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Recent Cases

Automobiles—Liability of Used Car Dealer for Damages Caused by Defective Condition of Used Car in Course of Demonstration

*Standard Oil Company v. Leaverton*¹

Defendants, engaged in the business of buying and selling used and wrecked automobiles, auto parts and salvage metal, delivered a used car to a prospective customer for the purpose of trying it out with the view of purchasing the automobile from the defendants. The customer, Williams, paid the defendants $60 as a deposit either to be returned to Williams if the automobile was not purchased by him, or applied on the purchase price if he did purchase it. While driving the automobile the following day, Williams collided with and damaged plaintiff’s gasoline pumps. The accident was found to be caused by defective brakes on the automobile. The Kansas City Court of Appeals reversed the lower court’s judgment sustaining defendant’s motion to dismiss for failure to state a cause of action and held that the fact that the automobile was not offered as a new automobile or one which had been reconditioned, or the fact that defendants and their customer all knew it was a used automobile would not relieve the defendants of their duty to the plaintiff and other third parties.

The court bases its holding on the reasoning in *Vaughn v. Millington Motor Co.*,² where the court recognized that while automobiles and motor trucks are not *per se* dangerous instrumentalities, they may become so when used at places and in a manner calculated to do injury. Hence the necessity for the rule that one who lets an automobile or motortruck for use on public highways owes the duty of exercising ordinary care to avoid putting forth a machine with defects likely to cause injury to persons who come in contact with it. The court sets forth the modern concept of liability for negligence when it states that this study does not rest upon the contract of bailment, but arises from the obligation which the law imposes upon every man to refrain from acts of omission or commission which we may reasonably expect would result in injury to a third person. It follows that if the bailor knows, or by reasonable diligence could know, of defects in devices intended to control them an obligation rests upon him not to let the machine without correcting the defects, or, in the usual situation, without notifying the bailee of the defective condition and the need to make the machine safe before using it in public. This is the modern common law doctrine of negligence which was first applied in the bailment cases and subsequently extended to the manufacturer.

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1. 192 S. W. (2d) 681 (Mo. 1946) K. C. C. A.
2. 160 Tenn. 197, 201, 22 S. W. (2d) 226, 227 (1929)

(57)

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cases. Later it was adopted to extend liability to rent-a-car dealers for injuries to third persons caused by automobiles let in defective condition.

The liability of a seller of an article not inherently dangerous, but made dangerous by defective conditions present at the time of sale, for an injury to a third person raises a different question from that presented where the injury is to the buyer himself. In the latter case, there is privity of contract between the seller and buyer, whereas in the former case such privity of contract does not exist. In either case liability may be predicated upon the breach of a common law duty which the seller of the article owes to anyone whom he has reason to believe will come in contact with it, where he knows, or by the exercise of ordinary diligence should know, that the article he is delivering is in an imminently dangerous condition. In such cases he is liable to any person, or class of persons, he has reason to believe will come into contact with the article, and who suffers injury because of its defective and dangerous condition. While the cases are not in accord upon this doctrine, the trend of the later decisions is to sustain the liability.

The Missouri court cites but three cases to support its decision, all of which involve the letting for hire of automobiles and trucks. There seems to be no logical reason to limit the doctrine to those particular facts. Certainly the same social considerations that impose a duty upon the manufacturer and the bailer for hire should impose a similar duty upon one who sells a used car for use upon the highway.


5. The writer has found but one reported case where the problem has arisen under facts somewhat similar to those of the principal case, and there the case
The development of the common law doctrine of negligence applied here had its beginning with the exceptions to *Winterbottom v. Wright.*6 The English court there held that in the absence of privity of contract the manufacturer of a chattel was not liable to persons injured by its negligent construction. With the changing social conditions brought on by the growth of industry in the United States and England certain exceptions were adopted by the courts:7 (1) where the seller knew the chattel was dangerous for its intended use and failed to disclose that fact to the buyer, he became liable to third persons injured by such use;8 (2) where the chattel furnished was furnished for use in the vendor's business on his premises—treating the user as a business visitor;9 (3) where the article is inherently dangerous in itself.10 Justice Cardozo set out the modern doctrine in *MacPherson v. Buick Motor Co.,*11 holding the manufacturer liable for injury to persons other than the vendee if the manufacturer knew or should have reasonably foreseen that, unless he used care, serious injury might occur to those who use or come in contact with the chattel.

The *MacPherson* case has been followed in many jurisdictions,12 and rejected in others,13 but most of the modern text writers have endorsed it.14 While

was disposed of upon another ground. Sandlin v. Hamilton Auto Sales Co., 49 Ohio App. 313, 197 N. E. 238 (1934). The presiding judge (dissenting) states the law as adopted by the Missouri court in the principal case.

11. 217 N. Y. 382, 111 N. E. 1050 (1916). It may be interesting to note that the English case of *Winterbottom v. Wright supra,* note 6, relied upon in the dissenting opinion in the *MacPherson* case has been repudiated in England by Donaghue v. Stevenson, [1932] A. C. 562, in which the majority opinion of Cardozo, J. in the *MacPherson* case was approved and followed.


14. Bohlen, Liability of Manufacturers to Persons Other Than Their Immediate Vendees (1929) 45 L. Q. Rev. 343, 353; Harper, Torts (1933) 246; Burbick, Torts (1926) 544; Huddy on Automobiles (1916, Sec. 210; 7 Blashfield's *Cyclopedia of Automobile Law and Practice.* (Perm. Ed.) § 4811; Restatement, Torts (1934) § 265.
the earlier Missouri decisions were based on exceptions to the rule of Winterbottom v. Wright, our supreme court approved the doctrine of the MacPherson Case in McLeod v. Linde Air Products Co.

It might be argued that the manufacturer's liability should be distinguished on the ground that his negligence is affirmative where he has installed defective parts or materials in an automobile which, when put to its contemplated use, will be dangerous to life, limb, or property of the user or those in which he comes in contact. On the other hand the used car dealer has done nothing; his negligence, if it is negligence at all, takes a passive form. However the same policy which brought about the adoption of the doctrine in the manufacturer cases should be applied to the used car case. No hardship is placed upon the used car dealer because the duty in his case is limited to that of reasonable inspection. The fact that the dealer's negligence takes the form of inaction does not alter the fact that he has allowed a dangerous instrumentality to be driven upon the highway. A condition imminently dangerous to life and limb can be caused by negligent omission and failure to inspect as well as the negligent installation of a defective part.

It should be part of the calculated risk of the business man to assume responsibility for the reasonable inspection of the products he offers for sale. The public has come to rely upon the vendor's profession of competence. Should the fact that defendant is a dealer in used cars place him beyond the pale of the law which is so rigidly applied to manufacturers and vendors of other products? Who else better than he is in a position to know or become aware of defects latent or patent in the automobile he offers for sale?

The principal case is an interesting extension of the principle laid down in the MacPherson case in that it makes the negligent used car dealer liable to third persons for loss to property. The court, in refusing to limit the liability to personal injuries, reasons that negligent injury to property is actionable as negligent injury to persons. The fact that the point was not brought up by the defendant in the principal case shows that once we recognize the policy of placing risks on the used car dealer, the vendor, and the bailor, who can best remedy the danger, there is no

15. Wright v. Holland Furnace Co., 186 Minn. 265, 243 N. W. 387 (1932); Mazzetti v. Armour, 75 Wash. 622, 135 Pac. 633 (1913); Bohlen, supra note 14.
16. 318 Mo. 397, 1 S. W. (2d) 122 (1927). Although the McLeod Case was couched in terms of an extension to exception one mentioned in Hussert v. J. I. Case Threshing Machine Co., supra note 10, subsequent cases in Missouri have cited it as establishing the modern doctrine in this state. Gibbs v. General Motors Corp., 166 S. W. (2d) 575 (Mo. 1942), McCormick v. Lowe & Campbell Athletic Goods Co., 144 S. W. (2d) 566 (Mo. App. 1940); Taylor v. York Ice Machinery Corp., 342 Mo. 912, 119 S. W. (2d) 240, 117 A. L. R. 1414 (1938); Shroder v. Barron-Dady Motor Co., 111 S. W. (2d) 66 (Mo. 1937).
17. "We intend only to hold that he (the dealer) must exercise reasonable diligence to know the condition of his machines before letting them into the hands of drivers for use on the highways. He must in that regard exercise such simple and available tests as the intended use would suggest to sensible and right minded persons—the jury being at last the judges." Saunders System Birmingham Co. v. Adams, 217 Ala. 621, 117 So. 72 (1928) 61 A. L. R. 1333 (1929).
apparent reason for going half way and limiting the liability to personal injury. While some courts have been reluctant to apply the doctrine of the MacPherson case to cases involving property, there is no logical reason for so differentiating.\textsuperscript{18} The rule proceeds on the theory that the dealer has breached a duty to those within the area of its use, and the nature of the resultant damage is immaterial.\textsuperscript{19}

GEORGE W. HARLAN

CONSTITUTIONAL LAW—CIVIL LIBERTIES—RIGHT OF JEHOWAH'S WITNESSES TO DISTRIBUTE RELIGIOUS LITERATURE UPON STREET OF COMPANY TOWN

Marsh v. Alabama\textsuperscript{2}

Appellant, a member of Jehovah's Witnesses, was convicted of violation of a statute of the State of Alabama\textsuperscript{2} which provided that it should be a criminal offense to enter or remain upon the premises of another after having been ordered not to do so. She attempted to distribute religious literature upon a sidewalk in the business district of a company-owned town. The company had posted notices in various stores to the effect that no street or house vendors would be permitted to carry on their businesses in the town without written permission. Appellant was told that she could not distribute literature without a permit and that none would be issued to


19. In Quackenbush v. Ford Motor Co., \textit{supra} note 18, the court discussed the problem where it was asked to hold that a different rule is involved in the case of injury to the property of a third person. The court held that the manufacturer's duty is made to depend, not upon the inherent danger of the automobile which he places on the public highway, but upon the result of the accident which grows out of his faults of construction. The court said that in such cases the negligence is based upon the failure to perform a duty owed to all persons in whose presence the machine is to be used, not upon a duty to the purchaser only, and the particular class of injury which may result has no bearing upon the question of liability. Having disregarded this duty to the public in general, including the purchaser, the manufacturer is liable for the injury growing out of such negligence, whether such injury be to the person or the property of the purchaser, although the vehicle was not purchased directly from the manufacturer, but from an agent to whom it was sold.

