

1942

Recent Decisions

Fordham Law Review

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Fordham Law Review, *Recent Decisions*, 11 Fordham L. Rev. 88 (1942).

Available at: <https://ir.lawnet.fordham.edu/flr/vol11/iss1/23>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

RECENT DECISIONS

BANKING—RELATIONSHIP ARISING OUT OF DEPOSIT TO PAY BONDHOLDERS.—Defendant, a private banker, distributed bonds for the Mexican Government and agreed to service them semi-annually, out of funds supplied by Mexico. In 1913, a sum, too small to meet coupon payments was advanced by Mexico which deposit defendant banker has continued to hold. Since that time, nothing has been advanced by Mexico. Plaintiff, assignee of the Mexican Government's claim against the fund, sues the defendant banker. A bondholder had previously sued the banker to have the fund turned over to the bondholders. On submission of controversy on an agreed statement of facts, *held*, the plaintiff assignee of the Mexican Government, is entitled to the fund, since the deposit of money in a bank, for the payment of maturing interest coupons creates the relationship of "creditor and debtor," between the depositor and bank, and does not give rise to a trust in favor of the bondholders. *Nacional Financiera, S. A. v. Speyer et al.*, 26 N. Y. S. (2d) 865 (1941).

Courts are often presented with the problem of determining whether a deposit made with a bank is (1) a general deposit, (2) a general deposit for a specific purpose or (3) a special deposit.¹ This inquiry arises very often, in cases where banks have become insolvent.² Many a depositor has, then, claimed that his deposit was special. If it was special, the law is that the funds are held not as part of the bank's assets and not subject to distribution to pay general claims. The depositor is no longer in the class of general creditors of the bank and he is entitled to a preference on insolvency.³ If the deposit is held to be a general deposit or a general deposit for a special purpose, the depositor is a mere general creditor of the bank. In the present case, substantially the same question is raised in a different way.

In determining into which class a deposit falls, courts have indicated that the intention of the parties, the depositor and the bank, is to be determinative.⁴ Where the parties intended that the money deposited was to become the bank's property and was to be used by the bank in its own business for its own profit, the deposit may be general or a general deposit for a specific purpose.⁵ Where the intention of the parties is that the bank shall not be permitted to use the monies in its own business for its own profit, the deposit is held by the bank as a special deposit.⁶ The funds are not an asset of the bank.

1. 3 SCOTT, TRUSTS (3rd ed. 1939) § 530.

2. 1 PATON, DIGEST OF LEGAL OPINIONS (1940) ch. Bankruptcy and Insolvency, Op: § 7 D 3.

3. *First National Bank v. Fidelity & Deposit Co. of Maryland*, 48 F. (2d) 585 (C. C. A. 9th, 1931); *Davis v. McNair*, 48 F. (2d) 494 (C. C. A. 5th, 1931); *Bell National Bank of Pineville v. Green*, 258 Ky. 317, 79 S. W. (2d) 967 (1935); *Bartholf v. Millett*, 22 F. (2d) 538 (C. C. A. 8th, 1927).

4. *Minard v. Watts*, 186 Fed. 245 (C. C. D. Kan., 1910); *Fallgatter v. Citizens' National Bank*, 11 F. (2d) 383 (D. C. D. Minn. 1926); *Northern Sugar Corp. v. Thompson*, 13 F. (2d) 829 (C. C. A. 8th, 1926); *McKee v. Lamon*, 159 U. S. 317 (1895); *Titlow v. Sundquist*, 234 Fed. 613 (C. C. A. 9th, 1916)

5. *Corporation Commission of North Carolina v. Merchants' Bank and Trust Co.*, 193 N. C. 696, 138 S. E. 22 (1927); 1 PATON, DIGEST OF LEGAL OPINIONS (1940) ch. Bankruptcy and Insolvency, Op: § 7 D 3.

6. *In Corporation Commission of North Carolina v. Merchants' Bank & Trust Co.*,

Determining this intention is a difficult question where the depositor has indicated to the bank that he wishes the bank to assist him in accomplishing some special purpose of his own.⁷ Thus a business man may deposit a large amount of money to meet his weekly payroll and ask the bank to make particular arrangements to honor his payroll checks. Again, as in the case at bar, the depositor might indicate to the bank that it desires its services in paying interest on bonds. Many courts seem to think that the mere fact that a bank agrees to assist in some such special purpose of the depositor, indicates that the funds deposited are not to be used in the bank's business.⁸ They are to be set aside and devoted only to the purpose indicated. Thus a rule of thumb has been adopted by some courts, *i.e.*, an indication by a depositor that he has some special purpose in mind, in making a deposit, characterizes the deposit as a special deposit.

Such a rule is deplored by bankers and seems opposed to sound principles. The New York court in the case at bar adopts a sounder construction of the intention of the parties and points the way for other courts to follow. It indicates that the mere fact that a depositor tells his bank that his purpose in making a deposit is to have funds available for a particular object, does not necessarily mean that he intends the bank to hold his deposit aside and withdraw it from the funds it has available for its own business. Such a purpose of the depositor is consistent with an intention to take the bank's promise, which is given in return, that it will provide funds for his purpose, to meet the checks he intends to issue, and not require the bank to hold the deposit aside as a special deposit. He may be willing that the bank shall use his deposit in its own business. What other profitable agreement could a bank make when it is not carrying other accounts for the depositor and does not make service charges for paying checks? The presumption is and should be that a deposit is not special⁹ and unless the intention of the parties is clearly that the bank may not use the funds in its own business the court should consider deposits like those in the case at bar as general deposits for a special purpose.

The case at bar brings to mind another unfortunate distinction made in the law.

193 N. C. 696, 138 S. E. 22, 24 (1927) the court said: "A special deposit is a deposit for safe-keeping, to be returned intact on demand . . . , the bank acquiring no property in the thing deposited and deriving no benefit from its use. The title remains in the depositor, who is a bailor and not a creditor of the bank."

7. For such an arrangement see *Central Coal & Coke Co. v. State Bank of Bevier*, 226 Mo. App. 594, 44 S. W. (2d) 188 (1931); and *Equity Elevator & Trading Co. v. Farmers' and Merchants' Bank*, 64 N. D. 95, 250 N. W. 529 (1933). See also *Diebold Safe & Lock Co. v. Fulton*, 46 Ohio App. 127, 187 N. E. 784 (1933),

8. *Ibid.* In the cases cited in note 7 *supra*, the banks agreed to assist in such special purpose of the depositor, and this was said to be sufficient to justify a finding that a special deposit was intended. *Contra*: *Carnegie-Illinois Steel Corp. v. Berger*, 105 F. (2d) 485 (C. C. A. 3d, 1939); *Erie R. Co. v. Mizell*, 9 F. Supp. 143 (D. C. W. D. N. Y. 1934); *Craig v. Bank of Granby*, 210 Mo. App. 334, 238 S. W. 507 (1922).

In *Central Coal & Coke Co.*, 226 Mo. App. 594, 44 S. W. (2d) 188 (1931), the bank also exacted a small revenue charge. This last fact does not definitely show a special deposit. Service charges for active general accounts are not unusual.

9. *National Bank of the Republic v. Millford*, 10 Wall. 152, 155-156 (U. S. 1869); *President & Directors of Manhattan Co. v. Blake*, 148 U. S. 412, 425 (1893); *Collins v. State of Florida*, 33 Fla. 429, 15 So. 214, 217-218 (1894).

Many cases seem to hold that where a deposit is made to pay interest on bonds it can be held a general deposit and no trust arises, but where the deposit is made to pay dividends to stockholders it will be a special deposit and a trust arises in favor of stockholders.¹⁰ These cases seem to hold that merely because a situation involves bondholders it can be classed in a non-trust category and if it involves stockholders, in a trust category. Determining whether or not a trust arises should be a matter of investigating the intention of the parties. Where it is their intention to have the money held aside and not used by the depository in its own business then a trust may arise and this should be the rule whether the monies are given to him to pay stock dividends or bond interest.

