Michigan Law Review

Volume 9 | Issue 3

1911

Note and Comment

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Recommended Citation
Clarence E. Eldridge, Ben H. Dewey & McKee Robison, *Note and Comment*, 9 MICH. L. REV. 233 (1911).
Available at: https://repository.law.umich.edu/mlr/vol9/iss3/3

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MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW FACULTY OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE $2.50 PER YEAR. 35 CENTS PER NUMBER

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NOTE AND COMMENT.

LIMITATION OF THE AMOUNT OF THE COMMON CARRIER'S LIABILITY.—HEPBURN ACT.—When the case of *Railroad* v. *Lockwood,* 17 Wall. (U. S.) 357, settled the law that the common carrier can not contract against liability for losses due to his negligence, it did not put an end to the efforts of common carriers to escape liability for losses so arising. See 8 MICH. L. REV. 531. Various stipulations were printed in bills of lading, among them one providing that in case of loss the money recoverable should not exceed a specific sum. In many early cases this was decided to be but a new way of escaping the common law liability of the carrier for his negligence, by getting out of one half, or one-third, or some other fraction, of the liability which the courts had said could not be escaped at all. Thus in *Moulton* v. *St. Paul, Minneapolis & Manitoba Ry. Co.,* 31 Minn. 85, 47 Am. Rep. 781, an agreement that, in case of total loss, the damage should in no case exceed $100.00 per head for horses, the court held to be contrary to public policy as relieving the carrier of liability for his own negligence. Horses worth $200.00 each having been shipped under such a contract and lost through the negligence of the carrier, full recovery was allowed. The United States Supreme Court, however, in *Hart* v. *Pennsylvania R. Co.,* 112 U. S. 331, held that an agreed valuation for the purpose of shipment of not more than $200.00 each

on horses was valid, because it appeared that this valuation had furnished the basis for the carrying charges. It was not only no exemption from liability for negligence, but on the other hand to hold the carrier liable in a greater sum would be fraud, and repugnant to the soundest principles of fair dealing and of the principle of freedom of contract.

It is more than a quarter of a century since that decision, but there is not yet any sign of diminution in the volume of cases in which shippers continue to contend against conditions resulting from that rule of law. The question is a troublesome one. Fraud is often attempted upon the carrier. If Persian shawls and rugs and a diamond ring are shipped under a contract describing the goods as a second-hand desk, and providing against no extraordinary liability, unless a special agreement is made and the value is endorsed thereon, then certainly it is entirely equitable to limit recovery to the value of a second-hand desk. *Hachadoorian* v. *Louisville & Nashville R. Co.*, 128 App. Div. 171, 112 N. Y. Supp. 660. And if a shipper himself fills in a shipping receipt limiting recovery to fifty dollars unless the value is stated, and if the carrier has no knowledge of the real value of the goods shipped, then it seems reasonable to deny a higher recovery where a shipper did not fill in the blank as to value. *High Co.* v. *Adams Express Co.*, (Ga. App.), 63 S. E. 1125. See also *Douglass Co.* v. *Minnesota Transfer Co.* (Minn.), 30 L. R. A. 860. But a limitation of recovery to $50.00 where the carrying charges were $98.10 is pretty clearly not based upon any understanding that $50.00 represents the real value. And the same thing is true in a case like *Murphy* v. *Wells Fargo & Co.*, 99 Minn. 230, 108 N. W. 1070, in which strawberries worth $2,000.00 were shipped at a charge of $330.00 and the carrier unsuccessfully attempted to limit the value for purposes of shipment to $50.00. See however, *Baum* v. *Long Island R. Co.*, 108 N. Y. Supp. 1113, in which the goods were worth $1,192.88, but recovery was limited to $50.00, and *Donlon* v. *Southern Pacific Co.*, 151 Cal. 603, 91 Pac. 603, 11 L. R. A. (N. S.) 811, in which the owner of valuable horses which had been shipped over defendant railroad was limited to the recovery of the stipulated $20.00 for each horse.

Some cases have gone very far to uphold all such stipulations. *Baum* v. *Long Island R. Co.*, supra, *Donlon* v. *Southern Pacific Co.* supra. Some have denied the operation of the rule almost *in toto*. *Baltimore & Ohio R. Co.* v. *Oriental Oil Co.* (Tex. Civ. App.), 111 S. W. 979; *Southern Express Co.* v. *Owens* (Ala.), 41 South. 752. The widely divergent rules are fully discussed in the recent case of *Hansen* v. *Great Northern Ry. Co.* (N. D.), 121 N. W. 78, which adopts a middle course, holding that a value in a bill of lading, which is set without inquiry or investigation as to the true value of the property, is arbitrary, is not reasonable and just, and is therefore invalid. It would seem from the general principles accepted by the courts that the test as to the validity of provisions of this sort should be their reasonableness. An actual *bona fide* valuation should be binding, but one that is arbitrarily fixed or one that was evidently intended to excuse the carrier from his real liability on the condition that he would charge the shipper a less rate, should not. If he and a shipper may agree that the liability may be less than the real value, there would seem to be no reason why they may

not by their private agreement make it as much less as they please, or even excuse the carrier altogether. This it is well settled, can not be done by a contract assented to by an individual shipper. On the other hand, if the shipper attempts a fraud upon the carrier, or refuses to respond upon the carrier's request for information, it is certainly just to fix limits on the carrier's liability. *Central of Georgia Ry. Co.* v. *Butler Marble Co.* (Ga. App.), 68 S. E. 775. Compare *Alair* v. *Northern Pacific R. Co.*, 53 Minn. 160, 19 L. R. A. 764, with *Moulton* v. *St. Paul, Minneapolis & Manitoba R. Co.*, 31 Minn. 85, 47 Am. Rep. 781, in which the Minnesota court harmonizes its decisions upon this basis. In the Georgia case a general limitation as to value of twenty cents per cubic foot for monumental marble was held to be clearly nothing more than an arbitrary adjustment for the measure of damages in case of loss, which could not exempt the carrier from liability for the true value of a shipment lost by his negligence. If there were an issue of fact as to whether the value fixed was a *bona fide* valuation the question would be one for the jury, but here the carrier knew what the goods were and the value fixed was manifestly inadequate. See also *Southern Express Co.* v. *Hanaw* (Ga.), 67 S. E. 944, in which the Supreme Court of Georgia refused to give effect to the New York rule on a shipment from New York, because the express receipt limiting liability to $50.00 unless a definite value was given, while it would be binding in New York, was contrary to public policy in Georgia unless it appeared that $50.00 was a *bona fide* valuation. In *Powers Mercantile Co.* v. *Wells Fargo & Co.*, 93 Minn. 143, 100 N. W. 753, the same limitation in an express receipt was held not binding on a consignment known by the Express Co. to contain silk shirtwaists. The same court in *Ostroot* v. *Northern Pacific Ry. Co.* (Minn.), 127 N. W. 177, held a shipper not bound by a stipulation limiting recovery for household goods to five dollars per hundred-weight. "It should require no argument to show that a valuation of five dollars per hundred-weight, when applied to pianos, cooking utensils and household goods, is intended as a mere arbitrary limitation of liability." But the same court in *Porteous* v. *Adams Express Co.*, (Minn.) 127 N. W. 429, refused to allow a recovery of more than $50.00 on a shipment of a paste-board box, although the box contained jewelry to the value of $1,435.00. It appeared that the carrier had no knowledge of the contents of the box. The Utah court seems to make the same distinction, refusing to recognize a limitation where the facts show that it is unreasonable, but enforcing it in a case when goods worth $40.00 per hundred-weight were shipped as household goods at a limit of $5.00 per hundred-weight, the goods being described as "A roll of carpet including one feather bed." These goods might, for all the carrier knew, be worth no more than $5.00 per hundred-weight. *Larsen* v. *Oregon Shortline R. Co.*, (Utah) 110 Pac. 983.