2. "Any person who, without legal cause or good excuse, enters into the dwellinghouse or on the premises of another, after having been warned, within six months preceding, not to do so; or any person, who, having entered into the dwelling without having been warned within six months not to do so, and fails or refuses, without legal cause or good excuse, to leave immediately on being ordered or requested to do so by the person in possession, his agent or representative, shall, on conviction, be fined not more than one hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than three months." ALABAMA CODE 1940, Title 14, Section 426.
her. The Supreme Court of the United States held that the Alabama statute was unconstitutional, because it abridged freedom of press and of religion—rights protected under the Fourteenth Amendment from impairment by state legislation.

On the same day that the Supreme Court handed down its decision in Marsh v. Alabama it also declared invalid a similar statute of the State of Texas as applied to a Jehovah's Witness who refused to discontinue religious activities in a village owned by the federal government, although he had been ordered to do so by the manager of the village.

The Court stated in its opinion that the difference in ownership of the two towns did not affect the result in any way, for the First Amendment safeguards the freedom of press of religion from abridgment by action of either Congress or federal agencies pursuant to Congressional authorization.

The Supreme Court has held that the concept of liberty embraced in the due process clause of the Fourteenth Amendment includes those liberties guaranteed by the First Amendment. The legislatures of the several states are, therefore, as unable as Congress to enact laws prohibiting the free exercise of religion. The same restriction applies to municipal ordinances, for, it is held, municipal ordinances adopted under state authority constitutes state action within the meaning of the Fourteenth Amendment.

The Court has seen fit to treat of the prohibition on legislation concerning the exercise of religion in a double aspect. Freedom of conscience or belief is absolute, but freedom to act in accordance with such belief is not. The extent to which such conduct may be regulated is highly uncertain.

In the case of Cantwell v. Connecticut the Supreme Court held invalid a statute of Connecticut, prohibiting the solicitation of contributions for any alleged religious

3. Tucker v. State of Texas, 90 L. Ed. 235, 66 Sup. Ct. 274 (1946). Article 479, Chapter 3 of the Texas Penal Code provided: "Any Peddler or hawker of goods or merchandise who enters upon premises owned or leased by another and willfully refuses to leave said premises after having been notified by the owner or possessor of said premises, or his agent, to leave the same, shall be fined not less than one nor more than twenty-five dollars."


7. Ibid.

8. "No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such person or organization is located unless such cause shall have been approved by the secretary of the public welfare council. Upon application of any person in behalf of such cause, the secretary shall determine whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity, and, if he shall so find, shall approve the same and issue to the authority in charge a certificate to that effect. Such certificate may be revoked at any time. Any person violating any provision of this section shall be fined not more than
cause, unless a certificate therefore had first been issued by a designated public official, who was given authority to determine whether the cause was a religious one. The Court has likewise held to be unconstitutional ordinances requiring the securing of a license as a condition precedent to the right to distribute literature, whether or not a tax was collected in connection therewith. The Court explained that liberty of circulation is as essential to freedom of the press as liberty of publication. Obviously, if unlimited restrictions could be placed on circulation, then the freedom of the press could be effectively curtailed, for the primary purpose of publication of literature is circulation.

The Supreme Court stated in *Murdock v. Pennsylvania* that hand distribution of religious tracts is a form of religious activity, that it occupies the same status under the First Amendment as do worship in churches and preaching from pulpits, and that it is entitled to the same protection as the more orthodox exercises of religion. It has held that a municipality may prohibit the use of its streets for the distribution of purely commercial handbills, but that it may not do so as to handbills of a religious nature, even though the particular ordinance does not discriminate against religious handbills but prohibits alike the distribution of all types of handbills. The fact that religious literature is sold rather than donated does not result in its distribution being commercial.

Mr. Justice Reed in his dissent in *Marsh v. Alabama* refers to the case of *Martin v. Struthers*. In that decision the Supreme Court held unconstitutional as a denial of freedom of speech and press a municipal ordinance prohibiting any person from summoning a resident of a dwelling house to the door for the purpose of distributing to him any handbill or circular. The Court mentioned with apparent approval the general trespass after warning statutes existing in at least twenty states. It stated that the decision as to whether a distributor of literature may call

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9. In Largent v. Texas, 318 U. S. 418, 87 L. Ed. 873, 63 Sup. Ct. 667 (1942), the ordinance prohibited the solicitation or orders for goods, or merchandise within the residential area without first obtaining a permit, to be issued within the discretion of a municipal officer. In Lovell v. Griffin, 303 U. S. 444, 82 L. Ed. literature of any kind at any place within the city without the written permission 949, 58 Sup. Ct. 666 (1937), the applicable ordinance forbade the distribution of of the city manager. In Murdock v. Pennsylvania, 319 U. S. 105, 87 L. Ed. 1292, 63 Sup. Ct. 870 (1942) the ordinance imposed a flat license tax upon solicitors of orders for goods or merchandise of any kind.

at a home should be left with the home-owner himself. Obviously, in the Marsh case there is no doubt as to the wishes of the owner in the matter. However, a corporation, owning a corporation town, can hardly be considered to be an ordinary householder. As the majority opinion points out, a company town is in most respects like any other town. Should the mere fact that a single corporation has title to all of the land in the town enable that corporation to bar the distribution of literature?

The Court appeared to be influenced by the fact that many people live in company-owned towns. It referred to a report showing that during a certain period of time approximately one-half of the miners in the bituminous coal industry resided in company-owned houses. There is involved in the company town situation not only the right of freedom of religion but also the interests of labor. If it were not for the magnitude of the problem of the company-owned town, the Court might have assumed a somewhat different attitude.

The Supreme Court has previously held that an employer may not prohibit employees from soliciting union membership during nonworking time on the property of the employer. A lower federal court has held that refusal to permit union representatives to come onto the premises of the employer for the purpose of soliciting union membership amounts to a violation of the employees' right of collective bargaining. Mr. Justice Reed in his dissent suggests that the case of employer interference with solicitation of union membership is not applicable, for the right of employee organization is guaranteed by a regulatory statute and not by a Constitutional provision. It might be suggested, however, that a right, expressly guaranteed by a Constitutional provision, should be considered to be of even greater dignity than one derived from a statutory enactment. If activity necessary to the organization of labor may be engaged in upon the premises of an employer, contrary to his express direction, then it would seem reasonable to conclude that activities necessary to the exercise of religion may be carried out upon the premises of an unwilling employer.

The holding of the instant case does not necessarily indicate that the Court would reach the same result in an instance where the distribution of literature occurs at some place other that upon a sidewalk or street. A sidewalk is a particularly appropriate place for the dissemination of ideas, and there is less likelihood of interference with the interests of others than in places less public. If the appellant had attempted to distribute her religious literature within the nearby postoffice or stores a somewhat different question would have been presented. Her efforts under such circumstances might amount to a serious interference with the business carried on within such establishments. If the appellant had insisted upon remaining within a company-owned dwelling house contrary to the expressed desires of a resi-

dent thereof, then again the Court might very well have arrived at a different conclusion. A tenant in possession of a company-owned house would be in the position of an individual householder. In Martin v. Struther the Court indicated that a householder may within his option determine whether he shall permit such an invasion of his privacy.

The Court admits that there has been no irrevocable dedication of the sidewalk to the public use. However, the Court does not admit that the case may be disposed of upon the basis of the property interests of the corporation. The more an owner of property opens up his property to use by the general public, the more do his rights become restricted by the rights of those who use the property. In balancing property rights against the rights of freedom of press and religion the Court grants a preference to the latter.20 The corporation could, if it so desired, entirely close the sidewalk and town to the public. Since, however, the corporation has seen fit to permit the public to make use of the sidewalk, members of the public have a Constitutional right to disseminate religious ideas while thereon.

The position of the Court seems to be that once a corporation owning a company town admits members of the public to the use of a sidewalk of such town, it may not thereafter revoke the license of a particular member of the public because of his exercise of religion while on such premises.