COMMON LAW MARRIAGE.—CONTRACT—COHABITATION AND REPUTATION.—In 1908, appellant and decedent entered into an oral agreement, to which there were no witnesses, to live together as man and wife. The decedent was to pay the bills, and the appellant was to prepare the meals, do the laundry, and occupy his home and bed. The parties took an occasional trip, and on such excursions registered at various hotels as man and wife. Appellant, however, ran a boarding house and represented the decedent to her friends, neighbors and relatives as boarder therein. The decedent never represented the appellant as his wife, and the appellant never used the decedent's name. The appellant brought action against the administrators for a widow's share of decedent's estate. On appeal from judgment denying appellant's petition, *held*, that although there was a binding contract, there was no valid common law marriage, since the parties did not hold themselves out as a married couple. Judgment affirmed. *Schilling v. Parsons*, 36 N. E. (2d) 958 (App. Court of Ind. 1941).

The principle followed by the court in deciding this case was that in addition to a valid unwitnessed, oral agreement of marriage there must be subsequent cohabitation,¹ and a general holding out of the marriage to the public. That there was cohabitation here, is not questioned by the court, but there was no evidence of any "holding out" of the marriage to the public.

The court distinguished between a marriage contract which is written or one which is oral and witnessed, on the one hand; and one, as in this case, which was oral and unwitnessed, on the other hand. It conceded that in the first two types

10. *In re Interborough Consolidated Corp.*, 267 Fed. 914 (D. C. S. D. N. Y. 1920) (involves bonds, held, no trust); *Ford v. Easthampton Rubber Thread Co.*, 158 Mass. 84, 32 N. E. 1036 (1893) (involves stocks, held, a trust); *Searles v. Gebbie*, 115 App. Div. 778, 101 N. Y. Supp. 199 (4th dep't 1906), *aff'd mem.* 190 N. Y. 533, 83 N. E. 1131 (1907) (involves stocks, held, a trust); *Guidise v. Island Refining Corporation*, 291 Fed. 922 (D. C. S. D. N. Y. 1923) (involves bonds, held, no trust); *Staten Island Cricket & Baseball Club v. Farmers' Loan & Trust Co.*, 41 App. Div. 321, 58 N. Y. Supp. 460 (2d dep't 1889) (involves bonds, held, no trust).

1. *Yardley's Estate*, 75 Pa. St. 207, 211, (1874) "To cohabit, is to live or dwell together; to have the same habitation; so that where one lives and dwells, there does the other live and dwell always with him." *People v. Spencer*, 199 Mich. 395, 165 N. W. 921, 923 (1917) "Cohabit in this behalf means dwelling together; living in the usual manner of married people. . . ."

of contract, no holding out is required, but under the third type, it makes cohabitation and "holding out" necessary.

This distinction seems questionable. Insofar as contract law is concerned, there is generally no difference between an oral and a written contract except with regard to the Statute of Frauds.² Since the Statute of Frauds is not pertinent to a contract of marriage,³ a marriage agreement may generally be either oral or in writing,⁴ and both types are treated as equally valid.

Furthermore, the principle applied by the court is opposed to the sounder view that "holding out" is not required. This sounder view is one which rests the validity of the marriage upon the contract which supports it, and not the publicity given it.⁵ The only requirements for a valid common law contract are: competency of the parties to contract, free and mutual consent, and a present agreement.⁶ Subsequent cohabitation is not required to perfect a marriage under this view. Cohabitation and publication are universally recognized as some evidence of a valid marriage contract but it is submitted that such evidence is neither conclusive nor required.⁷ If cohabitation is not required, it seems illogical to require publication.

Furthermore, the *Teter* case,⁸ upon which the principal case relies, does not seem to be supporting authority. In that case, there was a "holding out" of the marriage by the parties, and a subsequent formal ceremony. The court accepts this as good evidence of the marriage. But the court does not say that it would find the

2. 1 WILLISTON, CONTRACTS (1936) § 12.

3. RESTATEMENT, CONTRACTS (1932) § 178.

4. *In re Seymour*, 113 Misc. 421, 185 N. Y. S. 373, (1920); *Love v. Love*, 185 Iowa 930, 171 N. W. 257 (1919). It has been well argued that the state is a third party to each marriage contract. MADDEN, DOMESTIC RELATIONS (1931) § 19, *Wade v. Kalbfleisch*, 58 N. Y. 282 (1874), *KEEZER, MARRIAGE AND DIVORCE* (2d ed. 1923) § 74. Certain restrictions may be placed on marriage contracts for the good of the state as held in *Grigsby v. Reib*, 105 Tex. 597, 153 S. W. 1124 (1913). But marriages solemnized in accordance with restrictions rest ultimately upon a contractual basis. *Davis v. Davis*, 119 Conn. 194, 175 Atl. 574 (1934). *Jackson v. Winne*, 7 Wend. 47 (N. Y. 1831). Marriage contracts, either solemnized or at common law, are of equal importance and validity. MADDEN, *op. cit. supra* § 20-21, N. Y. DOM. REL. LAW § 10.

5. *U. S. v. Simpson*, 4 Utah 227, 7 Pac. 257 (1885). *In re Hulett's Estate*, 66 Minn. 327, 69 N. W. 31 (1896). New York only requires proof of a contract, and definitely asserts that no cohabitation is required. See *Caujolle v. Ferrie*, 23 N. Y. 90, 106 (1861). See note 6 *infra*. New York has followed this doctrine throughout its history. *Hall, Common Law Marriage in New York State* (1930) 30 COL. L. REV. 1.

6. "If copula follows, it adds nothing in law, though it may aid the proof of marriage." BISHOP, MARRIAGE, DIVORCE, and SEPARATION, (1891) § 315; *U. S. v. Simpson*, 4 Utah 227, 7 Pac. 257 (1885); *Tiuna v. Willmott*, 162 Okl. 42, 19 P. (2d) 145 (1933). For sufficiency of evidence see Comment, (1935) 21 CORNELL L. Q. 122. *In re Seymour*, 113 Misc. 421, 185 N. Y. S. 373 (1920). For the most part, however, where the courts find a contract, there is usually some evidence of cohabitation.

7. BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, (1981) §§ 314, 315; Note, (1919) 3 MINN. L. REV. 426; *Davis v. Stoufer*, 132 Mo. App. 112 S. W. 282 1908).

8. *Teter v. Teter*, 101 Ind. 129 (1884). Cf. *In re Heitman's Estate*, 154 Misc. 838, 279 N. Y. Supp. 108 (1935). Cf. *Matter of Erlanger*, 145 Misc. 1, 259 N. Y. Supp. 610 (1932).

common law marriage contract invalid if the "holding out" or a formal ceremony had not been established. Another problem arises if the doctrine of the principal case is applied. Cohabitation is a permanent status,⁹ and the process of "holding out" apparently takes more than a day. However, "at each particular moment of the existence of a person, he must be either married or single; there is no intermediate condition".¹⁰ When, therefore, is "holding out" accomplished and when do the parties to the contract become married?

Although they are receiving more and more legislative attention, common law marriages are still objects of judicial cognizance.¹¹ What, therefore, should be the court's attitude in treating a case where there is an oral, unwitnessed contract of marriage? For purposes of public policy and to prevent fraud, strong proof of the marriage contract should be required.¹² As a practical matter, this proof is usually supplied by showing cohabitation and publication. However, where the contract is conclusively proved by other evidence, the absence of proof of cohabitation and "holding out" should not be allowed to defeat the marriage.¹³

CONSTITUTIONAL LAW—VALIDITY OF HANDBILL ORDINANCES.—Plaintiff owned a submarine and desired to exhibit it for a fee to the public. He sought to lease a berth at a pier owned by the City of New York. Upon the City's refusal he obtained a state-owned pier and designed a circular to advertise the presence of the submarine. Being informed that distribution of such commercial circular violated a city ordinance, he drew a circular announcing, on one side, the presence of the submarine and bearing on the reverse side, a printed protest against the city's refusal of a berth for his ship. Defendant, the Police Commissioner of the City of New York, restrained its distribution. Plaintiff brought action for, and obtained, an injunction in the District Court¹ perpetually enjoining defendant from enforcing the regulation against distribution of plaintiff's handbills. Upon appeal from the district court, *held*, one judge dissenting, insofar as it prevents distribution of a circular containing a combined protest and advertisement, the ordinance is repugnant to the

9. *Yardley's Estate*, 75 Pa. St. 207, 211 (1874); *People v. Spencer*, 199 Mich. 395, 165 N. W. 921, 923 (1917).

