶ which appears to look in this direction, a building contract required the contractor to obtain a permit from the building department of the city for the construction of the building. His plans first submitted to the department were apparently labeled unsatisfactory. In an action to recover the first installment of the contract price, *held*, that no liability under the contract accrued to defendant until plaintiff had filed plans reasonably free from objection and acceptable to the building depart-

³ *Newport News & Mississippi Valley Co. v. McDonald Brick Co.'s Assignee*, 109 Ky. 408, 59 S. W. 332 (1900).

⁴ *Creamer v. Metropolitan Securities Co.*, 120 App. Div. 422, 105 N. Y. Supp. 28 (2d Dep't 1907).

⁵ *Query*: Would the result have been the same if the exercise of the franchise were a punishable offense?

⁶ *Strom v. Dongon*, 31 Misc. 754, 64 N. Y. Supp. 57 (Sup. Ct. 1900).

ment, as the filing of acceptable plans was a prerequisite to the obtaining of a building permit.

Plainly, if a party is bound to endeavor to secure the sanction, he cannot enforce the contract until he has done so. Further, failure to do so will render that party liable for damages or, in a proper case, specific performance may be compelled. Where either or both parties are bound only to endeavor to procure sanction, and do so endeavor, but are unsuccessful, then if the performance of the contract depends on the success of the endeavor, the contract should simply fail, and neither party be allowed to enforce it.

Somewhat analogous to this problem are the cases where a promise is made to pay out of a specified fund, not yet in existence. We find that the courts in those cases inquire whether the promisor was under a positive duty to do acts reasonably calculated to bring the fund into existence. They appear to be unusually favorable towards the promisee, and almost invariably refuse to let him suffer nonpayment when there is the slightest indication that the promisor has not acted reasonably to effectuate the existence of the fund.⁷ The general conclusion reached is that the promisor must be "free from fault" where his efforts to raise the fund have been unavailing.⁸

Another line of cases analogous to the subject of this discussion involves the question whether a judicial, executive, or administrative order restraining or preventing performance of a contract is an impossibility that will excuse a promisor. The analogy is in the problem whether the promisor, to prevent a breach of contract, must make an effort to procure the abandoning or dissolution of such a restraining order. There are cases holding that an injunction secured by a private party will not excuse a breach of contract where the contract is lawful and possible of fulfillment, for the injunction should have been dissolved.⁹ If the legal proceedings are in any way due to the fault of

⁷ *Nunez v. Dautel*, 19 Wall. 560, 22 L. ed. 161 (U. S. 1873); *Smithers v. Junker*, 41 Fed. 101 (C. C. N. D. Ill. 1889) (where the court said: "Such contracts should be construed liberally, in favor of the payees."); *Hood v. Hampton Plains Exploration Co.*, 106 Fed. 408 (C. C. D. Nev. 1901); *Williston v. Perkins*, 51 Cal. 554 (1876).

⁸ *Simpson v. Kimberlin*, 12 Kan. 579 (1874) (*D* was under contract with *P* to recover by suit from *X* certain damages to which *D* was entitled, and *P* was to be paid a certain sum out of the sum recovered from *X*. *D* commenced the action but did not prosecute it in good faith and so collected nothing. Held, *P* is entitled to recover the amount he would have realized if *D* had faithfully prosecuted his action against *X*).

⁹ *South Memphis Land Co. v. McLean Hardwood Lumber Co.*, 179 Fed. 417 (C. C. A. 6th, 1910); *Klauber v. San Diego Street-Car Co.*, 95 Cal. 353, 357, 30 Pac. 555 (1892) (where the court said: "No case has been cited in which it has been held that interference by a writ, sued out by a private litigant, will excuse performance of a contract, although it may deprive the contractor of the means of performance."); *Sample v. Fresno Flume & Irrigation Co.*, 129 Cal. 222, 61 Pac. 1085 (1900).

the promisor, the interference should constitute no defense.¹⁰ Even those cases that recognize the rule that restraining proceedings, resulting from no fault of the promisor, should be an excuse, add that the promisor in an honest effort to carry out his agreement must, if possible, procure a dissolution of the injunction.¹¹ The general trend of these cases is to place on the promisor a duty to make a reasonable and diligent effort to obtain the sanction of such judicial, administrative, or executive body by a removal of the restraining order.¹²

It is clearly seen that no "rule of thumb" can be found whereby to determine what diligence may be required in any "sanction obtaining" attempt. Possibly this is due to the present scarcity of applicable cases. But in view of the rapidly growing number of instances in which conduct requires the approval of administrative officers or agencies, the problem is likely to become increasingly important.

HARRY McMULLAN, JR.

Deeds—Construction—Conflict between Specific and General Descriptions.

Defendants executed a deed of trust upon certain land as security for personal indebtedness. Upon default of payment, the deed of trust was foreclosed, and the plaintiff became purchaser at the foreclosure sale. Both in the deed of trust and in the later deed from the substituted trustee to the plaintiff the descriptions of the land were identical, containing a particular or specific description by metes and bounds of lots 1, 2, and 3, followed by a general description "And all those certain lots conveyed to [defendant grantor] . . ." by deeds of designated registry whose descriptions embraced lots 3, 4, and 5. Situated upon lots 1, 2, 3, 4, and 5 were a dwelling house, garage, and front yard; but only the yard and a small portion of the dwelling were covered by lots 1, 2, and 3. Plaintiff brought ejectment for possession of all five lots. *Held, both* the particular and general descriptions controlled, and the plaintiff was entitled to succeed as to all the lots.¹

Numerous decisions have enunciated the principle that when a deed contains both a specific and a general description and they are repugnant to or in conflict with one another, the specific description will

¹⁰ *Primos Chemical Co. v. Fulton Steel Corp.*, 266 Fed. 937 (N. D. N. Y. 1920) (voluntary receivership in which promisee participated).

¹¹ See *Peckham v. Industrial Securities Co.*, 31 Del. 200, 206, 113 Atl. 799, 802 (1921) (approving rule, and adding, "But in the honest effort to carry out his agreement he must, if possible, procure the dissolution of the injunction or secure the dismissal of the interfering proceeding by removing the cause therefor.").

¹² 6 WILLISTON, CONTRACTS (Rev. ed. 1938) §1939.

¹ *Realty Purchase Corp. v. Fisher*, 216 N. C. 197, 4 S. E. (2d) 518 (1939).

control.² This rule has been termed one of the most rigid of the rules of construction³ and declared derived from "common sense and common experience".⁴ Its basis is that ". . . the law prefers the best evidence as to the intention of the parties and when properly considered the particular description is more certain and reliable than the other one . . .",⁵ and further, ". . . that the parties are presumed to be governed by the description which they make specific when it is in conflict with another."⁶ Yet this rule is not absolute or dogmatically applicable in every instance, as it is subject to disparity of application as well as to doctrinal exceptions in various jurisdictions.⁷

By universal consensus the cardinal consideration in the construction of deeds is to ascertain the true intent of the parties.⁸ Whenever found, such intent must govern. A familiar postulate is that intention must be gleaned from a consideration of the entire instrument after looking at the four corners of it.⁹ Technical rules of construction may aid in the discovery of intent, and in the absence of stronger evidence may prevail.¹⁰ The general rule that a definite specific description will dominate a conflicting general description may thus be rebutted when a court conceives the manifest intent of the grantor to be that the general description shall prevail.¹¹ In its inquiry, a court is concerned only with intent actually expressed by the grantor's language, as distinguished from unexpressed but desired intent.¹² No precise or readily

² *Everitt v. Thomas*, 23 N. C. 252 (1840); *Cox v. McGowan*, 116 N. C. 131, 21 S. E. 108 (1891); *Johnson v. Case*, 131 N. C. 491, 42 S. E. 957 (1902); *Gaylord v. McCoy*, 158 N. C. 325, 74 S. E. 321 (1912); *Potter v. Bonner*, 174 N. C. 20, 93 S. E. 370 (1917); *Von Herff v. Richardson*, 192 N. C. 595, 135 S. E. 533 (1926). For extensive collection of cases from other states see: 2 *DEVLIN, DEEDS* (3d ed. 1911) §1039, n. 5; 4 *THOMPSON, REAL PROPERTY* (1924) §3158, n. 8; *Note* (1931) 72 A. L. R. 410.

³ *Perry v. Buswell*, 113 Me. 399, 94 Atl. 483 (1915).

⁴ *Holman v. Houston Oil Co.*, 152 S. W. 885 (Tex. Civ. App. 1913).

⁵ *Dill-Crammer-Truitt Corp. v. Jacksonville Lumber Co.*, 183 N. C. 660, 668, 112 S. E. 740, 745 (1922).

⁶ *Cox v. McGowan*, 116 N. C. 131, 137, 21 S. E. 108, 110 (1891).

⁷ *Note* (1931) 72 A. L. R. 410.

⁸ 2 *DEVLIN, DEEDS* (3d ed. 1911) §§835, 836, 840, 1035.

⁹ 2 *DEVLIN, DEEDS* (3d ed. 1911) §1039; 4 *THOMPSON, REAL PROPERTY* (1924) §3162.

¹⁰ *Perry v. Buswell*, 113 Me. 399, 94 Atl. 483 (1915).

¹¹ *Sutton, S. & S. Mfg. Co. v. McCullough*, 64 Colo. 415, 174 Pac. 302 (1918) (general clause reading "all the real estate of said grantor . . . in said Summit County . . . whether the same is particularly described herein or otherwise"); *McKinney v. Raydure*, 181 Ky. 163, 203 S. W. 1084 (1918); *Dochterman v. Marshall*, 92 Miss. 747, 46 So. 542 (1908) (governed by relation of the parties); *Thomson v. Thomson*, 115 Mo. 56, 21 S. W. 1085 (1893); *Adams v. Alkire*, 20 W. Va. 480 (1882); see *Hatcher v. Virginia Min. Co.*, 214 Ky. 193, 196, 282 S. W. 1102, 1104 (1926); *Rosenberger v. Wabash Ry.*, 96 Mo. App. 504, 507, 70 S. W. 395 (1903); *Whitaker v. Whitaker*, 175 Mo. 1, 4, 74 S. W. 1029, 1031 (1903); 4 *THOMPSON, REAL PROPERTY* (1924) §3162.

¹² See *Seawell v. Hall*, 185 N. C. 80, 82, 116 S. E. 189, 190 (1923); 2 *DEVLIN, DEEDS* (3d ed. 1911) §837; 4 *THOMPSON, REAL PROPERTY* (1924) §3076.

applicable criterion has been prescribed to govern a court in recognizing clear and manifest intent.¹³ As acutely observed by Ruffin, J., "... attempts have been made to establish artificial rules for discovering the intention; and the offices of terms of general and specific description defined. The truth is, no positive rule can be laid down; for as each subject differs in some respects from another, and each writer will be more or less precise or perspicuous in expressing himself, the whole instrument is to be looked at, and the inquiry then made, can it be found out, from this, what the party means."¹⁴ Since intention must necessarily remain a pliant concept, each decision partakes somewhat of a law unto itself. It is commonly recited that the court should assume the position of the parties at the time of execution, and that in the event of doubtful or ambiguous language resort may be had to the attendant circumstances and the situation of the parties.¹⁵ Other rules of construction invoked are: First, that every clause should be regarded as inserted for a purpose and whenever possible each word should be rendered operative;¹⁶ and second, an instrument should be construed most strongly against a grantor in the event of uncertainty.¹⁷ However, it is said that the latter should be resorted to only if construction is doubtful after application of all other rules.¹⁸

Apparently little or no importance is accorded the relative positions of the specific and the general descriptions in a deed, although certain earlier decisions evidently attached weight to this factor.¹⁹ A particular description by metes and bounds will undoubtedly prevail when a court concludes that the insertion of a general description had as its purpose either: (1) to show the grantor's source or chain of title;²⁰ (2) to

¹³ See *Lincoln v. Wilder*, 29 Me. 169, 181 (1848). In *Walsh v. Hill*, 38 Cal. 481, 487 (1869), it was said: "In the construction of written instruments, we have never derived much aid from the technical rules of the books. The only rule of much value . . . is to place ourselves as near as possible in the seats which were occupied by the parties at the time the instrument was executed; then taking it by its four corners, read it."

