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Note and Comment

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NOTE AND COMMENT

POWER OF MUNICIPAL CORPORATIONS TO GRANT EXCLUSIVE PRIVILEGES.—The rapid development of the law due to the ever increasing number and importance of public service corporations has given rise to many interesting questions of vital importance to both the corporations and the municipalities, and has left it in many respects in an uncertain and unsettled condition. Because of the fact that cases involving the question indicated in the heading often go off on constitutional grounds, two very recent decisions by the United States Supreme Court, *Vicksburg* v. *Vicksburg Waterworks Company*, 202 U. S. 453, 26 Sup. Ct. Rep. 660, decided in 1906, and *Water, Light & Gas Company* v. *City of Hutchinson*, 207 U. S. 583, 28 Sup. Ct. Rep. 135, decided Dec. 23, 1907, are especially worthy of note.

In the *Vicksburg case* the facts briefly stated were as follows: The city of Vicksburg, Miss., with the usual general authority to supply itself and inhabitants with water and to enter into contracts with reference thereto, executed a contract with the water company's assignors whereby they were to furnish the city with water, the city on its part contracting "that in consideration of the public benefit to be derived therefrom the

exclusive right and privilege is hereby granted for a period of thirty (30) years * * * of erecting, maintaining and operating a system of waterworks," etc. (*Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 69). Later the Mississippi legislature passed an act authorizing municipal corporations within the state to establish municipal water plants for the purpose of furnishing themselves and inhabitants with water for public and domestic purposes. Pursuant to authority granted by this act, the city council of Vicksburg enacted an ordinance for the establishment of such a plant, whereupon the water company instituted suit in the United States Circuit Court to enjoin the city from proceeding further, claiming that this last ordinance and the proceedings about to be taken thereunder interfered with its exclusive right and impaired the obligation of its contract with the city. The circuit court allowed the injunction, which order upon appeal to the supreme court was affirmed. 5 MICH. LAW REV. 42.

In the *Hutchinson case* the complainant company had acquired from its assignors rights under a certain contract made with the defendant city, whose authority from the state was of the same general nature as that of Vicksburg. The contract in terms granted them "the exclusive right and privilege for the term of twenty years from the date of the passage and approval of this ordinance (No. 402), of supplying the city of Hutchinson, Reno county, Kan., and the inhabitants thereof, by a system of waterworks with water * * *, with electric current for electric light and power," etc. That the contract conferred, or purported to confer, an exclusive right or privilege cannot be denied, and the supreme court so considered it in its opinion. In 1905, some years after the date of the contract referred to and after the company had expended considerable sums of money in improvements, etc., on the strength of its supposed exclusive right, the city council, by its ordinance No. 651, granted to certain other parties the right to construct and operate a street railway and to construct and operate electric and gas plants for the purposes for which electricity and gas may be used. Thereupon the complainant brought suit in the United States Circuit Court to restrain the city and the grantees of the right under ordinance No. 651 from interfering with its exclusive rights, basing its claim upon the same grounds that were urged in the *Vicksburg case*. The court refused to grant the injunction for the reason that the city of Hutchinson had no authority, under the charter and the laws of Kansas, to grant an exclusive right or privilege such as it had purported to give complainant. 144 Fed. 256, 5 MICH. LAW REV. 136. On appeal to the supreme court the decree of the lower court was affirmed.

It will thus be seen that in these two cases, in which the decrees of the supreme court were exactly opposite, the only difference in the facts out of which they arose was that in the one it was a thirty-year exclusive franchise to furnish water, which was violated by the city attempting to establish a municipal water plant, while in the other case the franchise was for twenty years, violated by the city attempting to grant the right to furnish electricity to the city and its inhabitants to a new company. Neither the difference in time nor the fact that in one case it was a water supply that

was involved, while in the other it was electricity, seemed to influence the court in arriving at its conclusions, thus leaving as the only real distinguishing feature the fact that in the *Vicksburg case* it was the city itself that attempted to establish a competing plant, while in the *Hutchinson case* the city, instead of putting in its own plant, granted that right to third parties.

At first blush the two cases seem to be almost squarely in conflict, but a careful analysis of the opinions and facts upon which they were based shows possible grounds of distinction. It is the purpose of this note to point out and briefly discuss those grounds, together with a consideration of the principles involved and the cases relative thereto with especial reference to the decision of the United States Supreme Court.