WILLIAM E. AULGUR

CONVERSION—LIABILITY OF LIVESTOCK COMMISSION MERCHANTS FOR SALE OF LIVESTOCK CONSIGNED BY ONE NOT THE OWNER

Cresswell v. Leftridge1

Five head of cattle were stolen from the plaintiff's farm. The plaintiff alleged that the cattle were stolen by Dan Leftridge and consigned by him to the Leo Hardy Livestock Commission of St. Louis, Missouri. He further alleged that the cattle were sold for Leftridge by the Leo Hardy Livestock Commission Company and the proceeds of the sale, less expenses, were remitted to him. There was no showing that the Leo Hardy Livestock Commission Company, or any person connected therewith, knew or had reason to know that the cattle were not the property of the consignor. The plaintiff sued the defendants, Dan Leftridge, the Leo Hardy Livestock Commission Company and the owner thereof, Leo Hardy, for conversion of the cattle. Later he dismissed the suit against the Leo Hardy Livestock Commission Company. The plaintiff had the judgment in the trial court, and the defendant, Leo Hardy, appealed. The Springfield Court of Appeals held that the evidence disclosed only that some cattle—not shown, more than by suspicion, to have been the

1. 194 S. W. (2d) 48 (1946).
cattle of the plaintiff—were delivered by Dan Leftridge to the Leo Hardy Livestock Commission Company and sold by it. The court then said that even if it were admitted that the cattle belonged to the plaintiff, neither the Leo Hardy Livestock Commission Company nor Leo Hardy were liable in conversion to him; that they were mere bailees of Leftridge, and as such, under the evidence, could not be charged with notice from where the cattle came or who owned them.

It is the general rule, and the rule which has long been recognized in this state, that a seller of stolen property, even though innocent, has converted the property and is liable to the true owner for the value thereof. It is also generally recognized that, *prima facie*, a sale of another's property evidences conversion, *i.e.*, any voluntary act which changes the nature of the goods and places them beyond the reach of the owner.²

While the general rule is as stated above, it is recognized by the courts that it is not a conversion merely to take possession of property as a depository or common carrier. Cases involving a bailee acting merely as a conduit depository, *e.g.*, a common carrier, have uniformly held that such a bailee, who has acted reasonably in accepting the goods from a thief or other converter without notice of the lack of title in the consignor, is not liable to the true owner for conversion thereof if the property was disposed of in accordance with the terms of the bailment.³

The court in the instant case failed to explain its holding that a livestock commission merchant is a "mere" bailee acting as a conduit. With one exception, previous Missouri cases based on sets of facts similar to those in the instant case have followed the general rule and have uniformly held that a livestock commission merchant selling stolen property is a converter and is liable to the true owner for the value thereof.⁴

The exception is *Blackwell v. Laird*⁵ which also held that a livestock commission merchant, innocently selling stolen property, is not liable as a converter. As the court in that case points out, the Packers & Stockyards Act, 1921,⁶ applicable to stockyards, market agencies, dealers, etc. provides in part as follows: "It shall be the duty of every stockyard owner and market agency to furnish upon reasonable

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2. Kock v. Branch & Crookes, 44 Mo. 542, 100 Am. Dec. 324 (1869); Kramer v. Faulkner, 9 Mo. App. 494 (1890); note 13 L. R. A. 605 (1891); note 50 L. R. A. (NS) 52 (1914); collection of cases and note (1922) 20 A. L. R. 132.


4. Lafayette County Bank v. Metcalfe, Moore & Co., 40 Mo. App. 494 (1890); Thompson, Payne & Co., v. Irwin, Allen & Co., 76 Mo. App. 418 (1898); Arkansas City Bank v. Cassidy, 71 Mo. App. 186 (1897), where the court said, "Factors and agents may render themselves liable for conversion. If such persons sell or intermeddle with property, it is no answer that they acted for another or under authority from another who himself had no authority. It is their business to know the character of the persons with whom and for whom they deal, and to see to it that their principals are able to protect them if their action in reference to the property bought and sold amounts to a conversion."

5. 236 Mo. App. 1217, 163 S. W. (2d) 91 (1942).

request, without discrimination, reasonable stockyard services at such stockyards . . .” The United States Supreme Court has held that this act has made the stockyards and the marketing agencies connected therewith public utilities. This decision opened the way for the Kansas City Court of Appeals to take the logical step in Blackwell v. Laird and to treat the stockyards and kindred agencies, so far as innocent conversion of stolen property consigned to them is concerned, in the same manner as other public utilities which act merely as conduits. It is pointed out by that court that stockyards as public utilities must perform, without discrimination, the services requested in absence of good reason for not doing so. It would be unlawful, in such case, for them to refuse to receive the animals. Therefore, it would be unjust when later it is discovered that the consigned property really belongs to someone else to held the commission merchant liable as a converter if he acted reasonably.

The decisions in the instant case and in Blackwell v. Laird seem to be a natural evolution of the law regarding the liability of livestock commission merchants for the innocent conversion of livestock consigned to them by one other than the true owner. It would not be in the interest of the trade nor in the public interest to hold that a livestock commission merchant acts at his peril unless he ascertains the true state of ownership by conducting an inquiry or investigation into the ownership of all livestock consigned to it for sale. The volume of livestock passing through the usual commission merchant’s hands makes such an investigation impractical. Since most of the livestock from the ranges and farms pass through such agencies on their way to the markets, it is to the interest of the public, in a commercial sense, that the flow be expedited.

Louis W. Cowan

Descent and Distribution—Effect of Renunciation by Heir at Law as Against Creditors

Bostian v. Milens

The trustee of the estate of Bessie Eichenberg, a bankrupt, instituted a suit in equity, seeking cancellation of written and oral renunciations by which the bankrupt had undertaken to renounce her rights as an heir at law of her deceased brother, Harry C. Milens, and a decree that the plaintiff trustee be vested with the title to

7. In Stafford v. Wallace, 258 U. S. 495, 516, 42 Sup. Ct. 397, 402, 66 L. Ed. 735 (1922), the court said: “The act, therefore, treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East. It assumes that they conduct a business affected by public use of a national character and subject to national regulation.”


9. Ibid.

an undivided one-fourth interest in the decedent's estate, such estate consisting entirely of personal property. Subsequent to the alleged oral renunciations but prior to the written renunciations, Bessie Eichenberg and the other heirs of Harry C. Milens had entered into a written contract involving a portion of the decedent's estate. The trial court found for the plaintiff. The Kansas City Court of Appeals, in affirming the judgment of the trial court, held that as a part of the general theory of intestate succession, the heir at law has no power to prevent the passage of title to himself by a renunciation or disclaimer, and that even if this were not true, the written renunciation was void because prior thereto Bessie Eichenberg had accepted her interest in the estate by exercising dominion over it in signing the above mentioned written contract.

Most courts and text-writers recognize the right of a devisee or legatee under a will to disclaim or renounce such devise or legacy, provided he has not already accepted it. A devisee-debtor may even defeat his judgment creditors by renouncing the devise, for, in the absence of fraud or collusion, the motives which prompt a renunciation are immaterial. Since the renunciation relates back to the time the gift was made, no estate vests in the devisee, and a rejection by him is not equivalent to a conveyance for the purpose of defeating creditors. By the same reasoning, the courts have upheld the right of a donee, as against creditors, to renounce a gift inter vivos.

If the owner of property dies without a will, however, the title to such property passes by force of the rules of law, and no voluntary act on the part of either the former owner who is dead, or of the subsequent owner who takes by intestate succession, is of any legal significance. The law having cast the title upon the heir, he is without power to prevent the passage of such title by a renunciation or disclaimer. The text-writers generally agree that an heir at law is the only person who, by the common law, becomes the owner of land without his own agency or assent, and that he is not now allowed any choice whether he will become the owner of land as the successor of his ancestor, or not. Although the case law on this subject is sparse, the courts in this country seem generally to hold a renunciation by an heir at law to be ineffective. It has been so held where creditor's rights were not involved. At least two text-writers have taken a contrary view, and some courts

6. WASHBURN, REAL PROPERTY (6th ed. 1902) sec. 1829; 2 BLACKSTONES COMMENTARIES, § 201; BINGHAM, LAWS OF DESCENT (1870) 1-3.
8. See Watson v. Watson, 13 Conn. 83 (1839).
seem to uphold the right of an heir at law to renounce his intestate share. But it should be noted that some cases cited in support of the principle that an heir can renounce are not cases in which the heir prevents the estate from descending to him, but rather are cases illustrating different methods by which the heir can dispose of the interest he has acquired by descent.

There seems to be no valid reason why the law prohibiting renunciation in case of intestate succession should not apply without distinction to both real and personal property. The contention by the appellants in the principle case that title to personal property descends to the administrator and therefore never vested in the heir was disposed of by the court’s pointing out that the administrator is merely a trustee and the equitable title is in the heir.