¹⁴ *Proctor v. Pool*, 15 N. C. 371, 373 (1833).

¹⁵ 2 DEVLIN, *DEEDS* (3d ed. 1911) §§839, 1038; 4 THOMPSON, *REAL PROPERTY* (1924) §3075.

¹⁶ 4 THOMPSON, *REAL PROPERTY* (1924) §3075.

¹⁷ In *Ferguson v. Champion Fibre Co.*, 182 N. C. 731, 735, 110 S. E. 220, 223 (1921), it was said by Walker, J., after conceding the rule that a deed must be construed most strongly against the grantor: "... that does not mean that its description must be made to include land not covered by it." See 2 DEVLIN, *DEEDS* (3d ed. 1911) §848; 4 THOMPSON, *REAL PROPERTY* (1924) §§3166, 3167 (rule not applicable to grant from sovereign).

¹⁸ See 4 THOMPSON, *REAL PROPERTY* (1924) §3166; (1919) 6 VA. L. REV. 63.

¹⁹ See 4 THOMPSON, *REAL PROPERTY* (1924) §3165.

²⁰ *Prentice v. Northern Pac. Ry.*, 154 U. S. 163, 14 Sup. Ct. 997, 38 L. ed. 947 (1894); *Lovejoy v. Lovett*, 124 Mass. 270 (1878); *Dow v. Whitney*, 147 Mass. 1, 16 N. E. 722 (1888); *Von Herff v. Richardson*, 192 N. C. 595, 135 S. E. 533 (1926); 4 THOMPSON, *REAL PROPERTY* (1924) §3161.

further identify the land;²¹ or (3) to reiterate or redescribe for emphasis or clarification.²²

Controversy has arisen when the general description assumed one of the following forms: First, where the land was designated by its particular or well-known name, e.g. "known as the Wooldridge plantation". North Carolina concurs with other states in ruling that such general description must yield to a more particular description by metes and bounds.²³ However, numerous decisions dissent from this view and allow the general designation to prevail as a manifestation of the grantors intent.²⁴ Second, where there was a declaration that "all" of the grantor's land in a particular locality is to pass. If additional land beyond that specifically described would pass by effectuating such clause, then North Carolina, among other states, holds that it must be subordinated to the particular designation;²⁵ but elsewhere there are many decisions to the contrary.²⁶ Third, where there was a statement of quantity, e.g. "said tract embracing 700 acres". Ordinarily, a reference to quantity has no effect beyond assistance to the particular description,²⁷ yet, in a few instances where a grantor has unequivocally expressed an intent to pass only a certain quantity of land, this has taken precedence over a specific description by metes and bounds.²⁸

²¹ *Carter v. White*, 101 N. C. 30, 7 S. E. 473 (1888); *Midgett v. Twiford*, 120 N. C. 4, 26 S. E. 626 (1896); *Johnson v. Case*, 131 N. C. 491, 42 S. E. 957 (1902); *Roper Lumber Co. v. McGowan*, 168 N. C. 86, 83 S. E. 16 (1914).

²² *Baltimore Bldg. & Loan Ass'n v. Bethel*, 120 N. C. 344, 27 S. E. 29 (1897); *Gaylord v. McCoy*, 158 N. C. 325, 74 S. E. 321 (1912); *Ferguson v. Champion Fibre Co.*, 182 N. C. 731, 110 S. E. 220 (1921).

²³ *Carter v. White*, 101 N. C. 30, 7 S. E. 473 (1888) ("known by name of Walker's Island"); *Roper Lumber Co. v. McGowan*, 168 N. C. 86, 83 S. E. 16 (1914) ("the Hancy Jones land"); *Guilmartin v. Wood*, 76 Ala. 204 (1884); *Pettit v. Gibson*, 201 Ala. 177, 77 So. 703 (1917) ("home place of P. Sr., now deceased"); *Osteen v. Wynn*, 131 Ga. 209, 62 S. E. 37 (1908) ("known as Wooldridge plantation"); *Coppermines Co. v. Comins*, 38 Nev. 359, 148 Pac. 349 (1915) ("as Comins Ranch"); *Roberts v. Dreyer*, 200 S. W. 1097 (Tex. Civ. App. 1918) ("old Dreyer Homestead"); cf. *Dill-Cramer-Truitt Corp. v. Jacksonville Lumber Co.*, 183 N. C. 660, 112 S. E. 740 (1922).

²⁴ *Lodge's Lessee v. Lee*, 6 Cranch 237, 8 L. ed. 210 (U. S. 1810); *Haley v. Amestoy*, 44 Cal. 132 (1872); *Martin v. Lloyd*, 94 Cal. 195, 29 Pac. 491 (1892); *Moir-Nandorf v. Milner*, 34 Idaho 396, 201 Pac. 720 (1921); *Dochterman v. Marshall*, 92 Miss. 747, 46 So. 542 (1908); *Reddock v. Williams*, 129 Miss. 706, 92 So. 831 (1922).

²⁵ *Gaylord v. McCoy*, 158 N. C. 325, 74 S. E. 321 (1912); *West v. Hermann*, 104 S. W. 428 (Tex. Civ. App. 1907); *Spiller v. Scribner*, 36 Vt. 245 (1863); *Cummings v. Black*, 65 Vt. 76, 25 Atl. 906 (1892); cf. *Murphy v. Murphy*, 132 N. C. 360, 43 S. E. 922 (1903).

²⁶ *Costello v. Graham*, 9 Ariz. 257, 80 Pac. 336 (1905); *Clifton Heights Land Co. v. Randell*, 82 Iowa 89, 47 N. W. 905 (1891) ("... all other lands that may not have been heretofore described belonging to said grantor"); *Marr v. Hobson*, 22 Me. 321 (1843); *Lauchheimer v. Saunders*, 27 Tex. Civ. App. 484, 65 S. W. 500 (1901).

²⁷ 2 DEVLIN, DEEDS (3d ed. 1911) §1044; 4 THOMPSON, REAL PROPERTY (1924) §3148.

²⁸ *Sanders v. Godding*, 45 Iowa 463 (1877) ("said tract to contain just one acre, and the distances shall be so construed"); *Tompkins v. Thomas*, 54 Tex.

A comparison of cases clearly illustrates the irreconcilable conflicts to be met in determining what language will constitute a manifest expression of intent. In certain deeds where specific descriptions by metes and bounds were followed by general clauses reading "the premises hereby intended to be conveyed being . . .",²⁹ and "the purpose and intent of this deed being to convey . . .",³⁰ these general descriptions were held such unequivocal expressions of intent as necessarily to control.³¹ However, in direct opposition stand those cases where the general descriptions read "this deed is intended to convey . . .",³² "meaning and intending to convey . . .",³³ "intending to convey the same and identical real estate . . .",³⁴ yet the court decreed that they must yield to prior delineations by metes and bounds.

Numerous cases have involved the construction of deeds whose descriptive language closely paralleled that of the principal case, there being a specific description by metes and bounds followed by a general description of the land as "being all that tract conveyed to [grantor] by" a prior deed whose description embraced additional land beyond that particularly marked off. A majority of those decisions have ruled that the specific description must prevail over the more general one, which is construed to be inserted merely to fortify the preceding description or else to show chain or title, as distinguished from a purpose of fixing boundaries.³⁵ This view is taken by the United States Supreme Court, which interpreted the words "and being" as equivalent to "which is", thus indicating reiteration rather than independent

Civ. App. 440, 118 S. W. 581 (1909); see 2 DEVLIN, DEEDS (3d ed. 1911) §1045; 4 THOMPSON, REAL PROPERTY (1924) §3149.

²⁹ Ousby v. Jones, 73 N. Y. 621 (1878).

³⁰ Plummer v. Gould, 92 Mich. 1 (1892). Accord: Bates v. Foster, 59 Me. 157 (1870); Witt v. St. Paul Ry., 38 Minn. 122, 35 N. W. 862 (1888).

³¹ In Pendrey v. Godwin, 188 Ala. 565, 66 So. 43 (1914), a general clause reading, "And it is understood that the purpose of this conveyance is to convey to P . . . the Jess Myers place, whether the above description is correct or not . . ." controlled the prior particular description. In Flagg v. Bean, 25 N. H. 49 (1852), three parcels were specifically described and then a general clause "meaning to convey all the land I purchased of . . . , referring to their deeds for particulars . . . all land set forth in said deed and no more." Although the general description passed only a one-half undivided interest, it was allowed to prevail.

³² Potter v. Bonner, 174 N. C. 20, 93 S. E. 370 (1917).

³³ Smith v. Sweat, 90 Me. 528, 38 Atl. 554 (1897). Accord: Winn v. Cabot, 35 Mass. 553 (1837).

³⁴ Brunswick Savings Instit. v. Crossman, 76 Me. 577 (1885).

³⁵ Smith v. Sweat, 90 Me. 528, 38 Atl. 554 (1897); Jones v. Webster, 85 Me. 210, 27 Atl. 705 (1892); Brown v. Heard, 85 Me. 294, 27 Atl. 182 (1893); Lovejoy v. Lovett, 124 Mass. 270 (1878); Dow v. Whitney, 147 Mass. 1, 16 N. E. 722 (1888); Everitt v. Thomas, 23 N. C. 252 (1840); Cox v. McGowan, 116 N. C. 131, 21 S. E. 108 (1891); Johnson v. Case, 131 N. C. 491, 42 S. E. 957 (1902); Potter v. Bonner, 174 N. C. 20, 93 S. E. 370 (1917); Von Herff v. Richardson, 192 N. C. 595, 135 S. E. 533 (1926); Cuillers v. Platt, 81 Tex. 258, 16 S. W. 1003 (1891); Cutler Co. v. Barber, 93 Vt. 468, 108 Atl. 400 (1919). Further cases collected in 4 THOMPSON, REAL PROPERTY (1924) §3161, n. 28.

description.³⁶ Yet, there are decisions which, in identically worded deeds, have found a manifest intent that the general description shall control.³⁷ One well-established exception to the general rule is that if the specific description be proven erroneous or void for insufficiency, the general description may then be utilized.³⁸ Clearly illustrative of this principle is *Child v. Fiquet*,³⁹ where the deed read "three parcels of land situated . . ." and then proceeded to specifically mark off only one parcel, but subsequently referred to the land as "being the same conveyed by" a prior deed which covered all three parcels. This general description was held sufficient to pass all three parcels, in accord with the obvious intent of the grantor. Sweeping language found in the decisions of one state would appear to sanction the dominance of a general over a specific description as the rule rather than the exception, but such phraseology is seemingly negated by actual practice.⁴⁰

North Carolina precedents have given close adherence to the general rule.⁴¹ In *Cox v. McGowan*⁴² the specific description embodied more acreage than would have passed under the general description of "being the part of the G. land conveyed to him by G. and containing 87 acres more or less". It was there said: "In doubtful cases the rule that the construction must be favorable to the grantee will prevail . . . but whether a specific description comes before or after a general

³⁶ *Prentice v. Northern Pac. Ry.*, 154 U. S. 163, 14 Sup. Ct. 997, 38 L. ed. 947 (1894).

³⁷ *Boone v. Clark*, 129 Ill. 466, 21 N. E. 850 (1889); *Wuesthoff v. Seymour*, 22 N. J. Eq. 66 (1871); *Adams v. Alkire*, 20 W. Va. 480 (1882). Accord: *Lake Erie & W. Ry. v. Whiten*, 155 Ill. 514, 40 N. E. 1014 (1895).