Municipal and public corporations are creatures of the state, created primarily for the purpose of enabling the state to more adequately administer its governmental functions and duties, and as such they act as agents of the state. As such agents they have no powers except those granted by the charter or the general law in express terms or by necessary implication. In the case of the municipal corporation there is the additional feature that to a certain extent its creation is for the benefit of the people within its limits, but that fact does not confer upon them any wider powers. As between the state and the municipality any doubt as to the construction of powers granted, is resolved in favor of the state, the interest of the public at large being in theory considered as superior to that of any portion thereof. *Detroit Citizens' Street R. Co.* v. *Detroit R. Co.*, 171 U. S. 48, 43 L. Ed. 67; 18 Sup. Ct. Rep. 732. While as between the municipality and an individual or private corporation any doubt as to the construction of the extent of any power or right granted by the city, is resolved in favor of the city, the interest of a portion of the public being considered as of paramount importance to that of any individual or private corporation. *Rogers Park Water Co.* v. *Fergus*, 180 U. S. 624, 45 L. Ed. 702, 21 Sup. Ct. Rep. 490; *Freeport Water Co.* v. *Freeport*, 180 U. S. 598, 45 L. Ed. 688, 21 Sup. Ct. Rep. 497; *Joplin* v. *Southwest Missouri Light Co.*, 191 U. S. 150, 48 L. Ed. 127, 24 Sup. Ct. Rep. 43, *Owensboro* v. *Owensboro Waterworks Co.*, 191 U. S. 358, 48 L. Ed. 217, 24 Sup. Ct. Rep. 82. In the early and leading case of *Charles River Bridge* v. *The Warren Bridge*, 11 Pet. 422, the rule was stated by Mr. CHIEF JUSTICE TANEY to be that no grant by the *legislature* to a private corporation or individual would be considered as exclusive unless granted in the clearest express terms, and that every doubt would be resolved against the individual and in favor of the public. The principle of this case has since been reaffirmed in a multitude of cases. So had the legislatures of Mississippi and Kansas made the contracts directly with the water companies, instead of making them through their agents, the cities of Vicksburg and Hutchinson, such contracts would not have been construed as granting exclusive rights unless so expressed in the most unequivocal terms. Still in the *Vicksburg case* the court held that a contract by the city granting an exclusive right was valid (for otherwise the city would not have been barred from erecting its plant), thus necessarily holding that the city had such authority from the state.

But its authority from the state was in mere general terms, there being no express power given to confer exclusive rights. In reaching its conclusion it is apparent that the court went squarely contrary to the settled rules of construction, and held in effect that what the state could not do directly it could do indirectly through its agent.

It may be answered to this objection that the power to make such a contract was given Vicksburg by necessary implication, that it could not exercise the powers expressly granted except in that manner. But the court did not put its decision on that ground, and in the *Hutchinson case* it concluded that such a contract was not necessarily the only manner in which the city's express powers could be exercised. The only case which it has been possible to find holding that such a contract was necessary to the execution of the powers conferred is *Atlantic City Waterworks Co.* v. *Atlantic City,* 39 N. J. Eq. 367.

It would seem, therefore, that in the *Vicksburg case* the supreme court must have found the contract between the city and the water company to be valid, as otherwise the city would not have been prevented from establishing its own plant, there being no contention that there was anything besides the contract that prevented it.

In the cases in which the supreme court has been called upon to consider the question it has held that a municipal or public corporation cannot grant an exclusive franchise without express authority from the state so to do. *Minturn* v. *LaRue,* 23 How. 435; *Wright* v. *Nagle,* 101 U. S. 791.

In *Minturn* v. *LaRue* the city of Oakland, which had general authority by its charter to establish and regulate ferries, granted to the complainant the exclusive right of operating a line of ferries between that city and San Francisco. Later the defendant undertook to run a competing line. The object of this action was to secure an injunction restraining the defendant from interfering with the complainant's exclusive right. The question whether, under the power conferred upon the city, it had authority to grant the exclusive right which it purported to have done was squarely presented. In holding that the city had not such authority, the court, by Mr. Justice NELSON, said (page 436): "It is a well settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public. This principle has been so often applied in the construction of corporate powers that we need not stop to refer to authorities."

In *Wright* v. *Nagle* the Inferior Court, which under the statutes of Georgia had authority to establish and regulate ferries and bridges, gave to complainants what in terms amounted to an exclusive right to maintain toll bridges within certain limits. Later the commissioners of roads and revenue for the county authorized the defendant to erect and maintain a bridge within the limits of the grant to complainants, who thereupon applied for an in-

junction to restrain the interference with their exclusive right. The lower court and the Georgia Supreme Court held that the grant to complainants did purport to be exclusive, but that the Inferior Court had not the power under the general authority conferred upon it to grant an exclusive right to erect and maintain toll bridges, and so refused the injunction. On appeal to the United States Supreme Court the decision was affirmed.