But several recent decisions have upheld these limitations without regard to the distinctions in the last mentioned cases. The Michigan court, in *D'Arcy* v. *Adams Express Co.*, (Mich.) 127 N. W. 261, upheld an express receipt limiting to $50.00 the value recoverable, though the goods shipped were opals worth $372.00, and the carrier had notice and knowledge that the package contained valuable opals. *Bernard* v. *Adams Express Co.*, (Mass.)

91 N. E. 325, was a case in which the Massachusetts court without making distinctions, upheld a similar contract, and cited with approval the recent New York case of *Greenwald* v. *Weir,* 130 App. Div. 696, 115 N. Y. Supp. 311. This very late case has been several times cited by other courts, see *Travis* v. *Wells Fargo & Co.,* (N. J.), 74 Atl. 444; *Larsen* v. *Oregon Shortline R. Co.,* (Utah), 110 Pac. 983, and it has now been approved by the court of last resort in New York, *Greenwald* v. *Barrett,* (N. Y.), 92 N. E. 218. See also *In re Released Rates,* 13 Int. State Com. Com. R. 550.

The Hepburn Act, passed June 29, 1906, c. 3591, 34 Stat. 594, (U. S. Comp. St. Supp. 1909, p. 1166), has been held by some courts to put an end to contract limitations as to value. *Greenwald* v. *Weir,* 111 N. Y. Supp. 235, (overruled in 115 N. Y. Supp. 311), *Vigouroux* v. *Platte,* 115 N. Y. Supp. 880, 62 Misc. 364. The act provides, p. 550, "that any common carrier, railroad or transportation company, receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be transferred, or over whose line or lines such property may pass; and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; provided that nothing in this section shall deprive any holder of such receipt or bill of lading, of any remedy or right of action which he has under existing law."

The result of the opinions rendered thus far indicates that the statute will make no change in the effect of such contracts, except that it will fasten upon the carrier liability for the defaults of connecting carriers as well as for its own negligence. It has yet to be passed upon by the Supreme Court of the United States. The various states are likely to hold to their former positions. See *Larsen* v. *Oregon Shortline R. Co.* (Utah), 110 Pac. 983; *Southern Express Co.* v. *Hanaw,* (Ga.) 67 S. E. 944; *Greenwald* v. *Barrett,* (N. Y.) 92 N. E. 218; *Travis* v. *Wells, Fargo & Co.* (N. J.) 74 Atl. 444; *Bernard* v. *Adams Express Co.* (Mass.) 91 N. E. 325.

An interesting turn is taken in *Schlosser* v. *Great Northern Ry. Co.* (N. D.) 127 N. W. 502. It is there held that if one person is bound to ship goods to another the carrier becomes the agent of the consignor. If by the negligence of the carrier the goods are lost, then the consignee may sue either the consignor or the carrier, not on the contract of shipment, but on the liability of both principal and agent, or of either alone, for the torts of the agent. If this is good law, why may not a shipping public devise a contract whereby a consignor employs the carrier as his agent, so that the consignee may recover in tort against the carrier for any loss due to the negligence of the latter, and that he shall not be bound by the contract between the consignor and the carrier? The end of this struggle between the carrier and the people is not yet. It may be that further statutes are to be required to secure quiet on this troubled water. In this connection the language used by the Interstate Commerce Commission in *Matter of Released Rates,* 13 Int. State Com. Com. R. 565, is very suggestive. "But we should not hesitate

to express our disapproval of tariff rules that are ambigious and misleading, and to a certain extent incapable of enforcement. Rule 4 of the Western Classification, quoted above, would be unobjectionable if it went no further than to absolve the carrier from liability for loss due to causes beyond its control. The carrier could not, however, escape responsibility for losses due to many of the causes catalogued therein if its negligence were the legal cause of the damage. The carrier must know, too, that the courts will not give full effect to stipulations that there shall be no liability for losses 'from any cause to property carried on open cars.' Again, the stipulation that 'shipments not made as above provided are subject to an additional charge of 20 per cent' is unreasonable. A certain differential between rates which leave the carrier's liability unlimited and rates which provide for a limited liability is obviously proper, but the differential should exactly measure the additional insurance risk which the carrier assumes when the liability is unlimited. An increased charge of 20 per cent is manifestly out of all proportion to the larger risk involved; and its virtual effect is to restrict the public to rates calling for limited liability. Herein lies the vice in stipulations of this character. It is a mischievous practice for carriers to publish in their tariffs and on their bills of lading rules and regulations which are misleading, unreasonable, or incapable of literal enforcement in a court of law. A revision in the interest of simplicity and fairness, eliminating such provisions as may be open to legal objection, would go a long way toward improving the relation of the railroads and the shipping public." E. C. G.

SURETY'S RIGHT TO EXONERATION.—If a surety pays the debt to the creditor he is entitled to all the rights which the creditor had the moment before payment. This right to the assignment of the claim against the principal and co-sureties and to the assignment of all the collateral securities for the payment of the debt is purely equitable; it is given to the surety because the creditor, having been paid can no longer enforce the securities and the debtor, not having paid can not have them surrendered up and cancelled. The rights which the surety gets by the assignment may, of course, be either legal or equitable and generally speaking he may bring whatever suit the creditor might have brought. This right of substitution, or subrogation does not arise until the creditor has been fully satisfied.