10. BISHOP, *op. cit. supra*, note 4, § 317.

11. This problem has been largely curtailed by the passing of legislation in most of our states, including N. Y. DOM. REL. LAW § 11; (1-5) LAWS OF 1933, c. 606. However, these statutes are not retroactive, and this problem will appear again and again for many years. N. Y. DOM. REL. LAW § 11, (42); *Matter of Mahel*, 153 Misc. 228, 274 N. Y. Supp. 625 (1934).

12. In *Davis v. Stoufer*, 132 Mo. App. 555, 112 S. W. 282, 285 (1908) the court said, "It has been said that a contract incapable of proof is for practical purposes no contract, since, if it is not shown by believable evidence it cannot be known that it exists."

13. The purpose of this is well stated in *Teter v. Teter*, 101 Ind. 129, 51 Am. Rep. 742, where the court said at p. 745, "The law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy. . . ." *Cf. Dalrymple v. Dalrymple*, 2 Hagg. Con. 51, 161 Eng. Rep. R. 665 (1884).

1. 34 F. Supp. 596 (S. D. N. Y. 1940).

guaranty of liberty contained in the Fourteenth Amendment. Judgment affirmed. *Chrestensen v. Valentine*, 122 F. (2d) 511 (C. C. A. 2d 1941).

Thus appears another case² involving the validity of municipal prohibitions against the distribution of handbills in streets and public places. The prohibition herein is found in the New York City Sanitary Code³ and applies to "commercial and business advertising matter". Plaintiff insists he is being deprived of the rights of freedom of speech and of the press guaranteed by the First Amendment and extended by the Fourteenth Amendment. It is well settled that freedom of speech and freedom of the press, protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from unreasonable invasion by state action.⁴ Likewise it is agreed that municipal ordinances adopted under state authority constitute state action and are within the prohibition of the Fourteenth Amendment.⁵ Under this general guarantee of the fundamental rights of a person the state, nevertheless, has authority to enact reasonable laws to promote the health, safety, morals and general welfare of its people.⁶

2. Other cases are *Lovell v. City of Griffin*, 303 U. S. 444 (1938); *Schneider v. State of New Jersey*, *Town of Irvington*, 308 U. S. 147 (1939); *Hague v. C. I. O.*, 307 U. S. 496 (1939); *Thornhill v. Alabama*, 310 U. S. 88 (1940); *Carlson v. California*, 310 U. S. 106 (1940); *Cantwell v. Connecticut*, 310 U. S. 296 (1940).

3. NEW YORK SANITARY CODE, § 318 (Health Department Regulations, Art. III, § 318), which reads as follows:

"Handbills, cards, circulars.—No person shall throw, cast or distribute, or cause or permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever, in or upon any street or public place, or in a front yard or court yard, or on any stoop, or in the vestibule or any hall of any building, or in a letter box therein; provided, that nothing herein contained shall be deemed to prohibit or otherwise regulate the delivery of any such matter by the United States postal service, or prohibit the distribution of sample copies of newspapers regularly sold by the copy or by annual subscription. This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter."

4. *Gitlow v. New York*, 268 U. S. 652, 666 (1923); *Whitney v. State of California*, 274 U. S. 357, 373 (1927); *Stromberg v. California*, 283 U. S. 359, 368 (1931); *Near v. Minnesota*, 283 U. S. 697, 707 (1931); *Grosjean v. Amer. Press Co.*, 297 U. S. 233, 244 (1936); *Palko v. Connecticut*, 302 U. S. 319 (1937).

5. *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20 (1907); *Home Tel. and Tel. Co. v. Los Angeles*, 227 U. S. 278 (1913); *Cuyahoga River Power Co. v. Akron*, 240 U. S. 462 (1916).

6. The laws in the following cases were upheld as constitutional: *In re Wong Yung Quy*, 2 Fed. 624 (C. C. A. 9th 1880) (law prohibiting burial custom dangerous to the health); *Owens v. State*, 6 Okla. Cr. 110, 116 Pac. 345 (1911) (law punishing person who denied medical aid to his child); *Reynolds v. U. S.*, 98 U. S. 145, 166 (1878) (statute punishing those practicing bigamy); *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. U. S.*, 140 U. S. 665 (1890) (state revoked charter granted to corporation because of its religious beliefs and practices); *Commonwealth v. Plaisted*, 148 Mass. 375, 19 N. E. 225 (1889) (ordinance prohibiting cornet playing without a license). But such legislative intervention can find constitutional justification only by dealing with the abuse of rights; the rights themselves cannot be curtailed. *De Jonge v. Oregon*, 299 U. S. 353, 364 (1937).

In the instant case the majority,⁷ in holding for the plaintiff, relied on *Schneider v. State of New Jersey*⁸ which stamped four ordinances⁹ as unconstitutional. Speaking through Mr. Justice Roberts, in that case, the court held¹⁰ that the mere desire to keep streets clean was not a ground to prohibit persons rightfully on streets from handing out literature to willing receivers. The resulting burden of cleaning up, was the price paid for the right of free speech. It was suggested that punishment for the actual street litterers would prevent such uncleanness.

The handbills involved in the *Schneider* case were not commercial advertising. Whether the present handbill is such is a question open to some doubt. The present opinion gives plaintiff the benefit of the doubt in this borderline¹¹ case, on whether the handbill is "primarily commercial",¹² and refuses to class it as such because the plaintiff had profit in mind.¹³ On the other hand, the long dissent argues that the hand-bill herein was "wholly commercial"¹⁴ and therefore within the scope of the ordinance. The dissent makes much of the fact that the primary motive of the plaintiff was profit. But it is beyond the police power of the states to interfere arbitrarily with a lawful business.¹⁵ Even if the advertising were commercial the statute might be invalid as such an arbitrary interference. The statute in question seems to be quite arbitrary because it prevents the distribution of commercial handbills in any manner. It seems that the minority used the same line of reasoning followed in the majority opinion of the recent "Flag Salute" case,¹⁶ and strained to support legislation merely because a state legislature had enacted it.¹⁷

7. 122 F. (2d) 511, 514 (C. C. A. 2d 1941).

8. 308 U. S. 147 (1939).

9. *Schneider v. State* decided four cases at the same time since ordinances involved were nearly the same in all four. *Young v. California*, 3 Cal. App. (2d) 62, 85 P. (2d) 231 (1938) (defendant distributed handbills announcing a meeting of the "Friends of the Lincoln Brigade"); *Nichols et al. v. Massachusetts*, 18 N. E. (2d) 166 (Mass. 1938) (defendants distributed leaflets describing meeting to be held to protest manner of administration of state unemployment insurance system); *Snyder v. Milwaukee*, 230 Wis. 131, 238 N. W. 301 (1939) (leaflets were distributed by a picket in a labor controversy); *Schneider v. Irvington*, 121 N. J. L. 542, 3 Atl. (2d) 609 (1939) (defendant, one of "Jehovah's Witnesses", left religious pamphlets at the homes she visited). The *Schneider* and *Snyder* cases came up on *certiorari*, the *Young* and *Nichols* cases on appeal. For full historical and general coverage of the subject of handbills, see Lindsay, *Council and Court: The Handbill Ordinances, 1889-1939*, (1941) 39 MICH. L. REV. 561-96. See also Comment, (1940) 35 ILL. L. REV. 90.