In the other federal courts and in the state courts, almost without exception, the rule seems to be to the same effect as announced in *Minturn* v. *LaRue* and *Wright* v. *Nagle*. See *Jackson County Horse R. Co.* v. *Interstate Rapid Transit Co.*, 24 Fed. 306; *Saginaw Gas Light Co.* v. *City of Saginaw*, 28 Fed. 529; *Grand Rapids E. L. & P. Co.* v. *Grand Rapids E. E. L. & F. G. Co.*, 33 Fed. 659; *The Westerly Waterworks Co.* v. *Town of Westerly*, 80 Fed. 611; *Norwich Gas-Light Co.* v. *Norwich City Gas Co.*, 25 Conn. 19; *Gale* v. *Village of Kalamazoo*, 23 Mich. 344 (opinion by COOLEY, J.); *Logan & Sons* v. *Pyne*, 43 Iowa 524; *Long* v. *City of Duluth*, 49 Minn. 280; *Davenport* v. *Kleinschmidt*, 6 Mont. 502; *State* v. *Cincinnati Gas-Light & Coke Co.*, 18 Oh. St. 262; *Altgeld* v. *City of San Antonio*, 81 Tex. 436; *Syracuse Water Co.* v. *City of Syracuse*, 116 N. Y. 167.

The decision in the *Vicksburg case*, as appears from the opinion of Mr. JUSTICE DAY, was based upon the decision of the same court in *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. Rep. 77. But, as pointed out in 5 MICH. LAW REV. 42, the facts in the two cases were not at all the same. In the *Walla Walla case* the city had granted the water company a franchise to furnish water for public and domestic purposes, the city agreeing on its part that "the city of Walla Walla shall not erect, maintain or become interested in any waterworks except the ones herein referred to," etc. Subsequently the city attempted to establish a municipal plant, and an injunction restraining the city from violating its contract was granted. But in that case there was involved no question of the validity of an exclusive grant, the only question considered being whether the city could contract to exclude *itself* from competing, and the decision of the court went only to the extent of holding that a contract such as the city had there made was valid. The contract being valid, of course the city was properly enjoined. In the *Vicksburg case* the contract attempted to do more than merely exclude the city itself from competition; it purported to create an absolutely exclusive franchise—in other words, a monopoly. In the *Hutchinson case* the court, in line with what is manifestly the overwhelming weight of authority in the other courts and its own decisions prior to the *Vicksburg case*, held that such a contract was ultra vires. It being ultra vires on grounds of public policy, the contract was void. If such a contract really is ultra vires, is it not a rather startling proposition to hold that by it a municipality can bar *itself* from establishing a plant of its own and thus destroy the monopoly, and still at the same time and under the same contract is not prevented from granting the privilege to a third party and thus indirectly accomplish the same purpose? Yet that is exactly the condition in which the law is left by the decisions in the *Vicksburg* and *Hutchinson cases*.

There are two reasons given for holding these exclusive privilege con-

tracts void, first, because the city has no authority from the state to enter into such contracts; and, second, because a monopoly is thereby created, and monopolies are odious. However, since the primary reason for holding that cities have no such authority is that a monopoly is created; the creation of which is possible only by the clearest terms and since the city has only such power as is given it, it is apparent that the two reasons really amount to but one, and that, the law's aversion to monopolies. In practically every instance in which a city has granted such an exclusive right and then attempts to grant a new franchise to other parties or to establish a plant of its own, it is self evident that the object is the betterment of conditions caused by the monopoly. Nor does it require judicial expression to establish the fact that in villages and cities of comparatively small size, where there are public service corporations already in operation, it is next to impossible to induce private capital to enter into competition. In such cases, unless the municipality can install its own plant, the established companies have, in effect, as complete and secure a monopoly as they would have were their contracts purporting to give them their exclusive rights held valid and binding. In view of the large number of exclusive franchises which our municipalities have purported to give and the ever increasing popularity and demand for municipal ownership of public service enterprises, it is, indeed, much to be desired that the supreme court will not feel inclined to follow its decision in the *Vicksburg case.*

In the opinion of the court in the *Hutchinson case* in distinguishing that case from the *Vicksburg case,* besides the difference in the facts, there was given one other ground, stated by the court as follows: "In the *Vicksburg case* it was pointed out that the power of the city to exclude itself from building waterworks was recognized to exist by the Supreme Court of Mississippi." A most careful examination, however, of the opinion and statement of facts in that case discloses no such conclusion or even intimation that the decision was in anywise founded on that fact. The only Mississippi law or cases referred to were *Collins* v. *Sherman,* 31 Miss. 679; *Gaines* v. *Coates,* 51 Miss. 335, and *Greenville Waterworks Co.* v. *City of Greenville,* 7 So. 409. As clearly pointed out by Mr. JUSTICE DAY, those cases only went to the extent of holding that an exclusive grant would not be presumed, that clear and express terms must be used. But even granting that such had been shown to be the law of Mississippi, it seems that it would not have been controlling. In *Wright* v. *Nagle,* at page 793. Mr. Chief Justice WAITE said: "It is true, the court below disposed of the case by deciding that the state statutes did not authorize the Inferior Court to grant Miller an exclusive right to maintain bridges within the designated limits, and that in so doing it gave construction to a state statute. It is also true that ordinarily such a construction would be conclusive on us. One exception, however, exists to this rule, and that is where the state court has been called upon to interpret the contracts of states, though they have been made in the forms of law, or by the instrumentality of a state's authorized functionaries in conformity with state legislation." See also *Jefferson Branch Bank* v. *Skelley,* 1 Black. 436; *Louisville & Nashville Railroad* v. *Barnes,* 109 U. S.