In addition to this right of subrogation by which the surety is enabled to stand in the creditor's shoes, the surety has also a direct right to sue the principal for reimbursement and the co-sureties for contribution. These rights were first given by equity but for over a century the surety has been allowed to sue at law; *Decker* v. *Pope*, 1 Selwyn, Nisi Prius 91; *Turner* v. *Davies*, 2 Esp. 479. The rights have become so well settled that they are frequently spoken of as being based upon a contract implied in fact at the time that the surety binds himself, but like the right of subrogation the better view is that these rights exist independently of contract. *Dempsey* v. *Bush*, 18 Ohio St. 376 (subrogation); *Hall* v. *Smith*, 5 How. 96, (reimbursement)—but see *Osborn* v. *Cunningham*, 4 Dev. & B. 423; *Deering* v. *Earl of*

Winchelsea, 2 Bos. & Pul. 270 (contribution). In order to entitle the surety to these rights it is not necessary that the creditor be fully satisfied; the right to reimbursement from the principal arises as soon as the surety pays any part of the debt and the Statute of Limitations as to that part begins to run at once against the surety. *Davies* v. *Humphreys*, 6 M. & W. 153. The right to contribution arises when it appears that the surety has paid more than his share and the Statute of Limitations as to such excess begins to run at that time. *Davies* v. *Humphreys*, ante.

These rights presuppose that the surety has already paid; what right does the surety have before paying? It has been sometimes said that the surety may compel the creditor to sue the principal first; *Harris* v. *Newell*, 42 Wis. 687; but there seem to be no decisions to that effect and there are many to the contrary. See *Meade* v. *Grigsby*, 26 Grat. 612, where the court said: "The creditor is under no obligation to look to the principal debtor or to his property or to exhaust his remedies against the latter before resorting to the surety." However, in those jurisdictions which by decision or statute have the rule of *Pain* v. *Packard*, 13 Johns. 174, a surety may escape liability if upon giving notice to the creditor to sue the principal debtor, the creditor does not comply.

Though the surety can not compel the creditor to sue the principal debtor, yet the surety may himself sue the principal and the co-sureties before paying anything. This right of exoneration, as it is called, is especially valuable to the surety where it would cause a financial sacrifice for him to raise the money by a forced sale of his own property. In such a case it is obvious that his rights of subrogation, indemnity and contribution are not adequate protection, since his measure of recovery will not be greater than the amount that he has paid. On the other hand, it is obvious that the enforcement of this right must not in any way hinder or embarrass the creditor; he may, notwithstanding the suit for exoneration by the surety, proceed to judgment and execution against him. *Roberts* v. *American Bonding Co.*, 83 Ill., App. 464. Hence the realization upon the right is dependent upon the inaction of the creditor against the surety. It is to be further observed that if the surety seeks exoneration against the co-surety he must be ready to pay his share.

Though this right has long been recognized, the cases are not numerous. Some points seem fairly clear. The right is purely equitable in its nature since it seeks a decree in personam; and exists independently of contract between the parties. It thus belongs to anyone who occupies substantially the position of surety. *Hayden* v. *Thrasher*, 18 Fla. 795. *Medsker* v. *Parker*, 70 Ind. 509. The right arises as soon as the debt matures; the surety need not wait till he is sued. *Merwin* v. *Austin*, 58 Conn. 22; *West* v. *Chasten*, 12 Fla. 315; *Lloyd* v. *Dimmack*, 7 Ch. D. 398, 401. But the right does not arise before maturity.

There is one important point which can hardly be said to be settled: Must the creditor be made a party to the suit? According to *Stephenson* v. *Taverners*, 9 Grat. 398, and *Moore* v. *Topliff*, 107 Ill. 241, he should be made a party in order that he may be at hand to receive the money and be bound by the decree. In most of the cases the point is not raised. Upon principle it

would seem that the principal would have the right to demand it in order to avoid any possible peril of having to pay twice. The creditor would not, of course, be liable for any costs. *Moore* v. *Topliff*, ante.

The recent case of *Fidelity and Deposit Co.* v. *Buckley* (1910), — N.H. —, 77 Atl. 402, did not raise the question because of the nature of the relief asked. In that case there was an express contract by which the principal agreed to mortgage sufficient real estate to indemnify the surety; the latter asks that the principal be decreed to execute the mortgage. The plaintiff having attached the defendant's real estate, the court refused the decree asked for on the ground that a decree ordering the defendant to pay the debt would be more direct, since it would bind the property so attached.

The right to exoneration has been placed on various grounds. Some cases seem to regard it as an extension of the right of subrogation based upon the fact that subrogation is not always an adequate remedy; see *Stephenson* v. *Taverners*, ante. Other cases seem to regard the bill as in the nature of a bill quia timet, *MacFie* v. *Kilauea Co.*, 6 Hawaiian 440; or as a bill for specific performance, *Street* v. *Chicago Wharfing Co.*, 157 Ill. 605. The remedy would seem to be satisfactorily explained on either of the first two grounds; and the third would be a satisfactory basis where there is an express contract. As was said in *Tankersley* v. *Anderson*, 4 Desaus 47: "It would be hard on sureties, if they were compelled to wait till judgment against them, or they paid the debt, before they could have recourse to their principal, who might waste his effects before their eyes." In *Wolmerhausen* v. *Gulick*, L. R. [1893], 2 Ch. 514, the court said: "if a man were surety with nine others for £10,000 it might be a ruinous hardship if he were compelled to raise the whole £10,000 at once and perhaps to pay interest on the £9,000 until he could recover the £9,000 by actions or debtor summonses against his co-sureties."

If the principal gives to the surety a bond or contract of indemnity, the surety is allowed to recover at law the full amount of the bond or contract though he has not paid the debt and has not been sued. *Loosemore* v. *Radford*, 9 M. & W. 657; *Lathrop* v. *Atwood*, 21 Conn 117. This doctrine has been criticised in SEDGWICK, DAMAGES, Ed. 8 § 790. Baron PARKER in *Loosemore* v. *Radford*, suggested that in such a case the defendant "may perhaps have an equity that the money he may pay to the plaintiff shall be applied in discharge of his debt." Even if the principal debtor has such an equity, he still incurs the peril of the surety disregarding the equity and of thus being compelled to pay twice.

G. L. C.

PROTECTION OF RIGHTS OF BONA FIDE PURCHASERS OF PERSONAL PROPERTY.—In view of the unmistakable trend of the law toward the protection of a bona fide purchaser of personal property, a trend that is being manifested particularly by the enactment by various state legislatures of recording acts the ultimate purpose of which is to protect the innocent purchaser, the recent decision of the Oregon Supreme Court in the case of *Johnson* v. *Iankovetz* (1910), — Ore. —, 110 Pac. 398 is noteworthy.