³⁸ *Campbell v. McArthur*, 9 N. C. 33 (1822) (mistake in a specific description should not defeat the intent of the parties where intent is manifest and a means of correcting the mistake is furnished by reference to another deed); *Ritter v. Barrett*, 20 N. C. 266 (1838); *Crews v. Crews*, 210 N. C. 217, 186 S. E. 156 (1936) (mistake of draftsman); *Weller v. Barber*, 110 Mass. 44 (1872). See cases collected in 2 *DEVLIN, DEEDS* (3d ed. 1911) §1041, n. 3; Note (1931) 72 A. L. R. 410. *Contra*: *Guilmartin v. Wood*, 76 Ala. 204 (1884) (general description forced to yield to erroneous specific description).

³⁹ 4 Me. 471 (1827).

⁴⁰ The following language is found in *Marshall v. McLean*, 3 Iowa 363, 367 (1852): "A particular description should never control a general one unless the object is to render that which is general and uncertain more specific, definite, and certain." In *Barney v. Miller*, 18 Iowa 460, 466 (1865), the court said: "Where a deed . . . contains a general description of the property conveyed which is definite or certain in itself and is followed by a particular description also, such particular description will not limit or restrict . . ."—but "all . . . estate . . . in those lands . . . known as Half Breed Tract" was held *not* to be a sufficiently definite general description. Again in *In re Orwig*, 185 Iowa 913, 167 N. W. 654 (1918), a general designation of "commonly known as no. 1210 Pleasant St." was held not sufficiently certain.

⁴¹ See note 2, *supra*. Also: *Carter v. White*, 101 N. C. 30, 7 S. E. 473 (1888); *Midgett v. Twiford*, 120 N. C. 4, 26 S. E. 626 (1896); *Building & Loan Ass'n v. Bethel*, 120 N. C. 344, 27 S. E. 29 (1897); *Roper Lumber Co. v. McGowan*, 168 N. C. 86, 83 S. E. 16 (1914); *Sugg v. Greenville*, 169 N. C. 606, 86 S. E. 695 (1915); *Ferguson v. Champion Fibre Co.*, 182 N. C. 731, 110 S. E. 220 (1921).

⁴² 116 N. C. 131, 21 S. E. 108 (1891).

designation it must prevail upon the underlying principle that the law will always demand the production of the highest evidence, and as between two descriptions will prefer that which is most certain."⁴³ Again, in *Ferguson v. Champion Fibre Co.*⁴⁴ it was said: "If the first description by metes and bounds does not embrace the *locus in quo*, the second one should not be allowed to control it, and thereby enlarge its boundaries, unless it was the clear, if not manifest, intention of the grantor to do so and to convey lands not covered by the first description." And in that case the general description, by way of reference to a prior deed, was deemed inserted "... merely to repeat the former description, but in different, and as he evidently supposed, plainer and more unmistakable language." In two instances there has been apparent contravention of the general rule, but held justified in order to effectuate the clear and manifest intent of the grantor as expressed in the instrument. In *Dill-Cramer-Truitt Corp. v. Jacksonville Lumber Co.*⁴⁵ the land was generally described as "Town Point Plantation" and then specifically delineated by metes and bounds which failed to include all the tract embraced by "Town Point Plantation", as its boundaries were known to the public. It was held that the particular description was *erroneous* and must yield, heavy reliance being placed on the fact that the land involved had been previously levied upon and advertised for foreclosure sale under the designation of "Town Point Plantation". In *Quelch v. Futch*⁴⁶ the deed contained a specific description followed by a declaration that "the tract hereby conveyed being the same deeded by W. to K. . . ."—the latter deed encompassing land in addition to that particularly described. Such language was held to plainly manifest an intent that the general description prevail over the *erroneous* description by metes and bounds, and thus pass the larger tract. As a process of reasoning, it seems that once the general description is discovered to be clearly and manifestly intended to control then *a fortiori* a conflicting specific description is erroneous. To be distinguished from the problem at hand is the practice of naming or partially describing a tract and then adding "for more specific description reference is hereby made to X deed", in which case the description of the deed referred to will be embodied into the deed in question.⁴⁷

⁴³ Cf. *Reddick v. Leggat*, 7 N. C. 539 (1819). In this case it is said that a particular description may abridge and limit, but not enlarge a general description; vet, illustrations given apparently contradict this rule.

⁴⁴ 182 N. C. 731, 736, 110 S. E. 220, 223 (1921).

⁴⁵ 183 N. C. 660, 112 S. E. 740 (1922).

⁴⁶ 172 N. C. 316, 90 S. E. 259 (1916).

⁴⁷ *Euliss v. McAdams*, 108 N. C. 507, 13 S. E. 162 (1891) ("for more specific description reference is made to . . ."); *Williams v. Bailey*, 178 N. C. 630, 101 S. E. 105 (1919) ("B. Allen place, for a full description of which reference is hereby made to deed from . . . to . . . at . . .").

The instant case is unique in its particular fact situation. The general description of "all those certain lots conveyed to [defendant] . . ." embraces only one of the three lots specifically described but includes two additional lots. The lappage as to number 3 may possibly be explained by the fact that lots 3 and 4 were conveyed to the defendant by a single deed, and thus any reference to the deed passing lot 4 would necessarily include also lot 3. This is apart from the usual case where the general description includes both the land specifically described and also additional land. It lends credence to the majority holding that there is no variance between the two descriptions, but rather that the latter description is independent of and *additional* to the specific description. This conclusion admits application of the rule that where two descriptions can be reconciled, both must stand.⁴⁸ Yet it is significant to note that lots 17 and 18, which were not involved in the present appeal, were included in both the specific and general descriptions. This would seem to weaken considerably the view that the instant deed contains two independent and exclusive descriptions which are not in conflict. Admitting the principle that a grantor's manifest intent, once discovered, must be effectuated even though it contravenes the settled rule that a specific description controls a general one, does such manifest intent appear here? As a matter of form, the language of the instant deed obviously coincides with that of many previous cases which have reached a different conclusion. Yet upon resort to the situation of the parties it appears rather illogical that the defendant should secure a substantial loan by a deed of trust covering his front yard, concrete walk, and only a *fractional* part of his dwelling, especially since his application for a loan was accompanied by a description and photographs of the dwelling. This restricted conveyance results if the specific description alone is allowed to govern. So it seems not unlikely that a consideration of economic factors proved some guide to the court in its ascertainment of intent. And, when it is remembered that cases such as the principal one hinge upon the highly intricate concept of intent and thus depend to a peculiar degree upon the particular facts at hand, then perhaps the instant holding does not too severely affront the past.

JAMES K. DORSETT, JR.

Defamation—Liability of Broadcasting Company for Defamatory Remarks Transmitted over Its Facilities.

Defendant broadcasting company leased its facilities to a commercial advertising company for a series of broadcasts sponsored by a large

⁴⁸ Proctor v. Pool, 15 N. C. 370 (1833); Murphy v. Murphy, 132 N. C. 360, 43 S. E. 922 (1903).

oil corporation. All participants in the program were employed by the advertising company. The principal performer deviated from the script prepared by the advertising company and approved by the radio company, and uttered an extemporaneous remark concerning plaintiff, a hotel, which sued the broadcasting company for defamation. *Held*, conceding the remark to have been defamatory, the defendant was not liable in the absence of negligence on its part.¹

Although there have been but few cases involving this problem, the majority of those decided have held that a broadcasting company is absolutely liable for defamatory remarks broadcast over its facilities.² The theory of this rule is that since a radio, like a newspaper, has the ability to reach vast numbers of people, the liability of a broadcasting company for publishing defamatory remarks should be the same as that of a newspaper. By means of the same analogy, most of the cases have held that defamation by means of radio should be treated as libel rather than slander.³ One case, however, has taken the view that defamatory remarks not actually written in the script are slander,⁴ regardless of the number of people listening. In any event, this distinction affects only the requirements of proof; the only difference is that in an action for slander the plaintiff must show that the remarks are slanderous *per se* or must prove special damages, whereas, if the remarks are treated as libel, no proof of special damages is necessary.

Many writers have criticized⁵ the use of the newspaper analogy in cases involving extemporaneous remarks on the basis of the difference in the two methods of publication. The newspaper publisher has the power and the opportunity to eliminate defamatory material, because all printed matter goes through his hands, or those of agents directly responsible to him, before it is finally published and delivered to the public. The broadcasting company, on the other hand, while it may call for and edit the script of a program, has no way of knowing whether the script will be strictly followed when the program is broadcast, and has no means of keeping the defamatory remark off the air once it has

¹ *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302 (Pa. 1939).

² *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889 (W. D. Mo. 1934); *Sorensen v. Wood*, 123 Neb. 348, 243 N. W. 82 (1932); *Irwin v. Ashurst*, 158 Ore. 61, 74 P. (2d) 1127 (1938) (broadcaster not liable because the speaker had a privilege, but the court approved of the analogy advanced by the *Sorensen* case); *Miles v. Louis Wasmer, Inc.*, 172 Wash. 466, 20 P. (2d) 847 (1933).

³ See cases in footnote 2, *supra*, where the analogy of libel is used both in the determination of the character of the words and in the fixing of the responsibility.

⁴ *Locke v. Gibbons*, 164 Misc. 877, 299 N. Y. Supp. 188 (Sup. Ct. 1937).

⁵ *Guider, Liability for Defamation in Political Broadcasts* (1932) 2 J. RADIO L. 708; *Huston, Liability of Broadcasting Company* (1932) 12 ORE. L. REV. 149; *Nash, The Application of the Law of Libel and Slander to Radio Broadcasting* (1937) 17 ORE. L. REV. 307; *Thornton, Liability of Radio Re-Broadcaster* (1934) 14 ORE. L. REV. 492.

been spoken into the microphone.⁶ For these reasons most writers take the view that although the newspaper publisher should be subjected to liability without fault, the radio company should not be placed under such a strict rule.

It appears that the analogy can be criticized, however, even where the script is checked by the company and strictly followed. In the case of newspaper publishing, the agents of the publisher write the material, and are supposed to write only facts which they have investigated and know to be the truth. Many times, however, as in the instant case, radio script is written by companies not responsible to the broadcasting company, which has no time to ascertain the truth of the remarks.

Several of the critics have offered analogies of their own.⁷ Probably the most widespread is that of the telegraph company. Similarity is said to exist here because the radio company, like the telegraph company, does not have time to examine the submitted material to discover its truth or defamatory character unless the material is clearly defamatory on its face. In the telegraph cases, the company has a privilege to send a defamatory message provided it uses due care in receiving and transmitting the message.⁸ Other analogies offered are those of the news vendor, who is not subjected to liability if he did not know the material contained a libel, and if this ignorance was not due to any negligence on his part,⁹ and the owner of a loudspeaking device set up in public halls, and rented for public addresses,¹⁰ in which case it has been suggested that the newspaper analogy, carried to this extreme, would be absurd. The court in the instant case, while it considered the analogy of the loudspeaker nearest to the problem at hand,¹¹ rejected all these analogies on the ground that none of them were exactly similar to the problem.

The court took the view that the distinctions between libel and slander were inapplicable to radio broadcasting,¹² and seemed to regard defamation by means of radio as a new tort for which there should be

⁶ See Nash, *The Application of the Law of Libel and Slander to Radio Broadcasting* (1937) 17 ORE. L. REV. 307, 311; (1932) 18 CORN. L. Q. 124, 127. *Contra*: Vold, *Defamation by Radio* (1932) 2 J. RADIO L. 673, 682.

⁷ Bohlen, *Fifty Years of Torts* (1936) 50 HARV. L. REV. 725; Nash, *The Application of the Law of Libel and Slander to Radio Broadcasting* (1937) 17 ORE. L. REV. 307.

⁸ *Nye v. Western Union Telegraph Co.*, 104 Fed. 628 (C. C. D. Minn. 1900); *Western Union Telegraph Co. v. Brown*, 294 Fed. 167 (C. C. A. 8th, 1923); see *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302, 309 (Pa. 1939).

⁹ See Bohlen, *Fifty Years of Torts* (1936) 50 HARV. L. REV. 725, 731; *RESTATEMENT, TORTS* (1934) §581, comment *f*.

¹⁰ See Bohlen, *Fifty Years of Torts* (1936) 50 HARV. L. REV. 725, 731.