10. 308 U. S. 147, 162 (1939).

11. *Chrestensen v. Valentine*, 122 F. (2d) 511, 515 (C. C. A. 2d 1941).

12. Criticism of suggested "commercial" distinction is made in (1938) 5 U. OF CHI. L. REV. 675, 676. But see (1940) 35 ILL. L. REV. 90, 94. See also (1940) 24 MINN. L. REV. 570; (1940) 13 So. CALIF. L. REV. 253; (1940) 25 WASH. U. L. Q. 611; Lindsay, *Council and Court: The Handbill Ordinances, 1889-1939* (1941) 39 MICH. L. REV. 561, 580, 589, 593.

13. *Chrestensen v. Valentine*, 122 F. (2d) 511, 516 (C. C. A. 2d 1941) note 6.

14. *Id.* at 518.

15. *Meyer v. Nebraska*, 262 U. S. 390, 400 (1923); *Liggett Co. v. Baldrige*, 278 U. S. 105, 111 (1928); *Allgeyer v. La.*, 165 U. S. 578, 589 (1897).

16. *Minersville School Dist. v. Gobitis*, 310 U. S. 586 (1940).

17. (1941) 6 Mo. L. REV. 106; (1940) 15 ST. JOHN'S L. REV. 95.

That the case under consideration is one of first instance,¹⁸ there cannot be much doubt. How the Supreme Court¹⁹ will rule no one can say. Its decision will be another landmark in the series of cases on the subject of handbill ordinances, which should tend to settle the law on the topic. Coupled with the tendency toward censorship resulting from the critical and troublous times through which we are passing,²⁰ decisions, to a greater extent, may be expected to reflect these conditions.²¹ So it would seem, that there is a possible chance that the Supreme Court might reverse the judgment of the Circuit Court of Appeals.

DOMESTIC RELATIONS—ACTION FOR MALICIOUS PROSECUTION FOR OBTAINING A FOREIGN DIVORCE.—The defendant-wife, acting upon the advice of her attorney, in good faith, went to Nevada where she obtained a divorce by default. While her action was pending, the plaintiff-husband obtained a declaratory judgment in Connecticut, the state of their domicile, stating that the defendant-wife's residence in Nevada was merely a colorable one for the purpose of securing a divorce. The defendant-wife, after having obtained the divorce returned to New York, whereupon the plaintiff-husband instituted this suit for malicious prosecution in accordance with Connecticut law,¹ the state where his cause of action arose. On motion, *held*, that the complaint should be dismissed on the merits because plaintiff failed to show that prosecution originated in the malice of the defendant and was without probable cause. *Weidlich v. Weidlich*, 30 N. Y. S. (2d) 326 (1941).

The New York Supreme Court, admitting the novelty of the husband's suit for malicious prosecution of the divorce, correctly dismissed the complaint in this case in view of the common law and the statute involved. The plaintiff failed to make out a cause of action under the theory of malicious prosecution. As was said in *Burt v. Smith*,² "While malice is the root of the action, malice alone even when

18. *People v. Rollo*, 24 N. Y. S. (2d) 350, 353 (Mag. Ct. Bronx Co. 1940).

19. *Cert. granted*. No. 707, October Term 1941. Order allowing *cert.* filed Nov. 24, 1941.

20. Chaffee, *Freedom of Speech in War Time* (1919) 32 HARV. L. REV. 932. See also CHAFFEE, *FREE SPEECH IN THE UNITED STATES* (1941).

21. *Schenck v. U. S.*, 249 U. S. 47 (1919). Mr. Justice Holmes here stated that war time cuts down on individual liberty when it is found to be a hindrance to the war effort. At page 52, he said: "But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic".

1. CONN. GEN. STAT. (rev. 1918) § 6148, now CONN. GEN. STAT. (rev. 1930) § 6000. "Treble damages for vexatious suit. If any person shall commence and prosecute any suit or complaint against another, in his own name, or the name of others, without probable cause, and with a malicious intent unjustly to vex and trouble him, he shall pay him treble damages." The plaintiff's right to maintain a tort action against his spouse in N. Y. is established in: N. Y. DOM. REL. LAW § 57: "Right of action by or against married woman by husband or wife against the other, for torts. . . . A married woman . . . is liable to her husband for her wrongful or tortious acts resulting in any such personal injury to her husband or his property, as if they were unmarried."

2. 181 N. Y. 1, 5, 73 N. E. 495, 496 (1905).

extreme, is not enough, for want of probable cause must also be shown." It has long been held that if a party acts in good faith upon the advice of an attorney, (however erroneous that opinion might be) after having fully and fairly laid all the facts of his case before that attorney he has a complete defense to a suit for malicious prosecution.³ The sworn deposition of the defendant's two attorneys (one in Nevada and another in Connecticut) as to this fact, destroyed any cause of action the plaintiff might have had.⁴

The case emphasizes the fact that the remedy of a plaintiff, whose spouse seeks an unconscionable foreign divorce, is inadequate at law. It raises the question whether public policy would counsel an extension of the powers of equity to make it mandatory for a court to issue an injunction when an applicant seeks to restrain a divorce action in a foreign jurisdiction, brought on only colorable grounds.

In equity,⁵ it is very difficult to restrain the maintenance of divorce actions in foreign jurisdictions. The difficulty of applying to equity for a remedy is shown in *Goldstein v. Goldstein*.⁶ The plaintiff-wife there sought to restrain the defendant-husband from obtaining a Florida divorce by showing that she would be irreparably damaged, and that she was financially unable to defend the divorce. The court refused to grant the decree and took a "point of view which is opposed to essential considerations of natural justice, particularly within the domain of equity."⁷ The court argued that the "plaintiff has nothing to fear from the action which her husband has sought to bring against her"⁸ because Florida was not the matrimonial domicile. This seems to be answered by Loughran, J., in his dissenting opinion,⁹ when he pointed out that the husband may undertake another marriage on the strength of the Florida decree. His second wife would then have tangible and practical quasi-matrimonial claims upon him for support which the courts would recognize.¹⁰ Clearly the wife's chances of recovery against her husband for support

3. *Ames v. Rathbun*, 55 Barb. 194 (N. Y. 1869); *Richardson v. Virtue*, 2 Hun. 208 (N. Y. 1874); *Hall v. Suydam*, 6 Barb. 83 (N. Y. 1849); *Lathrop v. Mathers*, 143 App. Div. 376, 128 N. Y. Supp. 492 (1st Dep't 1911); (1932) 31 MICH. L. REV. 139, 140; (1934) 2 KAN. L. REV. 217, 218; *Brodrib v. Doberstein*, 107 Conn. 294, 140 Atl. 483 (1928).

4. It is suggested by HARPER, *THE LAW OF TORTS* (1933) 584-585, that the plaintiff must also allege that the previous suit was "terminated in the plaintiff's favor" and that the defendant's claim was baseless. Here the divorce suit was terminated in defendant's favor.

5. Wormser, *Injunctions Against Prosecutions of Divorce Actions in Other States* (1940) 9 FORDHAM L. REV. 376.

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

7. Wormser, *supra* note 5, at 378.

8. 283 N. Y. 146, 148 (1940).

9. *Id.* at 149, 150.

10. *Krause v. Krause*, 282 N. Y. 355, 360, 26 N. E. (2d) 290, 292 (1940). This case held that the second wife can sue for her support although concededly the second marriage is invalid. For as was said, "it is not open to defendant in these proceedings to avoid the responsibility which he voluntarily incurred." The *Baumann* case (*infra*, note 11) held that the first wife may not get an injunction to restrain the second wife from using the name of her spouse, even though the marriage by which she received that name might be invalid. In *Lowe v. Lowe*, 265 N. Y. 197, 192 N. E. 291 (1934), the first wife sought to obtain an injunction to restrain her husband and his second wife from representing themselves as married and said injunction was refused.

would be decreased. Her standard of living might have to be lowered. Certainly this subjects the plaintiff-wife to enough inconveniences, hardships, troubles and expenses for equity to intervene and protect the rights of the oppressed party.