Numerous attempts have been made to explain the distinction between the right of a beneficiary under a will and one taking by descent to renounce an estate. According to an early explanation, the law cast the title on the heir and would not allow uncertainty as to the person in whom it was vested, hence an heir cannot disclaim his title; while a devise, being the voluntary act of an individual, should not be forced on any man. The reason for this distinction advanced by the court in the principle case is that a devisee is allowed to renounce because the devisor might otherwise place a burden upon him as a condition to the enjoyment of the gift. These purely technical explanations fail to disclose any logical reason why a devisee or legatee should be allowed to defeat his creditors by a renunciation. The right to reject a non-beneficial bequest could be preserved without applying the fiction of “relation back”, and holding that the title has never vested. The theory that title to a renounced devise has never vested seems to be based on the misconception that acceptance by the devisee or legatee is necessary to perfect a devise or bequest. The requirement of acceptance has resulted from the assimilation of principles of contract law to principles of conveyancing. A more reasonable and just result could be reached by treating the devisee and legatee in the same manner as the court treats the heir at law in the principle case. A recent California case has handled the problem in this way.

At Roman law, since an heir who accepted a succession became personally liable for the debts of his ancestor, an intestate succession was always subject to renunc-

9. See Snell v. Snell, 165 Ga. 724, 142 S. E. 96 (1928); Atkinson, Wills (1937) 726; 1 Bouvoir, Institutes (1st ed. 1851) 37, 38.
10. Rice v. Braden, 243 Pa. 141, 89 Atl. 877 (1914) (release by heir after death of testator as part of compromise); Haden v. Haden’s Heirs, 30 Ky. (J. J. Mar.) 168 (1832) (ancestor made advancements unenforceable by law; after ancestor died heirs agreed upon a distribution which allowed for such advances; held valid).
13. Williams, Real Property (18th ed.) 83, 84.
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of
plaintiffs'
but
frequent
and
regular
flights
of
military
aircraft,
especially
the
heavier
types,
passed
over
plaintiffs' land
and
buildings
at
an
altitude
of
about
83
feet.
The
noise
and
glaring
lights
resulted
in
destruction
of
the
use
of
plaintiffs' property
as
a
commercial
chicken
farm
and
interference
with
the
peace
and
comfort
of
their
home.
Since
the
Government
was
not
suable
in
tort,
plaintiffs
sought
compensation
in
the
Court
of
Claims
for
an
alleged
taking
of
their
property.
The
Court
of
Claims
held
that
defendant
had
taken
an
easement
in
the
airspace
over
plaintiffs' land.1
The
Supreme
Court
granted
certiorari.
Held: Judgment
reversed.
There
has
been
a
taking,
but
the
cause
is
remanded
for
additional
findings
of
fact
as
to
the
precise
description
of
the
easement
taken.

The
theory
of
the
action
brought
here
is
a
consequence
of
the
Government's
immunity
in
tort.
Had
plaintiffs
been
seeking
relief
for
similar
injury
caused
by
privately
operated
civil
aircraft,
their
remedy
would
have
been
a
tort
action
for
nuisance
or
trespass
or
a
suit
to
enjoin
further
low-level
flights
over
their
land.2
But
such
remedies
were
not
available
against
the
United
States,
which,
as
a
sovereign
government,
may
not
be
sued
by
a
private
citizen
without
its
consent.3
Plaintiffs' 17.

1. 66 S. Ct. 1062 (1946).
Air. L. Rev. 480; Swetland v. Curtis Airports Corp., 55 F. (2d) 201 (C. C. A.
New England Aircraft Co., 270 Mass. 511, 170 N. E. 385, 69 A. L. R. 300 (1930);
Prosser, Torts (1941) § 13.
4. 54 Am. Jur., United States, §§ 127-140; Borchard, Government Liability in
Tort (1924-1925), 34 Yale L. J. 1, 129, 228. But see infra note 27.
only alternative was to present their claim as one upon which Congress had authorized suit against the Government.

Under the Tucker Act the United States has consented in advance to be sued in the Court of Claims on claims founded upon the Constitution, upon any contract, express or implied, with the Government, or for damages in cases not sounding in tort. By virtue of the condition placed by the Fifth Amendment upon the Government's exercise of its power of eminent domain, the existence of a "taking" of private property for public use provides a basis upon which the Court of Claims may entertain the owner's suit against the United States. For wherever, without assertion of title, private property is appropriated by the Government, an implied contract arises to pay the reasonable value thereof. Moreover, if there is a taking, the claim is one "founded upon the Constitution," without reference to contract. On the other hand, no obligation arises from a tort as such. The fiction of waiving a tort and suing in assumpsit cannot be used to evade the Government's immunity. Thus, in order to recover against the United States for injury which is essentially tortious, plaintiffs are obliged to establish a taking of their property by right of eminent domain. The single issue is whether there has been a "taking" of private property within the meaning of the Fifth Amendment.

It is not clear, however, what constitutes a taking, as this term has been construed by the courts. The numerous decisions, relating to a great variety of factual situations, have not produced a clearcut basis upon which to differentiate a compensable taking from mere incidental, consequential injury for which no recovery may be had against the Government. Conflict has existed a physical conception of the eminent domain process, viewing property as consisting of tangible physical objects, as contrasted with a legal relations approach. The latter has steadily gained ground, so that it may now be stated somewhat generally that acts causing substantial and permanent interference with the use and enjoyment of property amount to

7. This proposition is firmly established. 28 U. S. C. A. § 250(1) note 140, and cases cited; Crane, Jurisdiction of the Court of Claims (1920) 34 Harv. L. Rev. 161.
a taking, though title and possession remain undisturbed. In any event, considerations of policy should override legal formulae in eminent domain proceedings.

In their consideration of this problem in the present case, both the Supreme Court and the Court of Claims placed great emphasis upon modern theories as to the ownership of airspace, and stressed plaintiffs' dominant property right in the airspace through which Government aircraft passed. The view followed, that ownership extends to so much of the airspace as is necessary for enjoyment of the surface, is well supported, so far as practical consequences are concerned, on one theory or another. And the Government's contention that legislation making the navigable airspace over this country part of the public domain was intended to include airspace needed for landing and taking off, is properly rejected as untenable, since it implies that privately owned land might with impunity be rendered completely uninhabitable through operation of aircraft at very low altitudes. Moreover, it has been stated that such legislation is not determinative of the landowner's


13. Cormack, supra note 10, at 259: "It is neither necessary nor desirable that legalistic considerations have any place in connection with the awarding of compensation in eminent domain proceedings. Considerations of policy should control. If from the standpoint of policy it is desirable that a citizen have compensation, there should be no hesitation, under constitutional provisions, in awarding it to him. The legal relations of an individual cover every aspect of his existence, and when there is violation of these relations, his property is taken. Manifestly it is not practicable for society to compensate proceedings, any more than it is feasible for the courts to take into consideration the remote consequences of torts or other occurrences. The problem is one of practical expediency. The judicial experiences in the administration of eminent domain proceedings indicate that it is important that the problem be recognized, in this field as elsewhere, as one of drawing the line between proximate and remote consequences."

16. This aspect of the case has been dealt with in the following Notes on the Court of Claims decision (supra note 15); (1945) 9 Detroit L. J. 30, 58 Harv. L. Rev. 1252, 19 So. Calif. L. Rev. 130, (1946) 46 Col. L. Rev. 121. For more deliberate treatment, see Noel, Airports and Their Neighbors (1946) 19 Tenn. L. Rev. 563.
Thus the way is open for the conclusion that flights over private land constitute a taking if "they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."  

It is difficult to see why this result should be deemed a radical or unreasonable extension of the concept of taking in the constitutional sense. In the writer's opinion, there is a tendency to confuse taking of the land with taking of the airspace over the land, and to lose sight of the former as the critical line of inquiry. Before there can be any taking of the airspace, ownership thereof must be established, but such ownership of the airspace would not seem to be prerequisite to the existence of a taking of the land itself. The manner in which the alleged taking of land, i.e., substantial interference with its beneficial use, is accomplished, whether through physical invasion of the surface, of the supervening airspace, or activities on adjacent land, is not conclusive. The injury here complained of is an immediate, foreseeable consequence of frequent flights of heavy aircraft at tree-top level, and represented a substantial interference with the use and enjoyment of plaintiffs' property for a period which, at the time suit was brought, appeared likely to last indefinitely.

20. Swetland v. Curtiss Airports Corp., 55 F. (2d) 201 (C. C. A. 6th, 1932); Bouve, Private Ownership of Navigable Air Space Under the Commerce Clause (1933) 21 A. B. A. J. 416. The latter authority, writing in support of the public right of freedom of transit through the airspace, makes the following significant qualification (p. 421 of the article cited): "It should be emphasized, in closing, that the above considerations are addressed to the claim of private property in navigable airspace, and not to that of the airspace actually occupied by the owner or reasonably susceptible of occupancy having in mind the uses to which the land is or may be put. The proprietary interest which the owner has in such air space is indissolubly merged with the title to and enjoyment of the soil. Although Congress has under the commerce clause the undoubted power to fix the lower limit of altitude of navigable air space where it sees fit, it is believed that if it were to fix it at an altitude which would result in a taking of airspace actually occupied, or air space reasonably susceptible of such occupancy, the taking would call for compensation under the Fifth Amendment." (Italics ours.)


24. The problem has been stated to be one of drawing the line between proximate and remote consequences. Supra note 13.

25. The Government's lease of the adjoining airport was for twenty-five years (1942-1967), or until six months after the end of the national emergency, whichever should first occur.
In theory this should have been sufficient to establish a taking, without the additional element of trespass.

