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NOTES

BREACH OF MARRIAGE PROMISE—DEFENSES.—A most unique set of facts is presented in the recent case of *Longmuir v. Ashbey.*[1] The plaintiff gave birth to an illegitimate child as the result of a felonious assault made upon her without her consent, the perpetrator of the assault subsequently being convicted for the crime. The unmarried girl brought an action for breach of promise to marry and seduction under promise of marriage. The defendant had had intercourse with the plaintiff a few days before the date set for the marriage. Among other defenses to the action, the defendant interposed the defense of unchastity of the plaintiff as an excuse for breaching his promise to marry her. The New Jersey court, by a majority vote, affirmed the

[1] 172 Atl. 372 (N. J. 1934).

decision of the lower court and held that the felonious assault upon the plaintiff resulting in the birth of a girl child, did not render her "unchaste" so as to be unable to maintain against another an action for breach of promise and seduction.

The facts and conclusions of law reached in the instant case leads to the inquiry of what constitutes a defense in an action for breach of promise. The defenses are comparatively few in number, it being the policy of the law to preserve and protect the relationship set up between the parties by an agreement between them to enter into a marriage contract.

Agreements to marry, like all other agreements, are governed by the principles of contract law. It is an elementary fact that one who promises to marry another must be capable of making a contract. Infancy, insanity, and consanguinity or affinity, offer grounds for the setting aside of the promise of marriage. A promise to marry is of course void where either of the parties is already married to a third person.[2] Likewise, a contract to marry may be rescinded or released by mutual agreement and such recission or release is a good defense to an action for breach of the promise.[3] However, a mere consent to a postponement of the marriage does not show a release.

As a general rule, a defense to an action for breach of promise to marry cannot be based on the undesirable traits of character, or on objectionable characteristics or conduct of the plaintiff. The basis for this rule is set out in the opinion of the Pennsylvania court in *Gring v. Lerch*:[4] "When a man enters into an engagement of marriage with a woman he is presumed to have made himself acquainted with her appearance, her temper, her manner, her character, and other matters which are obvious to the understanding and which can be ascertained in the social intercourse which usually accompanies courtship. If he changes his mind and refuses to marry her for a defect which is open to observation, and which he might have ascertained before by reasonable care, it is no defense to an action for breach of promise to marriage." The fact that the plaintiff lacked affection for the defendant, or that her motives in desiring the marriage were purely mercenary, does not provide a good defense for the defendant in the action,[5] although if the fraudulent concealment of such facts if known would have prevented the making of a promise to marry, then the defendant is relieved from liability thereon. The plaintiff is not bound to make known such facts but if she should undertake to do so she is bound to state material facts truthfully, and is also bound not to suppress

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2 Johnson v. Iss, 114 Tenn. 114, 85 S. W. 79, 108 Am. St. Rep. 891 (1905).

3 Mabin v. Webster, 121 Ind. 430, 28 N. E. 863 (1891).

4 112 Pa. St. 244, 56 Am. Rep. 314, 26 L. R. A. 432 (1886).

5 Van Houten v. Morse, 38 N. E. 705 (Mass. 1894).

facts necessary to an understanding of her history. If she wilfully refrains from telling such facts, she is guilty of fraudulent concealment.[6]

Disease or physical disability or incapacity is often resorted to as a defense in breach of promise suits. It can be successfully interposed as a defense only under certain conditions. If the disease or disability is of a permanent character, and has been contracted sometime during the date of the promise to marry and the date of the wedding, without fault on his or her part, the party so afflicted can refuse to carry out the contract. If the disease or disability is of a temporary character, the marriage can be postponed until a cure is effected.[7] The beneficial results of such a rule are apparent in many instances. It lessens the number of offspring who are afflicted with the diseases, many times loathsome, communicated to them by the infected spouse. Holding the party to his or her promise to marry would be dangerous to the life of contracting party in some instances because of the character of the disease. The breach is and ought to be clearly excusable in such cases.[8] Over and above the fact that the decisions along these lines rest in a measure on public policy, the underlying reason for the rule is found in the legal conception of the contract to marry. A contract to marry is coupled with the implied condition that both of the parties shall remain in the enjoyment of life and health, and if the condition of the parties has so changed that the marriage state would endanger the life or health of either, a breach of the contract is excusable.[9] However, if the defendant knew, or by exercise of reasonable care should have known, of the disease at the time he made the promise, then it is ordinarily not a good defense.

If the plaintiff marries another after the defendant's breach of promise to marry, the question presents itself as to whether the defendant can avail himself of this situation and interpose it as a defense. In the leading case of *Fisher v. Barber* [10] the plaintiff was allowed to relieve the defendant of a tidy sum for substantial damages, regardless of the fact that she had secured a husband after the defendant's breach of promise to marry her. The Court held that the great distress and disappointment and resultant humiliation caused by the defendant's failure to marry the plaintiff, could find no adequate compensation except in a verdict for substantial damages. An interesting Canadian case [11] asserts a contrary view and supports its contentions on the dubious ground that by marrying another, the plaintiff has benefited by the defendant's breach of promise to marry her.

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6 Van Houten v. Morse, *op. cit. supra* note 5.

7 Trammell v. Vaughan, 59 S. W. 79, 51 L. R. A. 854 (Mo. 1900).

8 In re Oldfield's Estate, 156 N. W. 977 (Iowa 1916).

9 Sanders v. Coleman, 97 Va. 690, 47 L. R. A. 581 (1899).

10 62 Tex. Civ. App. 34, 130 S. W. 870 (1910).

11 Pepperos v. Le Due, 11 Dom. L. R. 193, 194 (1895).

As a matter of interest it might be noted that perhaps the plaintiff would not so "benefit" in all cases. Marriage of the parties, of course, extinguishes the right of the plaintiff to bring an action for the breach of promise. "Marriage of the parties as effectually kills the action as death." [12]

In *Roper v. Clay* [13] the Missouri court held that it is no defense in an action for a breach of promise of marriage that the plaintiff had previously contracted to marry another person. This is especially true where the defendant continues the engagement after learning of such previous engagement and its continuance.

There remains but one important defense that the defendant can interpose in an action for a breach of promise—unchastity of the plaintiff. The Supreme Court of Iowa, in *Williams v. Fahn*,[14] states the correct doctrine thus: ". . . where a man discovers after entering into a contract for marriage—the rule is the same, of course, the parties being reversed—that his fiancée is a woman of unchaste and immoral character, he may, at his election, renounce the contract, and may plead such fact in justification of his conduct in any court of law and equity." The principle involved is akin to that upon which the doctrine of implied warranty rests. The defense would be good if the defendant had knowledge of the fact that she became unchaste since the making of the promise and prior to the breach.[15] The presumed chastity of a woman is an essential element of a contract for marriage. A man assumes, at least ordinarily, that the woman he is to marry is chaste, and if he agrees to marry the woman under that assumption, and afterwards discovers that she had been unchaste, there is no law that will bind him to his promise. Such a quality in a prospective wife is essential to promote the confidence necessary to a happy married life. For these reasons unchastity of the plaintiff is a good defense even though the plaintiff has reformed and has become a chaste and virtuous woman subsequent to the marriage promise.[16] Of course, if the defendant knows of the shortcomings of the plaintiff, but regardless of her unchastity entered into a contract for marriage and then violates it, the plaintiff's unchastity will be no more of a valid defense than if illicit intercourse between the parties after the agreement to marry had been set up to justify the breach of promise. This latter rule finds its ultimate justification on the principle that no person may take advantage of his own wrong.[17]

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12 Harris v. Tisom, 63 Ga. 629, 36 Am. Rep. 126 (1879), headnote.
13 18 Mo. 383 (1853).
14 94 N. W. 252, 253 (Iowa 1903).
15 Garmong v. Henderson, 95 Atl. 409 (Me. 1915).
16 La Porte v. Wallace, 89 Ill. App. 517, 524 (1900).
17 Gerlinger v. Frank, 145 Pac. 1069 (Ore. 1915).

The decision favoring the plaintiff in the instant case seems to be correct from a legal standpoint and as a matter of principle. The assault upon the plaintiff was wholly without her consent, that fact being firmly established by the conviction of the perpetrator of the assault. She should not be allowed to suffer for the consequences of an act not her own although much can be said on the part of the defendant as is evidenced by the fact that six judges of the New Jersey court subscribed to the dissenting opinion. She has worked no fraud upon the defendant by concealment of a material fact or otherwise. In the eyes of the law and upon the tenets of principle she is a chaste and virtuous woman, and a decision in her favor is a triumph of legal justice over emotional thinking.

John J. Locher, Jr.

CONTRACTS—INDUCEMENT TO BREACH BY THIRD PERSON—FRAUDULENT CONSIDERATION.—The Supreme Court of New York in a recent case, *Budd v. Morning Telegraph*,[1] held, two judges dissenting, that where the plaintiff entered into a contract with a third party as a handicapper of race horses, and the defendant induced the plaintiff to breach this contract and enter into its employment under an agreement whereby the defendant would assume all liability for breach of the first contract with the third party, that the plaintiff, upon breach of second contract by defendant, would not be precluded from maintaining an action for breach of contract on the ground that the contract was based upon a fraudulent breach of the first contract and that the parties were in *pari delicto*. At first blush it would seem that such a holding was in direct contrariety of the weight of authority. However, after analyzing the situation, it may be seen that such a ruling is more conducive to the ends of justice than that of the so-called weight of authority.

In *Hocking Valley R. Co. v. Barbour*,[2] a New York case, it was held that a buyer's bond to indemnify the seller against liability for damages to a third party, to whom the seller had previously contracted to sell the goods, was unenforceable, having been executed as an inducement to the seller to break his contract with the third party, and therefore was based on illegal consideration and was executed for an illegal purpose. The theory upon which the court reached this conclusion was of its being against public policy.

Another leading case that is cited as supporting the illegality of consideration is the case of *Reiner v. North American Newspaper Alli-*

1 241 App. Div. 142, 271 N. Y. S. 538 (1934).
2 190 App. Div. 341, 179 N. Y. S. 810 (1920).

ance,[3] wherein a contract between a newspaper man and a news agency to furnish news of a zeppelin flight through radio messages to friends constituted breach of contract of passage on zeppelin, the owners of which had contracted for the exclusive right to the news to a third party, and the newspaper man was held not to be entitled to recover stipulated compensation from news agency. However, this case does not answer the question as propounded in the principal case. In the *Reiner* case the wrongful acts of the newspaper man constituted a tort. By his contract with the news agency, he robbed the third party of the exclusive right to the news rights of the voyage and attempted to take for himself the advantage which had been contracted for by the third party. The court held that it would not lend its aid to a party who had committed a tort to enable him to recover from another the price agreed to be paid for his wrongful act. "The defense is allowed not as a protection for the defendant, but as a disability to the plaintiff."

The case of *Rhodes v. Malta Vita Pure Food Co.*,[4] a Michigan case, adheres to the rule of refusing to enfore a contract, the consideration of which, was the inducement to breach a former contract, together with an assumption of all liability resulting from such breach. The Michigan court held that where a company made a secret agreement with an employee of a rival company, whereby he was to abandon his contract of employment, the object being to embarrass the rival company as a competitor, the transaction was illegal and fraudulent and did not furnish a good consideration for the promise to pay the employee a salary. This case can be distinguished from the principal case on the ground that it was a dishonest scheme by the two parties to cause an intentional injury to the third person, or rather the original employer. The entire transaction was illegal and fraudulent, even to the point of its actual conception and could not possibly furnish good consideration.