¹¹ *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302, 309 (Pa. 1939).

¹² *Id.* at 310.

no liability where there was no fault. It was stated that a high standard of care was necessary in order to protect the public, but that this necessity was adequately met by the rigid requirements imposed on radio broadcasting by means of federal statutes.¹³ Moreover, the rule of liability without fault might open the door to frauds against the broadcaster, if an unscrupulous performer should conspire with a listener in order to impose liability on the radio company.¹⁴

Aside from the difference in the methods of publication, there seems to be another reason why broadcasting companies should not be subjected to liability without fault as are newspaper publishers. In most cases of libel published by newspapers, the injured person has no recourse except against the publisher; whereas, in the case of defamation by means of radio, the injured person has a claim against the person uttering the defamatory remarks or against the company that employed him. For these reasons, it seems that the Pennsylvania court has adopted a better rule than that laid down by the courts which have considered the problem heretofore.

The court in the principal case had a greater incentive to lay down a rule of due care than most courts, since in Pennsylvania a newspaper publishing a libel is subjected to this standard and not to the rule of absolute liability.¹⁵ If, however, as most of the courts have held, defamation by means of radio is to be governed by the rules of defamation and not of negligence, it would seem that the radio company should be allowed a privilege similar to that of the telegraph company when, as in the instant case, it has no control over the uttering of the defamatory remark. This rule would accomplish substantially the same result as that laid down by the Pennsylvania court, since the broadcasting company would be protected by the privilege only so long as it exercised due care. Adoption of such a rule would not necessitate a departure from the established rules of defamation, and, thus, would be desirable for those courts which do not wish to make such a departure.

FRANK N. PATTERSON, JR.

Escheat—Jurisdiction of State Court over Funds in Custody of United States Treasury.

The United States District Court for Eastern Pennsylvania ordered payment by the Pennsylvania Railroad Company of certain moneys to petitioners (bondholders).¹ Most, but not all, of the bondholders filed

¹³ 50 STAT. 190, 191 (1937), 47 U. S. C. A. §303 (1937).

¹⁴ See *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302, 311 (Pa. 1939).

¹⁵ *Id.* at 307; *Clark v. North American Co.*, 203 Pa. 346, 53 Atl. 237 (1902).

¹ *Brown v. Pennsylvania Canal Co.*, 229 Fed. 444 (E. D. Pa. 1916), *aff'd*, 235 Fed. 669 (C. C. A. 3d, 1916).

their claims; and the unclaimed moneys were paid into the registry of the court. Later on appeal, the circuit court of appeals denied a petition that the unclaimed moneys be divided *pro rata* among those whose claims had been approved;² and the balance of the fund was transferred to the United States Treasury through the Federal Reserve Bank in Philadelphia.³ The state's petition for the escheat of the fund was denied without prejudice.⁴ In conformity with a state statute,⁵ appellee, Escheator of Pennsylvania, gave notice by publication of his intention to file a plea in the state court. Petition was dismissed, but on appeal to the Pennsylvania Supreme Court this decree was reversed,⁶ and the United States Supreme Court affirmed this judgment.⁷ During the interim the Pennsylvania Railroad Company filed a claim for the moneys, which was denied.⁸ In 1938 appellee filed an amended petition in a federal district court praying for an order directing the payment to appellee of these moneys as to which the escheat had been declared by the state court. This prayer was granted, and the circuit court of appeals now affirms the decree.⁹ The court reasoned that in order for the state court to have jurisdiction, the *res* escheated must have its situs within the territorial limits of the state, but need not actually be seized by the state court or be in its possession. Furthermore, since the United States did not claim the fund, transfer to the United States Treasury did not change the Pennsylvania situs of the fund.

The immediate problem presented by this case is the validity of the state's title under the escheat proceeding in the state court. Consideration of this problem, however, entails discussion of the jurisdiction of a state to escheat intangibles, particularly those in the possession and under the control of the United States Government.

Escheat is an exercise of sovereignty, as distinguished from succession, as to heirs and next of kin.¹⁰ It has been held that the principle of ultimate ownership of everything within the jurisdiction of the sovereign is the basis for the right of escheat.¹¹ Obviously, the jurisdictional question as to immovables is simple; but when it arises with regard to movables, and especially to intangibles, the difficulties are manifest. In a consideration of the jurisdiction of courts to escheat

² *Brown v. Pennsylvania Canal Co.*, 279 Fed. 417 (C. C. A. 3d, 1922).

³ REV. STAT. §996 (1897), 35 U. S. C. §852 (1934). As further involving the application of this statute, see *United States v. Cochrane*, 87 F. (2d) 3 (C. C. A. 5th, 1936).

⁴ *Klein v. Brodbeck*, 15 F. Supp. 473 (E. D. Pa. 1934).

⁵ PA. STAT. (Purdon, 1936) tit. 27 §282.

⁶ *In re Escheat of Moneys in Custody of United States Treasury*, 322 Pa. 481, 186, Atl. 600 (1936).

⁷ *United States v. Klein*, 303 U. S. 276, 58 Sup. Ct. 536, 82 L. ed. 840 (1938).

⁸ *Pennsylvania R. R. v. United States*, 98 F. (2d) 893 (C. C. A. 3d, 1938).

⁹ *United States v. Klein*, 106 F. (2d) 213 (C. C. A. 3d, 1939).

¹⁰ *In re Miner's Estate*, 143 Cal. 194, 76 Pac. 968 (1904).

¹¹ *Klein v. Brodbeck*, 15 F. Supp. 473 (E. D. Pa. 1934).

intangibles it is helpful to consider the related jurisdictional field in garnishments and attachments.

The proceeding in garnishment is often referred to as being *quasi in rem*,¹² although it was originally a proceeding *in rem*.¹³ Thus, as it is now used, the term indicates a process by means of which real and personal property of a debtor, in the hands of a third party, the garnishee, is applied to the payment of debts.¹⁴ Since garnishment is a purely statutory proceeding, its application is limited to those specific instances authorized by statute.¹⁵

Apparently inseparable from the question of jurisdiction is that of situs. Suppose *A*, who is domiciled in North Carolina, owes *B*, who is domiciled in Tennessee, \$500. *B* owes *C*, who is domiciled in North Carolina, \$500. If *C* starts garnishment proceedings, the question to be determined is the situs of the *res* (*A*'s debt to *B*).¹⁶ Cases similar to this one have come before the courts many times. The court's answer to the question settles the problem of jurisdiction. There is a conflict in the decisions that have attempted arbitrarily to give a physical location to an intangible.¹⁷

There is authority to the effect that a debt is garnishable in at least four places: the place of payment;¹⁸ the domicile of the creditor;¹⁹ the domicile of the debtor;²⁰ and wherever the debtor may be found.²¹ In its decision in *Chicago, Rock Island & Pacific Ry. v. Sturm*,²² the United States Supreme Court dealt with the jurisdictional question of power to garnish an indebtedness due a non-resident, who was not

¹² *Pennington v. Fourth Nat. Bank of Cincinnati*, 243 U. S. 269, 37 Sup. Ct. 282, 61 L. ed. 713 (1917); see *Freeman v. Alderson*, 119 U. S. 185, 187, 7 Sup. Ct. 165, 166, 30 L. ed. 372, 373 (1886); GOODRICH, *CONFLICT OF LAWS* (2d ed. 1938) 143.

¹³ Beale, *Jurisdiction in Rem to Compel Payment of Debt* (1913) 27 HARV. L. REV. 107, 118.

¹⁴ *American Cent. Ins. Co. of St. Louis v. Hettler*, 37 Neb. 849, 56 N. W. 711 (1893).

¹⁵ *Siegel, Cooper & Co. v. Schueck*, 167 Ill. 522, 47 N. E. 855 (1897).

¹⁶ MINOR, *CONFLICT OF LAWS* (1901) 286; STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* (1937) 102.

¹⁷ Note (1928) 27 MICH. L. REV. 207, 575.

¹⁸ *Atchison, T. & S. F. R. R. v. Maggard*, 6 Colo. App. 85, 39 Pac. 985 (1895); STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* (1937) 102.

¹⁹ *Central Trust Co. of N. Y. v. Chattanooga, R. & C. R. R.*, 68 Fed. 685 (E. D. Tenn. 1895); *Louisville & N. R. R. v. Nash*, 118 Ala. 477, 23 So. 825 (1898); *Central of Ga. Ry. v. Brinson*, 109 Ga. 354, 34 S. E. 597 (1899); *Johnson v. Central of Ga. Ry.*, 110 Ga. 303, 34 S. E. 1002 (1900); *Beasley v. Lennox-Haldeman Co.*, 116 Ga. 13, 42 S. E. 385 (1902). Accord: *Bullard v. Cameron*, 61 Neb. 83, 84 N. W. 604 (1900). But see *RESTATEMENT, CONFLICT OF LAWS* (1934) §108.

²⁰ *Swedish Am. Bank v. Bleecker*, 72 Minn. 383, 75 N. W. 740 (1898); *Berry v. Davis*, 77 Tex. 191, 13 S. W. 978 (1890); *Bragg v. Gaynor*, 85 Wis. 468, 55 N. W. 919 (1893).

²¹ *Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. ed. 1023 (1905).

²² 174 U. S. 710, 19 Sup. Ct. 797, 43 L. ed. 1144 (1899).

under the jurisdiction of the court, by resting the power upon the control which the court had over the debtor.²³ The Court rejected as too indefinite the idea that a debt has its situs where it is to be paid. In another case, decided during the same year as the *Sturm* case, the Court held that notice by publication to a non-resident creditor was sufficient.²⁴ And finally, in the famous case of *Harris v. Balk*,²⁵ the Supreme Court decided that a debt may be garnished at any place in which the debtor may be sued and that such proceedings are entitled to recognition in other jurisdictions under the full faith and credit clause.²⁶

It is submitted that the most logical and reasonable view is that jurisdiction depends upon the ability to serve process within the territorial limits of the state upon the garnishee of the absent creditor. The United States Supreme Court has held that the only essentials to the exercise of the power of the states to seize tangible and intangible property, in order to satisfy the obligations of absent owners, are the presence of the *res*, its seizure at the commencement of the proceedings, and the opportunity of the owner to be heard.²⁷ It seems obvious, therefore, that the real basis of jurisdiction for garnishment is the control which the court can exercise over the *res* or over the garnishee.²⁸

Although the majority rule seems to be that the contents of safety deposit boxes may be levied upon, attached, or garnished,²⁹ with regard to national banks, a federal statute prohibiting attachment was interpreted to include garnishment against such a bank as a principal defendant.³⁰ There is a split of authority in the federal courts as to whether government-controlled corporations should be subject to gar-

²³ In this case *Sturm* sued the railway company in Kansas for wages due, and recovered the full amount. The company appealed and set up the fact that in Iowa a creditor of *Sturm* had sued him and garnished the company there for the wages sought to be recovered in the present suit. Further, this suit was still pending in Iowa. Judgment was rendered for *Sturm*. On appeal to the United States Supreme Court, it was held that the Iowa court had jurisdiction and that the Kansas courts did not give to the Iowa proceedings the faith and credit to which they were entitled in Kansas.

²⁴ *King v. Cross*, 175 U. S. 396, 20 Sup. Ct. 131, 44 L. ed. 211 (1899).

²⁵ 198 U. S. 215, 25 Sup. Ct. 625, 49 L. ed. 1023 (1905). Beale, in *Jurisdiction in Rem to Compel Payment of Debt* (1913) 27 HARV. L. REV. 107, 119, criticizes the result of these cases. He argues that the decision in the *Sturm* case was the product of faulty reasoning, and that consequently, in *Harris v. Balk* the holding was not compatible with the nature of garnishment as a *quasi-in-rem* proceeding.

²⁶ U. S. CONST. Art. IV. §1.

²⁷ *Pennington v. Fourth Nat. Bank of Cincinnati*, 243 U. S. 269, 37 Sup. Ct. 282, 61 L. ed. 713 (1917).