Legislation abolishing the general tort immunity of the Federal Government, long advocated,\(^26\) has recently been passed by Congress.\(^27\) The new law provides for administrative settlement of tort claims up to $1,000, and litigation of larger claims in the federal district courts, subject to review by the circuit courts of appeal or the Court of Claims. Apparently, therefore, under the facts of the principal case, litigants will no longer be obliged to resort to an action based on the artificial theory employed here of a "taking" of their property by the Government, but may sue directly in tort.

WILLIAM A. BETZ

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**Insurance—Breach of Warranty Against Other Insurance**

**Kossmehl v. Millers National Insurance Company**

Defendant, Millers Insurance Company, had issued its policy against loss of plaintiff's jewelry upon an application executed by her husband. The policy (hereinafter called the first policy) provided: "Warranted by the Assured that no other insurance is or will be carried on the property insured hereunder during the term of this policy except as may be endorsed hereon" and "This entire policy shall be void if the Assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or in case of any fraud or false swearing by the Assured touching any matter relating to this insurance or the subject thereof, whether before or after loss." Plaintiff subsequently was divorced from her husband and being under the impression that he had cancelled the first policy, she obtained from the Dubuque Fire and Marine Insurance Company a policy (hereinafter called the second policy) on the ring and other property, which policy stipulated that "no other insurance is permitted on the property insured hereunder except as may be endorsed hereon." Plaintiff lost her ring, valued at $1400.00, and presented her claim against defendant, which denied liability on the ground that the second policy violated the warranty against other insurance. She then presented her claim to Dubuque, which also denied lia-

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27. Federal Tort Claims Act, Title IV of the Legislative Reorganization Act of 1946, Pub. L. No. 601, 79th Cong., 2d Sess. (Aug. 2, 1946). Abolition of Governmental tort immunity was for the ostensible purpose of increasing legislative efficiency and economy, through elimination of private relief bills. The act also provides that both administrative settlement and litigation are governed by a one-year statute of limitations; rules of liability will be the same as if the Government were an individual, but recovery is limited to actual damages; suits are to be heard without a jury; and there are provisions relating to limitation of attorneys' fees. Certain exceptions are made to the general tort liability. See forthcoming, Gottlieb *The New Government Tort Act* (1946) 35 George-Town L. J. (Nov.).

1. 185 S. W. (2d) 293 (Mo. App. 1945).
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5. See cases cited by Vance, op. cit. supra note 2, p. 729, n 57.

6. Reference is to the standard New York fire policy adopted in 1918, sometimes called “commissioners Policy.” A new standard policy became effective in New York in 1932 (N. Y. Laws 1942, c. 900; N. Y. Laws 1943, c. 671) which has been widely accepted throughout the United States. The new form eliminates many of the so called “moral hazard” clauses and as to the provision thereunder discussion reads: “Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto.” In the absence of such endorsement, other insurance is not prohibited and, depending upon the wording of the endorsement, the problem of the instant case may or may not be avoided.
Limitation of the provision against "other insurance" to other valid insurance creates a hopeless dilemma where, as here, the invalidity of the other insurance rests upon the violation of an identical "other insurance" clause by the very policy in suit. Which policy, if either, is valid "other insurance?" Courts of other jurisdictions have answered the question variously,7 with perhaps the more approved authority being in accord with the instant decision, although it has been observed that if such reasoning were employed in criminal law, no person could ever be convicted of bigamy. No prior decisions have been found in Missouri.8 It has been held in this state that temporary, non-fraudulent, additional insurance did not totally avoid a policy containing an "other insurance" clause where there was no excess insurance at the time of loss.9 A valid second policy will justify denial of liability by the first insurer if the first policy contains the other insurance provision10 and, conversely, it was said in Parks v. Hartford Fire Insurance Company11 that if the second policy contains a warranty against "other insurance," it never becomes effective if the first policy is valid and contains no similar provision.

There is authority in other jurisdictions that the condition against other insurance is not violated by other insurance issued without the beneficiary's knowledge or consent.12 This rule seems just to the beneficiary, who should not be prejudiced by conduct in which he did not participate, and fair to the insurer, for the moral hazard is not increased if the insured is ignorant of the existence of other insurance.13 By parity of reasoning, the second insurance in the instant case might have been considered valid, the Plaintiff's assumption that her husband had cancelled the insurance being fairly comparable under the circumstances to the ordinary insured's assumption that no one else had obtained insurance for his benefit. However, the facts in the Parks case suggest that it might be authority against the adoption of this approach.

The court was evidently eager to protect the insured in this case, being undoubtedly influenced by a conviction that she had acted in good faith at all times. It is uncertain whether a non-fraudulent misrepresentation avoids a Missouri in-

8. Cf. Cox v. Home Ins. Co. of New York, 331 Mo. 10, 52 S W (2d) 872 (1932) where the first cyclone and windstorm policy contained a clause that it would become void if other insurance, valid or invalid, were taken out on the property without consent of the company. This policy lapsed and a second policy was taken out without consent of the first company, the second policy containing a pro-rata clause in case "other insurance" exists or should be taken out. In a suit against the second company, held it could not pro-rate since the first policy had lapsed. The court said that even if it had not lapsed, the policy would have been void due to the existence of the other insurance without its consent. Note that the policy had lapsed, and also that it was a cyclone and windstorm policy so that "other insurance" cannot in fact increase the risk.  
11. 100 Mo. 373, 12 S. W. 1058 (1890).  
12. See Vance op. cit. supra note 2, p. 728, n. 53.  
surance policy. If it does not, an additional argument can also be made that the second policy was valid insurance. On either theory, the plaintiff would have been protected but no recovery could have been obtained in the instant litigation which was, of course, instituted for the benefit of the second insurer. The rather arbitrary position taken by the court is neither better nor worse than the exact converse, unless some reasoning not evident in the opinion was applied. In the absence of the existence of special circumstances, the only logical result is to hold both policies invalid.

Jerred Blanchard

Libel—Dictation to Stenographer as Publication

Rickbeil v. Grafton Deaconess Hospital

Defendant Tverberg, acting within the scope of his employment as secretary of defendant hospital (a charitable, non-profit corporation) dictated to his stenographer, also an employee of the hospital, a letter to plaintiff concerning the unpaid hospital bill of one Julia Sargent. This letter, containing statements which were libelous per se, was transcribed and typewritten by the stenographer, signed by Tverberg, and subsequently sent to plaintiff by registered mail. At the close of plaintiff’s case, the trial court allowed defendant’s motion to dismiss the action, holding that there was no publication of the libel, since the stenographer had “no distinct third party entity.” On appeal, the Supreme Court (Nuessle, J., dissenting) reversed the judgment of the lower court and ordered a new trial. The majority opinion, held that the dictation of the letter to the stenographer and her transcription of the notes constituted publication of the libel. This held to be true whether the relation was that of master and servant or co-employees of a corporation. The majority opinion specifically rejected the conception of the trial court that modern business makes such universal use of stenographers that incidental communication of the libel to such persons is not publication within the purview of the law of libel.

Both the trial judge and the dissenting justice found support for their opinions

14. For a discussion of this problem as applied to life insurance, see Note (1943) 8 Mo. L. Rev. 137. See also Note (1928) 55 A. L. R. 743 indicating that the cases require a showing of fraud on the part of the insured before misrepresentation as to “other insurance” is material to the risk; and 45 C. J. S. 221 paragraph 489 which states that “A misrepresentation relied on as avoiding the policy must be false in a substantial and material respect; an intent to deceive is generally not essential if the misrepresentation is as to a material fact and is relied on by the insurance company.”


1. 23 N. W. (2d) 247 (N. D. 1946).

2. Ibid.
in a series of cases exemplified by Freeman v. Dayton Scales Co. In that case, a special agent of defendant corporation dictated to his stenographer the alleged libel. It was transcribed and typewritten by her, and mailed to the attorney for the plaintiff. In holding this as not constituting publication, the court reasoned that a stenographer employed by a corporation has no distinct third party entity, and one employed by an individual is a confidential instrumentality of that individual, not recognized as having an independent third party personality while engaged in a mainly mechanical duty. A considerable body of cases in this country supports the view thus expressed.

The great objection to such a line of reasoning is that it seems to confuse "publication" and "privilege." It is said that "If the defamatory matter is not seen or heard by anyone except the defamer and the defamed, damages to character or reputation cannot result, since man's reputation is the estimate in which others hold him, and not what he himself thinks." This is the gist of the requirement of publication. Artificially to reduce the individual personality of a stenographer or clerk to a piece of machinery in order to declaim that there has been no publication seems highly questionable "legal" logic. The damage to plaintiff lies in the loss of the esteem of other persons. Can it be said that a stenographer, by the nature of his or her calling, is incapable of having any feeling concerning the libellee? The injurious effect of the libel is the loss of the personal esteem of the stenographer which is no less mitigated by her relation to a common employer.

Owen v. Ogilvie Publishing Company represents a somewhat different ap-

3. 159 Tenn. 413, 19 S. W. (2d) 255 (1929).
4. Id. at 421, 19 S. W. (2d) at 258.
approach in finding "no publication." The defendant corporation's general manager dictated the libel to his stenographer, also an employee of the corporation. The letter was transcribed, typewritten, and sent to the plaintiff. The court concluded that where the relation between the libellant and the copyist is that of master and servant, there is a publication. However, such publication may be privileged. But if they are employees of a common master, they are merely performing the duties which their respective employment requires and their acts should be treated as a single act of the corporation not constituting publication.\(^9\) Though the New York courts have never specifically overruled this decision, it has been severely questioned.\(^10\) Certainly, it creates a very fine distinction upon which to hang the question of publication.