In *Roberts v. Criss* [5] the Circuit Court of Appeals of United States, Second Circuit, held that a contract, the basis of which is the violation by one of the parties of a contract with a third party will not be enforced by a court, as between the parties. The case was this: The plaintiff, with knowledge that the defendant was a member of the New York Stock Exchange and bound by its rules—and, in other words, that he had a contractual relation with the exchange to obey these rules—entered into a contract with the defendant in violation of these rules. This was a contract to commit a tort and can form no basis for the recovery in his action. The courts do not aid the

[3] 259 N. Y. 250, 181 N. E. 561, 83 A. L. R. 23 (1932).
[4] 149 Mich. 235, 112 N. W. 940 (1907).
[5] 266 Fed. 296 (C. C. A. 2nd, 1920).

parties to illegal agreements. If any principle of law is well-settled it is that a party to an illegal undertaking cannot come into a court either of law or equity and ask to have his illegal contract carried out. *Ex dolo malo non oritur actio,* and *in pari delicto potior est conditio defendentis.*

In the case of *Attridge v. Pembroke* [6] the rule was laid down that the court will not aid one basing his cause of action on his illegal act in breaking his contract with the third party. Quoting from the language of the court: "The law favors observance of a contract, and frowns on its breach. Common honesty and sound morality demand that a party be compelled to live up to his agreement, if honestly and freely made." The court refuses to enforce a contract against public policy on the theory that such an agreement is injurious to society in general, and that the only way to stop making such contracts is to refuse to enforce them.

The Restatement of the Law of Contracts provides that "A bargain, the making or performance of which involves breach of contract with a third person, is illegal";[7] and states that "Since breach of contract is a legal wrong, a bargain that requires for its performance breach of contract with another, is opposed to public policy." [8] In another section we find the basis for the rule laid down in the *Reiner* case: "A bargain to commit a tort or in consideration of the commission of a tort, or to interfere with rights belonging to the public, or in consideration of interference with such rights is illegal." [9]

Thus we see, from reviewing the authorities on the question, that the principal case is quite contrary to anything that has been decided upon the question in some time. However, this contrariety is more apparent than real and can be readily justified.

It is quite obvious that one may breach his contract at most any time and in any manner he chooses; but, of course, will subject himself to an action for damages for such breach. The mere fact that these damages are assumed by a third person and incidentally form a part of the consideration for a second contract of employment by that third person does not constitute any fraud perpetrated by said third person. By such an act the third person would subject himself to a liability to the original employer for an interference with contractual relations, which damages would compensate the original employer for any injury he might have suffered by the third person's in-

6 235 App. Div. 101, 256 N. Y. S. 257 (1932).
7 § 576.
8 Comment to section 576.
9 § 571.

terference. These damages together with the damages realized from the employee's breach would completely and adequately remedy any injury caused the original employer.

It can be seen from reviewing the decisions, considered herein, that they were based principally on the so-called "public policy" which much too often is given, apparently when no good reasoning can be reached to support the holding in a particular case.

W. A. Stewart, Jr.

CONTRACTS—RESTRAINT OF TRADE OR COMPETITION IN TRADE—INJUNCTIONS.—Recently the Court of Chancery of New Jersey [1] refused to enforce an employment contract entered into between the complainant, a local union, and the defendant, a corporation engaged in the upholstery business. By the terms of this agreement the defendant had agreed to employ only members of the complainant labor union and under the terms stipulated in the contract. The defendant's plant was located at Newark, New Jersey, in what is known as the "metropolitan area." The complainant, International Union, maintained locals throughout this district, and by its own affidavits showed that contracts identical to the one sought to be enforced in this case had been entered into between the complainant and the majority of employers engaged in similar businesses in the same business area. The court held that according to the complainant's own proof this was a part of an attempt to unionize the industry in that area and to create a labor monopoly in that industry and vacated the limited restraint imposed by the order to show cause. Berry, Vice Chancellor, in commenting on the agreement said: "Such a contract is opposed to public policy and is void."

This case presents the view that courts will not sanction the creation of closed shops when they tend to create a labor monopoly. It also shows the extent to which the New Jersey courts will allow labor to go in its attempt to organize and bargain collectively. It is the purpose of this note, first, to briefly point out the advance made by labor in its struggle for judicial recognition of its right to organize and bargain collectively, and, secondly, to give some insight into the conflicting views taken by the courts toward the labor provisions in the National Industrial Recovery Act.

The struggle of labor for recognition by the courts of its right to combine and bargain collectively has a long history. The opposition to

[1] Upholsterers' C. & L. M. I. Union, etc., v. Essex R. & F. Co., 174 Atl. 207 (N. J. 1934).

trade unions has been based on two well-used conceptions of the courts, the doctrines of criminal conspiracy and of restraint of trade. Although the former has been universally repudiated by the courts it was the doctrine followed by the courts in the earlier cases in the United States. This doctrine, that any combination of laborers was indictable as a criminal conspiracy, was the early common law conception in England.[2] A glance back at the history of the organized labor movement in the United States shows that for a time the courts were constrained to follow this early English common law doctrine.[3] However, it is now universally recognized as the rule that workingmen and laborers have the right to organize in unions provided they are for lawful purposes.[4] The favored weapons against the activities of trade unions is now the doctrine of restraint of trade. The principle has been firmly settled that to render a combination illegal, under the anti-trust laws, it must stifle all other competition by intentionally or necessarily preventing others from engaging in such business.[5]

According to judicial determination, labor unions may now be organized for the purpose of securing better conditions of working;[6] employees may organize for the purpose of fixing fewer hours of labor,[7] for the establishment of a certain standard of wages[8] and to secure collective bargaining upon their own initiative or that of others.[9]

Insofar as labor unions have been affected by federal law, the Clayton Act of 1914 [10] seemingly withdrew them from the operation of the anti-trust laws by assuming that their normal operations are legal and that such organizations shall not, in themselves, merely because of their existence and operation, be construed to be unlawful combinations or conspiracies in restraint of trade. However, this provision of the Clayton Act came to mean little or nothing when tested by the Supreme Court of the United States in *Duplex Printing Press Co. v. During*,[11] where it was declared that there was nothing in the Clayton Act exempting a labor union or its members from liability

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2 The King v. Journeymen-Taylors of Cambridge, 8 Mod. 10, 88 Eng. Rep. 9 (1721).

3 People v. Fisher, 14 Wend. 9, 28 Am. Dec. 501 (1835).

4 Hitchman Coal and Coke Co. v. Mitchell, 172 Fed. 963 (C. C. N. D. W. Va. 1909).

5 United States v. American Naval Stores, 172 Fed. 455 (C. C. S. D. Ga. 1909).

6 Auburn Draying Co. v. Wardell, 124 N. E. 97 (N. Y. 1919).

7 Saulsberry v. Cooper's International Union, 147 Ky. 170, 143 S. W. 1018, 39 L. R. A. (N. S.) 1203 (1911).

8 New Jersey Painting Co. v. Local No. 26, etc., 126 Atl. 399 (N. J. 1924).

9 International Pocketbook Workers' Union v. Orlove, 148 Atl. 826 (Md. 1930).

10 15 U. S. C. A. § 17.

11 245 U. S. 443, 65 L. ed. 349 (1921).

when it or they depart from its normal operations and engage in an actual combination in restraint of trade as defined in the Sherman Act.[12] And it has been well settled since the decision in the above mentioned case in 1921 that the Sherman Act is intended to punish alike monopolies existing in both capital and labor whenever interstate trade is thereby directly restrained.[13]

Standing in the foreground of this forbidding picture is the National Industrial Recovery Act which, among other things, provides, in Section 7-A,[14] that laborers shall have the right to organize and bargain collectively through representatives of their own choosing. But the cause of labor, in its struggle for the right to bargain collectively with employers under the National Industrial Recovery Act, has received several set-backs at the hands of the courts, which definitely indicate that some of the courts are viewing the labor provisions of the Act with an eye to the past instead of with the view to the intent of the Act.

There are many cases which illustrate this point. It is sufficient here to mention but a few of the more important ones. In a recent Ohio case, *Drake Bakeries, Inc. v. Dilliard C. Bowles*,[15] the court granted an injunction against a union striking to create a closed shop. It held that the plaintiff employer should not be required to sign an agreement to employ only members of one union. In interpreting Section 7-A, the court held that this section forbids a contract for a closed shop, and that the injunction would issue to restrain all activities of employees in this connection to induce the employer to sign such a contract. In interpreting Section 5-A of the Act, which exempts those who sign the codes from the operation of the anti-trust laws, in connection with Section 7-A, the collective bargaining provision of the Act, the court said that there was nothing in either section which would permit the defendant's interpretation of Section 7-A

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12 15 U. S. C. A. § 1.

13 Vandell v. United States, 6 Fed. (2d) 188 (C. C. A. 2nd, 1924).

14 15 U. S. C. A. § 707 (a). The complete text of section 707 (a) is: "Every Code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That the employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of the employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; and (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that the employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President."

15 1 FEDERAL TRADE AND INDUSTRY SERVICE § 8051 (Ct. of Common Pleas, Cuyahoga County, Ohio, 1934).

thus authorizing a closed shop. The defendant Union contended that if the majority of the drivers of the plaintiff company chose the Union to represent them the minority of the employees would, under the National Industrial Recovery Act, be compelled to surrender their representation to the Union and either join it or quit their employment. In passing on this point, the court said that to permit such a construction would be violative of Section 7-A. McMahon, J., pointed out that, by the express language of that section, the representation must be of their (the employees') own choosing and that no mention was made in the Act of the majority of the employees controlling the minority. "Furthermore," said McMahon, J., "such a construction is violative of Section 5-A which provides in part 'nothing in this act and no regulation thereunder shall prevent an individual from pursuing the vocation of manual labor and selling or trading the products thereof . . .' " The court then referred to statements of General Johnson and also from Mr. Donald Richberg to the effect that *neither employers nor employees are required, by law, to agree to any particular contract, whether proposed as an individual or as a collective agreement,* and that they had interpreted Sections 7-A and 5-A exactly as did the court.

Giving the same interpretation to Section 7-A, as did the Ohio court, but presenting more clearly the apparent inconsistencies the court must deal with in construing the provisions of the Act, was the case of *Bayonne Textile Corporation v. American Federation of Silk Workers,*[17] a New Jersey Chancery case, with Berry, Vice Chancellor, writing the opinion. In this case the operators of a silk mill sought to enjoin the American Federation of Silk Workers from its efforts to unionize the employees of the complainant by circulating information through the medium of a national strike committee for the purpose of causing a strike among the employees of the complainant. The complainant alleged that at the time of the filing of its bill none of its employees were affiliated with any labor organization. The court held that inasmuch as the purpose of the strike instigated by the defendant was to compel the complainant to submit to its attempt to obtain for the Federation a complete monopoly in the labor market in the industry by compelling all employees who wanted to work to join the union, and by compelling it to agree not to employ workers in its factories who did not belong to the union, its object was unlawful. In granting the injunction restraining the activities of the defendant, the court pointed out that Section 3-A[18] of the National Industrial Re-

[16] 15 U. S. C. A. § 705, in addition to exempting those who sign the codes from the operation of the anti-trust laws, provides: "Nothing in this chapter, and no regulation thereunder, shall prevent an individual from pursuing the vocation of manual labor and selling or trading the products thereof. . ."

[17] 168 Atl. 799 (N. J. 1933).

[18] 15 U. S. C. A. § 703 (a).

covery Act, which provides that the codes shall not allow monopolies or monopolistic practices, applied to employees as well as to employers, and that Section 7-A, as applicable to this case, meant that employees might organize for the equitable adjustment of grievances, real or fancied; but that it did not mean that intermeddlers, such as the defendant, could intervene. The court then cited N.R.A. Bulletin No. 3 (clause 5),[19] where it is provided: "The employees' part is . . . to cooperate with N.R.A. and employers in peaceable adjustment of differences."