²⁸ Beale, in *Jurisdiction in Rem to Compel Payment of Debt* (1913) 27 HARV. L. REV. 107, 109, suggests that possession by the debtor of property which can be reached by the court is the basis of jurisdiction.

²⁹ *Farmers' Savings Bank of Hartwick v. Roth*, 195 Iowa 185, 191 N. W. 987 (1923); *State ex rel. Rabiste v. Southern*, 300 Mo. 417, 254 S. W. 166 (1923).

³⁰ *Posselius v. First Nat. Bank*, 264 Mich. 687, 251 N. W. 429 (1933).

nishment,³¹ but the various governmental units and their agencies are usually exempt.³²

Although escheat is not wholly a statutory creation, as is garnishment, still its operation is regulated by statute, and in some states a judicial proceeding is necessary.³³ Each state has the power to determine the procedure necessary to enforce its right of escheat, which includes the establishment of a time limit within which the property must be claimed by the heirs, and the final disposition of the property once it has passed to the state.³⁴

The Supreme Court in *United States v. Klein*³⁵ expressly reserved opinion on the questions of the effect on the state court's decree of the absence of the fund from the state, and the absence or non-residence of the unknown claimants. If the rules of the law of garnishment were applied to the issues raised by the principal case, the following results might be reached. Although the United States is not a debtor for the amount, the funds are held in the Treasury. These funds are to be paid to the proper persons on order of the district court.³⁶ Thus the place of payment is Pennsylvania and according to the courts that follow this view, the courts of the place of payment have jurisdiction over the debt. A more difficult situation is presented when the "domicile of the creditor" rule is applied. One of the issues of the case is the domicile of the missing bondholders, and to attempt to answer the problem by assigning them a domicile would be merely to hazard a guess. Assuming for the purposes of analogy that the United States occupies a position similar to that of the debtor in the garnishment cases, it is obvious that the domicile of the debtor view cannot be adopted here, since the United States Government has no domicile.³⁷ If the rule as announced in *Harris v. Balk*³⁸ is followed, the debt may be attached wherever the debtor may be found. The conclusion reached in the garnishment cases is that the real basis for jurisdiction for garnishment is

³¹ *Commonwealth Finance Corp. v. Landis*, 261 Fed. 440 (E. D. Pa. 1919); *McCarthy v. United States Shipping Board Merchant Fleet Corp.*, 53 F. (2d) 923 (App. D. C. 1931); *Haines v. Lone Star Shipbuilding Co.*, 268 Pa. 92, 110 Atl. 788 (1920); 275 Pa. 260, 118 Atl. 909 (1922); Schnell, *Federally Owned Corporations and Their Legal Problems* (1936) 14 N. C. L. Rev. 238, 261.

³² *State ex rel. Arkansas Construction Comm. v. Toler*, 188 Ark. 1082, 69 S. W. (2d) 394 (1934); *White v. Wright*, 151 Okla. 93, 1 P. (2d) 668 (1931).

³³ *Louisville School Board v. King*, 127 Ky. 824, 107 S. W. 247 (1908); *State v. Kearns*, 79 Mont. 299, 257 Pac. 1002 (1927); *Delaney v. State*, 42 N. D. 630, 174 N. W. 290 (1919).

³⁴ *Re Apostolopoulos*, 68 Utah 344, 250 Pac. 469 (1926).

³⁵ 303 U. S. 276, 58 Sup. Ct. 536, 82 L. ed. 840 (1938).

³⁶ Rev. Stat. §996 (1897), 35 U. S. C. §852 (1934).

³⁷ As was pointed out in *Orinoco Iron Co. v. Metzel*, 230 Fed. 40 (C. C. A. 6th, 1916), the jurisdiction of the federal courts in the administration of the federal law is co-extensive with the United States. It seems that in very much the same manner, the domicile of the Federal Government would be co-extensive with the territorial limits of the country.

³⁸ 198 U. S. 215, 25 Sup. Ct. 625, 49 L. ed. 1023 (1905).

the possession by the debtor of property that can be reached by the court. If there is strict adherence to the technical interpretation of "situs", there are two possibilities.

The money may actually have been transferred to the United States Treasury in Washington, and in that event, its situs would be in the District of Columbia. It is more likely, however, that the money or fund was transferred to the Federal Reserve Bank in Philadelphia and there credited to the account of the Treasury. If this be true, the "money" (*i.e.*, the deposit account) never left the territorial jurisdiction of the state courts. But we have seen that national banks are not subject to state escheat statutes and that usually federal agencies are not subject to attachment and garnishment. Since accessibility of the property to the court seems to be the real basis of jurisdiction, it reasonably follows that the state court does not have the requisite control over the money (deposit account), although it is within the limits of the state. On the other hand, the Supreme Court, in its decision in *United States v. Klein*,³⁹ held that the jurisdiction of the federal court over the money is exclusive only in so far as is necessary for the appropriate disposition of the property. It is submitted, therefore, that since the United States is merely a stakeholder, it has no standing to appeal from the district court's order of payment.⁴⁰ For purely practical, non-legalistic reasons, it seems that the decision is correct, since the possibility of the necessary claims being filed by the remaining bondholders is slight; and since the Federal Government cannot escheat the fund, the state should have it.

VIRGINIA EMERSON LEWIS.

Injunction—Restraint against Defamation of a Commercial Product.

Plaintiff company is engaged in the business of motion picture production and distribution. It goes to large expense to furnish meritorious and attractive advertisements for display by its exhibitors. Exhibitors of plaintiff's pictures are required by contract to advertise them as "A Paramount Picture". Defendant, without the consent of the plaintiff, manufactured and sold to these exhibitors deceptive, grotesque, and erroneous displays to be used as advertisements of plaintiff's pictures. These displays also failed to identify the pictures as "A Paramount Picture". Plaintiff, alleging that the exhibitors' use of such advertising brought discredit to its pictures, impaired its good will and injured its business, and tended to induce a breach of contract

³⁹ 303 U. S. 276, 58 Sup. Ct. 536, 82 L. ed. 840 (1938).

⁴⁰ Brief for Appellees, p. 20, *United States v. Klein*, 106 F. (2d) 213 (C. C. A. 3rd, 1939).

with plaintiff, sought to enjoin the defendant from continuing the manufacture and sale of such displays. *Held*, the complaint stated a cause of action for injunction against defamation of the plaintiff's commercial product.¹

The American courts still subscribe to the rule that injunction will not be granted against libel or slander.² This is because of a now out-moded idea that equity does not protect interests of personality,³ of an over-literal conception of freedom of speech and press,⁴ of the desirability of a jury's verdict on such issues of fact as truth or malice,⁵ and of certain difficulties of drafting and enforcing the decree with justice and efficiency.⁶ The rule is strictly applied in the field of personal defamation.⁷ In the case of defamation of a business or of a commercial product, however, injunctive relief is allowed without consideration of the above-mentioned policy factors upon which the rule is supposed to be based.

In these situations, the courts have made exceptions by seizing some accepted head of equity jurisdiction and enjoining libel or slander as an incident of it. The principal exception occurs in cases involving interference with a plaintiff's business in such a manner as to constitute unfair competition. There, equity will not hesitate to enjoin the defendant's acts, even though they constitute the publication of a libel or slander.

One of the most common situations involving unfair competition is that in which a defendant circulates to a plaintiff's customers letters or circulars defamatory of the plaintiff's business. If such publications merely advise a customer not to deal with the plaintiff, and leave him free to make up his own mind, the libel will not be restrained.⁸ But, if the defendant's representations threaten, coerce, or intimidate the

¹ *Paramount Pictures Inc. v. Leader Press Inc.*, 106 F. (2d) 229 (C. C. A. 10th, 1939). (The court relied upon the treatment of defamatory disparagement of property in *RESTATEMENT, TORTS* (1938) §§626, 629).

² *Francis v. Flinn*, 118 U. S. 385, 6 Sup. Ct. 1148, 30 L. ed. 165 (1886); *Balliet v. Cassidy*, 104 Fed. 704 (C. C. D. Ore. 1900); *Robert E. Hicks Corp. v. National Salesmen's Training Ass'n*, 19 F. (2d) 963 (C. C. A. 7th, 1927); *Dehydro Inc. v. Tretolite Co.*, 53 F. (2d) 273 (N. D. Okla. 1931); *Lietzman v. Radio Broadcasting Station*, 282 Ill. App. 203 (1935); *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69 (1873); *William E. Whitehead v. Kitson*, 119 Mass. 484 (1876); *Covell v. Chadwick*, 153 Mass. 263, 26 N. E. 856 (1891); *Wolf v. Harris*, 267 Mo. 405, 184 S. W. 1139 (1916); *Brandreth v. Lance*, 8 Paige 24 (N. Y. 1839); *Marlin Firearms Co. v. Shields*, 171 N. Y. 384, 64 N. E. 163 (1902); *DeWick v. Dobson*, 18 App. Div. 399, 46 N. Y. Supp. 390 (2d Dep't 1897); *Yood v. Daly*, 37 Ohio App. 574, 174 N. E. 779 (1930).

³ *RESTATEMENT, TORTS* (1939) §937, comment *a*. See Pound, *Equitable Relief Against Defamation* (1916) 29 HARV. L. REV. 640.

⁴ *RESTATEMENT, TORTS* (1939) §942, comment *d*.

⁵ *Id.* §933(2), comment *c*. ⁶ *Id.* §943, comment *b*.

⁷ *Id.* §942, comment *d*.

⁸ *Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co.*, 171 Fed. 553 (C. C. M. D. Ala. 1909); *American Malting Co. v. Keitel*, 209 Fed. 351 (C. C. A. 2d, 1913).

customers or the public to the injury of the plaintiff's business, an injunction will issue.⁹ Similarly, where a conspiracy to destroy a plaintiff's business, as by boycott, is effected by means of libelous or slanderous publications, such publications will be enjoined.¹⁰ Recent decisions, however, indicate that if the libel is pleaded, not as a libel, but as a continuing damage to a business, the injunction will be allowed,¹¹ regardless of unfair competition or conspiracy.¹²

A closely related situation is that in which the plaintiff asks an injunction to restrain defendant from sending circulars or making defamatory statements threatening plaintiff or his customers with suits on the false ground that the plaintiff is infringing a patent or trademark of the defendant. These publications, if made under an honest belief and with an intent to bring such suits, cannot be enjoined.¹³ However, if the defendant's representations are made in bad faith for the purpose of injuring plaintiff's business, and amount to attempted intimidation of the plaintiff's customers, by maliciously threatening them with suits which the defendant has no intention of prosecuting, the injunction will be granted.¹⁴ Such bad faith may be shown by the defendant's unreasonable delay in bringing the suit,¹⁵ or by the bringing of suit and the voluntary dismissal thereof.¹⁶

⁹ *Beck v. Railway Teamsters Protective Union*, 118 Mich. 497, 77 N. W. 13 (1898); see *Willis v. O'Connell*, 231 Fed. 1004, 1014 (S. D. Ala. 1916); *Yood v. Daly*, 37 Ohio App. 574, 576, 174 N. E. 779 (1930).

¹⁰ *Casey v. Cincinnati Typographical Union*, 45 Fed. 135 (C. C. S. D. Ohio 1891); *Chamber of Commerce v. Federal Trade Comm.*, 13 F. (2d) 673 (C. C. A. 8th, 1926); *Grand Rapids School Furniture Co. v. Haney School Furniture Co.*, 92 Mich. 558, 52 N. W. 1009 (1892); cf. *Gibraltar Savings Ass'n v. Isbell*, 101 S. W. (2d) 1029 (Tex. Civ. App. 1937).

¹¹ *Dehydro Inc. v. Tretolite Co.*, 53 F. (2d) 273 (N. D. Okla. 1931); *Old Investors & Traders Corp. v. Jenkins*, 133 Misc. 213, 232 N. Y. Supp. 245 (Sup. Ct. 1928); see (1938) 38 Col. L. Rev. 1291.