254, 257; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683, 697; *Douglas* v. *Kentucky*, 168 U. S. 488; *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U. S. 453.

It seems, then, that the only possible manner of distinguishing or reconciling the decisions in the two principal cases is on the theory that, though a contract of a city granting an exclusive right for a term of years is void to the extent of not barring the city from conferring a franchise to other parties, still there is left in that contract enough force and vitality to prevent the city from establishing a plant of its own. In other words, the court having held in the *Walla Walla case* that it was competent for a city by express contract to bar itself from competition, in cases involving such contracts as was considered in the *Vicksburg* and *Hutchinson cases* the court will hold invalid only that part which makes the contract exclusive, thus in effect severing it, retaining that which when standing alone has been held valid, and rejecting the remainder. But suppose this kind of contract were presented to the court: A franchise to a public service corporation, the city contracting not to grant a similar right to others, either not mentioning it at all, or expressly reserving the right to establish a municipal plant. Would not the court have to hold such contract valid? There certainly would not be present the element of exclusiveness or monopoly, the ground upon which these franchises have been held invalid. And if the court would hold such contract valid, what would their holding be in another case similar to the *Vicksburg case?* In adopting this doctrine of the severability of the contract the court has adopted a rule of construction quite contrary to the trend of previous decisions, for the tendency has been to hold that the municipality has not excluded itself. In fact, there is very respectable authority for the view that even by express contract a city cannot exclude itself, there being no question of creating a monopoly involved. ELLIOTT, MUNIC. CORPS., § 148; DILLON, MUNIC. CORPS., § 97, and cases cited.

R. W. A.

POLICE REGULATION OF SLEEPING CAR BERTHS.—From the time of the introduction of the sleeping car there has been a constant feud between the sleeping car companies and the travelling public in regard to the upper berths. The exigencies of the situation have, of course, made economy of space a prime requisite in sleeping car construction, and there is no doubt but that a high degree of success in this respect has attended the efforts of the sleeping car builders. The public has usually been tolerant enough of the close quarters assigned to it, when crowding has seemed necessary to accommodate the travellers applying for sleeping car space, but it has never been quite clear to the average traveller why he should be forced to practice the arts of the contortionist at the risk of breaking his head against the upper berth when no one occupied or wanted that upper berth. He has usually assumed that the company's regulation in regard to unoccupied upper berths has been designed to force him to buy an entire section if he wished head-room enough to make a lower berth comfortable.

This long-standing abuse, of denying to the occupant of the lower berth the space of the unoccupied upper, was sought to be corrected by the legislature of the state of Wisconsin during the session of 1907, by means of an act providing that "whenever a person pays for the use of a double lower berth in a sleeping car he shall have the right to direct whether the upper berth shall be open or closed, unless the upper berth is actually occupied by some other person." The act was entitled an act relating to the health and comfort of occupants of sleeping car berths.

The act was held unconstitutional. *State* v. *Redmon* (Wis. 1907), 114 N. W. 137. The opinion is somewhat more vague and indefinite than most opinions of that very able court, and leaves an impression upon the mind of the reader that the court felt called upon to curb the movement toward paternalism which finds expression in a constant expansion of the police power of the state, and that this case was expected to serve as a warning and an example.

The chief infirmity in the law pointed out by the court is the fact that it gives the occupant of the lower berth the option of having the upper berth open or closed as he may choose. "To thus leave such matter," says the court, "to the mere caprice of the occupant of the lower berth is a confession on the face of the act that it was not treated by the legislature as one deemed to be reasonably vital to the public interests. So the law is not, in reality, a police regulation, but an unwarranted interference with property rights."

It is not quite clear why the mere existence of the option should of itself conclusively show that the act was not designed primarily to benefit the public. The wishes of those individuals chiefly concerned frequently determine the specific effect and application of lawful legislative acts passed in pursuance of the police power. Thus, in the case of *Swift* v. *The People,* 162 Ill. 534, an ordinance of the city of Chicago prohibiting the granting of a license to keep a dram-shop within a described portion of the city unless the applicant should present a petition signed by a majority of the legal voters of that portion of the city, was held a valid exercise of the police power. And a similar ordinance in regard to livery stables was held valid in *City of Chicago* v. *Stratton,* 162 Ill. 494.