It will be noted that these two cases show an apparent conflict existing between the sections of the Act providing for the suspension of the anti-trust laws for those who sign the codes (Section 5-A and the provision that nothing in the Act shall be construed to permit monopolies or monopolistic practices, Section 3-A) as they bear on Section 7-A. They also reveal a very unfavorable attitude of these courts toward the right of labor to organize and bargain collectively under the codes.

To the same effect as the two cases last reviewed are two New Jersey Chancery cases with, Berry, Vice Chancellor, again writing the opinions. They are, *Elkind & Sons v. Retail Clerks' International P. Ass'n* [20] and *J. Lichtman & Sons v. Leather Workers' Industrial Union.*[21] From the reading of these cases it would appear that Sections 7-A and 5-A, which have been incorporated into the New Jersey State Enforcement Act,[22] are to be interpreted to mean that the employer shall not be required to sign any agreement to employ only union labor because any other interpretation would destroy the rights of the individual employee under the National Recovery Act.

The conflict existing in the letter of the National Industrial Recovery Act between the exemption from the operation of the anti-trust laws and the prohibition of monopolies will no doubt present some difficult questions for the courts to settle. The determination of this conflict will, no doubt, have a marked effect on the interpretations the courts are to put on Section 7-A.

In the cases thus far reviewed the view is presented that a strike for a closed shop is illegal under the National Industrial Recovery Act. This view is based on the belief of the judges that Section 7-A guarantees the liberty of collective bargaining and that the closed shop hinders the right of the individual employee to bargain freely as was intended by the Act. It would seem that the National Labor Rela-

19 3 FEDERAL TRADE AND INDUSTRY SERVICE § 18044.

20 169 Atl. 494 (N. J. 1933).

21 169 Atl. 498 (N. J. 1933).

22 3 FEDERAL TRADE AND INDUSTRY SERVICE § 60214 (enacting Section 7-A); § 60204 (enacting Section 5-A); and § 60209 (enacting Section 3-A).

tions Board has given a better and more practical interpretation of Section 7-A in its decision of *In the Matter of Houde Engineering Corporation.*[23] The Board found, in this case, that the Corporation had violated Section 7-A in interfering with the right of its employees to organize and bargain collectively and in refusing to bargain collectively within the meaning of the section because, among other things, it had negotiated with a certain association after its employees "had, by a majority vote designated the Union as their exclusive agency." This decision is to the effect that the choice of the majority may bind the minority.[24] This has been called the majority view since it presents the opinion that if the majority of the employees decide on a certain representative the minority may be compelled to use the same representative as their agency in bargaining with the employer. It was the same view taken by the court in *Fryns v. Fair Lawn Fur Dressing Company.*[25] It seems to be the more sensible rule that if the majority of the employees desire a closed shop Section 7-A requires, rather than forbids, that they should have the right to completely unionize the plant.

In this connection it is interesting to note that the Court of Appeals of New York, in 1927, in *Exchange Bakery & Restaurant v. Rifkin,*[26] held that a labor union could call a strike for the purpose of inducing an employer to hire only union labor. In contrast with the principal New Jersey case, Andrews, J., went so far as to say that the efforts of a labor union to unionize an entire trade or business might be justified.

The provisions of the National Industrial Recovery Act gave to labor a new ray of hope for the solution of the difficulties that beset every past attempt at collective bargaining. The practicability of Section 7-A as a means of effecting a working agreement between capital and labor depends entirely upon the interpretations the courts place upon that section of the National Industrial Recovery Act.

John H. Logan, Jr.

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23 U. S. LAW WEEK (Sept. 4, 1934) 11.

24 In U. S. LAW WEEK (Sept. 4, 1934) 11 the National Labor Relations Board said: "Under Section 7 (a) of the National Industrial Recovery Act, when a person, a committee, or organization has been designated by the majority of the employees in a plant or other appropriate unit for collective bargaining, it is the right of the representative so designated to be treated by the employer as the exclusive collective bargaining agency of all the employees in the unit."

25 168 Atl. 862 (N. J. 1933). Bigelow, Vice Chancellor, said: "If the majority of the employees are members of a particular union, the employer cannot dictate to them another union. But if they are not organized and are, in fact indifferent as to how they shall be organized, or if the enterprise is just starting, then the employer may choose his own union and require all his men to join it."

26 245 N. Y. 260, 157 N. E. 130 (N. Y. 1927).

CRIMINAL LAW—EVIDENCE—BEST AND SECONDARY EVIDENCE—AUTHENTICATION OF DOCUMENTS—TELEGRAMS.—In a recent case in the Federal courts, *Hartzell v. United States*,[1] the defendant was convicted in the lower court of using the mails to defraud. The defendant while in London had ventured upon a scheme to obtain money from people in this country. He established several agents throughout the United States and, through them, represented to many people in this country that he had found the sole heir to the estate of Francis Drake, the English navigator who died about 1596; that he had obtained an assignment of the estate; that the British government, holding the vast amount of property belonging to the estate, had recognized his claim; but that he needed money for attorney's fees and other expenses before he could have the property turned over to him. He promised that for every dollar that was given to him to meet these expenses he would return at least one thousand dollars when he obtained the property. On the trial the lower court admitted in evidence certain cablegrams received by persons in this country and purporting to come from the defendant in London. These cablegrams appeared on their face to come from London, England, and the defendant's name was at the end of each. They were delivered to persons with whom other evidence showed the defendant was dealing, and their contents related to the subject matter of the defendant's dealings. On appeal the court held that there was no error on the part of the lower court in admitting these cablegrams in evidence. While the originals of the cablegrams were those delivered to the sending office in London, they were outside of the jurisdiction of the court and the secondary evidence was admissible. The fact that the defendant actually sent the cablegrams was held to be sufficiently established by the evidence, even though that evidence was circumstantial.

The first matter to be determined in regard to the admission of telegrams in evidence is whether the copy sent or the one received is the original. This will depend more upon the purpose for which the telegram is offered in evidence than upon the order of time in which the two copies came into existence. The document required to satisfy the best evidence rule is the one actually in issue, regardless of whether it was made before or after another copy of the same instrument.[2] In *Montgomery v. United States*[3] the defendant was charged with violating the Mann Act. A copy of a telegram obtained from the receiving telegraph office and purporting to be sent by the defendant was admitted in evidence. On appeal it was held that the

1 72 Fed. (2d) 569 (C. C. A. 8th, 1934).
2 WIGMORE ON EVIDENCE (2d ed.) § 1232.
3 219 Fed. 162 (C. C. A. 8th, 1915).

copy of the telegram delivered to the sending office was the original, the court saying: "The contents of telegrams are proved either by primary or secondary evidence. Primary evidence is the original telegram itself or the admission of the sender. Secondary evidence of a telegram may consist of a copy proved to be correct or an oral account of the contents by one who has seen it and knows its contents. Before secondary evidence, however, may be received, the absence of the primary evidence must be satisfactorily accounted for.

"In the practical application of this rule, for the proof of the contents of telegrams, it must be determined which is the original, the message sent or the one received. This, as a general rule, is determined by ascertaining whether the contents of the telegram sent or that of the one received are in issue. In suits between the immediate parties to telegrams, the telegram received is often the original. In suits against the telegraph company for damages for failure to send a telegram correctly or at all, the original would be the telegram sent."

In *State v. Cologne*[4] the agent of a corporation was prosecuted for making false and fraudulent representations to a purchaser of stock as to the dividends being paid by the corporation. The agent claimed to have made the representations believing they were true. It was held that copies of certain telegrams received by the defendant in the regular course from the telegraph company, which the defendant claimed induced him to believe that the corporation was making money, were admissible in evidence as the originals. The purpose of these telegrams being offered in evidence was not to prove who sent them, but rather to show that the defendant received them, and based his opinion as to the financial condition of the corporation on them.

We come now to the main question for consideration, the question of what is necessary to establish the authenticity of a telegram so as to make it admissible in evidence. In this connection it may be stated that the rules of evidence in regard to the necessity of identifying a telegram before it is admissible in evidence do not differ from those governing the identification of other documents.[5] A telegram differs from other documents only in the nature of the instrument and the type of proof that is usually available for the purpose of establishing its authenticity. It is frequently set forth in decisions that the authenticity of documents may be proved by either direct or circumstantial evidence.[6] This rule, however, is of little value to us. We must look into the cases to find out just what kind and what amount of circumstantial evidence is required before the telegram or document will be admitted in evidence.

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4 111 Kan. 332, 206 Pac. 1112 (1922).

5 EVIDENCE, 10 R. C. L. § 354.

6 Hartzell v. United States, *op. cit. supra* note 1; State v. Hixon, 208 Ia. 1233, 227 N. W. 166 (1929); State v. Davis, 203 N. C. 13, 164 S. E. 737 (1932)

There are certain types of circumstantial evidence for the authentication of documents that are well-established. If an instrument bears evidence on its face that it is more than thirty years old, if it is in the custody of a public official, if it has an official seal or signature—any of these are sufficient to warrant its admission in evidence.[7] We are not dealing here with any of these established cases. A telegram is very often neither written nor signed in the handwriting of the sender. Thus one of the most common methods of authenticating a document, proof of the handwriting, is not available.

The mere fact that a telegram is signed in the name of the defendant is not sufficient to make it admissible in evidence against him. In *Christain v. State*[8] the defendant was on trial for bigamy. In order to establish the fact that the defendant's first wife was still living, the prosecuting attorney sent a telegram to her. He received a telegram in reply signed, "Mrs. Christain." The lower court admitted this telegram in evidence in behalf of the state. On appeal it was held that the admission of this evidence was error. The fact that this telegram was signed, "Mrs. Christain," did not prove that it was sent by the defendant's wife. In *State v. Manos*[9] the defendant was charged with being a common gambler. The lower court admitted in evidence a telegram signed in the name of the defendant and sent to a Chicago concern, making inquiry as to certain articles commonly used in gambling. A reply to this telegram, directed to the defendant, and a receipt from the telegraph company to the defendant for money deposited in payment of an order were also admitted. The Supreme Court of Washington held that this evidence was improperly admitted in view of the fact that there was no evidence that the first telegram was actually signed by the defendant or was in his handwriting, or that the reply telegram or receipt were received or seen by him.

In *People v. Manganaro*[10] the defendant was on trial for murder. The state offered in evidence a will signed in the name of the defendant, and found in a room occupied by the defendant up to the time of the killing. The New York Court of Appeals, holding that it was not sufficiently shown that this will was executed by the defendant to make it admissible against him, stated the law on the question of authentication of documents as follows: "It is a fundamental rule that, in general, all private writings must be proved to be genuine before they are admissible in evidence. The genuineness may be proved by indirect or circumstantial evidence the same as many other facts; but the circumstantial evidence, in the present case, and as a general

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7 WIGMORE ON EVIDENCE (2d ed.) § 2131.
8 174 Ark. 357, 295 S. W. 368 (1927).
9 149 Wash. 60, 270 Pac. 132 (1928).
10 218 N. Y. 9, 112 N. E. 436 (1916).

rule, must be of such a force and character that the defendant's authorship of the writing can be legitimately deduced from it. It must, with reasonable and natural certainty and precision, compel the conclusion that the defendant wrote the document, and exclude the conclusion that it was the product of another. It must force or induce the mind to pass beyond a suspicion or conjecture that the defendant was the author. Suspicion is not proof, nor conjecture, evidence, upon which courts can act in determining the rights of parties."