Probably the most feasible way of eradicating this hesitancy of equity courts to grant injunctions is by legislative fiat. A statute should make it mandatory for equity to grant the injunction after the defendant's residence in a foreign state has been adjudicated merely colorable. To expect that courts might enlarge the legal cause of action for malicious prosecution, as the plaintiff here evidently did, is to expect them to run counter to well-settled doctrines of *stare decisis*. However, if the Legislature would enact a statute compelling the equity court to act, the inequities of oppression and hardship caused in the *Baumann* case,¹¹ the *Krause* case,¹² and similar cases, would be obliterated.

GOVERNMENT CONTRACTS—THIRD PARTY BENEFICIARIES.—The United States, through the Secretary of the Interior, contracted with the defendant for the construction of a library building at Howard University in the District of Columbia, under authority of the National Industrial Recovery Act.¹ The Secretary of the Interior requested the defendant to furnish a performance and payment bond in accordance with the provisions of the Miller Act.² Noland furnished materials to a subcontractor but was never paid for it. On appeal from a judgment denying a motion to dismiss a suit brought by the United States on a payment bond for the use of Noland, *held*, the provisions of the Miller Act requiring payment bonds to the United States apply only to construction of public buildings. Such a bond cannot be enforced by the government as a private obligation.

The court felt that even though Congress authorized the expenditure of W. P. A. funds for the erection of the Howard University Library, the nature of the building was not changed; it remained private. *Irwin et al. v. United States to the Use of Noland Co., Inc.*, 122 F. (2d) 73 (D. C. App. 1941).

The instant case considered the previous decision of *Maiatico Construction Co., Inc. v. United States*,³ which dealt with identical facts. In that decision, the court exhaustively reviewed the status of work done under the Heard Act⁴ for Howard

11. *Baumann v. Baumann*, 250 N. Y. 382, 165 N. E. 819 (1929).

12. *Krause v. Krause*, 282 N. Y. 355, 26 N. E. (2d) 290 (1940). For a complete discussion of this case see Kane, *Recognition of Foreign Divorce Decrees in New York* (1940) 9 *FORDHAM L. REV.* 242.

1. 48 STAT. 201 (1933) 40 U. S. C. A. § 402 (Supp. 1940).

2. 49 STAT. 793 (1935) 40 U. S. C. A. § 270a (Supp. 1940) states in effect that before any person is awarded a contract to do public work a performance and payment bond must be furnished to guarantee performance of the work and to protect all material-men. Section 270b (Supp. 1940) gives the material-men the right to sue on the above payment bond for unpaid balance in the name of the United States.

3. 79 F. (2d) 418 (D. C. App. 1935).

4. 28 STAT. 278 (1894) as amended, 33 STAT. 311 (1905) 40 U. S. C. A. § 270. This statute, referred to as the HEARD ACT, was passed in recognition of the inability of subcontractors to take liens upon the public property of the United States and provided an authorization to require from the contractor a payment bond for the benefit of subcon-

University, and concluded that Howard University was a private institution since it served private purposes and interests. The use of federal funds was held not to change the character of work done for such an institution so as to bring it within the provision of the Heard Act, which applied only to the construction of public buildings of the United States. The court also concluded that the enactment of the Miller Act, superseding the Heard Act, produced procedural changes only and did not alter the definition of public work.

The decision upon the facts reported is undoubtedly correct and supported by precedent.⁵ The United States as plaintiff, lacking the statutory authorization of the Miller Act,⁶ was not the proper party in interest, and could not maintain an action as on a statutory bond.⁷ A recovery under the theory of a voluntary bond was barred because the United States can enter into binding contracts only where a statute creates the authority to do so.⁸ However, the court in the last paragraph of the decision commented upon the obvious inequity of the result, and thus invites discussion of what might be done to arrive at a more equitable solution. The simplest and safest solution would be to revamp the Miller Act to permit the instant action.

With removal of the United States as a Use plaintiff, the facts suggest a direct suit by the subcontractor as a third-party beneficiary under the doctrine of *Lawrence v. Fox*.⁹ This doctrine has the approval of the majority of the state courts¹⁰ and also of the Federal Courts¹¹ and would be a suitable basis for a claim, provided that the payment bond given by the defendant to the United States could be upheld for the purpose of this action. This question has been the subject of

tractors. The practical effect of the Act was the substitution of the bond for the building on which a lien, because of its public nature, could not exist.

5. See note 3, *supra*. See also, *Peterson v. United States*, 119 F. (2d) 145 (C. C. A. 6th 1941) where the *Mañatico* case is cited with approval.

6. *Supra*, note 2.

7. *United States v. Faircloth*, 265 Fed. 963 (D. C. App. 1920); *Penn Iron Co. v. Trigg Co.*, 106 Va. 557, 56 S. E. 329 (1907); *United States v. Empire States Surety Co.*, 114 App. Div. 755, 100 N. Y. Supp. 247 (1906).

8. See note 7 *supra*.

9. 20 N. Y. 268 (1859).

10. *Byram Lumber & Supply Co. v. Page*, 109 Conn. 256, 146 Atl. 293 (1929); *Miller v. Farr*, 178 Ind. 36, 98 N. E. 805 (1912); *Peoples Bank & Trust Co. v. Weidinger*, 73 N. J. L. 433, 64 Atl. 179 (1906); *First City Trust & Savings Bank v. Doolittle*, 36 Ohio App. 218, 173 N. E. 19 (1930). *Cf. Orenberg v. Horan*, 269 Mass. 312, 168 N. E. 794 (1929).

11. *Hendrick v. Lindsay*, 93 U. S. 143 (1876); *Pennsylvania Steel Co. v. N. Y. City Ry. Co.*, 198 Fed. 721, 750 (C. C. A. 2d 1912); *United States v. Union Metallic Cartridge Co.*, 265 Fed. 349, 353 (D. C. Conn. 1920). See also *Corbin, Third Parties as Beneficiaries of Contractor's Surety Bonds* (1928) 38 *YALE L. J.* 1. For the law of the District of Columbia see *Willard v. Wood*, 135 U. S. 309 (1890) and 164 U. S. 502 (1896) where the court stated that in the District of Columbia an action at law of a third party beneficiary could not be maintained; but under the doctrine of *Keller v. Ashford*, 133 U. S. 610, 621 (1890) such a recovery may be had in equity. To the same effect see *Van Senden v. Wilkinson*, 76 F. (2d) 151 (D. C. App. 1935); *De Leon v. Rhines*, 74 F. 477 (D. C. App. 1934).

many decisions which mainly uphold the third-party beneficiaries' rights.¹² Recently in a well reasoned New York decision, *McClare v. Massachusetts Bonding and Trust Company*,¹³ recovery was permitted, despite the invalidity of the bond between the contracting parties, on the ground that the defendant surety is estopped from asserting the invalidity of the bond. Applied to the case under discussion, this decision would permit Noland to recover if he knew of the existence of the bond and supplied the material in reliance thereon. Other cases go even further and permit the laborer and material-men to avail themselves of the protection of a bond regardless of their actual knowledge.¹⁴ It seems therefore, that Noland should be able to recover under the doctrine of *Lawrence v. Fox*.

LIBEL AND SLANDER—STATUTORY EXTENSION OF THE DEFENSE OF ABSOLUTE IMMUNITY.—Allegedly, in pursuance of a conspiracy to injure plaintiff, the defendants, President of a state university and Dean of its medical school, at a session of the Board of Regents of the University, made derogatory statements concerning plaintiff's fitness as librarian. This board was charged with the statutory duty of governing the University "in all its interests". On an appeal from an order sustaining a demurrer to the petition which alleged that the statements were made with an evil intent to injure the plaintiff, and that as a result thereof plaintiff was discharged and suffered actual damages, *held*, in making said statements, the defendants were acting "in the proper discharge of an official duty" within the meaning of the statute defining privileged communications, and that the occasion upon which the report was made was absolutely privileged. *Hughes v. Bizzel et al.*, 117 P. (2d) 763 (Sup. Ct. Oklahoma, 1941).