The action was instituted in that case to recover by replevin two guns

sold by the plaintiff to the defendant's vendor. The plaintiff, who was doing business as the Portland Gun and Bicycle Co., contracted with E. C. Adams, a stranger, for the sale of two guns which were delivered immediately to Adams. At the time of the transaction Adams gave Johnson his check for the purchase price. Adams had no money in the bank, and the check, when presented for payment, was dishonored. On the day of the sale by the plaintiff, Adams sold the guns to the defendant, whose business name was The Maine Loan Office, under such circumstances that the defendant had no knowledge of the transaction between Adams and the plaintiff. The case went to the Supreme Court of Oregon with the surprising result that the court, after holding that the defendant was a bona fide purchaser for value without notice, held nevertheless that he had acquired no property rights in the guns, which could be protected as against the original vendor, and the plaintiff was allowed to recover the guns.

The court evidently based the decision on the ground that there is a distinction between a sale induced by fraud, in which case they concede that such a voidable title will pass to the fraudulent vendee as to make it possible for him to transfer good title to a bona fide purchaser for value without notice, and a conditional sale, in which payment is a condition precedent to the passing of title. Judge EAKIN, in delivering the opinion of the court, says:

"There is a distinction between a sale, induced by fraud, in which the vendor, in ignorance of the fraud, transfers the title and possession, in which case the sale is voidable but not void, and an innocent purchaser from the vendee may acquire a good title; and a case in which the vendor does not intend to part with the title until the price is paid, the delivery and payment being concurrent acts, and although the goods are delivered to the vendee, yet, without payment, no title will pass. In the one case it is intended that the title shall pass; in the other, that it shall not."

After holding that the present case falls into the second category, and that for that reason no title at all passed to the original vendee, the court passes to the question of waiver. It is admitted that if the intention of the vendor in a cash sale, as gathered from the circumstances of the transaction, is to pass the title with the delivery of possession, or if he waives immediate payment, then as to an innocent purchaser the title will pass; but in this case without assigning reasons for such a conclusion, it is said that "every circumstance tends to show that the vendor did not waive immediate payment of the price of the goods. The purchaser was a stranger to him, and there was no intention to deliver the goods upon his credit, but plaintiff expected to receive the cash upon the presentation of the check, and evidently would not have parted with the goods otherwise. The delivery was conditional, and defendant acquired no title."

On no conceivable theory can the decision be sustained. It is in accord with *National Bank of Commerce* v. *Chi. etc. R. R. Co.*, 44 Minn. 224, and *Johnson-Brinkman Co.* v. *Central Bank*, 116 Mo. 558, the first of which in particular holds squarely with the Oregon court, but although there are no cases *contra* which present precisely the facts governing the case under dis-

cussion, it is evident that the decision is in conflict with well-settled legal doctrines as enunciated by courts of the highest respectability; with the trend of the law toward the protection of the innocent vendee of personal chattels; and with recognized principles of public policy.

In *National Bank of Commerce* v. *R. R. Co.*, supra, it is held that where goods are sold for cash on delivery and payment is made by the purchaser by check on his banker, such payment is only conditional, and the delivery of the goods also conditional; and if the check on due presentation is dishonored, the vendor may retake the goods even from a subvendee for value, unless the vendor has been guilty of such negligence or laches as would equitably estop him from so doing. If the decision in that case were to be accepted as law, the Oregon court in the case under discussion scarcely could have come to a conclusion other than the one actually reached. However, the doctrines contended for in these two cases have not received extensive judicial sanction, and probably will not, for the conclusion seems inevitable that the reasoning of the court in evolving the two grounds on which the decision is based is questionable.

The doctrine that a sale procured by fraud is not void, but only voidable, is so firmly established in our law as to be incontrovertible. Where the sale and delivery are obtained by the fraud of the vendee the fraud does not intercept the passing of the title to the goods to the purchaser, but the title acquired is defeasible, subject to the right of the vendor on the discovery of the fraud to reassert his original right and reclaim the property, unless it has come to the hands of a bona fide purchaser. *Goodwin* v. *Wertheimer*, 99 N. Y. 152. A purchaser for valuable consideration without notice or knowledge of the fraud takes valid title from such fraudulent buyer, which cannot be defeated by the original vendor. *Mears* v. *Waples*, 3 Houst. (Del.) 581; *Moore* v. *Moore*, 112 Ind. 149. The title in such a case will pass and for the time constitute the vendee the owner, and persons dealing bona fide with him while the title remains in that condition will be protected against claims of the original owner to repossess himself of the property. *Parker* v. *Baxter*, 19 Hun 410.

But Judge EAKIN says that this case is distinguishable from the cases just cited, evidently (although he does not expressly say so) on the ground that here the fraud did not enter into the original undertaking but came into existence subsequently, namely at the time the check was given in payment. As though anticipating the query, What, then was the transaction in question? the learned judge says it is a case in which the vendor did not intend to part with title until the price was paid, and in which although the goods were delivered to the vendee, yet without payment no title passed. It is submitted that it is at this point that the Oregon court falls into its first error.

It is difficult to follow the court in the contention that the transaction here was not a fraudulent sale. True, it was not the sale itself that was induced by fraud, but only the delivery; but the act of the vendee in offering as payment a check against a bank in which he had no funds was conclusively fraudulent, *Industrial Bank* v. *Bowes*, 165 Ill. 70; and this fraud was such that "it entered into the original agreement," 2 Kent Comm. 666. Conse-

quently the case falls into the category of contracts induced by fraud, in which the subvendee for value without notice of the infirmity in his vendor's title will be protected, even against the original vendor, *Goodwin* v. *Wertheimer*, supra; *Mears* v. *Waples*, supra; *Moore* v. *Moore*, supra. But even if it were otherwise, as contended for by the Oregon court, and the fraud inducing the delivery did not go to the original transaction, the logic which forces the conclusion that whereas in a sale procured by fraud the vendee takes voidable title, no title at all passes to the vendee in a transaction in which the contract of sale itself is wholly executed and only the matter of delivery is affected by the fraud, is unique as well as questionable.

Not only does the learned judge err in his conclusion as to what this transaction was not, but he hits equally wide of the mark in his affirmative statement that this is a case "in which the vendor does not intend to part with the title until the price is paid, the delivery and payment being concurrent acts, and although the goods are delivered, yet, without payment, no title will pass." Despite the assertion earlier in the opinion that the sale was a "cash sale," the court very obviously at this point confuses cash sales with conditional sales, and attempts to classify the present transaction as a conditional sale, although labeling it a cash sale.