In *Lewis v. United States* [11] the defendant was on trial for using the mails to defraud. Testimony of certain telephone conversations was held properly admitted in evidence even though the witnesses could not identify the voice of the party to whom they talked. It was shown that the defendant had written letters to the witnesses acknowledging previous telephone conversations with them. This fact with the circumstances surrounding the conversations was held sufficient to identify the defendant as a party to the conversations. In *Gridley v. United States* [12] the defendant was charged with using the mails to defraud by obtaining money on false representations regarding the title to real estate. Certain unsigned communications sent from New York were admitted in evidence. Evidence was introduced showing that the defendant understood that communications sent by him were to be unsigned, and that he was located in New York. The court held that the fact that these communications were unsigned, that they were sent from New York, and that their subject matter had reference to the defendant's dealings was sufficient to connect the defendant with them.

After considering these cases it seems that it is not sufficient to authenticate a telegram for admission in evidence to show that it purports to be sent by the defendant, or that it is signed in the defendant's name. No general rule can be set down as to just what evidence is necessary to connect the defendant with the telegram. The facts in no two cases are exactly alike, and the evidence available for authenticating a telegram is necessarily different in different cases. The things usually considered in determining whether the telegram is properly identified are the subject matter of the telegram, whether it was sent from the place where the defendant was located, and the signature that it bears even though it cannot be proved that the purported signer actually placed his name on it. As stated in *People v. Manganaro* [13] it is necessary to do more than raise a suspicion that the defendant sent the telegram. Facts must be proved from which it can be logically deduced that the defendant was the sender.

John A. Berry.

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11 295 Fed. 441 (C. C. A. 1st, 1924).
12 44 Fed. (2d) 716 (C. C. A. 6th, 1930).
13 *Op. cit supra* note 10.

EXECUTORS AND ADMINISTRATORS—COLLECTION AND PROTECTION OF ASSETS OF THE ESTATE—DEBTS DUE FROM EXECUTORS AND ADMINISTRATORS.—In the recent case of *King v. Murray*[1] the Supreme Judicial Court of Massachusetts held that the surety of Murray on the executor's bond of Murray was liable for the indebtedness of the executor to the testator, though at the time of the appointment of Murray as executor he had no assets out of which the debt could be paid. The plaintiff, King, was appointed administrator *de bonis non cum testamento annexo* subsequent to the removal of Murray and therefore brought this action against defendant surety company upon the executor's bond. This case represents the so-called "Massachusetts Rule" to the effect that the bond of the executor or administrator covers debts owing from the representative to his testator irrespective of his ability to pay the same. The principal case applied the rule where the inability to pay existed at the time of the appointment of the personal representative.

In considering the ruling of the Supreme Judicial Court of Massachusetts, it would seem that the decision rendered, in the case above, presents too strict a conception of the law applicable and is a proposition which undoubtedly renders a hardship upon the surety which is unjust. This court in dealing with the question of insolvency absolving the surety from liability upon the bond of an executor or administrator brushes this contention aside and holds the surety liable regardless of the ability of the principal to pay at the time of appointment.

This principle which has been upheld by the courts of Massachusetts is rejected by a majority of the states. The court of last resort in West Virginia in the case of *State v. Citizens Guaranty Trust Co.*[2] said: "When, at the time of appointment, a personal representative indebted to the estate was insolvent and so continued, without laches on his part, the debt is to be treated as any other debt, and his official surety is not liable for any more than could have been enforced at any time within that period." This case is decidedly contra to the ruling of the Massachusetts court in the principal case. The West Virginia court adopts the common sense ruling which insures justice and equity. The *Murray* case which states the Massachusetts rule seems to be entirely too narrow. In the first place the court inferred that no amount of diligence on the part of the surety to ascertain the solvency of the personal representative would prevail and that the surety company must in effect gamble upon the financial status of the person it assures. Secondly, it would seem to follow logically that since the surety is placed in the same position as his principal there should be no liability against the surety when there can be none against his principal. Ver-

1 190 N. E. 526 (Mass. 1934).
2 84 W. Va. 729 (1919).

mont [3] and New Jersey,[4] in upholding the majority rule, maintain that the surety is liable only for that amount which the principal was able to pay.

It is a universal rule that debts owed by a personal representative to his testator become discharged by appointment and are chargeable as assets of the estate in the hands of the executor or administrator. But this has been termed a "legal fiction" and, speaking of "legal fictions," the Supreme Court of California declared, in *In Re Walker's Estate,*[5] that a debt is assets of the estate only as a legal fiction and to the extent that justice will prevail but the sureties are not liable if at the time of appointment and grant of letters the administrator was insolvent. This ruling was subsequently affirmed by the same court in the case of *Sanchez v. Forster* [6] with the added proviso that the surety was liable, upon the bond of the administrator, only for what the principal was able to pay at the time of appointment.

The case of *Sanders v. Dodge* [7] definitely aligned the Michigan Supreme Court with the majority. This case held that the executor or administrator must be insolvent at the time of appointment and also at the time of discharge before the surety was discharged from liability upon the principal's bond. Speaking of legal fictions this court bluntly declared that "Legal fictions should only be resorted to for the purpose of preventing a failure of justice and when they would result in an unjust and inequitable judgment they should never be invoked." In *Buchel v. Smith's Administrators* [8] the Court of Appeals of Kentucky unequivocally said: "But where he was always insolvent and unable to pay, the liability of his sureties upon their undertaking for his faithful performance of his duties should not be enlarged by a mere fiction of the law to such an unreasonable extent as to mulct them for something that no amount of honesty and no amount of diligence could guard against." The courts, excepting Massachusetts and a few other jurisdictions, are uniform in holding that insolvency of the executor is a bar to recovery against the surety. The only point on which they differ is when insolvency of the principal must occur in order to absolve the surety. In the cases cited all of the courts but Michigan hold that insolvency of the executor or administrator at the time of his appointment is sufficient to absolve the surety from liability. Michigan, in the *Sanders* case, requires the insolvency of the principal to exist at his appointment and at his discharge as executor or administrator before the surety is released from liability upon his

3 Lyon v. Osgood, 7 Atl. 5 (Vt. 1886).
4 Harker v. Irick, 10 N. J. Eq. 264 (1889).
5 57 Pac. 991 (Cal. 1899).
6 65 Pac. 1077 (Cal. 1901).
7 103 N. W. 597 (Mich. 1905).
8 82 S. E. 1001 (Ky. 1904).

bond. In the case of *McEwen v. Fletcher* [9] the Supreme Court of Iowa, in maintaining the majority rule, goes a step farther and says that the insolvency must exist at the time the debt matures. Naturally the status of the principal financially at his appointment or discharge as executor or administrator should not be the controlling factor in discharging his surety from liability.

In the case of *Costigan v. Krause* [10] the Kentucky Court of Appeals upheld their decision in the *Buchel* case, while adding that the insolvency must exist at the appointment of the principal. In the case of the *The State, ex. rel. McClamrock v. Gregory* [11] Indiana firmly adheres to the rule absolving the surety from liability where the personal representative is insolvent at the time of appointment.

The Illinois Supreme Court, in the case of *Wachsmuth v. Penn. Mut. Life Ins. Co.*,[12] aptly expresses the ultimate conclusion logically reached, after a close study of these cases, when it said: "It seems to us the rule laid down in Massachusetts is liable to work a great hardship upon administrators and the sureties upon their bonds. To compel sureties on administrators' bonds to augment the estate of the deceased by requiring them to pay a debt an insolvent administrator happens to owe the estate is imposing a burden upon them not contemplated, and in many cases a great hardship."

Albert J. Andreoni.

INSANE PERSONS—TORTS—SLANDER.—Where a person is so insane as not to understand at all the nature of his act, should he be held liable in slander for his statements? To answer this interrogatory unqualifiedly in either the affirmative or the negative is impossible, for there has been much litigation on this question and there is a marked contrariety of judicial opinion concerning it. In the first place, there is a great deal of ambiguity in the term "insanity." An individual adjudged insane by a court may have anyone of a number of mental diseases, the respective symptoms and manifestations of which are as divergent as day and night, and yet he is regarded as insane. Mental abnormalities, as the psychiatrists call them, are divided into two main classes: organic psychosis and functional psychosis, and the only point of difference between the two being that the causes of the former are known, and those of the latter are not. These two major divisions are divided into numerous subdivisions, each of which is different, and affect individuals differently. For instance, the reactions

9 146 N. W. 1 (Iowa 1914).
10 166 S. W. 755 (Ky. 1914).
11 119 Ind. 503, 22 N. E. 1 (1889).
12 89 N. E. 787, 788 (Ill. 1909).

of one who is the victim of paresis, an organic psychosis, acts differently from one afflicted with paranoia, a functional psychosis; their mental reactions are different, for one in the advanced stages of paresis is devoid of reasoning power, while the most rabid paranoiac is wholly rational except upon one or perhaps several points, yet both individuals would be declared "insane" by the courts. Should not an individual who is rational in regard to all but a few things be held to a stricter degree of legal liability than one who is entirely irrational? The most elementary principles of justice demand that he should.

Perhaps the earliest case dealing with the liability of an insane person for his torts is *Weaver v. Ward*,[1] wherein it was said that "if a lunatick hurt a man, he shall be answerable in trespass." This, however, was only dictum, but it clearly shows the extent to which those mentally deranged were liable three centuries ago. Yet before this case was decided, even greater liability was placed on such individuals.[2] Prior to this decision, there was absolute liability for torts;[3] *Weaver v. Ward* marked the turning point from this doctrine of absolute liability to liability for fault.[4] Much water has flowed under the bridge since that decision was rendered, and the tendency of the courts today in regard to the liability of insane persons for torts, and especially for slander, is to this effect: "Whether an insane person is or is not liable in damages for libel or slander depends on whether intent or malice is an element of the particular libel or slander. If it is, a person is not liable in damages therefor if, at the time of speaking or publishing the defamatory words he was totally deranged, or was the victim of in-

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1 Hob. 134, Moore K. B. 864, 80 Eng. Rep. 284 (1616).

2 An accidental defect, such as insanity, did not excuse those who were under it "from civil actions to have a pecuniary recompense for injuries done, as *trespasses, batteries, woundings;* because such a recompense is not by way of penalty, but a satisfaction done to the party. . ." 7 HALE, PLEAS OF THE CROWN (1800) 15.

Bacon, in treating of how far want of understanding will excuse a lunatic, goes on to say: "And here we must observe a difference the law makes between civil suits, that are terminated *in compensationem damni illati,* and criminal suits, or persecutions, that are *ad poenam et in vindictum criminis commissi;* and therefore it is clearly agreed, that if one who wants discretion commits a trespass against the person or possession of another, he shall be compelled in a civil action to give satisfaction for the damage." 5 BACON'S ABRIDGMENT (1848) 22, 23.

3 HOLDSWORTH, A HISTORY OF ENGLISH LAW (1909) 299-301, gives an excellent resumé of the early law of civil liability holding a lunatic to strict liability for his torts.

4 At the time of *Weaver v. Ward* the law was in a period of transition. The old concept was still a living force, with its implication that it was the objective character of the act that was material. The new idea that even in trespass there can be liability only if the defendant is proved at fault was as yet in its infancy. It is, therefore, not surprising to find courts at that time looking to the quality of the act and not at the capacity of the actor to be guilty of fault.

sane delusions on the subject to which the words related; and where the defendant was not totally deranged at the time of uttering the words complained of, he may nevertheless prove the unsound condition in the mitigation of damages. If malice is not necessary in order to recover actual damages done by an unprivileged libel or slander, an insane person may be liable to the extent of the actual damages caused by his libel or slander, but smart money cannot be given against him." [5] The *intent* referred to in the above-quoted section does not necessarily imply the meaning usually accorded the term; it is material only when the defamatory matter is not slanderous *per se*. *Malice* denotes the absence of lawful excuse, or indicates the absence of a privileged occasion when used in the technical sense; it may mean ill-will, too, but the existence of this latter type of malice must be proved, while that of the former is presumed.