Courts recognizing the defense of absolute privilege or immunity¹ as one in which the existence of malice is irrelevant, have limited the situations, as a general rule,² to judicial and legislative proceedings. This immunity was extended in *Spalding v. Vilas*³ to proceedings of important executive officers when the Supreme Court of

12. *Kansas City Hydraulic Press Brick Co. v. National Surety Co.*, 149 Fed. 507, 512 (C. C. W. D. Mo. 1906); *American Bonding Co. v. Dickey*, 74 Kan. 791, 88 Pac. 66 (1906); *Mississippi Fire Insurance Co. v. Evans*, 153 Miss. 635, 120 So. 738 (1929).

13. 266 N. Y. 371, 195 N. E. 15 (1935).

14. *Griffith v. Stucker*, 91 Kan. 47, 136 Pac. 937 (1913); *United States Gypsum Co. v. Gleason*, 135 Wis. 539, 116 N. W. 238 (1908); *Baker v. Bryan*, 64 Iowa 561, 21 N. W. 83 (1884); *Toner v. Long*, 79 N. H. 458, 111 Atl. 311 (1920).

1. Immunity seems the more accurate term, although not adopted by the Courts. See *Evans, Legal Immunity for Defamation* (1940) 24 MINN. L. REV. 607, 613. Green, *Relational Interests* (1935) 30 ILL. L. REV. 314; *Veeder, Absolute Immunity in Defamation* (1910) 10 COL. L. REV. 129.

2. Communications between husband and wife and publications to which plaintiff has given his consent are privileged utterances in the same class. See RESTATEMENT, TORTS (1934) § 592; *Campbell v. Bannister*, 79 Ky. 205, 2 Ky. Law Rep. 72 (1800); *Chapman v. Ellesmore*, [1932] 2 K. B. 431.

3. 161 U. S. 483 (1896) [Postmaster-General]. *Mellon v. Brewer*, 57 D. C. App. 126, 18 F. (2d) 168 (1927) [Secretary of Treasury]. To same effect, *Chatterton v. Secretary of State for India* [1895] 2 Q. B. 189.

the United States in 1896 gave absolute immunity to the head of an executive department of the government. In the latter case, the Postmaster General when issuing checks on claims, issued a circular to claimants who had engaged plaintiff as counsel, which gave the impression that plaintiff's services were entirely unnecessary, and thus worked an injury upon him in his profession. The court stated that the same general considerations of public policy and convenience which require that judicial officers should not be amenable to civil actions for their judicial acts apply to a large extent to official communications made by heads of executive departments in the discharge of duties imposed upon them by law; and the postmaster-general was held not liable, regardless of any personal or malicious motive that may have prompted his action. Since then, in later Federal cases, the protection has been widened in scope so as to include communications and reports of subordinate officials of the government to their superiors, when engaged in the discharge of duties, imposed upon them by law.⁴ However, the doctrine has been rejected where the communication was made by members of a school board of the District of Columbia rather than by an official of the Executive Department of the Government.⁵ It would seem that Federal jurisdictions are apparently inclined to limit the extension of absolute immunity to officials of the Executive Branch of the government.

The state courts are not uniform in extending absolute immunity to communications made by public officials in discharge of official duty.⁶ The general tendency shows a reluctance⁷ on the part of the Courts to extend the doctrine in the absence of statutory authority. Thus, there is considerable authority that minor officials, such as a superintendent of a government school,⁸ the principal of an institution for deaf mutes,⁹ a postmaster,¹⁰ or a member of an investigating committee¹¹ and others¹² are entitled only to a qualified immunity or privilege.

4. *De Arnaud v. Ainsworth*, 24 D. C. App. 167 (1904) (Report by the Chief of War Dep't, record and pension office); *Farr v. Valentine*, 38 D. C. App. 413 (1912) (Commissioner of Indian Affairs); *Miles v. McGrath*, 4 F. Supp. 603 (D. C. Md. 1933) (Communication by naval officer pursuant to orders was held to be absolutely privileged). *Cf. Maurice v. Worden*, 54 Md. 233 (1880) (denying absolute immunity to head of Naval Academy on authorized report.) *Harwood v. McMurtry*, 22 F. Supp. 572 (W. D. Ky. 1938) (a federal internal revenue officer).

5. *Nalle v. Oyster*, 230 U. S. 165 (1913).

6. *Roche v. O'Connell*, 66 Conn. 223, 29 Atl. 473 (1895); *Barry v. McCollom*, 81 Conn. 293, 70 Atl. 1035 (1908); *Mundy v. Hoard*, 216 Mich. 478, 185 N. W. 872 (1921); *Raymond v. Crall*, 233 Mich. 268, 206 N. W. 556 (1925).

7. *Pecue v. West*, 233 N. Y. 316, 321, 135 N. E. 515 (1922). A statement was made by an officer of a law enforcement society to a district attorney charging the plaintiff with crime based on an unverified report. The court said: "But while no authority controls us, the tendency of our courts is to restrict the rule of absolute privilege rather than to extend it. . . . We have said impliedly that the rule applies only to a proceeding in Court or one before an officer having attributes similar to a court. It is not applied 'to proceedings which though official and public, are not in substance judicial, . . .'" [Citing *Andrews v. Gardiner*, 224 N. Y. 440 (1918)].

8. *Maurice v. Worden*, 54 Md. 233 (1880).

9. *Hemmens v. Nelson*, 138 N. Y. 517, 34 N. E. 342 (1893).

10. *Petterson v. Steenerson*, 113 Minn. 87, 129 N. W. 147 (1910).

11. *In re Investigating Commission*, 16 R. I. 751, 11 Atl. 429 (1887); *Howland v.*

Although absolute privilege has been judicially criticized as an unwarranted encroachment on personal rights,¹³ some states¹⁴ seem to have enacted an extension by granting the privilege to communications made "in the proper discharge of an official duty. . . ." It is with the interpretation of this proviso, under the Oklahoma statute, that the instant case deals. Despite the liberal decision above set forth in the *Hughes* case, it is submitted that the interpretation that such enactments give only a qualified privilege would seem to be more in accord with the intent of the legislature. The adjective "*proper*" qualifies the occasion and restricts the scope under which the privilege is given. If the Oklahoma statute embraces an absolute privilege then a dishonest or malicious exercise of superior authority would be held to be proper and within the protection of the statute.

TORTS—GOVERNMENTAL IMMUNITY—LIABILITY OF QUASI-PUBLIC INSTITUTION FOR NEGLIGENCE OF EMPLOYEE.—Defendant is a private institution authorized by the legislature to care for delinquent minors. Plaintiff was committed to its care and sustained injuries by reason of the negligence of one of defendant's employees. On appeal from a judgment of the Appellate Division, which reversed the trial court and dismissed the complaint, *held*, the state has waived its immunity from liability for the negligent acts of its "officers and employees",¹ therefore, an agent of the state may no longer assert such immunity in its own behalf.² Judgment reversed. *Bloom v. Jewish Board of Guardians*, 286 N. Y. 349, 36 N. E. (2d) 617 (1941).

The instant case is one of a recent series exhibiting a departure from the rule of law which granted to the state and its agents, an exemption from liability for governmental acts. In 1928, the Court of Appeals said that public duties, properly called "governmental", included, among others, the functions of fire and police

Flood, 160 Mass. 509, 36 N. E. 482 (1894); *Weber v. Lane*, 99 Mo. App. 69, 71 S. W. 1099 (1903).