If it is claimed that there is a distinction between acts which aim to preserve the comfort rather than to protect the safety, health or morals of the public, and such a distinction seems to be vaguely suggested by the court, an answer has been given by the Supreme Court of the United States in *Lake Shore & M. S. Ry. Co.* v. *Ohio,* 173 U. S. 300, where Mr. JUSTICE HARLAN, speaking for the court, said: "The power of the state by appropriate legislation to provide for the public convenience stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals or the public safety." And the same doctrine was emphatically reaffirmed in *Chicago, B. & Q. Ry Co.* v. *Drainage Commissioners,* 200 U. S. 561, 592.

E. R. S.

THE LIABILITY OF A HUSBAND FOR SLANDER AND LIBEL COMMITTED BY HIS WIFE.—Defendant's wife had written a letter to plaintiff's employer, warning him that plaintiff was a thief. Because of this letter, plaintiff was discharged. In an action against the husband and wife for uttering a libel, held that where a wife uttered a libel without her husband's knowledge or participation he was not liable for punitive damages, though he was necessarily joined as a party defendant in the action because of the existence of the marital relation, and thereby became liable for the judgment in so far as it related to compensatory damages. *Price et ux.* v. *Clapp* (1907), — Tenn. —, 105 S. W. Rep. 864.

The husband's liability for his wife's torts at common law is ably discussed in the case of *Kosminsky* v. *Goldberg*, 44 Ark. 401. This common law liability as stated in the above case is as follows: The husband and wife are jointly liable and must be jointly sued for torts committed by the wife during coverture in three instances; first, when the husband is absent and the tort is committed without his knowledge or consent; second, when the husband is absent, but the tort is committed under his direction; third, when the husband is present, but the wife acts from her own volition. But where the husband is present and the act is committed by his command or encouragement he alone is liable. These being the rules at the old common law, the question arises whether the Married Women's Acts have discharged the husband from this liability. *Seroka* v. *Kattenberg*, 55 Law J. (N. S.), Q. B. D. 375, holds that the Married Women's Property Act of 1882 does not relieve a husband from his common law liability to be joined as a defendant in an action brought against his wife for a tort committed by her. In this case the action was brought to recover damages due to the wife's slander, and, as the husband was liable, it seems that the old common law rule still prevails in England.

In the United States the question is by no means settled. In *Baker* v. *Young*, 44 Ill. 42, 92 Am. Dec. 149, the court held that where a wife speaks slanderous words alone a verdict must be found against husband and wife. This decision did not settle the question in Illinois, as five years later the case of *Martin* v. *Robson*, 65 Ill. 129, 16 Am. Rep. 578, decided in 1872, held that since the passage of the act of 1869 the husband is no longer liable for the torts of his wife committed during coverture. This case was decided by an almost equally divided court, and a different construction was placed upon the Married Women's Acts than in *Baker* v. *Young*, supra. However, the decision in *Martin* v. *Robson* seems to have been followed ever since. The husband's liability for his wife's slanders was fixed in Indiana by *Yeates* v. *Reed*, 4 Blackf. (Ind.) 463, 32 Am. Dec. 43; *Mousler* v. *Harding*, 33 Ind. 176, 5 Am. Rep. 195. Statutes have since changed this liability so that a husband is no longer liable for the torts of his wife. *Indiana R. S.* (1897), § 7300.

The Iowa courts have held that the common law rule making the husband liable for the torts of his wife has not been changed by any provisions of the Iowa statutes. See *McElfresh* v. *Kirkendall*, 36 Iowa 224. In Massachusetts the husband's common law liability as held in *Austin* v. *Wilson*, 58

(4 Cush.) Mass. 273, has been abrogated by statute. (*Massachusetts P. S.*, 1882, p. 819.) The common law rule still prevails in Minnesota. *Morgan* v. *Kennedy*, 62 Minn. 348, 64 N. W. 912, 54 Am. St. Rep. 647, 30 L. R. A. 521. Similar holdings are found in Missouri. *Taylor* v. *Pullen*, 152 Mo. 434, 53 S. W. 1086; *Bruce* v. *Bombeck*, 79 Mo. App. 231. The law on this question is by no means settled in New York. *Laude* v. *Smith*, 6 Civil. Proc. R. (N. Y.) 51, hold that the husband is not a proper party in an action against a married woman for slander. However, the rule which seems to be most generally followed in New York is found in *Fitzgerald* v. *Quann*, 109 N. Y. 441, 17 N. E. 354. In that case the court held that the various statutes relating to married women have not abrogated the rule of the common law making the husband liable for the torts of his wife. The court also held that the Married Women's Acts must be strictly construed since they are in derogation of the common law.