In order to get a clearer perspective of the question, let us go back into history and see in what manner insanity was regarded in the past. "Early in the history of English jurisprudence the courts did not make a distinction between different degrees of insanity. Insanity was regarded as a fixed term in law, having a certain meaning. If a man were insane on one subject he was supposed to be insane on all subjects, and for all purposes. However, at the present writing, both legal and medical authorities recognize different kinds and degrees of insanity, the disease manifesting itself in different forms, varying in nature and intensity, as there are shades of difference in the human character. According to the modern doctrine insanity may either be total, complete, general, or partial in its character. It may either be permanent or temporary in duration. It may be habitual. So, also, it may be total and permanent; or, although total in its nature, it may be but temporary in point of duration." [6]

Turning from the earliest case on the subject to the more recent one of *Wilson v. Walt*,[7] we find in this case that insanity was recognized as a complete defense. In this case, the defendant accused the plaintiff, his son-in-law, of having had immoral relations with his wife, and for this an action of slander was brought. On trial it was shown that sometime previous the defendant had been suspected of being insane, and that no one but the plaintiff took the defendant's charges seriously, believing him to be subject to insane delusions on this point. The Supreme Court of Kansas affirmed the decision of the lower court, awarding judgment to the defendant, holding that in an action for slander, the defendant may show that he was a victim of insane delusions on the subject to which the slanderous words related. In this case, proof of insanity was a complete defense. The words spoken were

5 LIBEL AND SLANDER, 32 C. J. 750.
6 INSANE PERSONS, 32 C. J. 599.
7 138 Kan. 205, 25 Pac. (2d) 343 (1933).

actionable *per se,* for they were "words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished." [8] This court held that an insane person would not be liable where intent or malice is a part of the slander, if such person was subject to insane delusions on the subject to which the words related because such delusions showed a motive on the part of the defendant, justifiable to him. Therein lies the difference between the liability of a lunatic and a sane individual.

The decisions on the subject of an insane person's liability for his torts are somewhat confusing, and some cases cannot be reconciled. At the present time, however, it is generally conceded that, "a lunatic is not responsible for a tort in which malice is an essential ingredient, such as libel, slander, or malicious prosecution," [9] for a lunatic is incapable of legal malice. *Wilson v. Walt* [10] is on all fours with *Bryant v. Jackson,*[11] an early Tennessee case. In this case, Bryant charged Jackson with stealing his iron, and suit in slander was brought, resulting in a judgment for the plaintiff. On trial, the defendant offered to prove by several witnesses that he had been for many years an eccentric man at times wholly deranged and that during the summer in which the words were spoken, and before and after this season, he was not in his sound mind. Upon appeal, the Supreme Court held the rejection of the offer to so prove was error and reversed the decision, claiming insanity to be a good defense to an action of slander, and holding that proof is admissible to show the state of the defendant's mind before and after the time when the words were spoken, as tending to establish the defense. Clevenger, in his comprehensive work, "Medical Jurisprudence of Insanity," cites *Bryant v. Jackson* in connection with this statement: "*Defamation,* libel, and slander, by anonymous letter-writing, or otherwise, have frequently been committed by insane persons of many kinds. . . *False accusations and confessions* of the insane have also occasioned damage to others. . . . *Punitive damages* cannot be recovered from the insane for injuries. If actual injury is sustained, damages may be recovered for slanderous words spoken by a lunatic where the insanity is not so manifest and notorious that the words could produce no effect on the hearer. But insanity was held to be a good plea in defense to an action for slander" [12] This same case is cited in another connection by the same author: ". . . evidence in an action for slander that the defendant was weak-minded, and at times both before and after speaking the slander-

8 COOLEY ON TORTS (3rd ed.) 376-7.

9 THROCKMORTON'S COOLEY ON TORTS (1930) 94.

10 *Op. cit. supra* note 7.

11 6 Humph. 199 (1845).

12 Vol. I., pp. 206-7 (1898).

ous words was totally deranged, is competent to be considered on the question of his insanity at the time, though it has been said that the period of remoteness should not be extended further than for several months." [13] In *Dickinson v. Barber* [14] evidence of insanity in a slander suit was admitted, but the court gave no opinion on the degree of insanity which would be received as an excuse, and said if the derangement was great and notorious, it would be manifest that the words would have no damaging effect. The court further said that where the degree of insanity was slight or not uniform, the slander might have its effect, and the outcome of the case would depend upon the verdict of the jury. Clevenger cites a Virginia case [15] as authority for the following: "And it is a sufficient ground in equity for a perpetual injuction against a judgment for slander that at the time of speaking the defamatory words, and when the judgment was obtained, the defendant was insane or deranged on the subject to which such words related." [16] This case has gone to great lengths in protecting the lunatic from liability for damages for slander.

Another instance in which the court went to the limit is exemplified in an early Indiana case.[17] This was a slander case in which the plaintiff complained that the defendant accused him of larceny. In defense, the defendant claimed he was drunk at the time of the alleged statement. The court held that total drunkenness was a form of insanity, and that a lunatic cannot be guilty of malice; and that evidence of defendant's incompetency should have been admitted under the general denial, touching questions of malice and damages. The court said: "In slander, under an answer containing a general denial of the complaint, the defendant, in order to disprove malice or mitigate the damages, may prove that when the words were spoken, his mind was so besotted by intemperance and his character so depraved, that no one who knew him would have regarded what he said, or have given any credence to any slanderous words he might have uttered." This is perhaps the only case of its kind, and is decidedly unusual. *Mix v. McCoy* [18] is directly contra, the court holding that in a suit for slander, evidence offered by the defendant, to prove the drunken condition he was in at the time of uttering the slanderous words, was properly excluded because drunkenness is not mitigation in an action for slander, whether pleaded or not, in that state. This last seems to be the

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13 CLEVENGER, *op. cit. supra* note 12, at 493-4.
14 9 Mass. 225, 6 Am. Dec. 58 (1812).
15 Horner v. Marshall, 5 Munf. 466 (1817).
16 CLEVENGER, *op. cit. supra* note 12, at 402.
17 Gates v. Marshall, 7 Ind. 440 (1856).
18 22 Mo. App. 488 (1886).

better doctrine, for the general rule seems to be that intoxication constitutes no defense to an action of slander.[19]

Another Indiana case [20] is more in line with the weight of judicial opinion. This was a case of slander in which the Supreme Court held that, under the general issue in slander, the insanity of defendant at the time of speaking the words may be given in evidence, and the proof will be received in excuse or in mitigation of damages according to the circumstances of the case. "In this country the decisions are not altogether agreed, but a fair deduction from the later authorities gives the doctrine that insanity is not in itself a defense for libel or slander, but may be sufficient under the circumstances of the case to defeat a recovery by disproving any damage, as well as any malice, because the well-known insanity of the defendant may have prevented any heed being given to the remarks." [21]

In regard to other torts, a lunatic is held to a very strict degree of liability.[22] "While a guilty intent is an essential element of criminal responsibility, intent is not generally an essential element of liability for tortious acts or negligence, and hence the general rule is that an insane person may be liable for his torts the same as a sane person, except perhaps those in which malice, and therefore intention, is a necessary ingredient, as in the case of libel and slander." [23] He is liable for an assault as shown by a Tennessee case,[24] in which *W.* shot

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19 McKee v. Ingalls, 4 Scam. (Ill.) 30 (1842); Reed v. Harper, 25 Iowa 87 (1868); Williams v. McManus, 38 La. Ann., 58 Am. Rep. 171 (1886). "It may be matter in mitigation." Note, 51 L. R. A. (N. S.) 1198.

20 Yeates v. Reed, 4 Blackf. 463, 32 Am. Dec. 43 (1838).

21 Note, 26 L. R. A. 154.

22 "If a *lunatic* commit a treapass upon *A's* lands or goods, he has trespass; for though the *lunatic* is excused *criminaliter,* he is not *civiliter.*" 5 DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW (1824) 580.

"It is universally held that mere infancy or insanity does not preclude liability for the impairment of another's bodily condition or physical condition of another's property caused by conduct which, if that of an adult or mentally normal person would be a wrong of aggression or negligence." BOHLEN, STUDIES IN THE LAW OF TORTS (1926) 543.

An extensive treatment of the liability of an insane person for his torts, entitled "Mental Deficiency in Relation to Tort," is given by W. G. H. Cook, in 21 Col. L. R. 333.

"In the law of contracts, various grounds of personal disability have to be considered with some care. Infants, married women, lunatics, are in different degrees and for different reasons incapable of the duties and rights arising out of contracts. In the law of torts it is otherwise. Generally speaking, there is no limit to personal capacity either in becoming liable for civil injuries or in the power of obtaining redress for them." POLLOCK, THE LAW OF TORTS (12th ed.) 52.

23 INSANE PERSONS, 32 C. J. 749, 750.

24 Ward v. Conatser, 4 Baxt. 64 (1874).

In discussing a New Zealand case (Brennan v. Donaghy, 19 N. Z. L. R. 289), holding a lunatic civilly liable for assault even if he is unconscious of the nature

C. and recovery was permitted the latter on the ground that, if refused, the party suffering would be without redress. The court stated it was immaterial whether the injury be wilful or not, and held that in a civil action to recover damages for an injury inflicted upon the person or property of another by a lunatic, insanity cannot be looked to as a justification of the wrong, but that while the insane person will be liable for actual damages resulting from the injury, punitive or vindictive damages cannot be recovered. And in the case of *Cross v. Kent*,[25] where a lunatic burned her neighbor's barn, she was held liable for the value of the barn, the court saying that lunacy was no defense against liability for compensatory damages, nor was evidence of lunacy admissible in mitigation of damages. An outstanding case is that of *Williams v. Hays*.[26] The defendant in this case was the captain of a vessel in which he owned a minority and which he had chartered from his co-owners. The ship started from the coast of Maine for southern shores and encountered heavy storms which required the defendant to be constantly on deck for two days. He became exhausted and went to his cabin, leaving the ship in charge of the mate and crew. The mate, finding the rudder broken and the ship drifting upon a lee shore, called the defendant on deck. The defendant refused the assistance of two tugs which successively offered to take the ship in tow, and refused to drop the anchors, and so permitted the ship to drift upon the shore in calm weather. The ship became a total wreck, and defendant's co-owners brought action against him. The defendant tried to set up temporary insanity as a defense, but to no avail. The court said: "The general rule is that an insane person is just as responsible for his torts as a sane person, and the rule applies to all torts, except, perhaps, those in which malice, and therefore intention, actual or imputed, is a necessary ingredient, like libel, slander, and malicious prosecution. In all other torts, intention is not an ingredient, and the actor is responsible, although he acted with a good and even laudable purpose, without any malice." The unique ruling of this court, holding that if the defendant brought about the ship's destruction by what in sane persons would be wilful or negligent conduct he would be responsible, is perhaps the only one of its kind, and has been widely criticized. A curious part of the decision was that in which the court suggested that the defendant might not be liable if he became insane caring for the ship during the storm. Another im-

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and consequences of his acts and incapable of understanding them, Pollock says: "This, it is submitted, is erroneous in principle and not required by any English authority. The defence is not that the actor was insane, but that there was no real voluntary act at all. Liability can be imposed in such a case only on the obsolete theory that inevitable accident is no excuse." POLLOCK, *op. cit. supra* note 22, at 53.

25 32 Md. Rep. 581 (1870).

26 143 N. Y. 442, 38 N. E. 449 (1894).

portant case is *McIntyre v. Sholty*,[27] in which it was said that for killing a person the defense of insanity will not avail to defeat a judgment for mere compensation in a civil case. The shooting in this case was under such circumstances as would have made the act a felony if the defendant had been actually sane. The court held that punishment is not the object of the law when persons unsound in mind are the wrongdoers; the question of liability is of public policy. If an insane person is not held liable for his torts, the court reasoned, those interested in his estate, as relations or otherwise, might not have a sufficient motive to so take care of him as to deprive him of opportunities for inflicting injuries upon others. There is more injustice, the court continued, in denying to the injured party the recovery of damages for the wrong suffered by him than there is in calling upon the relatives or friends of the lunatic to pay the expense of his confinement, if he has no estate ample enough for that purpose.