12. *Forsythe v. Durham*, 270 N. Y. 141, 200 N. E. 674 (1936) (Report of H. S. Principal to Board of Education on rumor of student's pregnancy). *Nunan v. Bullman*, 256 App. Div. 741, 12 N. Y. S. (2d) 51 (3rd dep't 1939) (a privilege of member of Board of Education in reply to inquiry at instigation of plaintiff, held destroyed by utterance made with knowledge of falsity of charges).

13. See *White v. Nicholls*, 3 How. 266, 288 (U. S. 1845); *Dawkins v. Paulef*, L. R. 5 Q. B. 94, 110 (1869); *Pecue v. West*, 233 N. Y. 316, 321, 135 N. E. 515 (1922).

14. CAL. CIV. CODE (Deering, 1923) § 47; MONT. REV. CODES (Choate, 1921) § 5692; N. D. COMP. LAWS ANN. (1913) § 4354; 12 OKL. ST. ANN. 1443; S. D. REV. CODE (1919) § 99.

1. COURT OF CLAIMS ACT § 12-a, N. Y. Laws 1929 c. 467; now § 8 N. Y. Laws 1939 c. 860. Under this section the state has waived its immunity from liability and has consented to have the same determined according to the rules that apply to actions between individuals and corporations in the supreme court. The words "officers and employees" which appeared in § 12-a have been omitted from § 8; and *Bloom* case is apparently the first to reach the Court of Appeals since the amendment.

2. *Cf. Corbett v. St. Vincent's Industrial School*, 177 N. Y. 16, 68 N. E. 992 (1903) where an institution like that in the principal case was held to be within the governmental immunity of the state.

protection, and the protection of health and the administration of public charities, noting that in these fields the rule of non-liability prevailed.³ Today, in New York, this field of governmental immunity is disappearing.

The series of cases includes *Paige v. State of New York*,⁴ where the plaintiff was committed to a privately owned reformatory pursuant to a statute. There she was put to work operating a complicated machine without first having been given adequate instruction. As a result, she was injured. The state was held liable and a liberal construction was given to section 12-a (now section 8) of the Court of Claims Act. The holding was that officers and employees of the *agent* of the state were officers and employees of the state itself.⁵ In *Crandall v. City of Amsterdam*,⁶ the defendant municipality was held liable for injuries to a pedestrian resulting from a fall on ice, formed on the sidewalk by the freezing of water used by the city fire department in putting out a fire. Liability was imposed, though under its charter⁷ the city was not to be liable unless it had express notice of the condition; and apparently the city in its *corporate* character, had no express notice thereof.⁸ In *Volk v. City of New York*,⁹ the defendant municipality was held liable for injuries suffered by plaintiff, a nurse, as a result of negligent treatment administered in an infirmary for nurses, which was a part of a public hospital. A solution used for an injection had been allowed to decompose. The court put the decision on the ground that the hospital was fulfilling its contractual duty so to treat plaintiff and was not performing a governmental function. It was said *inter alia* that the negligence was connected with administrative duties and governmental immunity does not protect the municipality in such a case. A nurse whose duties are ordinarily considered *professional*, had treated the infection. These cases mark a tendency in New York away from the doctrine of governmental immunity in tort.¹⁰ They not only indicate a departure by legislative enactment, but also by judicial decision and liberal interpretation of statute by the courts.

This trend is demonstrated by other cases dealing with tort liability of municipal corporations. In these cases, without the aid of statute, such municipalities have been held liable for negligent acts.¹¹ They disclose a substantial modification of the doctrine that in the exercise of powers "proprietary and private" a municipality is liable for negligent acts of officers and employees, but not for those done in

3. *Augustine v. Town of Brant*, 249 N. Y. 198, 204-205, 163 N. E. 732, 734 (1928).

4. 269 N. Y. 352, 199 N. E. 617 (1935).

5. Lehman, J., who dissented in the *Paige* case, followed its reasoning and reached a similar result when he wrote for the court in the *Bloom* case.

6. 280 N. Y. 527, 19 N. E. (2d) 926 (1939).

7. See N. Y. Laws 1911 c. 242, as amended by N. Y. Laws 1917 c. 310.

8. See also *Cosgrove v. City of Newburgh*, 273 N. Y. 542, 7 N. E. (2d) 683 (1937).

9. 284 N. Y. 279, 30 N. E. (2d) 596 (1940). Note (1941) 10 BROOKLYN L. REV. 304.

10. Apparently this departure will not be without limit. Officers and privates in the militia have been held not to be "officers and employees" of the state in the sense of § 12-a of the COURT OF CLAIMS ACT. *Goldstein v. State of New York*, 281 N. Y. 396, 24 N. E. (2d) 97 (1939). See N. Y. MILITARY LAW § 15 which states that members of the militia shall not be liable for acts done by them while on active duty.

11. *Augustine v. Town of Brant*, 249 N. Y. 198, 163 N. E. 732 (1928); *Koehler v. City of New York*, 262 N. Y. 74, 186 N. E. 208 (1933); *Morse v. City of New York*, 262 N. Y. 495, 188 N. E. 35 (1933).

the exercise of powers "governmental and public".¹² Not only are functions that seem plainly governmental now regarded as corporate,¹³ but liability has been placed on municipalities on the theory that governmental agents may act in a corporate capacity.¹⁴ Thus, by narrowing the meaning of "governmental function" the liability of municipal corporations has been extended and the distinction between governmental and proprietary functions has correspondingly become confused.¹⁵

Upon the basis of the foregoing cases it would seem safe to conclude that the defense of governmental immunity will not now be recognized by the courts of New York in any field in which that defense has not heretofore been given effect. In this connection it should be noted that the Legislature has removed the defense in numerous situations wherein it was formerly applicable.¹⁶

TORTS—RECOVERY FOR FRIGHT AND ITS CONSEQUENCES WITHOUT PHYSICAL IMPACT.—An automobile in which plaintiff was riding was struck by a live electric wire through the negligence of an agent of the defendant company. Plaintiff was not struck by the wire but suffered nervous shock and fright, so that lengthy hospitalization was required. The trial court instructed the jury that, in the absence of any trauma caused by the application of some outside force, there could be no recovery for fright and its consequences. On appeal from a judgment for the defendant, *held*, that where it is proved that negligence proximately caused fright or shock in one who is within the range of the physical danger from that negligence, and this in turn produced injuries such as would be elements of damages had a bodily injury been suffered, the injured party is entitled to a recovery. *Orlo v. Connecticut Co.*, 21 A. (2d) 402 (Supreme Court of Errors of Conn. 1941).

In many jurisdictions, it is held that there can be no recovery for fright and its consequences, negligently caused, without a physical impact.¹ *Mitchell v. Rochester*

12. *Augustine v. Town of Brant*, 249 N. Y. 198, 163 N. E. 732 (1928).

13. *Collentine v. City of New York*, 279 N. Y. 119, 17 N. E. (2d) 792 (1938), *held*, the operation, maintenance and supervision of a public park is not the exercise of a governmental function.

14. *Metzroth v. City of New York*, 241 N. Y. 470, 150 N. E. 519 (1926). City of New York held liable for negligence of employees of its building department in allowing improper storage of building materials upon a shed over a city street. *Oeters v. City of New York*, 270 N. Y. 364, 1 N. E. (2d) 466 (1936), *held*, that employees of the Bureau of Buildings may be said to be acting in a corporate capacity when they demolished a building to safeguard a highway.

15. See 6 MCQUILLIN, *MUNICIPAL CORPORATIONS* (2d ed. 1937) § 2792 *et seq.*; Borchard, *Government Liability in Tort* (1924) 34 YALE L. J. 129.

16. Liability for negligence in constructing and maintaining highways imposed upon towns by N. Y. HIGHWAY LAW § 215 and upon counties by N. Y. COUNTY LAW § 6. Liability for defects in state highways imposed by N. Y. HIGHWAY LAW § 58. See also N. Y. CANAL LAW § 120 and N. Y. GENERAL MUNICIPAL LAW § 50 and subdivisions thereof.