Though it came some three years after the discredited Owen case, Gambrill v. Schooley\(^11\) is usually called the leading American case on the subject. Referring to the foregoing cases and their view that the stenographer is "...a mere phonograph, whose function in that regard was not a mental, but purely a mechanical, process, so that there was no such perception as is requisite to constitute publication;" the court replies that "Neither the prevalence of any business customs or methods, nor the pressure of business which compels resort to stenographic assistance, can make that legal which is illegal, nor make that innocent which would otherwise be actionable."\(^12\)

Even though the reasoning in this line of cases be rejected, it does not necessarily follow that defendant shall be held liable. For many courts, in situations such as this, have recognized without undue comment that there has been a publication; and then have considered the publication to be conditionally or qualifiedly privileged and thus a ground for avoidance of liability in the absence of express malice. Thus, when the communication is between persons having a common interest in the subject matter, the communication is privileged, if made in good faith and without actual malice.\(^13\) This privilege, of course, is a matter of defense to be pleaded and proved.\(^14\)

Apparenty the first case to consider the question of privilege in a fact situation similar to the principal case was Pullman v. Mill.\(^15\) The alleged libel was dictated by the managing director of defendant merchants to a clerk, who took it down in shorthand and then transcribed and typewrote it. The letter was subsequently mailed to plaintiffs', a partnership. Concluding without difficulty that there had been publication, the court discussed at some length the problem of whether

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9. Id. at 467, 53 N. Y. Supp. at 1034.
12. Id. at 61, 48 Atl. at 731.
or not the "occasion" was privileged. In concluding that it was not, Lord Esther said: "Can the communication of the libel by the defendants in the present case to the type-writer be brought within the rules of privilege as against the plaintiffs? What interest had the type-writer in hearing or seeing the communication? Clearly she had none."*16 And Lopes, J., added "I have never yet heard that it is the usual course of a merchant's business to write letters containing defamatory statements. If a merchant has occasion to write such a letter he must write it himself, and make a copy of it himself, or he must take the consequences."*17

It would seem that Judge Lopes raised for the first time the idea that publication to a stenographer or clerk in the course of communication with the person defamed may be privileged if it is incidental and reasonably necessary to the communication. The English courts had earlier recognized that publication to a third person as a reasonably necessary incident to a privileged communication does not abuse the occasion.*18

The Lopes theory is applied in the case of Boasius v. Goblet Freres,*19 decided by the same judges some three years later. A solicitor, on behalf of a client, dictated a libelous letter to a clerk in his office. In finding the occasion privileged, the court attempts to distinguish the Pullman case. They say that, while it is not in the usual course of a merchant's business to write letters containing defamatory statements and communicate them to a clerk, the case of a solicitor is different. The court holds that the business of a solicitor's office necessitates the communication of such matters to clerks and such communications should be held to be privileged.*20

It seems doubtful that any real distinction can be made between the two cases. However, it seems reasonably clear that the English rule in such situations is that there is always publication; but the occasion may be called privileged on the grounds that the communication to the stenographer or clerk is reasonable and necessary to carry out the firm's business. This view has found some accord in the United States.*21

In the principal case, in considering the question of privilege it was necessary to construe a North Dakota statute.*22 Relying heavily on the precedent of Lord

16. Id. at 528.
17. Id. at 530.
18. Lawless v. The Anglo-Egyptian Cotton and Oil Co., 38 L. J. Q. B. (N. S.) 129, L. R. 4 Q. B. 262, 268 (1869) (distributing printed reports to stockholders, in course of which the libel read by printers, held to be privileged because "usual and necessary method of communication to interested parties"); accord, Edmondson v. Burch and Co., Ltd and Horne, (1907) 1 K. B. 371, 380 (letter from main office of defendant to branch office dictated to stenographer held to be privileged).
20. Id. at 847.
22. N. D. Revised Code (1943) Sec. 14-0205 ("A privileged communication is one made...in a communication, without malice, to a person interested therein by one who also is interested, or by one who stands in such relation to the person
Esher's remarks in the Pullman case, the court holds that the stenographer is not "a person interested" and therefore the communication is not privileged. It concludes that "The personal rights of the individual to be free from defamations of character are paramount to any exigencies of business and the stenographer who types and the office-boy who copies are individuals with personalities even if mere employees."

The Restatement of Torts, 23 in its analysis of the situation, is much more careful than the courts have been to differentiate between two entirely different fact situations. In the one situation, where the dictation to a stenographer is in the course of communication to a third person about the libellee, 24 the questions involved are those of privilege and abuse of privilege. If the communication is privileged, the Restatement's opinion is that the incidental publication to the stenographer or other third person, if customary and sanctioned by business or other necessity, does not abuse the occasion. However, where the communication to the stenographer or other third person is incidental to communication with the person defamed, whatever protection the defendant enjoys is based entirely on the lack of harm necessary to create a cause of action. 25 There can be no question of abuse of privilege because communication to the party defamed is not privileged. Though the Restatement states flatly that "a dictation of a defamatory letter to a stenographer who takes shorthand notes thereon is itself a publication of the libel," 26 it apparently would except from liability a defendant who could satisfactorily show that publication to the third person was reasonably necessary and incidental to communication with persons defamed. The decisions which have exonerated defendants in fact situations similar to the principal case have, undoubtedly, often been predicated on just such a doctrine. But, invariably, they have labored to reach the more used, if less firm, ground of "no publication" or "unabused privilege."

M. Hency

LIENS—POSSESSORY-LOSS BY ATTACHMENT OR LEVY OF EXECUTION BY LIENOR

Sanders v. Brooks et al. 1

O brought replevin against B and C to recover possession of four hogs. B and C denied O's right to possession, asserting an agister's lien on the hogs. O claimed the lien had been lost by surrendering two of the four hogs to the constable on a

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1. 194 S. W. (2d) 540 (1946).

23. RESTATEMENT, TORTS (1934) Sec. 577, 604.
24. Id. Sec. 604, comment b.
25. Id. Sec. 604, comment c.
26. Id. Sec. 577, comment h.

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levy of execution secured by C for rent owed to C by O. The court held that where goods in possession of one having a lien thereon are attached at his suit or by his instigation, his lien is lost as to the portion so attached or surrendered, but the remaining portion of such goods is not thereby released from the burden of the whole lien.

Two interesting questions are presented by the case as briefed: (1) Is an agister's lien (or any common-law or statutory lien dependent upon possession) lost or waived where the lienor attaches or levies execution on the subject of the lien, and (2) if the subject of the lien is divisible and only a portion thereof is attached or levied upon in execution, does the lien for the whole debt attach to the remaining portion?

The court in the instant case states that "it is generally held that where goods in the possession of one having a lien on them are attached at his suit or by his instigation his lien is waived." The court states the proposition without discussion or reference to any Missouri authority, but further holds that the lien is lost only as to that portion so attached or surrendered and does not release the remaining portion from the burden of the whole lien.

The importance of the first question is underlined in any of the following situations: (1) Where the lienor attaches the subject of the lien and the lienee becomes bankrupt within four months after the attachment, such attachment lien being voidable by the trustee in bankruptcy (could the lienor then rely on his possessory lien?) ; (2) where the attachment or judgment lien is quashed because of some

2. One of the two remaining hogs had died and the other had been sold by B. This latter point of conversion was not discussed by the court.

3. Judgment was reversed and remanded, it being held that in a replevin action by the admitted owner, though not taking possession of the hogs under the writ, he is entitled to have the disputed question of existence and amount of agister's lien submitted to the jury.

4 Citing as authority, 37 C. J., Sec. 54 p. 335. The leading case on the point is Jacobs v. Latour, 2 Moore & P. 201, 5 Bing. 130 (1828). It was held that a lien of horses for training them was waived where the lienor caused an execution to be levied upon them for the debt secured by the lien, although he purchased them at the execution sale and they were never out of his possession. The purchaser set up the lien as a defense to an action in trover by the commissioner in bankruptcy of the original owner of the property upon the theory that if the execution would not avail against the commission in bankruptcy, the lien might be relied upon. The decision is on the ground that the lienor's possession at the time of the sale must be attributed to the officer who levied the execution, and the subsequent possession was by virtue of the purchase and not by virtue of the lien.


6. 11 U. S. C. § 107 (a) : "Every lien against property of a person obtained by attachment, judgment, levy, or other legal proceedings within four months before the filing of a petition in bankruptcy . . . shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent or (b) if such lien was sought and permitted in fraud of the provisions of this title . . . "

7. The Federal Bankruptcy Act specifically recognizes the right of the creditor to hold his security even though his right to sue on the debt itself may be barred. Moreover, the accepted view is that the discharge of a debtor in bankruptcy does not work an absolute discharge of the debt itself but merely affords the debtor
irregularity in acquiring it; (could the lienor then rely on his possessory lien?); (3) where the lienee has mortgaged the chattels subject to the lien, and the lienor's attachment is quashed for some reason or his levy of execution is unavailing for some reason (could the lienor assert the precedence of his lien over the chattel mortgage? (could the chattel mortgagee replevy the chattel from the constable?