Insanity is often a large factor in regard to insurance, especially is this so when an effort is made to recover upon a life insurance policy of a lunatic who has committed suicide. In such a case, recovery depends entirely upon the construction of the insurance contract,[28] or upon statute (if there is one governing the case), or upon both. Where it is dependent upon the contract, there is authority to the effect that insanity excuses. "An insurer in a life policy stating that on the death of the insured by self-destruction, sane or insane, the insurer shall be liable only for the return of the premiums paid, is liable for the face of the policy where the insured at the time he killed himself was so insane that he did not know that he was taking his life, or did not know that the act he was committing would probably result in death." [29] A later case [30] from the same state is in accord, as is an Iowa case.[31] Recovery under statute has been permitted in several instances, notably in Georgia and Indiana. In the former state it has been decided that a statute providing no recovery for suicide does not apply in the case of self-destruction by a lunatic, for such an act is not legally suicide.[32] In the latter state it has been held that under a statute providing that suicide shall not defeat recov-

27 121 Ill. 660, 13 N. E. 239, 2 Am. St. Rep. 140 (1887).

28 "The generally accepted rule is that a clause in a policy of life insurance exempting the insurer from liability on the policy in case the insured dies by his own hand, or by suicide, 'sane or insane,' is a valid limitation of the liability of the insurer, and operates to avoid the policy in the event of the suicide of the insured while insane." Note, 7 Ann. Cas. 659, citing many cases.

29 Inter-Southern life Ins. Co. v. Boyd, 124 S. W. 333 (Ky. 1910).

30 Vicars v. Aetna Life Ins. Co., 158 Ky. 1, 164 S. W. 106 (1914).

31 Gavin v. Des Moines Life Ins. Co., 149 Iowa 152, 126 N. W. 906 (1910).

32 Mutual Life Ins. Co. of N. Y. v. Durden, 9 Ga. App. 297, 72 S. E. 295 (1911).

ery on a life policy, "suicide" is not used technically, but means death by one's hand, irrespective of mental condition.[33]

Judging from the decisions noted in the preceeding paragraphs, no hard and fast rule can be set in regard to a lunatic's liability for his torts. While it is almost universally held that an insane person is liable for his torts, with the exception of those involving intent, it is these last which give rise to much discussion. Many cases have dealt with the subject, but it is doubtful whether in any one of them a clearer statement can be found than this: "Legal malice certainly cannot be imputed to one who in law is incompetent to harbor an intent. It would seem a monstrous absurdity, for instance, if one were held entitled to maintain an action for defamation of character for the thoughtless babbling of an insane person, or for any wild communication he might send through the mail or post upon the wall. There can be no tort in these cases because the wrong lies in the intent, and an intent is an impossibility. The rules which preclude criminal responsibility are strictly applicable here, because there is an absence of the same necessary element. And if, in the case of defamatory publications, it may be said that, after all, the requirements of malice as an element in the wrong is only nominal, still there can be no tort because presumptively the utterances, or rather publications, which proceed from a diseased brain, cannot injure." [34]

Richard A. Molique.

NUISANCES—EXTENT OF LIABILITY.—The term "nuisance" in its legal sense has been defined countless times by text writers and by the courts.[1] An appalling variety of structures and activities have been declared to be actionable nuisances.[2] But the definitions have been so broad, and the term applied to such a variety of wrongful conduct that a general conception of the scope of the term is difficult to grasp. What is the basis of liability for a nuisance? What are the limitations of the term? We know that it is flexible in its application, but is there not something fundamentally the same about every actionable nuisance?

Blackstone defined a private nuisance as "anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another." [3] The important element of actionable nuisance, according to

33 Travelers' Protective Ass'n of America v. Smith, 183 Ind. 59, 107 N. E. 283 (1914).

34 COOLEY, *op. cit. supra* note 8, at 103.

1 NUISANCES, 46 C. J. § 1.

2 See NUISANCES, 46 C. J. pp. 637 to 640 for an enumeration.

3 BLACKSTONE'S COMMENTARIES 216.

this definition, is the *hurt or annoyance* to another's realty. The conduct of the actor is of no importance. Whether the resultant harm was the *fault* of the actor is beside the point. When Blackstone wrote, *fault* was not essential to legal liability, wether the injury was to person, personalty or realty.[4] But today when practically all tort liability is based on conduct that is either wilful, negligent, or extra-hazardous, we find Blackstone's definition quoted with approval in many cases,[5] and its substance contained in any new definition.[6] Nuisance, then, is, even today, actionable though its creator is without fault.[7] The fact that responsibility for a nuisance does not depend upon fault means that there must be something peculiar in a nuisance which impel the courts to give such absolute protection to people against this wrong.

The early view of the courts was that an actor was absolutely liable for the proximate results of his acts. This view is perhaps best expressed in the words of Judge Brian in an *Anonymous* case [8] of 1466. "When one does an act he is bound to act in such a way as not to prejudice others, etc. As if, I am building a house, and a piece of timber falls on my neighbor's house and breaks his house he shall have a good action; and yet the raising of the house was lawful and the timber fell on me *invito,* etc. And so, if one assaults me and I would escape, and in self-defense lift my stick to strike him, and in lifting it hit a man who is behind me, in this case he shall have an act against me, and yet my act was lawful and I hit him *invito,* etc."

That this strict test of liability had been changed but little since Blackstone's time is evident from his words in the celebrated case of *Scott v. Sheperd.*[9] In discussing the case he intimated that while Sheperd, the one who originally threw the squib, might be liable in a proper action for the consequential damage from his mischievous act, Ryal, the one who last threw the squib to prevent harm to himself, would be liable in trespass. "Not even menaces from others are sufficient to justify a trespass against a third person. Much less a fear of danger to either his gods or his person;—nothing but inevitable necessity; Weaver v. Ward, Hob. 134; Dickenson and Watson, T. Jones, 205;

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4 See Blackstone's opinion in Scott v. Sheperd, 3 Wm. Blackstone 892, 96 Eng. Rep. 527 (1772), discussed further on in this note.

5 NUISANCES, 46 C. J. § 1, note 14 b.

6 NUISANCES, 46 C. J. § 1.

7 That this conclusion is correctly deduced from the definition, see NUISANCES, 46 C. J. § 26, and cases cited in note 43, which hold that lack of malice or the intent to injure is no defense; and see NUISANCES, 46 C. J. § 28, that negligence is not necessary in a nuisance, and that due care to avoid injuring others is no excuse if a nuisance exists.

8 Y. B. Edward IV, 7 pl. 18 (1466).

9 *Op. cit. supra* note 4.

Gilbert and Stone, Al. 35, Styl. 72." He then quoted with approval the opinion of Judge Brian set out above.

Thus it is no wonder that his definition of nuisance made no mention of fault in the actor. *Fault*, as we know it today in the law, was not comprehended as a test of liability at that time.

In *Brown v. Kendall* [10] the test of negligence for liability in non-wilful conduct finally emerged. In this case the defendant was attempting to separate two fighting dogs by beating them with a stick. In the struggle the dogs approached the plaintiff's position. The defendant in backing from them came close to the plaintiff and in swinging the stick to hit the dogs struck the plaintiff in the eye seriously injuring him. The trial court had instructed the jury that unless it was an "inevitable" accident the defendant was responsible. The Supreme Judicial Court of Massachusetts reversed a decision in favor of plaintiff under this instruction. It appeared to the court that the reason for holding one absolutely liable for the proximate results of his acts was largely due to a misunderstanding of the statement in the old cases that when one receives injury from the direct act of another trespass will lie. This statement the court felt was merely stating the elements for an action of trespass as against an action on the case, and not a test of liability. Although the criticism hardly seems justified when we examine the words of Brian and the approving words of Blackstone set out above, the test of liability which the court then announced was undoubtedly the sentiment of judicial opinion of the time and was soon followed by all courts:[11] ". . . if it appears that the defendant was doing a lawful act, and unintentionally hit and hurt the plaintiff, then unless it also appears to the satisfaction of the jury, that the defendant is chargeable with some fault, negligence, carelessness, or want of prudence, the plaintiff fails to sustain the burden of proof, and is not entitled to recover."

We have said that Blackstone's definition is as applicable to nuisance today as when he wrote it. We have said that fault in the sense of wilful or negligent conduct is not necessary for an actionable nuisance. We must now determine why the courts did not follow the lead of *Brown v. Kendall* [12] in considering nuisance liability.

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10 60 Mass. 292 (1850).

11 "The doctrine of strict liability, or liability without fault, seems far removed indeed from the rule of 'no liability without fault' as expressed by the courts in the leading American case of *Brown v. Kendall* (1850) and in the leading English case of *Stanley v. Powell* (1890) [1 Q. B. D. 86], as well as in a sizable line of cases that fill the books in both countries since that date." Harris, *Liability Without Fault* (1932) 6 TULANE L. REV. 337, 347, and cases cited.

12 *Op. cit. supra* note 10.

Nuisance was not the only wrong in which the courts determined that fault was unnecessary. The rest of these exceptional types of wrong are listed in an article [13] by Dean Harris of Tulane University. Of these few exceptions, fully half relate to injury to real property. Trespass to land, the removal of adjacent support and the escape of extra-hazardous substance to the land of another are all cases in which the actor is held absolutely liable. Liability for harm to real property then, was not governed by rules of negligence,[14] and since nuisance was an injury to the "lands, tenements or hereditaments of another" it is logical to suppose that nuisance continued to be in the "liability without fault class" because of the peculiar position of harm to realty in the law of torts.

This reason for the sanctity of real property is never actually explained in the cases. But that it is recognized is beyond doubt. In *Louisville Ry. Co. v. Sweeney* [15] the court said: "The plaintiff as the owner of her property was entitled to the undisputed possession of it. The entry of the defendant upon it either by its street car or by the pole which it set in motion was a trespass. One who trespasses upon another and inflicts an injury is liable for the injury unless caused by the act of God or produced by causes beyond his control. We have held that one who in blasting throws rock or other debris upon the land of another is liable for the injury done irrespective of whether the blasting was negligently done or not, as there is in such a case an actual invasion of another's premises, and the act itself is a nuisance. The same principle has been applied to the pollution of air or the abstraction of any portion of the soil, or the casting of anything upon the land in other ways." It is submitted that the reason for the fixed liability for harm to realty is the fixed nature of realty itself. Persons and personal property are not fixed in their location. The actor sought to be charged with liability for injury to these is constantly meeting them under different circumstances. It is only fair then that he only be held to exercise care under the particular circumstances. Responsibility should shift as the circumstances shift. But land he always meets under the same circumstances. Wherever he goes and whatever he does he encounters land which he must know belongs to others if it is not his own. Any time then that he acts he should be compelled to keep his activities on neutral ground or his own land.

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13 Harris, *op. cit. supra* note 11, at 352-355.

14 "It seems clear that every man was originally considered liable quite irrespective of moral fault, for the harm whether to another person, personal property or real estate, which his acts had directly caused, and that while the rigor of the early rule was relaxed at an early date when the harm was done to the person or personal property, it persisted unchanged where real estate was injured or invaded, or the owner's occupation and enjoyment of and dominion over it was interferred with." BOHLEN, STUDIES IN THE LAW OF TORTS (1926) 358.

15 157 Ky. 620, 163 S. W. 739, 740 (1914).