¹² See *Menard v. Houle*, 11 N. E. (2d) 436, 437 (Mass. 1937).

¹³ *Kidd v. Horry*, 28 Fed. 773 (C. C. E. D. Pa. 1886); *Kelley v. Ypsilanti Dress-Stay Mfg. Co.*, 44 Fed. 19 (C. C. E. D. Mich. 1890); *New York Filter Co. v. Schwarzwald*, 58 Fed. 577 (C. C. S. D. N. Y. 1893); *Welsbach Light Co. v. American Incandescent Lamp Co.*, 99 Fed. 501 (C. C. S. D. N. Y. 1899); *Warren Featherbone Co. v. Landauer*, 151 Fed. 130 (C. C. E. D. Wis. 1903); *Adriance Platt & Co. v. National Harrow Co.*, 121 Fed. 827 (C. C. A. 2d, 1903); cf. *Palmer v. Travers*, 20 Fed. 501 (C. C. S. D. N. Y. 1884).

¹⁴ *Emack v. Kane*, 34 Fed. 46 (C. C. N. D. Ill. 1888); *Adriance Platt & Co. v. National Harrow Co.*, 98 Fed. 118 (C. C. S. D. N. Y. 1899); *A. B. Farquhar Co. v. National Harrow Co.*, 102 Fed. 714 (C. C. A. 3d, 1900); *Adriance Platt & Co. v. National Harrow Co.*, 121 Fed. 827 (C. C. A. 2d, 1903); *Racine Paper Goods Co. v. Dittgen*, 171 Fed. 631 (C. C. A. 7th, 1909); *Electric Renovator Mfg. Co. v. Vacuum Cleaner Co.*, 189 Fed. 754 (C. C. W. D. Pa. 1911); *Atlas Underwear Co. v. Cooper Underwear Co.*, 210 Fed. 347 (E. D. Wis. 1913). But cf. *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69 (1873); *William E. Whitehead v. Kitson*, 119 Mass. 484 (1876).

¹⁵ *Racine Paper Goods Co. v. Dittgen*, 171 Fed. 631 (C. C. A. 7th, 1909); *Electric Renovator Mfg. Co. v. Vacuum Cleaner Co.*, 189 Fed. 764 (C. C. W. D. Pa. 1911); *Atlas Underwear Co. v. Cooper Underwear Co.*, 210 Fed. 347 (E. D. Wis. 1913).

¹⁶ *Emack v. Kane*, 34 Fed. 46 (C. C. N. D. Ill. 1888); *Adriance Platt & Co. v. National Harrow Co.*, 121 Fed. 827 (C. C. A. 2d, 1903).

Similarly, acting under the guise of repressing unfair competition,¹⁷ or under the power that equity has to prevent its decrees from becoming the instrumentalities of injustice,¹⁸ the courts will issue an injunction in cases where there is a distribution of circulars misrepresenting the scope or effect of a court's decree concerning patent rights, to the detriment of the plaintiff's business.¹⁹

Libelous publications inducing a breach of contract furnish another principal exception to the general rule. So, where the defendant caused the publication of matter allegedly injurious to plaintiff's business, which contained, among other things, advice to the plaintiff's customers not to perform their contracts, the entire publication was enjoined,²⁰ although the decree could have been limited to only that part of the publication inducing the breach of contract.²¹

In contrast to the American rule, English courts grant injunctions against both personal and commercial defamation as such,²² but only in cases where the publication is clearly tortious,²³ to wit: (1) where a jury's verdict that the publication was not libelous would be set aside;²⁴ (2) where there is no element of privilege;²⁵ and (3) where the court is satisfied that the defendant cannot justify his acts.²⁶

The principal case swings to the English rule. It would be fortunate if American courts generally would follow this lead and enjoin

¹⁷ *Gerosa v. Apco Mfg. Co.*, 299 Fed. 19 (C. C. A. 1st, 1924); *Price-Hollister Co. v. Warford Corp.*, 18 F. (2d) 129 (S. D. N. Y. 1926).

¹⁸ *Asbestos Shingle, Slate & Sheathing Co. v. Johns-Mansville Co.*, 189 Fed. 611 (C. C. S. D. N. Y. 1911); *Rollman Mfg. Co. v. Universal Hardware Works*, 238 Fed. 568 (C. C. A. 3d, 1916).

¹⁹ *Adjusta Co. v. Alma Mfg. Co.*, 36 F. (2d) 105 (S. D. N. Y. 1929); *Gardner Sign Co. v. Claude Neon Lights*, 36 F. (2d) 827 (W. D. Pa. 1929); cf. *Hobbs Mfg. Co. v. Gooding*, 113 Fed. 615 (C. C. A. 1st, 1902); *Grand Rapids School Furniture Co. v. Haney School Furniture Co.*, 92 Mich. 558, 52 N. W. 1009 (1892). See *Hoover Co. v. Sesquicentennial Exhibition Ass'n*, 26 F. (2d) 821, 822 (E. D. Pa. 1928).

²⁰ *American Malting Co. v. Keitel*, 209 Fed. 351 (C. C. A. 2d, 1913).

²¹ *Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co.*, 171 Fed. 553 (C. C. M. D. Ala. 1909).

²² For a discussion of the English rule, see (1935) 80 L. J. 146. American courts recognize the English position as based on statute. See *Kidd v. Horry*, 28 Fed. 773, 774 (C. C. E. D. Pa. 1886); *A. Hollander & Son, Inc. v. Joseph Hollander, Inc.*, 117 N. J. Eq. 578, 583, 177 Atl. 80, 82 (1935). But see Pound, *Equitable Relief Against Defamation* (1916) 29 HARV. L. REV. 640 at 665, in which Dean Pound states that the Common Law Procedure Act of 1854 and the Judicature Act of 1873 afford very little foundation for the extension of jurisdiction. He says the real reason was the desire of the judges "to put equitable relief against defamation on a sound basis".

²³ *James v. James*, 13 L. R. Eq. 421 (1872); *Thorley's Cattle Food Co. v. Massan*, 14 Ch. D. 763 (1880); *Thomas v. Williams*, 14 Ch. D. 864 (1880); *Herman Loog v. Bean*, 26 Ch. D. 306 (1884); *Hayward v. Hayward*, 34 Ch. D. 198 (1887); *Walter v. Ashton*, [1902] 2 Ch. 282.

²⁴ *Coulson v. Coulson*, 3 T. L. R. 846 (1887).

²⁵ *Quartz Hill Consol. Gold Mining Co. v. Beall*, 20 Ch. D. 501 (1882).

²⁶ *Bonnard v. Perryman*, [1891] 2 Ch. 269.

clearly libelous publications simply because they are defamatory, without regard to their incidental connection with other tortious conduct, or to subterfuges in pleading. The extent to which such libelous publications are actually enjoined under the exceptions mentioned casts doubt upon the significance of the factors which are supposed to justify the rule that equity will not enjoin a libel or slander.²⁷ In these commercial cases the interest to be protected is not one of personality but a substantial interest in property. The right of freedom of speech should not serve as a shield for tortious harm to private interests. The lack of issues of fact makes jury trial unnecessary. And the problems of drafting and enforcing the decree seem not to have been insurmountable.

J. B. CHESHIRE, IV.

Liability Insurance—Successive Insurers—Apportionment of Loss—Applicability of Fire and Marine Insurance Principles.

Libellant ship owner was insured against loss arising from liability for damage to cargo¹ under two similar policies with different insurers, one policy expiring, and the other becoming effective, in the middle of the voyage. As a result of negligent stowage, a shipment of tobacco was, unknown to the libellant, damaged by moisture and heat, 26% of the damage occurring, according to one witness, during the period covered by the first policy, and 74% during the period covered by the second policy. After having settled the claims of the owners of the tobacco, the libellant sued the two insurers to recover the amount paid. The district court held the first insurer liable for the entire amount,² while the circuit court of appeals, one judge dissenting, apportioned the loss between the two insurers according to testimony as to the amount of damage which had been done to the cargo during the time that each policy was in force.³

As a general premise it may be said that unless the event insured against, whatever it may be, occurs during the term of the policy, the

²⁷ See notes 2-7, *supra*. See *Artloom Corp. v. National Better Business Bureau Inc.*, 48 F. (2d) 897, 898 (S. D. N. Y. 1931).

¹ The contracts provided that the insurers were to "... make good to the Assured ... all such loss and/or damage and/or expense, as the Assured, without their privity or knowledge, shall ... have become liable to pay ... on account of the liabilities, risks, events and/or happenings herein set forth:" One of the categories enumerated was: "(8) Liability for loss of, or damage to ... cargo ... to be carried, carried, or which has been carried on board the vessel named herein:" Brief for Libellants-Appellees-Appellants, p. 3, *Export Steamship Corp. v. American Ins. Co.*, 106 F. (2d) 9 (C. C. A. 2d, 1939).

² *Export Steamship Corp. v. American Ins. Co.*, 26 F. Supp. 79 (S. D. N. Y. 1938).

³ *Export Steamship Corp. v. American Ins. Co.*, 106 F. (2d) 9 (C. C. A. 2d, 1939).

insurer will not be liable.⁴ In the principal case the insured event was loss arising from liability. In a sense, there was no loss until the insured carrier paid damages to the shipper; but the courts do not give such a narrow interpretation to these contracts,⁵ and all the judges considering this case agreed that the loss was to be regarded as complete when the liability accrued.⁶ The insured event, then, being loss by accrual of liability, and the injury causing the loss being a continuing one operating constantly to increase the loss over a considerable period beginning before, and ending after, the expiration of the policy in question, it becomes necessary to determine how much of the accrual of liability is to be ascribed to the term of the policy.

The court divided on the question as to when the liability accrued. The majority opinion took the position that the accrual of liability on the facts presented was a gradual matter, and that as the damage to the tobacco increased day by day, so did the liability of the shipowners. This would mean that, although the first indication of damage would make the insured liable to the extent of that damage, further damage would raise a new and greater liability.⁷ Since some of the liability accrual in the principal case occurred during the term of one insurer and some during the term of another, it may be said that the shipper's loss, the insured event, occurred during the terms of both. It would seem, then, following the general premise with which we started, that the loss should be apportioned.

The dissenting opinion, however, took the view that once the tobacco showed any damage at all, the shipowners then became liable, and that all subsequent damage was merely the inevitable result or consequence of the original negligence which caused the first damage,

⁴ Kelly, *Dempsey Co. v. Century Indemnity Co.*, 77 F. (2d) 85 (1935); *Tulare County Power Co. v. Pacific Surety Co.*, 43 Cal. App. 315, 185 P. 399 (1919); *Coit v. Smith*, 3 Johns. Cas. 16 (N. Y. 1802); *Duncan v. Great Western Ins. Co.*, 1 Abb. App. Dec. 562 (N. Y. 1867), *aff'd* *Crosby v. New York Mutual Ins. Co.*, 5 Bos. 369 (N. Y. 1859); *Howell v. Knickerbocker Life Ins. Co.*, 44 N. Y. 276 (1871); *Howell v. Protection Ins. Co.*, 7 Ohio 284 (1835); *Lockyer v. Offley*, 1 Term Rep. 252 (K. B. 1786); *Hare v. Travis*, 7 B. & C. 14 (K. B. 1827); *Knight v. Faith*, 15 Q. B. 649 (1850).

⁵ There is a difference between a "liability" policy of insurance and an "indemnity" policy. The former insures against liability and does not call for payment of a judgment as a condition precedent to recovery from the insurer, whereas the indemnity contract is one which only insures against loss, and the judgment must be paid before recovery can be had. *Boney v. Central Mutual Ins. Co. of Chicago*, 213 N. C. 470, 196 S. E. 837 (1938); VANCE, *LAW OF INSURANCE* (1930) 682-684; note (1926) 41 A. L. R. 509.

⁶ "We take it that in a time policy insuring against loss arising from legal liability, the insurer is bound to make the insured whole on losses due to liabilities that accrued against the insured during the term covered by the policy." *Export Steamship Corp. v. American Ins. Co.*, 106 F. (2d) 9, 10, 12 (C. C. A. 2d, 1939).