It is true that courts frequently have confused cash sales and conditional sales, but it is also true that there is a clear line of demarcation between the two classes of transactions. Mr. WILLISTON, in his work on SALES, criticizes the courts that use the terms interchangeably, and at the same time advances a test that seems admirably adapted to the situation.

"If the original bargain was for a cash sale, that must mean that the buyer was to have neither title nor use and enjoyment of the goods until the price was paid. If the buyer was to have the use and enjoyment, but not the title, before payment of the price, the transaction is a conditional sale, not a cash sale. Accordingly, if after bargaining for a cash sale, the seller subsequently, voluntarily, delivers to the buyer the goods with the intent that the buyer may immediately use them as his own, without insisting upon contemporaneous payment, this is absolutely inconsistent with the original bargain. Such delivery is not only evidence of the waiver of the condition of cash payment; it should be conclusive evidence." WILLISTON, SALES, § 346.

The test fits this case perfectly. The law presumes a sale to be for cash when nothing is said to the contrary, MECHEM, SALES, § 551; so that the original bargain in this case was for a cash sale. Attempted payment by a worthless check is no payment at all. *Canadian Bank* v. *McCrea*, 106 Ill. 281; *Cheatle* v. *McVeagh*, 83 Ill. App. 336, and cases there cited. But payment by a check which is never paid may operate as an extinguishment of a debt if shown to have been accepted absolutely as payment. *Sharp* v. *Fleming*, 75 Ark. 556.

Here, then is an original bargain for a cash sale, and subsequently the vendor relinquishes possession on receipt of a check of the vendee. If it was understood between the parties that the check was absolute payment, title passed; if, as probably was the case, the check was not accepted as absolute payment, the vendor countenanced an alteration of the contract,

and impliedly entered into a new agreement entirely inconsistent with the theory of a cash sale, and if Mr. WILLISTON'S test is accurate, his waiver of the right to immediate payment is not only evidence of his consent to the buyer to treat the goods as his own, but should be conclusive against him.

If it were not for other considerations, one of which (relative to fraudulent sales) already has been discussed, the decision in this case might be defensible on the ground that the transaction was a conditional sale, but the court does not proceed on that ground. In the absence of a recording act, making the recording of conditions in sales of personal chattels a condition precedent to their validity against bona fide purchasers, the Oregon court might hold that if the circumstances were such as clearly to indicate the intention that the sale should be conditional, delivery would pass no title. That point is debatable, as the best courts have not held unanimously on the effect that failure by the buyer to perform a condition precedent will have on the rights of a bona fide purchaser.

That question no longer is important in many states, as many state legislatures have enacted recording acts, providing that conditions upon which the passing of title in conditional sales is to depend shall be void against subsequent purchasers unless recorded. The New York statute (L. 1884, c. 315, § 1), which is representative of the legislation on this point, provides: "In every contract for the conditional sale of goods and chattels, hereafter made, which shall be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things contracted to be sold, all conditions and reservations which provide that the ownership of such goods and chattels is to remain in the person so contracting to sell the same, or other person than the one so contracting to buy them, until such goods or chattels are paid for, or until the occurring of any future event or contingency, shall be absolutely void as against subsequent purchasers and mortgagees in good faith, and as to them the sale shall be deemed absolute, unless such contract for sale with such reservations and conditions therein, or a true copy thereof shall be filed as directed in the succeeding section of this act." Recording acts similar in substance to the New York statute, have been adopted in the following states: Alabama, Arizona, Colorado, Connecticut, Florida, Georgia, Iowa, Kansas, Maine, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

In New York, even before the enactment of the recording act, *Comer* v. *Cunningham*, 77 N. Y. 391, enunciated the rule that where goods are sold to be paid for in cash or by notes on delivery, if delivery is made without demand of the notes or cash the presumption is that the condition is waived and a complete title vests in the purchaser, and that after actual delivery, although as between the parties to the sale such delivery be conditional, a bona fide purchaser from the vendee obtains a perfect title. This case overruled *Ballard* v. *Burgett*, 40 N. Y. 314, and was followed by the New York court in *Dows* v. *Kidder*, 84 N. Y. 121. Since that time the adoption of the recording act has made the question unimportant in New York, but the holding

of the New York courts prior to the recording act is cited as showing the tendency to protect the bona fide purchaser. Massachusetts, which has no recording act, has followed the doctrine laid down in *Comer* v. *Cunningham*, supra; *Upton* v. *Sturbridge Cotton Mills*, 111 Mass. 446.

In the absence of legislation, however, it may be said safely that the overwhelming weight of authority is the rule that in a conditional sale the seller is not estopped by his conduct in delivering the goods to the buyer from asserting his title even against one who purchases from the buyer relying upon the apparent title of the latter, unless there has been a waiver. WILLISTON, SALES, § 324; *Helby* v. *Matthews*, [1894] 2 Q. B. 262, [1895] A. C. 271; *Evansville and Terre Haute R. R. Co.* v. *Erwin*, 84 Ind. 457; *Schneider* v. *Lee*, 33 Ore. 578.

But even if it were to be assumed that the decision in *Johnson* v. *Iankovetz* was based on the theory that the sale was a conditional sale that the Oregon court had felt bound to follow the rule which has the support of the greater number of courts; and that the attempted distinction between fraudulent sales and the one in question is well taken; even then the arbitrary way in which the court disposes of the question of waiver by the vendor subjects the conclusion to unfavorable scrutiny.

No attempt is made to controvert the proposition that even in a conditional sale, in which something remains to be done before title is to pass, the vendor may waive the condition, and in that case the waiver will operate exactly as a performance of the condition would have done, at least so far as the rights of third parties are involved. The real difficulty is in determining how far the delivery of the goods by the seller to the buyer is a waiver of the condition requiring payment of the price before title is transferred; and there is not absolute unanimity in the various holdings as to what shall constitute such waiver.

The courts practically are agreed that waiver is a matter solely of intent; and that without the assent of the seller there can be no waiver of the condition. *National Bank* v. *R. R. Co.*, supra; *Upton* v. *Cotton Mills*, supra. As to the effect of delivery the courts disagree, most of them holding that while delivery is some evidence of a waiver, it may be explained by surrounding circumstances, and that the question of waiver is a question of fact for the determination of the jury. *Peabody* v. *Maguire*, 79 Me. 572; *Hammett* v. *Linneman*, 48 N. Y. 399; *Smith* v. *Lynes*, 5 N. Y. 43; *Adams* v. *Lumber Co.*, 159 N. Y. 176. A few courts follow the extreme but well-reasoned doctrine laid down in *Upton* v *.Cotton Mills*, supra; while no case has been found which goes as far as the recent Oregon case, in which it is held arbitrarily in the face of facts and circumstances which are at least presumptive evidence of an intent to waive the condition, that there has been no waiver. It may be added that the courts which consider waiver a question of fact will more readily infer a waiver when the rights of innocent purchasers have intervened. *Natl. Bank* v. *R. R. Co.*, supra.