Those courts which hold that the lienor has lost his lien by levying attachment or execution upon the subject of the lien, in the main, place their decision on the ground that the possession by virtue of the lien, and therefore the lien itself, is waived by the levy, the lienor being deemed to have abandoned possession in surrendering it to the sheriff. And this even where the sheriff leaves the subject of the lien in the hands of the lienor, taking a receipt therefor. Another reason assigned is that by making the attachment or levy of execution the lienor is asserting that the property levied upon belongs to the lienee and, having made the levy, he is estopped from afterwards asserting the contrary by claiming a lien upon the property. But this reason would seem to have little or no force as it would seem apparent that in either case, by lien or levy, the lienor is asserting that the property belongs to the lienee. The pivotal point seems to be, to the courts,


9. Neff v. Rhodes, 20 Mo. App. 347 (1886), where lienor's levy of execution and attachment levy of another creditor of lienee were both in the hands of the constable and although lienor's was levied first, sale was held only under levy of the other creditor.


11. "When he instructed the sheriff to take possession of it under the attachment, he voluntarily relinquished his own claim to the possession and transferred it to the officer, who thenceforth held it, not as the agent of the defendant (lienor), but as an officer of the law responsible for its safe custody as well as to the defendant as the plaintiff in the action. After its seizure under the attachment, it was no longer in the possession or custody of the defendant, and lost by his voluntary surrender of all claim to the possession," Wingard v. Banning, 39 Cal. 543 (1870); Accord: Fidelity & Deposit Co. v. Johnson cited supra note 8; Hill v. N. W. 336, 27 L. R. A. (N. S.) 692, 694; 140 Am. St. Rep. 332 (1910); Fein v. Rhule, 71 Colo. 140, 204 Pac. 894 (1922); Stein v. McAuley 147 Iowa 650, 125 Wyoming Loan & Trust Co., cited supra note 10; BROWN, PERSONAL PROPERTY (1936) § 121. But cf. Valley Nat. Bank v. Jackaway, 80 Iowa 512, 45 N. W. 881 (1890); (Mass. 1829); Neff v. Rhodes, supra note 9. Contra: Jones v. Ironton Garage Co., Townsend v. Newell, 14 Pick. 332 (Mass. 1833); Whitaker v. Sumner, 7 Pick. 551 9 Ohio App. 431 (1918); Arendale v. Morgan, 5 Sneed 703 (Tenn. 1857); Lambert v. Nicklass, 45 W. Va. 527, 31 S. E. 951, 44 L. R. A. 561, 72 Am. St. Rep. 828 (1898). See notes, 50 L. R. A. 719 (1901) for citation of cases involving pledges, carrier's liens.


13. 1 JONES, LIENS (2d ed. 1894) § 1014, and cases cited therein.
the technical argument of loss of possession by the lienor. One case at least has raised a loud dissenting voice, and, arguing the point on principle, has reached the conclusion that there has been no abandonment of possession by the lienor.\textsuperscript{14}

The cases generally fail to distinguish three situations and to consider any possible differences in the treatment they should receive: first, where lienor brings action in manner provided by statute to enforce his lien; second, where lienor seeks personal judgment on the debt independent of his lien and levies attachment or execution on the property which is the security for the debt; and, third, where the lienor brings action on a debt other than the debt secured by the lien and attaches or levies execution on the subject of the lien debt.

Missouri has specifically recognized the distinction between the first two situations stated in the preceding paragraph. In Neff v. Rhodes\textsuperscript{16} the lienor sought to enforce his lien as provided by statute and his levy of execution was levied just prior to a levy of attachment by another unsecured creditor of the lienee. For some reason not stated in the report of the case, sale was had under the unsecured creditor’s subsequent levy of execution and not under that of the lienor. In an action of replevin by the lienor it was held that he had not lost possession by his levy of execution and he should recover the stallion in question. The court said, “In this case, the plaintiff was proceeding to enforce his lien as provided by the statute. To say he lost it in such case, would be to hold that the statute gives him a lien and points out to him how he shall enforce it, which, if he obeys, is immediately lost to him.” In discussing the authorities cited by the unsecured creditor under whose execution sale was made and who was the purchaser at the sale, the court said, “Authorities cited by appellants holding that the levy of an execution discharges the lien, will be found on examination, to be executions based on judgments in suits independent of the lien, as if one having a lien should bring an ordinary action on account, without reference to the lien.” It is clear that the court was holding that where the lienor proceeded according to the statute\textsuperscript{10} in enforcing his lien, he should not lose his lien in case of any untoward circumstances.

\textsuperscript{14} Lambert v. Nicklass, 45 W. Va. 527, 31 S. E. 951, 44 L. R. A. 561; Am. St. Rep. 828, 831 (1889), where the court said: To sustain this loss of lien we must place it on one or the other of two ideas, ... intentional waiver, or from loss of possession. As to the first, authority is abundant to show that one will not be held to waive a lien unless the intent be express or very plain and clear. The presumption is always against it. Merely taking a new security does not. ... And as to loss of lien by loss of possession. ... Suppose, however, by reason of non-residence or other cause, the innkeeper can sue out an attachment, why shall he not do so? He is not thus waiving, but enforcing his lien. Why should it be said that, when the officer levies on the property to enforce this lien, the innkeeper loses his lien because he gives up possession, I cannot see. The officer is his agent for this purpose. To say so is technical in the highest degree and defeats justice.” Accord: Arendale v. Morgan, cited supra note 11 Criticized in 12 HARV. L. REV. 571 to the effect that “nothing is gained by saying that the necessity of the lien-holder continuing in possession is technical since it is based upon the fundamental conception of the nature of a lien.”

\textsuperscript{15} Cited supra note 9.

And just as clearly the court was distinguishing that case from the one where the lienor takes a personal judgment on the debt and levies execution on the property subject to the lien. The court in its discussion ignores the technical question of loss of possession by surrender to the constable or sheriff and decides the case on what, for want of a better term, might be called the "equities" of the case.

In the principal case the third situation is presented to the Missouri courts. The levy of execution and sale of two of the four hogs was on a personal judgment for rent, a debt unconnected with that for which the lien existed. We have seen that the court held that such levy resulted in a loss of lien to that portion levied upon. It does not appear however that any consideration was given as to the nature of the action in so holding. As to loss of lien in this situation no quarrel can be had. The technical argument of surrender of possession may be grudgingly heard to prevail. There are not equities in the lienor's favor. As to the lien debt he was clearly surrendering his lien in favor of his unsecured debt. He was content henceforth to rely on the personal credit of the lienee. It might be said that it is the same as if he permitted a third person to levy on the chattels in his possession. He stands in the position of any levying creditor and his rights with respect to the levy should be subject to all the pitfalls of such an action without recourse to his possessory lien.

However, with respect to the first two situations perhaps there are other considerations which should be taken into account. Loss of lien in the first situation has as we have seen, been denied in Missouri. The Restatement of Security17 would permit the lienor to rely upon his possessory lien if his judgment lien is avoided in the second situation, where the lienor obtains a personal judgment against the lienee. That the rule of that section refers to a personal judgment is clear from Comment (a) to that section. However, this is qualified in Sub-section (2), so that if the chattel has been subsequently mortgaged by the lienee the judgment of the lienor is inferior to the chattel mortgagee's lien. Section 58 involving the same problem with respect to pledges furnishes some insight into the reasons for the stand on this point. In Comment (a) to that Section it says "... Since the attachment involves a surrender of possession there is a technical argument that the pledge interest has been terminated by the lien of the attachment... Inasmuch as the pledgee's purpose is merely to enforce his security and no injury has been done to the pledgor the rule of this Section permits the pledgee to retain his pledge interest."

On the second point raised by the principal case, that if the subject of the lien is divisible and only a portion thereof is attached or levied upon in execution, the lien for the whole debt attaches to the remaining portion, there seems to be

17. Restatement, Security (1941) § 77 (1); "Where a lienor obtains a judgment for the amount of his demand and levy is made upon the chattel upon which the possessory lien exists, if the judgment lien is thereafter avoided, the lienor is entitled to the possession of the chattel, and the lien revives upon return of the chattel."
no authority directly in point, but this proposition is sustained by a great weight of authority in analogous situations.18 This point has frequently arisen with respect to carrier's liens where the carrier has permitted the owner or consignee to remove a portion of the goods without payment but retains the balance of the shipment for the charges on the whole shipment. That the carrier loses the lien upon the goods delivered up, but may retain the balance for the charges on the whole is uniformly sustained on the ground that the lien attaches to each and every portion of the shipment subject to it, and a partial delivery does not discharge the lien altogether or pro tanto.19 Inasmuch as the basis of the loss of lien on the portion delivered up is loss of possession, the analogy would seem to be complete where the levying lienor is deemed to have lost possession by the writ.

The effect of so holding is necessarily this: In any of the three situations above-described the lienor could attach or levy upon only that portion of the whole which is deemed necessary to satisfy, upon sale, the lien debt or an unsecured debt (as in situation there and the instant case) and to retain possession of the balance. If for any reason his attachment or levy of execution should be unavailing, he would still have possession of the remainder and could continue to hold them for the satisfaction of the lien debt. Undoubtedly this is a tremendous advantage to the lienor. At the same time this works no hardship on the lienee, and allowing the lienor to surrender a portion without losing the lien on the whole operates to the lienee's advantage in those situations where he wishes to take a portion for sale in order to derive sufficient funds to pay the lien debt and thus secure the release of the balance of the chattels being held under the lien. This procedure is eminently practical and promotes justice on all sides.