⁷ *Cf. Hare v. Travis*, 7 B. & C. 14 (K. B. 1827) (cargo of pearl ashes damaged from water shipped due to heavy seas, damage occurring over period of time).

so that the whole of the accumulated liability should be regarded as having occurred at the inception of the accumulation.⁸

The court in the principal case was, no doubt, handicapped in its opinion by an extreme paucity of cases on the precise point in question. The problem was further complicated by the existence of two successive insurers, a situation which seems to have arisen so seldom in any field of insurance as to make it practically a new point. As a result of this lack of authority, the court was driven, as was the dissenting judge, to draw analogies from the cases in other fields of insurance, such as fire, accident, and marine. The life insurance cases do not present the problem involved in the principal case since the fact on which payment by the insurer depends is the occurrence of the death of the insured, which happens at one moment of time and cannot extend over a length of time.⁹

The property loss cases may be divided on their facts into two classes, similar to the court's division in the principal case as to the time of accrual of liability—those where the cause of loss specified in the contract of insurance is a "momentary" cause, setting forces in operation, and all subsequent events which may be considered loss insured by the policy are merely the proximate results of the "momentary" operation of this cause; and those where the cause insured against continues over a period of time, no insured loss resulting until the property insured comes in contact with this "continuing" cause, the cause and the loss thus being concurrent.

In collision, explosion, and certain types of marine insurance the insured event is damage or loss resulting from the occurrence of these causal events.¹⁰ In any such insurance contract the specified cause of the loss insured against is "momentary".¹¹ It may be that, upon the

⁸ Cf. *Corporation of the Royal Exchange Assurance v. United States*, 75 F. (2d) 478 (C. C. A. 2d, 1935) (insurance against liability for non-delivery held matured when delivery became impossible, although amount of damage could not be determined at that time).

⁹ See *Howell v. The Knickerbocker Life Ins. Co.*, 44 N. Y. 276, 277 (1871).

¹⁰ The British Marine Insurance Act, 1906, 6 Edw. VII, c. 41, §1 defines a contract of marine insurance as "... a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses. . . ." The term is usually limited by dates or by the duration of the voyage. See PATTERSON, *CASES AND MATERIALS ON INSURANCE* (1932), Appendices D and E.

¹¹ Accident insurance, including workmen's compensation insurance, should fall in this category. In this type of insurance, however, the insured event is the accident, rather than the loss resulting therefrom—that is, the time limit of the policy applies to the occurrence of the accident, the company agreeing to pay for all proximate results. A typical policy reads: "One (a) to pay promptly to any person entitled thereto under the Workmen's Compensation Law . . . the entire amount of any sum due, and all installments thereof as they become due. . . . Seven. This agreement shall apply only to such injuries so sustained by reason of accidents occurring during the policy period." The case of *Treadwell v. Columbia Casualty Co.*, 167 So. 103 (La. App. 1936), arose under a statutory policy similar in terms to that just quoted. The court in *Phillips v. Holmes*

termination of such a risk, damage not yet suffered is, practically speaking, inevitable as a result of the occurrence of the specified momentary cause of loss.¹² This situation has given rise to the "death wound" rule of marine insurance, that if a ship receives its death wound during the term of the policy and is subsequently lost after the policy expires, the loss will be treated as occurring during the term of the insurance, since it was practically inevitable that total loss should result from the death wound.¹³ The element of inevitability must be present, however.¹⁴ This rule is based on a legal fiction that an inevitable "damage begun is a damage done".¹⁵ Its theory is that if the damage which ultimately results may be treated as inevitable, it can be said to have occurred at the time of its inception, thereby satisfying all the time elements of the insurance contract.¹⁶

In cases where property is insured against fire, tornado, hail, storms, etc., the insured event is damage or loss due to the operation of the cause insured against.¹⁷ But here the factual situation is slightly different. The cause in this case is "continuing", and there is, in fact, no actual damage of any part of the property until it has come in contact with the particular force insured against.¹⁸ This being the case, if the fire or whatever the insured cause is, extends beyond the period of the insurance, not only has the term expired before part of the loss itself occurred, but even before the cause of that part of the loss has occurred, which was not the situation in the marine insurance cases re-

Express Co., 229 N. Y. 527, 129 N. E. 901 (1920), reached a similar result, probably also because of the terms of the policy which are not given. Cf. Anderson v. Babcock & Wilcox Co., 256 N. Y. 146, 175 N. E. 654 (1931).

¹² Corporation of the Royal Exchange Assurance v. United States, 75 F. (2d) 478 (C. C. A. 2d, 1935), cited *supra* note 8; 5 COUCH, CYCLOPEDIA OF INSURANCE LAW (1929) 1213.

¹³ Coit v. Smith, 3 Johns. Cas. 16 (N. Y. 1802); Duncan v. Great Western Ins. Co., 1 Abb. App. Dec. 562 (N. Y. 1867), *aff'g* Crosby v. New York Mutual Ins. Co., 5 Bos. 369 (N. Y. 1859); Shawe v. Felton, 2 East 109 (K. B. 1801); see Knight v. Faith, 15 Q. B. 649, 660 (1850) for discussion of the case history of the rule; 1 PHILLIPS, LAW OF INSURANCE (3d ed. 1853), 684, 686; 7 COUCH, CYCLOPEDIA OF INSURANCE LAW (1929) §§1699, 1700. *Contra*: Howell v. Protection Ins. Co., 7 Ohio 284 (1835).

¹⁴ 5 COUCH, CYCLOPEDIA OF INSURANCE LAW (1929) §1213.

¹⁵ Rochester German Ins. Co. v. Peaslee-Gaulbert Co., 120 Ky. 752, 767, 87 S. W. 1115, 1119 (1905).

¹⁶ So long as the cause begins and ends during the policy period and damage starts, this insured cause need not be strictly "momentary", but may continue over a period of time, the treatment of the events subsequent to the *cessation* of the effective or original cause being the same as if it had operated all at one moment of time.

¹⁷ The New York and North Carolina Standard Fire Policies insure against "all Direct Loss and Damage by Fire" during a stated term. N. Y. INS. LAW §121; N. C. CODE ANN. (Michie, 1939) §6437.

¹⁸ Cf. Liverpool, London & Globe Ins. Co. v. McFadden, 170 Fed. 179 (C. C. A. 3d, 1909) (insurance against loss of cotton by fire, and during fire cotton prices rose, *held*, the time for valuing the cotton was when the fire reached and consumed it).

ferred to above. But as a practical matter, once the cause starts to operate, it is an impossibility to bring it under complete control so as to stop the resulting damage at will. The results are, therefore, practically inevitable. For this reason the rule applied in such cases, most frequently found in the fire insurance field, is adapted from the marine insurance rule.¹⁹ It apparently is not necessary for the proximate results to be in fact inevitable, the rule being that once a fire starts, *since* the subsequent loss is practically inevitable the insurer on the risk at the time will be liable for the entire damage if it is a continuous fire,²⁰ although some of the fire may occur after the end of the term.²¹

It is submitted that the application of these rules does violence not only to the facts of the case, but likewise to the terms of the insurance contract. Perhaps not so much violence is done in the "momentary" cause cases as is true in the "continuing" cause classification, for the reason that in the former the two facts determinative of liability have occurred during the term—that is, the cause of loss has been completed and loss, the insured event, has started; but in the latter, not only has part of the loss, the insured event, not yet occurred, but also part of the cause has yet to take direct effect. Looking at the contract, if the time limit applies only to the occurrence of the casual event, as possibly in the case of accident insurance,²² then if that has transpired completely during the term, the insurer might reasonably be held liable for all the proximate results. If, however, the insured event is merely the occurrence of loss, it is certainly a violation of the terms of the contract to hold the insurer for loss occurring outside of the period, even though the occurrence of the cause before the policy term would make no difference.²³ If the time limit applies to both cause and loss, the insurer's liability would seem to be even more limited. Certainly, in no case should the insurer be held liable for loss due to a cause which operated *after* the term, although that is what is done in the "continuing" cause cases, on the basis of an assumed inevitability, which, as a matter of fact, usually exists.

¹⁹ (1905) 17 GREEN BAG 674.

²⁰ *Saul v. Northwestern Nat. Ins. Co.*, 79 Pa. Super. 322 (1922) (liability of insurer dependent on question whether second fire was continuation of first, the policy having attached after the first but before the second fire).

²¹ *Fred J. Kiesel & Co. v. Sun Ins. Co. of London*, 88 Fed. 243 (C. C. A. 8th, 1898); *Globe & Rutgers Fire Ins. Co. v. David Moffat Co.*, 154 Fed. 13 (C. C. A. 2d, 1907); *Hartford Fire Ins. Co. v. Doll*, 23 F. (2d) 443 (C. C. A. 7th, 1928); *Davis v. Connecticut Fire Ins. Co.*, 158 Cal. 766, 112 Pac. 549 (1910); *Rochester German Ins. Co. v. Peaslee-Gaulbert Co.*, 120 Ky. 752, 87 S. W. 1115 (1905); *Wiig v. Girard Fire & Marine Ins. Co.*, 100 Neb. 271, 159 N. W. 416, L. R. A. 1917F 1061 (1916); VANCE, *LAW OF INSURANCE* (1930) 699. In these cases "practical" inevitability has been present, and the problem of its absence has therefore not been squarely settled.

²² See note 11, *supra*.

²³ *Tulare County Power Co. v. Pacific Surety Co.*, 43 Cal. App. 315, 185 P. 399 (1919).

In all the cases from which these rules have been drawn, the horns of the dilemma on which the court found itself were either to soak the insurer for the whole loss on the grounds of an actual or assumed inevitability, or to apportion the loss between the insurer and the insured on the basis of the facts as applied to the contract, or vice versa.²⁴ It would be wasted ink to say which way the court jumped. True, in the "death wound" rule, if the loss subsequent to the policy was not reasonably inevitable, the insurer would not be soaked, but even with the balm of "inevitability" the strict terms of the contract are transgressed. The need for doing this was not the logic of the case, for it is clearly a violation of the general premise on which this note is based, but was rather the desire to give the insured all the benefit possible from his insurance contract. The ideal situation for presenting the problem, uncomplicated by this sympathy with the insured, would, of course, be that of successive insurers, the time limit of the policy applying only to occurrence of loss. Whether the courts in such a case presented in the fire or marine fields would allow apportionment of the loss, thus following the contract, is open to question, but there is no apparent reason why they should not.

In the instant case there are successive insurers, a situation which has not been treated in the property loss cases. It would seem that, by analogy to the above reasoning, the logical and fair outcome would be apportionment, since this would apparently be in accord with the terms of the contract, assuming the liability to have accrued gradually.²⁵ The only objections which might be made would probably be lack of certainty of the rule,²⁶ and difficulty of apportionment.²⁷ As for lack of certainty and difficulty of apportionment, it would seem that if justice

²⁴ But cf. *Plecity v. Geo. McLachlan Hat Co.*, 116 Conn. 216, 164 Atl. 707 (1933) (workmen's compensation case, cause of injury being mercurial poisoning due to conditions of employment which extended over a period of time, held, both insurers liable for full amount of compensation, rights of contribution between them being postponed for future litigation).

²⁵ The question of when the liability accrued could have been avoided by the court by taking the view that accrual merely shows the time at which the cause of the loss occurs, and that the insurer is not insuring against accrual of liability, but against loss arising from such accrual, whenever that accrual may occur. It might be said that the only situation where such an ephemeral concept as liability could be the subject of insurance would be where there is a prearranged value set on the occurrence of it, such value to be paid to the insured when the "state" arises. The loss, under this view, is indicated by the facts which show loss, not by the legal interpretation of the word "accrual", and if some of these facts occur during the term of one insurer, and some during the term of another, the loss, following the contract strictly, should be apportioned.