The Massachusetts court has gone further than any other in protecting the bona fide purchaser, as Judge WELLS in *Upton* v. *Cotton Mills*, supra, sanctions the doctrine for which Mr. WILLISTON contends, namely, that de-

parture from the terms of the original bargain should be considered conclusive against the vendor.

"A waiver is the result of a voluntary unequivocal act of delivery," said Judge WELLS in that case. "To say that a person does not thereby intend a waiver is to say that he does not intend the legal effect of his voluntary act. If unaccompanied by any word or act or circumstance to indicate that it is qualified or made subject to a condition the vendee has a right to understand it to be absolute. * * * It is true that it is entirely at the option of the vendor whether he will waive the condition or not. It requires his voluntary act. But when he voluntarily does the act, which, unexplained, constitutes a waiver, he not only may be presumed to intend it, but he changes the relations between himself and the purchaser in respect to the property and the contract of sale. The purchaser cannot be presumed, by accepting a delivery apparently unrestricted, to assent to a condition which lies in the undisclosed intent of the other party."

In *Johnson* v. *Iankovetz* the court dismisses the question of waiver by saying that "every circumstance tends to show that the vendor did not waive immediate payment of the price of the goods." Without attempting to pass on the relative merits of the two rules on the question of waiver, further than to remark that Judge WELLS' final argument that the buyer ought not to be presumed to assent to be bound by an undisclosed intent of the vendor is unanswerable, the view of the Oregon court seems untenable, viewed from the standpoint either of judicial authority or of principles of logic. In that case the plaintiff accepted as payment the check of a stranger, and without ascertaining—as he might easily have done—whether or not the vendee had funds in the bank, he elected to deliver the guns without any express stipulation that he did not intend thereby that the vendee was to have authority to do with them as he chose. At least there was sufficient evidence of waiver to have made it a question for the jury, under even the rule most favorable to the vendor. The entire opinion discloses an unwarranted tendency on the part of the court to pervert technical legal principles into untenable conclusions, utterly ignoring the jealousy with which the law regards the rights of the bona fide purchaser of personal chattels who has acquired his claim from one whom the erstwhile rightful owner has clothed with the indicia of ownership; and the equally well-founded principle that as between two innocent persons the loss shall fall on him who made possible the injury.

Aside from the interest which the case attracts because of the facts and the peculiar holdings on several points, the decision scarcely can be viewed with anything like equanimity or assurance by advocates of the changes in law relative to conditional sales. The attempt of the state legislatures, more than half of which have adopted recording acts, to protect bona fide purchasers by requiring conditions precedent to the passing of title to be recorded, would be frustrated if the decision in *Johnson* v. *Iankovetz* were to become settled law; if transactions similar in nature to the one in this case are to be labeled cash sales, regardless of the facts involved, the recording acts will have become nugatory by a series of judicial perversions; for while the acts provide for recording in case of conditional sales, nothing is said

as to cash sales. Such a result would mean that the courts by an arbitrary misuse of words, and by treating sales which in fact are conditional as cash sales, could override the obvious intent of the lawmakers to safeguard the property rights of the innocent purchaser. C. E. E.

THE TIME AT WHICH A POLITICAL ASPIRANT BECOMES A CANDIDATE WITHIN THE MEANING OF THE MODERN PRIMARY ELECTION LAW.—Owing to the comparatively recent development of the system of primary elections, the law which concerns this, the most recent development in our system of government, is necessarily in a formative stage.

Two leading decisions on the above stated question,—*Adams* v. *Lansdon* (1910), — Idaho —, 110 Pac. 280, and *State ex. rel. Brady* v. *Bates*, 102 Minn. 104, 112 N. W. 1026, are of considerable interest and importance as illustrating the different holdings of the respective courts of Idaho and Minnesota, upon the same points.

In the former case under the provisions of § 24 (Sess. Laws of Idaho, 1909, p. 196) a candidate for nomination is prohibited from expending for personal expenses, or at all, in order to promote his nomination, more than fifteen per cent. of the yearly compensation or salary attached to the office which he seeks and in order to comply with § 25 (Sess. Laws of Idaho, 1909, p. 196), he must file an itemized statement of his expenditures not more than ten days after the day of holding the primary election at which he is a candidate. The court held (1) a person is a candidate for nomination within the intent of the primary election law when he is expending his money in employing and sending out workers, or perfecting an organization, or advertising or exploiting himself, or in influencing public opinion in his favor or against his opponent, or in numerous other ways that present themselves to the office seeker for the purpose of increasing or enhancing his ultimate chances of nomination for a given office, (2) that in his itemized statement of expenditures, the candidate must include all items contracted or paid prior to filing his nomination papers as well as those incurred subsequent thereto.

In Minnesota under the provisions of § 350 (Rev. Laws, 1905), every person who shall be a candidate for a nomination or election to any elective office including that of United States Senator shall make in duplicate within thirty days after the election, a verified statement of his expenditures. The court held that a political aspirant becomes a candidate at the time of filing his affidavit of intention of becoming a candidate for a specified office, and the verified statement which he is required by law to file need not include items of expense incurred or paid anterior to the time of filing such affidavit.

The cases on these two points are very rare and the courts are in direct conflict. While both lines of authority are supported by good reasoning, the Idaho case would seem to lay down the more logical rule, *Leonard* v. *The Commonwealth*, 112 Pa. 607, 4 Atl. 220, holding that a man is a candidate for office when he is seeking such office and that it is begging the question to say that he is a candidate only after nomination; for many persons have been elected to office who have never been nominated.