The common law rule is still enforced in North Carolina. *Presnell* v. *Moore*, 120 N. Car. 390, 27 S. E. 27. A similar holding is found in Ohio. *Fowler* v. *Chichester*, 26 Ohio St. 9. Conflicting decisions are found in Pennsylvania. Before the passage of the Married Women's Acts of 1887 the husband was liable for his wife's slanders. See *Quick* v. *Miller*, 103 Pa. St. 67. After the passage of these acts it was held in *Kuklence* v. *Vocht*, 4 Pa. Co. Ct. R. 370, 21 Wkly. Notes Cas. 521, 13 Atl. 198, that a husband was no longer liable for slanderous words uttered by his wife. However, *Ridgeway* v. *Speelman*, 20 Pa. Co. Ct. R. 596, 7 Dist. R. (Pa.) 290, holds that the acts of June 8, 1893, repeal the acts of 1887 and the husband is still liable. From this decision it seems that the old common law doctrine is still followed in Pennsylvania. The decisions in Texas are governed by the common law. See *McQueen* v. *Fulgham*, 27 Tex. 463; *Zeliff* v. *Jennings*, 61 Tex. 458; *Patterson & Wallace* v. *Frazer*, — Tex. Civ. App. —, 93 S. W. 146.

On the other hand the courts of some states hold that the husband is not liable for the slanders uttered by his wife. *Prentiss* v. *Paisley*, 25 Fla. 927, 7 L. R. A. 640, holds that a married woman is personally liable for her torts. The question was settled in Kansas by the decision of *Norris* v. *Corkill*, 32 Kan. 409, 4 Pac. 862, 49 Am. Rep. 489. This case followed *Martin* v. *Robson*, supra. *Lane* v. *Bryant*, 100 Ky. 138, 37 S. W. 584, 36 L. R. A. 709, held that the liability of the husband at common law for the slander and libel of his wife was based on the idea that the husband had absolute dominion and control over his wife and her property, but as this idea no longer exists, having been changed by statute (*Kentucky Statutes*, March 15, 1894, § 2128), the husband should not be held liable for torts in which he did not aid, or with which he had nothing to do. In Louisiana it has been held that a husband, not shown to have been cognizant of the slanderous utterance of his wife, should not be liable therefor. *McClure* v. *McMartin*, 104 La. 496, 29 So. 227. The husband's liability in Maryland has been expressly abrogated by *Maryland Acts* (1880), ch. 253. The Michigan statutes are to the same effect. *Michigan C. L.* (1897), § 8677. The rule that the husband is liable for his wife's torts committed away from his presence and without his instigation was never adopted in Nebraska. See *Goken* v.

Dallugge, 72 Neb. 16, 101 N. W. 244. The New Hampshire court in *Harris* v. *Webster*, 58 N. H. 481, held that the husband is no longer liable for his wife's torts, because he no longer controls her property. In Vermont this liability has been expressly abrogated. *Story* v. *Downey*, 62 Vt. 243; *Vermont Statutes of 1894*, § 2648.

The question of damages seems to have been raised in but few cases. Although none are in point with the principal case so far as the measure of damages is concerned, yet exemplary damages have been awarded against the husband for his wife's slanders in a few cases. They were allowed in *Fowler* v. *Chichester*, 26 Ohio St. 9, and in *Patterson & Wallace* v. *Frazer*, — Tex. Civ. App. —, 93 S. W. 146. However, this latter case was reversed on a different ground. 94 S. W. 324. Before the husband's liability was abolished in Vermont exemplary damages were awarded in *Lombard* v. *Batchelder*, 58 Vt. 558, 5 Atl. 511. Nor will the damages be diminished even though the husband requires the wife to retract the slanderous utterances. *Mousler* v. *Harding*, supra.

Where the husband is liable the question has been raised whether the wife's separate estate should be subjected to the payment of the judgment. In commenting upon the case of *Seroka* v. *Kattenberg*, supra, the *Central Law Journal*, Vol. 23:364, says: "One aggrieved by the tort of a wife has under the act in question this advantage, he may sue both, and upon recovering a judgment may have it satisfied out of the separate estate of the wife, under the statute, or of the husband, under the common law, or out of both, and may exhaust both if necessary to satisfy the judgment." In the case of *McQueen* v. *Fulgham*, supra, the question was raised whether the wife's separate estate or the community property should be taken to satisfy the judgment. The question was not decided in that case, but in *Zeliff* v. *Jennings*, supra, it was held that the wife's separate estate should be first exhausted before the husband's property was taken. J. E. W.