²⁶ See *Howell v. Protection Ins. Co.*, 7 Ohio 284, 287 (835); *Lockyer v. Offley*, 1 Term Rep. 252, 259 (K. B. 1786) ("it is of more consequence that the rule be certain than whether it is established one way or the other").

²⁷ There was much difference of opinion in the present case as to just how much damage had been done during the term of each insurer, all but two of the witnesses refusing to make an estimate because of the uncertainty involved. *Export Steamship Corp. v. American Ins. Co.*, 160 F. (2d) 9, 13 (C. C. A. 2d, 1939).

is best served by an uncertain and difficult rule, it should be so served. However, why such a rule in the case of successive insurers should be uncertain is hard to see. There is no reason why an insurer should not become liable the moment his policy attaches,²⁸ other than that to be found in the terms of the policy itself, the operation of the cause prior to the policy certainly being no objection.

It would seem, then, that the court, although having no direct authority to go on, reached a sound result in the principal case, from the view of the logic of the case before it as well as the probable outcome of similar cases in the analogous property field.

SAMUEL R. LEAGER.

Master and Servant—Storekeepers—Liability for Assaults by Servants Not Acting within Scope of Employment.

The plaintiff, a customer of the defendant store, remonstrated with an employee of the store in regard to language used by the employee to one of the girls employed in the store, whereupon the employee told the plaintiff to follow him, and they went out the back door and there the employee assaulted him. The North Carolina Supreme Court¹ reversed the lower court's judgment for plaintiff and held that the assault was made for reasons purely personal to the employee and unconnected with the employer's business, and, therefore, that the doctrine of *respondeat superior* did not apply and defendant was not liable. Justice Seawell dissented, suggesting that the defendant in this case should be subjected to the same rule of liability as that imposed on railroads² for injuries inflicted on persons dealing with them as patrons. It is this suggestion that is discussed in this note.

Although in the case of unintended injuries to passengers common carriers are liable only if they failed to exercise a high degree of care,³

²⁸ *Id.* at 719.

¹ *Robinson v. Sears, Roebuck & Co.*, 216 N. C. 322, 4 S. E. (2d) 889 (1939).

² Justice Seawell further states that the rule applies to municipalities, relying upon the following: quotation from *Munich v. Durham*, 181 N. C. 188, 194, 106 S. E. 665, 668 (1921): "The carrier owes to the passenger the duty of protecting him from violence and assaults of other passengers and intruders, and will be responsible for his own or his servants' negligence in this particular, when by the exercise of proper care the acts of violence might have been foreseen and prevented. . . . The same rule applies to any other corporation." This may be dictum, for the assault was said to have been committed by the employee while acting within the scope of his employment. Furthermore, the quotation here would seem to indicate that the employers' responsibility is the exercise of care rather than that he be absolutely liable for injuries inflicted by his employees.

³ *Henson v. Fidelity & Columbia Trust Co.*, 68 F. (2d) 144 (C. C. A. 6th, 1933); *Suttle v. Southern Ry.*, 150 N. C. 668, 67 S. E. 778 (1909); *Kearney v. Seaboard Air Line Ry.*, 158 N. C. 521, 74 S. E. 593 (1912); *Hughes v. Pittsburgh Transportation Co.*, 300 Pa. 55, 150 Atl. 153 (1930); *Bosworth v. Union R. R.*, 26 R. I. 309, 58 Atl. 982 (1904); *Scales v. Boynton Cab Co.*, 198 Wis. 293, 223 N. W. 836 (1929); note (1939) 17 N. C. L. Rev. 453.

in the case of injuries intentionally inflicted by an employee of the carrier the great weight of authority is that the carrier is absolutely liable; and it is immaterial that the employee is acting beyond the scope of his employment.⁴ This doctrine is not applied solely to railroads, but to other public service corporations as well.⁵ In *Dunn v. Western Union Telegraph Co.*⁶ the company was held liable for insulting and abusive language used by one of its employees toward a person entering the premises for the purpose of sending a telegram. The court intimated that the same result would be reached in the case of any public service company. The rationale seemed to be that the patron's right of respectful treatment, while attempting to do business with a public service company, follows as a natural sequence from the right to be served impartially.

This absolute liability is explained in a number of ways. With regard to carriers, the most generally accepted argument is that passengers contract not only for transportation, but also for good treatment and "... against personal rudeness and any wanton interference with their persons, either by the carrier or his agents . . . and for the fulfillment of these obligations the carrier is liable [whether breach be by] . . . principal or his employees." This statement is found in the early case of *Pendleton v. Kinsley*,⁷ and is the view adopted by the North Carolina court in the case of *White v. Norfolk & Southern R. R.*⁸ Furthermore, as expressed in the *Dunn* case, the government demands that all public service companies act impartially toward all. It is considered that they are under obligation to extend their facilities to all persons, and, in so doing, these institutions shall afford "... safe and decent access to the places opened up for the transaction of the business in question."⁹

In substance, Justice Seawell suggests that the law applicable to public utilities, as exemplified by the carrier and telegraph company cases,

⁴ *Savannah, F. & W. Ry. v. Quo*, 103 Ga. 125, 29 S. E. 607 (1897); *Garvik v. Burlington, C. R. & N. R. Ry.*, 131 Iowa 415, 108 N. W. 327 (1906) (an employee raped a passenger); *White v. Norfolk & Southern R. R.*, 115 N. C. 631, 20 S. E. 191 (1894); *Williams v. Gill*, 122 N. C. 967, 29 S. E. 879 (1898); *Strother v. Aberdeen & Ashboro R. R.*, 123 N. C. 197, 31 S. E. 386 (1898) (insulting remark by an employee).

⁵ *Taxi Companies: Terminal Taxicab Co. v. Public Utilities Comm.*, 241 U. S. 252, 36 Sup. Ct. 583, 60 L. ed. 984 (1916); *Yellow Cab Co. v. Carmichael*, 33 Ga. App. 364, 126 S. E. 269 (1925); *Reitz v. Yellow Cab Co.*, 248 Ill. App. 287 (1928); *Shelton Taxi Co. v. Bowling*, 244 Ky. 817, 51 S. W. (2d) 468 (1932); *Hogan v. Miller*, 156 Va. 166, 157 S. E. 540 (1931). Sleeping and Parlor Car companies: *Campbell v. Pullman Palace-Car Co.*, 42 Fed. 484 (C. C. N. D. Iowa 1890).

⁶ 2 Ga. App. 845, 59 S. E. 189 (1907).

⁷ 19 Fed. Cas. No. 10,922 (C. C. D. R. I. 1870).

⁸ 115 N. C. 631, 20 S. E. 191 (1894).

⁹ *Dunn v. Western Union Telegraph Co.*, 2 Ga. App. 845, 850, 59 S. E. 189, 191 (1907).

be extended to other enterprises which serve the public. Why should not the same rule be applied to stores, innkeepers, banks, and other such enterprises?

Stores owe their existence, as do public utilities, to the patronage they seek from the public, and though they are not *required* to serve the entire public, as a practical matter there is but little, if any, discrimination exercised by most storekeepers in the selection of their customers. It may be argued, therefore, that despite the difference in legal status between these two types of business enterprise, the changing economic need of the public and the changing business policy of the storekeepers require an enlargement of the degree of liability to invitees and an extension to them of absolute protection from assaults of an employee of the serving principal. A case may be found to the effect that when one enters a public place, such as a saloon, the proprietor is bound to see that he is properly protected from assaults; and the court in that case imposed liability upon the proprietor without making any apparent distinction between the cases where the injury is inflicted by an employee and the cases where the injury is inflicted by a fellow customer.¹⁰ Furthermore, the early New York case of *Mallach v. Ridley*¹¹ furnishes the following, which is directly in support of Justice Seawell's suggestion:

"It was long held by the courts that a common carrier was not responsible for a willful assault by one of its employees upon a passenger. This rule, however, has been abrogated upon the theory that the common carrier invites the passenger to subject himself to the protection and care of the employe of the corporation, and under these circumstances the common carriers should be responsible for all the acts of the subordinates towards the passenger while under his custody and control.

"In like manner, the store keeper invites the public to enter his premises, and to subject themselves to the custody and control of his subordinates, and by parity of reasoning he should be held responsible for the brutalities of such subordinates, even where they are not committed within the strict line of his employment. There seems to be no distinction in principle between the cases."

The majority of the cases, however, seem to limit the duty of proprietors of stores and like enterprises to an exercise of reasonable care

¹⁰ *Rommel v. Schambacher*, 120 Pa. 579, 11 Atl. 779 (1887). The presence of the defendant at the time when the injury occurred and his failure to take due precaution to protect the plaintiff undoubtedly was relied upon by the court in imposing liability. This factor and the vagueness of the court's opinion make it difficult to derive from the case the exact type of duty sought to be imposed upon the defendant in situations of this nature. Accord: *Clancy v. Barker*, 71 Neb. 83, 98 N. W. 440 (1904) (hotel); *Mayo Hotel Co. v. Danciger*, 143 Okla. 196, 288 Pac. 309 (1930).

¹¹ 24 Abb. N. C. 172, 181, 9 N. Y. Supp. 922, 923 (1st Dep't 1888).

toward the protection of the invitee from injury while on the premises.¹² In the case of *Swinarton v. Le Boutillier*,¹³ although the New York court cited the *Mallach* case, it was held that the storekeeper owed the plaintiff only a duty to use reasonable care in protecting him from the misconduct of his servants, and was not subject to the rule of absolute liability which is applied in the public utility cases. Nor can it be said that there is a contract, either express or implied, that the storekeeper will be absolutely liable for the acts of his servant when the servant exceeds the scope of his authority. The liability depends upon whether the master was negligent, either in the employment or retention of an unfit servant,¹⁴ or whether, after he knew that a tort was about to be committed, the master failed to take measures to prevent it.¹⁵

Although it is evident that there is need, from the plaintiff's standpoint, at least, for a broader basis for liability than the doctrine of *respondeat superior*, which may often be inadequate in cases of this nature, it would be inequitable to storekeepers if the duty imposed upon them consisted of more than the requirement that they use reasonable care in the selection and retention of servants, and that they refrain from putting the customers in a position where it is likely that a tort will occur. If absolute liability for injuries inflicted by employees and the requirement of the exercise of a high degree of care to prevent injuries by fellow patrons is imposed upon storekeepers in general, as upon carriers, this would no doubt be subject to great abuse.

HAL HAMMER WALKER.

¹² *Clancy v. Barker*, 131 Fed. 161 (C. C. A. 8th, 1904) (where opposite result was reached on same set of facts as in *Clancy v. Barker*, cited *supra* note 10); *Duckworth v. Appostalis*, 208 Fed. 936 (E. D. Tenn. 1913); *Rahmel v. Lehdorff*, 142 Cal. 681, 76 Pac. 659 (1904); *Ledington v. Williams*, 257 Ky. 599, 78 S. W. (2d) 790 (1935).

¹³ 7 Misc. 639, 28 N. Y. Supp. (N. Y. City Cts. 1894).

¹⁴ *Duckworth v. Appostalis*, 208 Fed. 936 (E. D. Tenn. 1913); *Rahmel v. Lehdorff*, 142 Cal. 681, 76 Pac. 659 (1904); *Fairbanks v. Boston Storage Warehouse Co.*, 189 Mass. 419, 75 N. E. 737 (1905); *Smothers v. Welch*, 310 Mo. 144, 274 S. W. 678 (1925); *Priest v. Woolworth Five & Ten Cent Store*, 228 Mo. App. 23, 62 S. W. (2d) 926 (1933); *Cobb v. Simon*, 119 Wis. 597, 97 N. W. 276 (1903).

¹⁵ *Molloy v. Coletti*, 114 Misc. 177, 186 N. Y. Supp. 730 (Sup. Ct. 1921) (proprietor of restaurant held liable to plaintiff for an assault on him by disorderly third person after proprietor had been warned of the presence of the person); *Gurren v. Casperson*, 147 Wash. 257, 265 Pac. 472 (1928) (injury to plaintiff by an intoxicated guest in hotel, after innkeeper had been asked for protection).