It has been presented that liability for those hurts or annoyances called "nuisances" is justly fixed without fault because they are annoyances to realty. Before discussing what are "hurts or annoyances" in actionable nuisance we must look into those few cases where we find people without any interest in realty collecting damages for harm resulting from a private nuisance.

Personal injury liability generally depends on negligent or wilful conduct.[16] Liability for nuisance does not necessarily depend on fault.[17] If liability for nuisance extends to injury to the person of one having no interest in land, justification for the "no fault" doctrine must be found in the nature of the harm done and not in the fact that it is injury to realty. Thus, either the cases which allow recovery for personal injuries[18] caused by a private nuisance are wrong, or the basis of liability advanced by this note is wrong.

It is submitted that the cases are wrong. *Ft. Worth & R. G. R. Co. v. Glenn*[19] is the leading case allowing recovery for injury to person by one having no estate in land. The plaintiff in this case was a child living at home on land owned by his father. The nuisance consisted in an old well on the defendant's premises which had become filthy. The plaintiff was made sick and suffered pain and discomfort as a result of the stench from the well. The reasoning of the case can best be shown by the following quotation from the decision of the Texas court: "If a suit be brought for an injury to real estate caused by a nuisance, it is clear that the plaintiff must show that he has some right which has been injuriously affected. If the damage be to the right of those occupying the property at the time, he must prove title, or at least a right of occupancy. If it be of such permanent character as to cause damage to an estate in reversion or remainder, the reversioner or remainderman, if he sue, must prove his title as such. But why should the owner of a house be allowed to recover damages for being made sick by a nuisance created in the vicinity thereof, and another lawful occupant be denied a remedy for a like reason? . . . It seems to us that a conflict of opinion upon this question has risen from confusing the damage which results to property from a nuisance

16 See Harris, *loc. cit. supra* note 11, and cases cited.

17 See NUISANCES, 46 C. J. §§ 26, 28.

18 When personal injury liability is referred to, we are speaking of injuries to the person of one who has no interest in the land where he receives the injury. Where a person has such interest in land he may of course recover for personal injuries to himself because that is a true measure of the damage to his enjoyment of the land. The injury itself is to the land. That the damages recoverable are not confined to the actual physical damage to the property has been long recognized. NUISANCES, 46 C. J. § 498, note 73.

19 97 Tex. 586, 80 S. W. 992, 65 L. R. A. 818, 104 Am. St. Rep. 894, 1 Ann Cas. 270 (1904).

with the special damage, such as sickness, which may result to an individual from a nuisance either public or private."

In the course of this argument the court cited two cases, *Holly v. Boston Gaslight Co.*[20] and *Hunt v. Lowell Gaslight Co.*[21] These cases did not support the argument but by clear inference pointed out that nuisance could not be the basis of recovery. In *Holly v. Boston Gaslight Co.* a child living upon her father's premises sought recovery for injury from gas which escaped from defendant's main. The court specifically denied the right to recover unless negligence of the defendant was shown and contributory negligence of the plaintiff was negatived. In short, liability for personal injuries was to be found as in all personal injury cases on a showing of negligence. Likewise in *Hunt v. Lowell Gaslight Co.*, where visitors in another's home recovered damages for illness caused by gas escaping from the defendant's main through a sewer pipe into the house, the court said that defendants were liable, "provided the jury should find that the plaintiffs were not guilty of negligence and that the defendants were guilty of negligence." The Texas court was certainly in error when they held the plaintiff entitled to recover in an action for nuisance, on the strength of two negligence cases. It is reasonable to suppose that negligence could have been found in the Texas case and the result would have been the same. But in basing the right to recover on nuisance in which fault plays no part the court did not follow the lead of the cases it cited.

Does the court assert in its argument any real reason why nuisance liability should extend to personal injuries? It asserts that the reason for pleading an interest in land in most cases is that recovery is usually sought for an injury to that interest, but that where a person is injured he should be entitled to recover for his particular type of injury. If this be true it leaves no explanation for the fact that fault is not a necessary element of nuisance. Without an explanation of that fact the court's argument has no weight. Its conclusion would leave liability for personal injuries depending in some cases on negligence, and in others on the mere showing of injury without fault, and this without an explanation of why the difference should exist. Perhaps the court felt that there was something inherent in the type of annoyance known as nuisance which would justify this strict liability, as compared with the type of annoyance in which negligence is the proper test. But it pointed out no such difference exists, and in truth there is none, as will be seen from our discussion of "hurt or annoyance" further on in this note.

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20 8 Gray (Mass.) 123, 69 Am. Dec. 233 (1857).

21 8 Allen (Mass.) 169, 85 Am. Dec. 697 (1864).

There are four other cases usually cited as supporting the rule of *Fort Worth & R. G. R. Co. v. Glenn.* In *Towaliga Falls Power Co. v. Sims* [22] the court took occasion to approve the rule although it had no place in the case since the suit was by a tenant at will whom the court held had an interest in land. The Georgia court said "It is hardly consistent with the modern idea of legal rights, wrongs, and remedies . . ." to deny recovery to one lawfully on the premises for injury to himself simply because he has no interest in the land—and yet some courts go to this extent.

Two Alabama cases approve the doctrine. In one [23] the court argues along the same lines as the Texas court and there is no need to repeat the criticism of this argument. In the other case [24] the court merely approves the principle without reason, and in this case the principle was of no importance since the plaintiff owned property.

An Indiana case [25] adds nothing to the argument. It approves in general terms the doctrine of the cases criticized above. But its decision gains strength from an Indiana statute [26] which defined nuisance. The part of this statute, which justified the decision, provides: "Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action."

Each of these cases fails to support the rule which it states. Recovery for personal injuries by one without an interest in realty, on

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22 6 Ga. App. 749, 65 S. E. 844 (1909).

23 Hosmer v. Republic Iron & Steel Co., 179 Ala. 415, 60 So. 801, 43 L. R. A. (N. S.) 871 (1913). This was an action for damages because of the death of plaintiff's intestate claimed to be due to noxious air from a pond which defendant corporation constructed in the neighborhood of plaintiff's residence. The intestate was the minor child of the plaintiff who sued as the child's personal representative. The child had no interest in the land. A demurrer to the complaint was sustained by the trial court. The court reversed this ruling declaring that an interest in land was not necessary. Justice Sayre said: "It is obvious that to maintain an action for an injury affecting the value of the freehold the plaintiff must have a legal estate. But if noxious vapors and the like cause sickness and death to one who has a lawful habitation in the neighborhood, no sufficient reason is to be found in the accepted definition of nuisance, nor in that policy of the courts which would discourage vexatious litigation, nor in the inherent justice of the situation, as we see it, why the person injured, or his personal representative in case of death, should not have reparation in damages for any special injury he may have suffered, although he has no legal estate in the soil."

24 Shelby Iron Co. v. Greenlea, 184 Ala. 496, 63 So. 470 (1913).

25 Pere Marquette R. Co. v. Chadwick, 65 Ind. App. 95, 115 N. E. 678 (1917). This was an action to recover for wrongful death of child, alleged to be caused by noxious air from a nuisance maintained by defendant. The child had no interest in the land.

26 IND. ANN. STAT. (Burns, 1914) § 291.

the basis of nuisance liability, is not justified. Lest the conclusion seem like an inhuman disregard of personal rights we should note two factors which soften the picture. First, the person may often recover on the theory of negligence, which is the general test of liability for nonwilful injury to person.[27] Secondly, the owner of the property is generally the head of the family. If he pays out money in caring for himself or members of the family made ill by a nuisance, this is recoverable in an action against the one who creates or maintains the nuisance.[28]

There are many cases which support the theories advanced in this article, and are contrary to the five cases we have criticised. In *Ellis v. Kansas City R. Co.*[29] the plaintiff sued for illness caused by the stench from a dead horse left by the railway along its line for some time after it had been killed. The title to the land had been in the plaintiff's husband who died before the suit. The court denied recovery. It quoted with approval Blackstone's definition of nuisance and held that an injury to an interest in land was the basis for recovery.[30] In England the basis of liability is definitely established along the lines we have discussed. The plaintiff in *Malone v. Laskey*[31] was living on premises which her husband held as a sub-lessee. Defendants operated a generating plant on the adjoining premises, and defendants were also the owners of the premises which were sub-let to plaintiff's husband. The vibration of the generating plant, it was alleged, had weakened the water tank on the premises of the plaintiff's husband. Although under no duty to repair, the defendants had braced this tank. The brace later fell on the plaintiff. She sued on the theory of negligence in repairing the tank and also on the theory that the nuisance of vibration had caused the harm. The court held that negligence was the proper theory of recovery in such case although in this case a cause of action was not made out. But the court emphatically denied recovery on nuisance theory because, as Sir Gorell Barnes said: ". . . no authority was cited, nor in my opinion can any principle of law be formulated, to the effect that a person

27 See HARRIS, *op. cit. supra* note 11, and cases cited.

28 NUISANCES, 46 C. J. § 501, and cases cited.

29 63 Mo. 131, 21 Am. Rep. 436 (1876).

30 Other cases in accord with this are: Kavanaugh v. Barber, 131 N. Y. 211, 30 N. E. 235, 15 L. R. A. 689 (1892); McCalla v. Louisville & N. R. Co., 163 Ala. 107, 50 So. 971 (1909) (It is interesting to note that Justice Sayre, who wrote this opinion, four years later wrote the opinion in Hosmer v. Republic Iron & Steel Co., *op. cit. supra* note 23, which in effect overrules the McCall case.); Elliot v. Mason, 76 N. H. 229, 81 Atl. 701, 37 L. R. A. (N. S.) 357 (1911), in which the case of Ft. Worth & R. G. R. Co. v. Glenn is criticized in an excellent discussion; Green v. Shoemaker, 111 Md. 69, 73 Atl. 688, 23 L. R. A. (N. S.) 667 (1909); Rober v. Ill. Cent. R. Co., 138 So. 524 (Miss. 1932).

31 [1907] 2 K. B. 141.

who has no interest in property, no right of occupation in the proper sense of the term, can maintain an action for a nuisance arising from the vibration caused by the working of an engine in an adjoining house."

In *Cunard and Wife v. Antifyre, Ltd.*,[32] the English court again carefully pointed out the difference between nuisance and negligence. In this case the plaintiffs were occupants of a flat on the third floor of a tenement house. The glass roof of plaintiffs' apartment extended beyond the roof of the tenement which was in control of the defendants. Part of the guttering fell through the glass roof and injured the wife. The court held that as mere occupants having no interest in the land, they had no right to maintain an action on the theory of nuisance. But the court did hold that the defendants were responsible for the exercise of due care in keeping the structure safe and that, on the showing of negligence, the plaintiffs were entitled to recover.

We have arrived at the conclusion that an actionable nuisance is found to exist whenever the realty of one has suffered "hurt or annoyance" from another's acts. We have determined that the injury must be to an interest in land, and that the *fault* of the actor is not necessary. There remains therefore the question of what constitutes a "hurt or annoyance" which the courts will recognize.

From the earliest times although the injury was spoken of as to the lands, it was not confined to physical hurt to the property but included injuries to the enjoyment of the property. Thus in addition to physical hurt to the land such as throwing water back upon it, Blackstone notes that injuries to the enjoyment of land, such as the "stopping of ancient lights" and "corrupting the air with noisome smells," were actionable nuisances.[33]

Today the same interests, the land and the enjoyment of the rights in the land incident to its possession, are protected. But because an injury to the rights in the land incident to its possession is a nuisance, the set of facts which make out an actionable nuisance must necessarily depend upon the courts' idea of what rights are properly incident to the possession of land. Since the actor's liability does not necessarily depend upon *fault*, in nuisance, it means that he is being restricted in conduct that is essentially *right* in order to protect other rights. The question of what constitutes a "hurt or annoyance" depends on a balancing of these rights. It is a question of degree. Bohlen expresses this idea thus:[34] "In every case where, by lawful and careful use of his land, an owner infringes his neighbor's exclusive occupation and enjoyment of and dominion over his land,

32 [1933] 1 K. B. 551.