The court in the Minnesota case substantiates its decision by saying that if the time of becoming a candidate was fixed at the time when the intention was formed and acted upon, a man who entered the race and later dropped out, would be under the necessity of filing an expense account or render himself liable to a misdemeanor. The impossibility of such a contingency under the Idaho statute, and the probability of such a result under the Minnesota statute, appears to be the cause of the conflicting decisions. By the terms of the former, it is provided:—that every candidate shall, not more than ten days after the day of holding the primary election, *"at which he is a candidate,"* file an itemized statement, etc., while the latter statute says:—that every person who shall be a candidate shall make in duplicate within thirty days after the election, a verified statement, etc. It will be seen in comparing the two statutes, that while the former contains the words, *"at which he is a candidate,"* the latter wholly omits them. Therefore, taking the construction of the Idaho court, viz., that a person is a candidate before he has filed his nomination papers, it is self-evident that the Idaho statute could apply only to those who file their nomination papers, and whose names go upon the ballot; while the Minnesota statute could, and under construction of the court would, refer to any person who enters the race and solicits votes, irrespective of whether or not the nomination or election is *"one at which he is a candidate."*

The Minnesota court is therefore justified in its statement, that a man who entered the race and later dropped out would be under the necessity of filing an expense account or render himself liable to a misdemeanor, if the time of becoming a candidate was fixed at the time when the intention was formed and acted upon. Such a result would be impossible under the Idaho statute which applies only to persons who are actually candidates at the election itself and whose names go upon the ballot.

Looking at the two cases in the light of public policy the Idaho case would seem to be the better holding, as the serious objection to the Minnesota statute, and the rule based thereon, is that it makes it possible for the candidate to debauch the electorate and the press of the state, provided he accomplishes it twenty days before the primary election, this being the time fixed for the filing of nomination papers.

The court in the Idaho case cites the Minnesota decision and directly disapproves of the holding therein. Its position in this regard seems a defensible one from the view point last mentioned above. On the other hand the Minnesota court was acting under a statute which differed materially from that, which governed the action of the Idaho court, and its conclusion was of necessity affected thereby.

Of course the way out of the difficulty in which the Minnesota court found itself, would be to amend the Minnesota statute so as to conform to that of Idaho, so that it would refer to those persons alone, who are candidates at the nomination or election, and whose names actually go upon the ballot. That would relieve the office seeker who spends money with the intention of becoming a candidate and then withdraws, from the necessity of filing a statement of his expenditures. In this way both the candidate who

drops out and the electorate at large are protected, in that, the former is not liable to commit a misdemeanor under any construction and the latter is protected from the unscrupulous office seeker who buys his way into positions of trust and honor. B. H. D.

WHEN ARE LETTERS WRITTEN BY A HUSBAND TO HIS WIFE NOT PRIVILEGED?—In a recent case decided in the supreme court of Michigan this interesting question was considered. *People v. Dunnigan* (1910), — Mich. —, 128 N. W. 180.

The case arose out of substantially these facts. The respondent, in connection with others, was prosecuted and convicted of murder in the first degree. The principal, if not the only, evidence produced by the state to connect respondent with the commission of the crime, was a certain letter written by Dunnigan to his wife, under the following circumstances. While respondent was in jail, awaiting trial, one Wilcox, an acquaintance of the respondent, was admitted to his cell, and suggested to respondent that if he wished to communicate with his wife, he, Wilcox, would carry a letter to her, whereupon respondent wrote and addressed to his wife the letter above referred to.

He delivered the letter to Wilcox, who in pursuance of a previous agreement, gave it to the sheriff. The letter was produced in evidence against respondent at his trial, and admitted, and on the strength of the statements which it contained he was convicted. On appeal he based error on the admission of the letter in evidence, contending that it was a confidential communication between husband and wife, and as such, privileged. The Supreme Court of Michigan per BROOKE, J., affirmed the conviction, holding that the letter was not a privileged communication under the circumstances of the case, and citing and relying upon their previous decision in *O'Toole* v. *Ohio German Fire Insurance Co.*, 159 Mich. 187, 24 L. R. A. (N. S.) 802.

The authorities are not entirely in accord, as to just what circumstances will render admissible in evidence a communication between husband and wife, which would, but for those circumstances, be privileged. When, however, we consider the circumstances under which the letter was written and delivered, together with the considerations which lie at the foundation of the whole rule as to privileged communications between husband and wife, it would seem as if the decision of the court in *People* v. *Dunnigan*, supra, is at least doubtful. TAYLOR, C. J., speaking for the Supreme Court of Florida, in *Mercer* v. *State*, 40 Fla. 216, stated the basic reason of the rule of privileged communications between husband and wife as follows:—"Society has a deep-rooted interest in the preservation of peace of family, and in the maintenance of the sacred institution of marriage, and its strongest safeguard is to preserve with jealous care from any violation those hallowed confidences inherent in it, and inseparable from the marriage status. Therefore the law places the ban of protection upon any breach of the confidence between husband and wife, by declaring all confidential communications between them to be incompetent matter for either of them to expose as witnesses." See also *State* v. *McAuley*, 4 Heisk. 424. It is quite apparent that a communication,

even between husband and wife, to come within the purview of the rule of privilege, must be intended by the party making it to be secret and confidential. 4 WIGMORE, EVID., § 2336 and cases there cited. It has been said, however, that all communications made by one spouse to the other during the continuance of the marital relation must be presumed to be confidential, until circumstances surrounding the communication be shown, which will rebut that presumption. 4 WIGMORE, EVID., § 2336 and cases there cited.

In many of the statutes of the several states upon this subject, the element of confidence is not expressed, as for example the Michigan statute, under which *People* v. *Dunnigan* was decided. [C. L. Mich. (1897), § 10,213]. This statute has been construed in *Ward* v. *Oliver*, 129 Mich. 300, as declaratory of the common law rule as to privileged communications between husband and wife, and that only secret and confidential communications are within its purview; while the Supreme Court of Minnesota in *Leppla* v. *Tribune Co.*, 35 Minn. 310, construing a similar statute, held that the statute included communications not within the common law rule.

The statute under which the principal case was decided having been construed as declaratory of the common law rule upon the subject, it becomes necessary to inquire under what circumstances a communication made by one spouse to the other and intended by the party making it, to be secret and confidential, will be deprived by reason of the circumstances surrounding its transmission, or by reason of the occurrence of subsequent events, of the privileged character which the law because of its inherent nature, impresses upon it at its inception. Before taking up that question it would be well to note that a written communication occupies precisely the same position with respect to the question of privilege as does a communication made by word of mouth, and that a husband or wife does not by implication waive in any degree the right to have the communication privileged by reason of the mere fact that by putting it in a permanent form renders greater the possibility of its contents becoming known to strangers. *Ward* v. *State*, 70 Ark. 204; *Henderson* v. *Chaires*, 25 Fla. 26; *Derham* v. *Derham*, 125 Mich. 109; *State* v. *Ulrich*, 110 Mo. 350; *Selden* v. *State*, 74 Wis. 271. Under a statute of Massachusetts, (Pub. Stat. C. 169, 8 sub. 1,) the Supreme Court of that state has held that letters are not within the privilege, *Com.* v. *Caponi*, 155 Mass. 534, citing 1 GREENL., EVIDENCE, § 254.