SUFFICIENCY OF A VERDICT WHICH FAILS TO FIX THE TIME OF AN ATTEMPT TO COMMIT BURGLARY, THE PUNISHMENT VARYING WITH THE TIME.—The Supreme Court of Montana in *State* v. *Mish* (1907), — Mont. —, 92 Pac. Rep. 459, has recently decided an interesting point relative to the sufficiency of a verdict, which failed to find whether an attempt to commit burglary was made in daytime or in nighttime when punishment is graduated accordingly as the attempt is made in daytime or in nighttime. The case is important because many other states have statutes similar to those of Montana. Apparently, however, only one other case has arisen on a similar state of facts, and that case is in conflict with the principal case.

In the principal case the defendant was tried for an attempt to commit burglary. The jury returned a verdict of guilty. The court then imposed sentence for 7 1-2 years in the state prison. By the statutes of Montana (PENAL CODE, § 821) burglary is divided into two degrees. Burglary in the first degree is burglary committed in the nighttime. It is punishable by from one to fifteen years in the state prison. Burglary in the second degree is

burglary committed in the daytime. It is punishable by imprisonment not exceeding five years (PENAL CODE, § 822). The Revised Statutes provide that when a person is found guilty of a crime divided into degrees, the jury, by their verdict, shall find of what degree the person is guilty. (PENAL CODE, § 2145.) Attempts to commit burglary are not expressly divided into degrees by statute. Instead, what constitutes an attempt is defined in general terms (PENAL CODE, § 1229), and it is provided that the punishment for an attempt to commit a crime which is punishable by imprisonment for more than five years shall be punishable by imprisonment for a term not exceeding one-half the longest term of imprisonment prescribed on conviction of the offense attempted, and an attempt to commit a crime which is punishable by less than five years shall be punishable by imprisonment in the county jail for not more than one year. (PENAL CODE, § 1230.) Thus, if the attempt to commit burglary is made in the nighttime, it is punishable by imprisonment not exceeding seven and one-half years. If the attempt is made in the daytime, it is punishable by imprisonment not exceeding one year. Quite naturally, therefore, three questions arise in the principal case. First, in contemplation of the Montana statutes, is an attempt to commit burglary divided into degrees; second, if divided into degrees, will a verdict be set aside for failure to find the degree; third, even if attempts to commit burglary are not divided into degrees, is the verdict in the principal case good?

The majority opinion maintains that by the Montana Statutes attempts to commit burglary are not expressly divided into degrees. Hence, the statute requiring the jury to find the degree does not apply. Furthermore, there is a presumption in favor of proceedings of the trial court and therefore, in the absence of the record giving all the evidence, it will be presumed that the evidence was sufficient to justify the court in inflicting punishment for an attempt to commit burglary in the nighttime. For all the court knows, it is argued, there may have been no question but that the attempt was made in the nighttime. The dissenting opinion, however, maintains that, since the crime of burglary is divided into degrees, the crime of attempting to commit burglary is divided into degrees when the punishment to be inflicted depends upon the degree of burglary attempted.

In *People* v. *Travers*, 73 Cal. 580, 15 Pac. 293, the defendant was convicted of an attempt to commit burglary as in the principal case. The California statutes, as far as is material, were the same as those of Montana. The verdict was held deficient. The court seems to think it obvious that, where burglary is divided into degrees, an attempt to commit burglary is divided into degrees. This appears to be the only case directly in point.

The reasoning of many cases when applied to the facts in the principal case seem to argue that the crime of attempting to commit burglary is divided into degrees. The reason of the statute which requires the jury to find the degree is that the court may know what punishment to inflict. *Dick* v. *State*, 3 Oh. St. 89. Consequently, the test to determine whether a crime is divided into degrees so as to fall within that statute is not necessarily whether, by the law of the state, a crime is expressly said to be divided into

degrees. The true test would seem to be whether different grades of punishment are assessed for different grades of the crime. *Lofton* v. *State,* 121 Ga. 172, 48 S. E. 908; *Benbow* v. *State,* 128 Ala. 1, 29 So. 553. Such reasoning, applied to the principal case, would reverse the decision, because there is a difference between the punishment inflicted for an attempt to commit burglary in the daytime and in the nighttime.

Once determined that, in contemplation of the statute, an attempt to commit burglary is divided into degrees, and the conclusion is clear. The overwhelming weight of authority is that a verdict failing to find the degree of the crime as required by statute is fatally defective. *Tully* v. *People,* 6 Mich. 273; *State* v. *Reddick,* 7 Kan. 143; *Kirby* v. *State,* 15 Tenn. 259.