JAMES P. BROWN

Statute of Limitations—Wrongful Confinement in Insane Asylum Not a Disability to Toll Statute Requiring Action for Malpractice to be Brought Within Two Years After the Cause of Action Arises

Woodruff v. Shores2

In September, 1946, plaintiff was confined as an insane person, and later paroled to her husband. In August, 1944, she was declared to have been sane and not a proper patient for commitment. In November 1944, the plaintiff instituted this action against the defendant, the physician who signed the certificate of her insanity, for alleged malpractice. The defendant moved to dismiss on the ground that the plaintiff’s petition showed on its face that her action was barred by the two

1. 190 S. W. (2d) 994 (Mo. 1945).
year statute of limitation set out in Section 1016, Missouri Revised Statutes (1939). The question presented to the court was whether or not the plaintiff’s commitment or confinement, brought about by the defendant’s certificate, disabled the plaintiff from bringing her action under Section 1020, which provided in certain types of disability for the bringing of the action within two years after the removal of the disability. The court held that even if the plaintiff were disabled from instituting her action by her commitment and confinement and subsequent parol to her husband as if she were actually insane, still since she was found to be in fact sane, and since the legislature of Missouri did not broaden the language of the excepting section to include a sane person, then the court of necessity must affirm the lower court’s decision dismissing the complaint.

Authority cited by the court for its conclusion was the case of Harnett v. Fisher. In that case it was found that the defendant had not exercised reasonable care in examining the plaintiff, and that the plaintiff was of sound mind when he was confined as insane as a result of the defendant’s certificate. The trial court entered judgment for the defendant’s certificate. The trial court entered judgment for the defendant upon the ground that the action was barred by the statute of limitation. In reviewing the case in the House of Lords, Viscount Sumner said that the plaintiff could not be allowed to blow hot and cold, and say, for the purpose of getting a verdict and damages, that he was sane all along, and yet, for the purpose of meeting the plea of limitations, say that he must nevertheless be deemed to have been insane so as to prevent time from running.

It should be noted, however, in answer to Viscount Sumner’s argument that it might equally be argued that there was inconsistency on the part of the defendant in such action, inasmuch as he had certified the plaintiff to be insane, and then in the action, as a defense, asserted that the plaintiff was sane and not entitled to the benefit of the provisions suspending the statute of limitations as to persons insane.

In an earlier Minnesota case to recover damages alleged to have resulted from a conspiracy between the defendants in preferring a false charge of insanity against the plaintiff and in securing an adjudication of insanity against her, the action was barred by the statute of limitations which provided that such actions must be commenced within two years after the cause accrued. In effect, the court said that although insanity would suspend the period of limitations until the disability was removed yet, since she was not insane during the period that she was confined, she was not under a disability as intended in the statute, but even if said confinement is disability within the meaning of the statute the action is still

2. Section 1020 of the Missouri Revised Statutes (1939) sets out four situations in which one entitled to a cause of action shall be at liberty to bring such action within the respective times limited, after such disability is removed. These are where plaintiff is within the age of twenty one, insane, imprisoned on a criminal charge, or in execution under sentence of a criminal court for a less term than his natural life.


4. Langer v. Neumann, 100 Minn. 27, 110 N. W. 68 (1907).
barred, for the statute also provides that in no case should the period be extended for more than one year after the disability ceases.

It would appear therefore that the authorities which have passed on this point favor the conclusion of the court in the principal case. Yet it cannot be denied that on first thought a gross injustice seems to have been perpetrated upon the plaintiff.

At common law there were no fixed periods for the commencement of suits nevertheless pleas of limitations were allowed long before there were any statutes on the subject. The courts applied them on the theory of a fiction to the effect that after a long lapse of time, during which the claimant made no assertion of his rights, in a personal demand, a presumption was raised that the obligation had been paid or discharged, and in the case of real estate that the conveyance had been executed but lost. The fiction was justified in the reasoning of the court by the evident justness of the effect.

Thus it will be noted that a liberal construction of these limitations and the first statutes of limitations was adopted by the courts, the basis of their origin being not arbitrarily to end certain actions at a given time, but rather the basis was founded upon the general experience of mankind that claims which are not usually allowed to remain neglected if the right to sue thereon exists. So if a valid claim could still be established to overcome the presumption of no claim, then the action was permitted. This is further emphasized by the fact that even under the interpretation of the courts today statutes of limitation do not confer rights of action, or discharge or pay debts; their only effect is to bar the remedy of action.

At one time considerable prejudice prevailed against statutes of limitation and the courts were hostile to their enforcement. Statements are found in the earlier cases to the effect that it was dishonorable to insist on the statutory defense of the statute of limitations. Even courts of law resorted to a species of artifice to exclude its operation, and the plea was sometime excluded under any slip of the attorney when any other plea would have been received.

Under such an interpretation of the statute of limitations, together with a plea of inconsistency in the defendant's defense as set out above, it might have been incumbent upon the court to reverse the ruling of the lower court dismissing the

8. HENRY VIII Chap. 2 (1540), limiting the time for the bringing of suit upon a cause of action concerning real estate; 21 JAMES I, Chap. 16 (1623), superseding 32 Henry VIII.
9. Tynan v. Walker, 35 Cal. 634 (1868); Regan v. Williams, 185 Mo. 620, 84 S. W. 959 (1905); Pritchard v. Howell, 1 Wisc. 118 (1853).
plaintiff's petition. However, it cannot be denied that the legislative policy has become recognized as controlling and that it is the duty of the courts to give full effect thereto.

EUGENE E. ANDERECK

TORTS—CAUSATION—SUICIDE AS INTERVENING CAUSE

Jones v. Stewart

In an action brought by the parents to recover for the death of a son, the declaration alleged that the defendant accused their son, 18 years of age, of breaking in his house and stealing $70 to $75; that the accusation was false and made without reasonable or probable cause for believing truth of same; that deceased was so shocked and frightened with this charge of crime that it came to be more than he could endure, and that as a consequence the boy hung himself; that before the suicide the deceased was greatly distressed. A demurrer to the declaration was sustained on the basis that a cause of action was not stated. In affirming the ruling of the lower court the Supreme Court of Tennessee stated "that no reasonable person would have expected" the suicide, that it could not have been foreseen, and that the death was the result of a deliberate act of the deceased.

The basis for denying recovery in a case of this type is that the suicide was an intervening cause, relieving the defendant from liability. Suicide is generally held to be an intervening cause if the deceased understood the physical consequences of his act and if he was not in an uncontrollable frenzy at the time. This test was first applied in the early insurance cases in determining if the insured's death resulted from suicide or by his own hand within the meaning of the policy. It has been applied to negligence and workmen's compensation cases.

In the application of the rule, however, the courts reach various results in determining if the manner of suicide indicates the deceased's knowledge of the physical effects of his act. This is no doubt due to the inability to prove the statutes of the

1. 191 S. W. (2d) 439 (Tenn. 1946).
deceased's mind, whether the act of suicide was caused by a mental defect or the deceased's own volition. The court's decisions seem to rest upon other factors. The nature of the wrongful act of the defendant has a very significant bearing. If it is a wilful act, particularly if of a heinous nature, the liability is extended. The presence of physical injury, its nature and seriousness, is considered. No doubt this is one reason for denying liability in the principal case. However, in workmen's compensation cases the courts are quite liberal in this respect. Perhaps the most important factor is the type of liability imposed upon the defendant: whether it is a personal liability or the result of a governmental plan as workmen's compensation.

Although the same principle of causation is applicable to actions for negligence, wilful tort, under workmen's compensation statutes, and in criminal prosecutions, the above test is not always applied. The Restatement of Torts would extend recovery in negligence actions to the case where the deceased was acting under the influence of an uncontrollable impulse caused by insanity which insanity was caused by an act of the defendant, although he realized the nature and consequences of his act. In convicting the defendant for murder when his raped victim bought and took poison, the Indiana court relied upon the reasonable and probable theory applicable to negligence actions. This was done even though it appeared that the deceased was mentally responsible. In the application of their workmen's compensation statutes, the English courts do not require the lack of knowledge of the physical effect of the act or an uncontrollable frenzy. It is only necessary that the suicide be a result of insanity; the insanity a result of the injury received from the employment. Neither is the rule applied by several


6. Restatement of Torts (1934) § 916.
10. No case has been found allowing recovery on personal liability basis.
12. Restatement of Torts (1934) § 455.
of the state courts in allowing recovery under a civil damage statute.\textsuperscript{15} It is held that the sale of liquor to the deceased during the drunken period is sufficient. The liquor weakening the mind of the deceased and thereby proximately causing his death. The rule was not considered in the principal case, but the liability of the defendant was limited upon the reasonable and probable theory applicable to negligence actions.\textsuperscript{16} 

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\textsuperscript{15} Poffinbarger v. Smith, 27 Neb. 788, 43 N. W. 1150 (1889); Garrigan v. Kennedy, 19 S. D. 11, 96 N. W. (1904).