Coming now to consider what circumstances will destroy the privilege, accorded by the policy of law, to communications made in the confidence of the marital relation, a critical examination of the cases seems to disclose the fact that one line of authorities appears to regard the essential nature of the communication as the test, whereby to determine whether it be privileged or not, while the other line of cases seems to regard the custody from which it was produced as a most significant, if not a determining, factor. As examples of the first line of authorities may be cited *Scott* v. *Com.*, 94 Ky. 511; *Wilkerson* v. *State*, 91 Ga. 729; and *Mercer* v. *State*, 40 Fla. 216. In all of these cases it is held that a letter of the husband to the wife, or vice versa, although in the custody of a third party, is still privileged. The Court in *Mercer* v. *State*, supra, states the reasoning relied on by this line of authori-

ties in these words:—"We * * * think the policy of the law, that favors the foundation of the general rule is far more strongly upheld by those authorities that recognize and declare certain classes of communications to be privileged from the inherent nature of the communication itself, and that in such cases the privilege attaches to the communication itself and protects it from exposure in evidence wheresoever and in whosesoever hands it may be." The court, in its opinion in that case expressly approved of the language of Judge SHIRAS in the case of *Liggett* v. *Glenn*, 2 C. C. A. 286, 301, 51 Fed. 381, announcing substantially the same rule. See also to the same effect *Bowman* v. *Patrick*, 32 Fed. 368; *Regina* v. *Pamenter*, 12 Cox C. C. 177; *Dreier* v. *Cont. Ins. Co.*, 24 Fed. 670; *Mahner* v. *Linck*, 70 Mo. App. 380; *Mitchell* v. *Mitchell*, 80 Tex. 101. Having regard to the reasons lying at the foundation of the rule for privilege for this class of communications, it would seem that the holding in the line of authorities just referred to, best subserves the purposes for which the rule was established. If a communication, whether oral or written, once takes upon itself the character of being privileged it is difficult to see how the party for whose benefit the law grants the privilege can be deprived of it except by his own consent or by the occurrence of facts from which a waiver can be implied. Now a waiver has been judicially defined to be "an election by a party to forego some advantage he might have had" (*Supreme Lodge K. of P.* v. *Quinn*, 78 Miss. 525), "and cannot arise out of acts done in ignorance of material facts." (*Freedman* v. *Fire Assn. of Phil.*, 168 Pa. St. 249; *Bennecke* v. *Conn. Mut. Ins. Co.*, 105 U. S. 355). How can it be said then that a party waives the benefit of this privilege, which the law impresses upon his communication with his spouse from its inception, by the fact that it was overheard by another inadvertently, or by an eavesdropper, or that the writing was taken by stealth from the custody of the person for whom it was intended. In other words how can a waiver be implied from facts of which the party, who is said to have waived the privilege, was entirely ignorant?

Yet it has been held by a number of respectable courts that if the communication escapes the custody of the parties no matter whether it be by accident or by the trickery or stealth of a third party, the privilege is lost. *O'Toole* v. *Ohio Ger. Fire Ins. Co.*, supra. See also *State* v. *Buffington*, 20 Kan. 599; *Lloyd* v. *Pennie*, 50 Fed. 4; *Brown* v. *Brown*, 53 Mo. App. 453; *State* v. *Hoyt*, 47 Conn. 518; *Com.* v. *Griffin*, 110 Mass. 181; *State* v. *Mathers*, 64 Vt. 101. In the case of *Hammons* v. *State*, 73 Ark. 495, a case arising upon almost identically the same facts as those in the principal case, a letter delivered to a messenger by a man in jail and by the messenger handed over to a third party was admitted, the court apparently following the ruling in *State* v. *Ulrich*, 110 Mo. 350. All these cases seem to proceed upon the theory that the party making the communication tacitly assents that if the communication escapes his control, or that of the party for whom it is intended, he waives the benefit of the privilege which the law for reasons of public policy confers upon a confidential communication made by one spouse to the other. And yet some of these same courts have decided that if the spouse receiving the communication divulge its contents to a third party

the privilege is not lost. *Wilkerson* v. *State,* supra; *Selden* v. *State,* supra. How it can be contended that the spouse making the communication impliedly assented to and took the risk of the contents thereof being obtained by stealth but did not assume the risk of the other spouse violating his confidence, is not very clear. It may be said that in fact he assents to neither, and that if he supposed that either event would happen he would never have made the communication at all. It would seem that the whole theory that a party assumes the risk of being overheard or having his letter to his spouse stolen or lost either before or after delivery and the privilege being thereby lost, proceeds upon an erroneous assumption that the privilege is accorded by the law for the sole benefit of the particular person making the communication, when in fact the whole rule as to privileged communications between husband and wife is grounded on broad considerations of public policy, and upon the interest which the public has in the fostering and preservation of the marital relation, and was not designed purely for the personal benefit of the immediate parties to that relation.

Moreover it is to be noted that in nearly all the cases in whcih it has been decided that the privilege is lost if a third person by accident or design overhear a confidential communication between husband and wife or obtain a letter written by one to the other, the contents of the communication were divulged to such third party by the very act by which it was being transmitted to the person for whom it was intended. In this respect the cases are distinguishable from *People* v. *Dunnigan,* supra, for in that case no act of respondent's directly placed the contents of the communication within the knowledge of a third party, as it does not appear that Wilcox, to whom the letter was delivered, was acquainted with its contents. Respondent in that case did everything in his power to keep it secret, which is not the case where a man orally communicates with his wife without first assuring himself that no one overhears, in which latter case by the very act of transmitting the communication he puts the third party in possession of its contents. Suppose in the principal case the respondent had duly addressed and sealed the letter in question and placed it in the mails for transmission to his wife, and it was surreptitiously extracted therefrom by a third party, or wrongfully opened by a mail clerk and thus its contents became known. Would the privilege then be lost? On principle we submit it would not. If it should be so held, the privilege accorded to letters between husband and wife would be practically destroyed, for then all that would be required to make evidence against the party would be to unlawfully and fraudently extract his letters from the custody of the very agency which the law provides for their transmission. Is it reasonable that the law should require one to forfeit a right which the law gives him in case he resorts to the agency furnished him for the safe transmission of his confidential communications, and they escape without fault of his from the custody of that agency? It would seem that justice demands that no such burden be placed upon him. And is respondent in *People* v. *Dunnigan* to be placed in a worse position because he employed a private messenger, a perfectly legal and appropriate method of transmission? On principle we think he should not be. McK. R.