1. *Hillard v. Western & Southern Life Ins. Co.*, 34 N. E. (2d) 75 (Ohio Ct. App. 1941), action to recover for death by fright due to defendant's agent telling plaintiff that she had a cancer. Court refused a recovery because there was no trauma; *Spade v. Lynn & Boston R. Co.*, 168 Mass. 285, 47 N. E. 88 (1897). For a good discussion of this topic see Throckmorton, *Damages for Fright* (1921) 34 HARV. L. REV. 260. *Edwing v.*

*R. R. Co.*² is cited as a leading case. There a woman was nearly hit by a trolley and the resulting fright caused a miscarriage. The case appears to have been decided against the plaintiff because of the difficulty in measuring the extent of the damage suffered and the further difficulty of establishing the foreseeability that the plaintiff would suffer a miscarriage. It does not seem to rest on the sole ground that there was no physical impact not to necessarily infer that in every case where physical impact is lacking, it will be so difficult to measure damages that relief must be denied. In tracing the development of the doctrine that there can be no recovery without a physical impact, one finds it to be really a special exception to the duty to exercise care against foreseeable harms,³ made to avoid the bringing of fraudulent claims. Holmes, C. J., in *Smith v. Postal Telegraph Co.*,⁴ said that the refusal to allow a recovery is not rested on "a logical deduction from the general principles of liability in tort, but a limitation of those principles upon purely practical grounds." The earlier New England case of *Spade v. Lynn & B. R. Co.*⁵ pointed out that many suits were arising from spurious complaints of railroad passengers, who alleged that train noises frightened them. The inability of the crude medical knowledge of the times, to verify the authenticity of those claims, indicated that in the interest of the public such claims should not be permitted.⁶

There has been a gradual drawing away from the rigors of this doctrine since its inception and in most jurisdictions, it has been done away with or modified. In England, the doctrine has been abandoned⁷ and likewise in many sections of our country particularly on the Pacific coast, the Northwest and the South.⁸ In other states where the doctrine has not yet been abandoned, it has been modified in practice, if not in theory, by finding impacts or injuries that hardly merited the name.⁹

Pittsburg Ry. Co., 147 Pa. 40, 23 Atl. 340 (1892); *Mitchell v. Rochester R. R. Co.*, 151 N. Y. 107, 45 N. E. 354 (1896); *Ward v. West Jersey Ry. Co.*, 65 N. J. L. 383, 47 Atl. 561 (1900) where defendant closed railroad crossing obstacle trapping plaintiff's buggy on the tracks in the path of an oncoming train, the court refused a recovery for injuries due to fear of death.

2. *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 45 N. E. 354 (1896).

3. *Botticelli v. Winters*, 125 Conn. 537, 542, 7 A. (2d) 443 (1939).

4. *Smith v. Postal Telegraph Co.*, 174 Mass. 577, 55 N. E. 380 (1899); *RESTATEMENT, TORTS* (1932) § 436 (*Caveat* states that the doctrine is a matter of administrative policy in the particular jurisdiction.) See also *Homans v. Boston Elevated Ry. Co.*, 180 Mass. 456, 458, 62 N. E. 737 (1902), which states that "The real basis for the requirement that there shall be a contemporaneous bodily injury or battery is that this guarantees the reality of the damage claimed".

5. *Spade v. Lynn & Boston Ry. Co.*, 168 Mass. 285, 47 N. E. 88 (1897).

6. *Id.* at 89. The court after stating that public policy was opposed to numerous fictitious claims went on to declare that if mere fright was not actionable, then injuries caused by mental disturbances should not be the subject of a suit.

7. *Hambrook v. Stokes*, [1925] 1 K. B. 141, where the court allowed a recovery for fear for the safety of another. See also *Dulien v. White & Sons*, [1901] 2 K. B. 669, where the court referred to *Mitchell v. Rochester*, 151 N. Y. 107, 45 N. E. 354 (1896) and refused the contentions of the N. Y. court. The court said that mere fear falls short of real damage but the injurious consequences of fear are actual damage.

8. *Clemm v. Atchinson, Topeka S. F. Ry. Co.*, 126 Kan. 181, 268 Pac. 103 (1928) where plaintiff fainted and injured herself after learning that the defendant had negligently misshipped her husband's coffin; *Bowmen v. Williams*, 164 Md. 397, 165 Atl.

Thus, in the recent New York case, of *Comstock v. Wilson*¹⁰ the plaintiff was in an automobile collision in which the impact was so slight that there was no damage to either car. The plaintiff stepped down from her automobile and started to write down the defendant's name and license number. While thus engaged, she fainted and fell to the sidewalk fracturing her skull, an injury from which she later died. The court declared that the collision and the consequent jar to the passengers, no matter how slight, was a battery and an invasion of her legal rights, and that this was sufficient to permit a recovery for her subsequent death.

It would have been a comparatively simple matter for the Connecticut court to invent an impact in the *Orlo* case. It might have said that just as in cases of wilful battery, a battery to the vehicle in which a person rides is constructively a battery to the person.¹¹ The court, however, openly rejected the "impact doctrine" and decided the case solely upon the question of foreseeability of harm. In this connection, it is to be noted that the requirement that the injury be to one who is within the range of the ordinary physical danger from that negligence, and that the negligent act produce injuries such as would be elements of damage in a case where there was an impact, serve to prevent fraud. It appears that states which follow the "impact doctrine" might better repudiate it. Recovery for authentic claims would not then be denied.

If the courts should feel that the way would be left open for fraudulent claims, it is to be remembered that it would be just as easy for a plaintiff to falsely testify to a small impact, non-permanent in character. Perhaps, imposing a special rule of evidence in regard to claims for fright and its consequences regardless of impact would help. The courts might require that in all such cases not only the preponderance of the evidence should be necessary but that there should be "clear and convincing" proof of the reality of the injuries claimed to have been suffered.

182 (1933) where plaintiff suffered nervous prostration in fearing for the safety of his wife and child; *Chiuchiolo v. New England Wholesalers Tailors*, 84 N. H. 329, 332, 150 Atl. 540 (1930) explosion of pressure gauge of steam boiler directly behind plaintiff; *Frazee v. Western Dairy Products*, 182 Wash. 578, 47 P. (2d) 1037 (1935) recovery for the safety of another; *Colsher v. Tennessee Electric Power Co.*, 84 S. W. (2d) 117 (Tenn. App. 1935) where defendant's agents forced their way into a house to inspect meter and plaintiff feared that they were burglars; *Central of Georgia Ry. Co. v. Kimber*, 212 Ala. 102, 101 So. 827 (1924); *Lindley v. Knowlton*, 179 Cal. 298, 176 Pac. 440 (1918); *Purchell v. St. Paul City Ry. Co.*, 48 Minn. 134, 50 N. W. 1034 (1892); *Bohlen & Polickoff, Liability in New York for the Physical Consequences of Emotional Disturbance* (1932) 32 Col. L. Rev. 409; *Hanford v. Omaha Ry. Co.*, 113 Neb. 423, 203 N. W. 643 (1925). Plaintiff, a pregnant woman, was frightened by collision of trolleys nearby and suffered miscarriage. Recovery was allowed. This case goes to great lengths in refuting the contentions of the court in *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 45 N. E. 354 (1896) whose facts were very similar and where the court denied a recovery.

9. *Freedman v. Eastern Mass.*, 299 Mass. 246, 12 N. E. (2d) 739 (1938) where plaintiff, a passenger on trolley, was frightened when it collided with an automobile, jumped from her seat and twisted her shoulder, though there was no external mark of injury.

10. *Comstock v. Wilson*, 257 N. Y. 231, 177 N. E. 431 (1931). See *Wilson, The New York Rule as to Nervous Shock* (1926) 11 CORNELL L. Q. 512.

11. *Bull v. Colton*, 22 Barb. 94 (N. Y. 1856) where defendant hit horse drawing plaintiff's buggy and court said he could recover for an assault upon himself.