But even if it be conceded that, according to a strict construction of the statute, attempts to commit burglary are not divided into degrees, still the reasoning of the principal case is not entirely unimpeachable. It has often been held, irrespective of statutes, that the record of conviction should point out with precision the sentence or judgment the court should inflict. *Neville* v. *State,* 26 Ark. 614; *Thomas* v. *State,* 38 Ga. 117; *Thomas* v. *State,* 5 How. (Miss.) 20. In none of these cases was the decision based on statutes requiring the jury to find the degree (apparently no such statutes existed), but on the rule that the verdict must guide the court as to the penalty to be imposed. Surely, in Montana, a verdict of guilty of attempt to commit burglary does not show the court what punishment should be inflicted. But we must not disregard the strong argument of the majority opinion that the presumption favors the proceedings of the lower court and that, in the absence of the record giving all the evidence, it will be presumed that the proceedings were in accordance with the evidence. *State* v. *Shepphard,* 23 Mont. 323, 58 Pac. 868; *State* v. *Gordon,* 35 Mont. 458, 90 Pac. 173. Hence it will be presumed that the trial judge was justified in inflicting the punishment he did. In a state where there is no reversal unless prejudice is actually shown, such an argument is very strong. S. W. D.

GRANTOR'S REMEDY ON BREACH OF CONDITION SUBSEQUENT.—In *Mash* v. *Bloom* (1907), — Wis. —, 114 N. W. Rep. 457, the court holds (SIEBECKER and TIMLIN, JJ., dissenting) that one, having conveyed real property subject to a condition subsequent, has no right of action to recover possession on breach of the condition until he has taken "advantage of condition broken and so notified the defendant, either by demand of possession or some other act equivalent to a re-entry for condition broken."

The plaintiff had made a deed of conveyance of the premises in question in consideration of $1.00, natural love and affection, and upon the "special considerations and conditions" that defendant and his wife should care for the plaintiff and administer to her natural wants "as good, loving, affectionate and kind children would do for a parent." The plaintiff had previously sought by a suit in equity to enforce her rights under the deed, and had asked to have it cancelled as a cloud on her title, but the court had held that she had a complete and adequate remedy at law and might enforce her rights

in ejectment without resorting to equity: *Mash* v. *Bloom,* 110 N. W. Rep. 203, 268. The parties had appeared before the court on the same matter several times (see 105 N. W. Rep. 831; 114 N. W. Rep. 99), so that the defendant had had notice of the nature of the plaintiff's demands. A statute of the state provides (St. Wis. 1898, § 3079) that it shall not be necessary for a plaintiff in ejectment "to prove an actual entry under title nor the actual receipt of any profits of the premises demanded, but it shall be sufficient for him to show a right to the possession of such premises at the time of the commencement of the action as heir, devisee, purchaser or otherwise." Therefore, the circumstances of the case seem to have been such as to warrant the court in disregarding the ancient rule which required a re-entry by the grantor upon breach of a condition before bringing an action to recover possession.

It was certainly true once that no estate of freehold could be made to cease, without entry, upon the breach of a condition: an estate of freehold could not begin nor end without ceremony (*Co. Litt.* 214 b.); and recent decisions, other than those cited by the majority of the court in the principal case, may be found sustaining the proposition that there must be a re-entry by the plaintiff, or at least a demand of possession and refusal by the defendant if peaceable re-entry cannot be made. (See, for example, *Randall* v. *Wentworth* (1905), 100 Me. 177, 60 Atl. 871; *Moss* v. *Chappell,* 126 Ga. 196, 54 S. E. 968; *Preston* v. *Bosworth,* 153 Ind. 458, 55 N. E. 224, 74 Am. St. Rep. 313.)

On the other hand, either because of statutes not unlike that of Wisconsin, or because of the implied or express confession of lease, entry and ouster in the action of ejectment, it is held in other recent decisions that an actual entry for condition broken is no longer necessary, but that ejectment will lie, without demand of possession or notice. Under the Washington statute, for instance (Ball. Co. § 5500), providing that one having a valid interest in real property and a right to possession may maintain ejectment, it is held that neither entry nor demand of possession prior to the commencement of an action to recover property for breach of condition is essential. *Lewiston Water & Power Co.* v. *Brown,* 42 Wash. 555, 85 Pac. Rep. 47. And it was expressly held in *Trustees of Union College* v. *City of New York* (1903), 173 N. Y. 38, 65 N. E. 853, 93 Am. St. Rep. 569, that proof of demand of possession before commencing the action of ejectment on breach of condition was unnecessary, and in *Gray* v. *C. M. & St. P. Ry. Co.,* 189 Ill. 400, the plaintiff was apparently permitted to sue at once upon breach of the condition. The prevailing doctrine seems to be that the "commencement of the action stands in lieu of entry and demand of possession." *Cowell* v. *Springs Co.,* 100 U. S. 55; *Sioux City and St. P. R. Co.* v. *Singer,* 49 Minn. 301, 51 N. W. 905, 15 L. R. A. 751, 32 Am. St. Rep. 554; *Ritchie* v. *Kan. N. & D. R. Co.,* 55 Kan. 36; *Austin* v. *Cambridgeport Parish,* 21 Pick. 215; *Brown* v. *Bennett,* 75 Pa. St. 420.