33 3 BLACKSTONE'S COMMENTARIES 217, 218.

34 BOHLEN, *op. cit. supra* note 14, at 367, 368.

there arises a conflict of antagonistic interests; and this conflict is not merely between the interests of the particular parties but involves a far wider antagonism. The ownership of land carries with it two beneficial incidents—each of which has come to be recognized as a legal right—the 'right' of exclusive occupation, enjoyment and dominion, and the 'right' to utilize it for the owner's social and economic purposes. When these two rights conflict which is to prevail?" After some discussion he goes on to say: "The solution must depend upon the existing social, political and economic conditions and conceptions prevailing at the particular time and in the particular place, the traditional attitude of mind and habit of thought, even the prejudices, of the class then and there dominating public thought."

It is doubtful if we can arrive in more definite terms at the conception of a nuisance. Specific examples of nuisances would help little since the field is so broad. It would perhaps be best to conclude by pointing out the general tests applied by the courts in the determination of what a nuisance consists. These tests reflect in a concrete way the effect of the factors which Bohlen points out as controlling the problem of balancing these two rights.

The injury or annoyance must be a substantial character [35] to persons of ordinary health, tastes, sensibilities and habits of living.[36] Social conceptions demand that the annoyance be measured by that which would annoy the average man. If another negligently interferes with that right by his activity or failure to act, a nuisance certainly exists [37] because the actor's conduct ceases to be right and proper when he has become negligent. But where the conduct of the actor is right in a moral sense (as we have so often said it may be, and yet be a nuisance), and yet interferes with possessory rights, the economic and political elements are the strong determining factors. Thus so that manufacturing and industry may be fostered, the locality [38] of the alleged nuisance may be considered and an activity which would be a nuisance in a residential section might not be one in a manufacturing section. And that commerce and trade may be encouraged one who lives in a city or village must endure the ordinary inconveniences that city life demands.[39] The mere fact that the nuisance was established before the complainant moved into the neighborhood will not justify it.[40] But such a fact may be evidence of the reasonableness of the activity for the locality.

Robert B. Devine.

35 NUISANCES, 36 C. J. § 45.
36 NUISANCES, 36 C. J. § 46.
37 NUISANCES, 36 C. J. § 23, note 12.
38 NUISANCES, 36 C. J. § 32.
39 NUISANCES, 36 C. J. § 34.
40 NUISANCES, 36 C. J. § 36.

STRIKES—BOYCOTTS—RIGHT TO JOIN A UNION.—In the current legal and financial uproar caused by the National Industrial Recovery Act the power and popularity of the strike and the lockout have taken on new vigor. The New Deal is giving the labor unions stronger backing than they have ever had before, and in the eternal conflict between capital and labor the strike bids fair to appear as a decisive weapon. The unions have always had to rely on the strike and its less-favored sister, the boycott. But hitherto it has been more of a defense; the employer had the option of calling on "scabs" to tide him over the emergency, with the police to enforce the doctrines of peaceful picketing. And after one such experience the employer more likely than not would choose his employees from nonunion applicants, making nonmembership in any union a prerequisite to employment. Then the union's only resort was the boycott, and this has long been held illegal. But under the National Recovery Act the situation has changed and the union is high man on the see-saw.

In the new order of things the following doctrines are prescribed:[1]

"Every code of fair competition, agreement and license approved, prescribed, or issued under this chapter shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing . . ."

Thus it will be seen that willy-nilly, like it or not, an employer may not prevent his employees from being members of a union if they so desire. Legislative attempts of this nature have been often made before on behalf of labor unions, and always they have been held void and unconstitutional. The court said, in one such case:[2] "The rights of liberty and property include the right to acquire property by labor and by contract. Ritchie v. People 155 Ill. 98, 40 N. E. 454 . . . The right of of property involves, as one of its essential attributes, the right not only liberty and property, the right to acquire property by labor and by contract. Ritchie v. People 155 Ill. 98, 40 N. E. 454 . . . The right of property involves, as one of its essential attributes, the right not only to contract, but also to terminate contracts. . . . The act of 1893, now

[1] 15 U. S. C. A. § 707a.

[2] Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 1009, 1010, 52 L. R. A. 283 (1900).

under consideration, deprives the employer of the right to terminate his contract with his employee . . . we are of the opinion that this act contravenes those provisions of the state and federal constitution which guarantees that no person shall be deprived of life, liberty or property without due process of law." In the right of contract there is also the right of the employer to set the terms of his contract; this too is abrogated by the foregoing provisions of the National Industrial Recovery Act. However, most of the cases dealing with legislation of this sort did not deny the right of the worker to organize. The objections were raised to laws which attempted to make misdemeanors of an employer's prerequisites of nonmembership in a union to employment. The weight of authority today is that laborers have the right to organize,[3] only that "it must always be exercised with reasonable regard for the conflicting rights of others."[4] With this right to organize has gone the right to strike. As it was held in 1891,[5] "An injunction will not lie to restrain handicraftsmen from combining and peacefully and without intimidation persuading their fellow workmen to leave the service of their employers in order to compel an advance in wages on the ground that such persuasion invades the constitutional right of the employer to prosecute his business free from unlawful obstruction." Modern holdings are in accord with this.[6] Striking itself, however, would have little strength without picketing. The courts have rarely refused to allow peaceful picketing. It was held in a recent case that the right to strike includes the right to use peaceable and lawful means to induce present and expectant employees to join the ranks.[7] However, the courts have been unfailingly severe in their attitude towards militant picketing. The measure of just what is allowable for picketers is perhaps best set out in the justly famous case of *Jersey City Printing Co. v. Cassidy:*[8] ". . . a combination of employers or a combination of employees, the object of which is to interfere with the freedom of the employer to employ, or of the employee to be employed . . . by means of such molestation or personal annoyance as would be liable to coerce the person upon whom it was

3 Arthur v. Oakes, 63 Fed. 310 (C. C. A. 7th, 1894); Thomas v. Cincinnati N. O. & T. P. Ry. Co., 62 Fed. 803 (C. C. S. D. Ohio 1894); Alaska S. S. Co. v. International Longshoremen's Ass'n, 236 Fed. 964 (D. C. W. D. Wash. 1916); Wabash R. Co. v. Hannan, 121 Fed. 563 (C. C. E. D. Mo. 1903).

4 Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461 (1916); Brennan v. United Hatters of North America, Local No. 17, 73 N. J. Law 729, 65 Atl. 165 (1906).

5 Rogers v. Evarts, 171 N. Y. S. 264 (1891).

6 Bayonne Textile Corp. v. American Fed. of S. Workers, 172 Atl. 551 (N. J. 1934).

7 Bayonne Textile Corp. v. American Fed. of S. Workers, *op. cit. supra* note 6.

8 53 Atl. 230, 234 (N. J. 1902).

inflicted, assuming that he is reasonably courageous and not unreasonably sensitive, to refrain from employing or being employed, is illegal, and founds an action for damages on the part of any person knowingly injured in respect of his 'probable expectancy' by such interference, and also, when the other necessary conditions exist, affords the basis of an injunction from a court of equity." But just what are these molestations and annoyances which would coerce a person not "unreasonably sensitive"? In *Iron Molders' Union v. Allis-Chalmers Co.*[9] it was held that an employer is entitled to enjoin striking workers from keeping other workers away by use of vile and abusive language, threats of violence and assault. In another case [10] it was stated that peaceful picketing by the striking members of a labor union in *reasonable numbers* for the purpose of *observation only* is lawful. Recognizing that violence is all too often the inevitable result of any picketing, however well-intended, the courts have in some cases refused to allow it at all. In *Vegelahn v. Guntner* [11] an injunction was granted which restrained the defendants "from interfering with the plaintiff's business by patrolling the sidewalk or street in front, or in the vicinity, of the premises occupied by him, for the purpose of preventing any person or persons who are now or may hereafter be in his employment, or desirous of entering the same, from entering it, or continuing in it."

The other threat of the Union, the boycott, may be dismissed briefly. This has invariably been held illegal, as an unlawful combination.[12] The justice and logic of this holding may be clearly understood from the excellent reasoning in the case of *Iron Molders' Union v. Allis-Chalmers Co.*:[13] "In contests between capital and labor the only means of injuring each other that are lawful are those that operate directly and immediately upon the control and supply of work to be done and of labor to do it, and thus directly affect the apportionment of the common fund, for only at this point exists the competition, the evils of which organized society will endure rather than suppress the freedom and initiative of the individual. But attempts to injure each other by coercing members of society who are not directly concerned in the pending controversy to make raids in the rear cannot be tolerated by organized society, for the direct, the primary, attack is upon society itself."

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[9] Iron Moulders' Union v. Allis-Chalmers Co., 166 Fed. 45 (C. C. A. 7th, 1908).

[10] Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Ass'n, 59 N. J. Eq. 49, 46 Atl. 208 (1899).

[11] 167 Mass. 92, 44 N. E. 1077 (1896). Accord: Beck v. Railway Teamsters Protective Union, 118 Mich. 497, 77 N. W. 13 (1898).

[12] Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307 (1888); Arthur v. Oakes, *op. cit. supra* note 3; Gompers v. Buck's Stove & R. Co., 221 U. S. 418, 55 L. ed. 797 (1911).

[13] *Op. cit. supra* note 9.

These, then, are the weapons of the labor union,—the one, boycott, illegal, and the other, strike picketing, legal only so long as peaceful—and occasionally not then. And these weapons are useful only when the employees are members of the union. They may not be forced on the employees whether the latter want them or not, merely because it would be to their benefit by improving their working conditions.[14] Nor will some courts allow unions to solicit membership in a non-union shop.[15] Thus, before the measures of the National Industrial Recovery Act, employers had the option of bargaining with union employees, subject to their right to strike, or absolutely refusing to deal with them by making nonmembership in a union a pre-requisite to employment, subject to dismissal if membership were taken out later.

Now what is the situation? According to those provisions of the National Industrial Recovery Act, quoted at the beginning of this note, an employer may no longer demand nonmembership in a union a prerequisite to employment. It may be said, Well, but he is not denied the right to hire nonunion workers. Granted; but where is he to find them, and how? If the employer does question the prospective employee as to his membership in a labor union, it would seem that he is making nonmembership in a union a condition to employment which would, in substance, constitute a violation of the code. The whole process must be veiled in mystery, much as the taking of the vows of a novitiate in a secret society.

To make what it is hoped will not seem like an awkward attempt to tie all these points together, here is the prospect for the employer. First, practically speaking, he must hire union workers. Secondly, he must arbitrate with their representatives. Thirdly, if he cannot reach an agreement with them, he is subject to a strike, and a subsequent delay and loss of business. Although, theoretically, he may run an open shop, it is not permissible for him to question an employee in regards to his membership in a union, lest a subsequent dismissal point to the question as to membership as a motive. It is a valid question to ask whether this does not interfere with employers' "probable expectancy" in the labor market that is protected by the *Jersey City Printing Co.* case? Is it not a violation of the right of contract and the due process clause, as pointed out in *Gillespie v. People?* [16] And, finally, is it not legislation of the type which will encourage the danger pointed out by the following prophetic dicta in the case of *State v. Kreutzberg*: [17]

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14 Hitchman Coal & Coke Co. v. Mitchell, *op. cit. supra* note 4.

15 George Jonas Glass Co. v. Glass Bottle Blowers' Ass'n, 79 Atl. 262 (N. J. 1911).

16 *Op. cit. supra* note 2.

17 90 N. W. 1098, 1102, 1103 (Wis. 1902).