

Michigan Law Review

Volume 20 | Issue 1

1921

Note and Comment

Herbert F. Goodrich
University of Michigan Law School

Edson R. Sunderland
University of Michigan Law School

Victor H. Lane
University of Michigan Law School

Paul W. Gordon
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Courts Commons](#)

Recommended Citation

Herbert F. Goodrich, Edson R. Sunderland, Victor H. Lane & Paul W. Gordon, *Note and Comment*, 20 MICH. L. REV. 86 (1921).

Available at: <https://repository.law.umich.edu/mlr/vol20/iss1/4>

This Response or Comment is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

MICHIGAN LAW REVIEW

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

SUBSCRIPTION PRICE \$2.50 PER YEAR.

50 CENTS PER NUMBER

JOHN BARKER WAITE, EDITOR-IN-CHIEF

ASSOCIATE EDITORS

HENRY M. BATES

EDWIN D. DICKINSON

RALPH W. AIGLER

BURKE SHARTEL

EDSON R. SUNDERLAND

STUDENTS, APPOINTED BY THE FACULTY

CYRIL E. BAILEY, of Michigan

ARTHUR F. NEEF, of Michigan

D. HALE BRAKE, of Michigan

WILLIAM C. O'KEEFE, of Michigan

FREDERICK D. CARROLL, of Michigan

LOUIS A. PARKER, of Iowa

ELWYN G. DAVIES, of Ohio

MILTON J. SALLWASSER, of Illinois

EDWARD C. P. DAVIS, of Michigan

GEORGE SELETTTO, of Illinois

PAUL W. GORDON, of Illinois

EDWIN B. STASON, of Iowa

LEO W. KUHN, of Kansas

CHARLES E. TURNER, of Illinois

GEORGE E. LONGSTAFFE, of South Dakota

THOMAS J. WHINERY, of Michigan

CLYDE Y. MORRIS, of New Mexico

FREDERICK F. WYNN, of North Dakota

NOTE AND COMMENT

THE DOMICILE OF A WIFE.—In 1903 Professor Dicey stated flatly, as a rule of the English law without exceptions, that the domicile of a married woman during coverture is the same as that of her husband, and changes with his.¹ It is a rule which makes for hard cases and offers constant invitations for exceptions to meet the situations it creates. Must a deserted wife follow her husband to the ends of the earth to secure the domiciliary jurisdiction for divorce? May he, by shifting his own place of permanent residence, arbitrarily deprive her of capacity to make a will, or determine the law to govern the devolution of the property upon her dying intestate? Where can she vote?

Despite the hardships, the rule has been consistently followed in England,² though with some departures in colonial decisions.³ In a tight place,

¹ DICEY, *CONFLICT OF LAWS* [2nd ed.], 124, 132, 134.

² The cases of *Deck v. Deck*, 2 Sw. & Tr. 90, and *Santo Teodoro v. Santo Teodoro*, L. R. 5, P. Div. 79, allowed a wife to maintain a divorce suit in England when the domicile of the husband was elsewhere. But in the later decision of *Le Mesurier v. Le Mesurier*, [1895] A. C. 517, the doctrine that domicile is essential as a foundation for divorce jurisdiction was conclusively settled.

³ *Ho-a-mie v. Ho-a-mie*, 6 Vict. Rep. (2 P. & M.) 113; overruled by *Forster v.*

the court has preferred to encroach upon the requirement that domicile is the basis of divorce jurisdiction, rather than admit the possibility of a married woman's separate domicile.⁴ So it is not so surprising to find a strong reiteration of the principle of inseparability of the domiciles of husband and wife in a recent House of Lords case.⁵

A Scotchman married a Scotchwoman, and for a time resided with her in Aberdeen. He contracted dissipated habits, and with the wife's consent it was arranged that he should go to Australia. He established a domicile in Queensland, and contracted a bigamous marriage there. When the wife heard of this she instituted divorce proceedings in Scotland, where she had remained, but died before their termination. Upon the question of legacy and succession duty, it was held that the duty was not payable in the United Kingdom, as the deceased died domiciled in Queensland.

The decision called for by the facts is but a reaffirmation of the refusal to make exception to the unity of the domicile of husband and wife. It still leaves it an open question whether a judicial separation, or divorce *à mensa et thoro*, empowers the wife to establish a domicile of her own. It simply follows previous authority in insisting that the mere fact of conduct on the part of the husband which would relieve her of the duty to live with him, or furnish her grounds for divorce or separation, does not alone make it possible to establish such separate domicile.⁶

The court seems anxious, so far as it can, to shut off possibility of exceptions to its general rule. Previous cases had suggested that there might be situations where the wife's domicile would not follow that of the husband, as, for instance, where he deserted her.⁷ These suggestions receive rough

Forster, [1907], Vict. L. Rep. 159; *Martin v. Martin*, 17 N. Z. L. R. 126 (wife permitted to sue for divorce at last common domicile, though husband had gone elsewhere); *Poingdestre v. Poingdestre*, 28 N. Z. L. R. 604 (statute provided that when husband deserted the wife "shall be deemed * * * to have retained her New Zealand domicile"); *Protapsaltis v. Protapsaltis*, [1918], Queensland St. Rep. 270 (wife permitted to sue for divorce in the domicile where she was deserted by husband).

⁴ As witness a case like *Stathatos v. Stathatos*, [1913], P. 46. An English girl married a Greek domiciled in England. Later he returned to Greece; the marriage was annulled because there was no Greek priest present at the ceremony, and the Greek remarried. The wife sued for divorce in England and got it, despite the court's reluctance in "giving the go-by to * * * the rule * * * that the wife's domicile is the husband's domicile." In *de Montaigu v. de Montaigu*, [1913], P. 154, a case presenting the identical problem, the court says that an exception is being made to the ordinary rule that domicile governs, because of the hardship involved. The hardship comes because the English court in *Ogden v. Ogden*, [1908], P. 46, refused to recognize the effect of a French decree of nullity of a marriage based upon the same jurisdictional facts considered sufficient in England for its courts. See "Jurisdiction to Annul a Marriage," 32 HARV. L. REV. 806, 818. So the plaintiff, like Kipling's *Towlinson*, belongs in neither place. Greece says she is not and never was married to her erstwhile husband, and has no place there; England says she is married to a Greek and domiciled in Greece.

⁵ *Lord Advocate v. Joffrey*, 89 L. J. Rep. (P. C.) 209.

⁶ *Dolphin v. Robins*, 7 H. L. C. 390; *Yelverton v. Yelverton*, 1 Sw. Tr. 574; *In re Mackenzie*, [1911], 1 Ch. 578.

⁷ See Lord Cranworth, in *Dolphin v. Robins*, 7 H. L. C. 390, 419; Sir R. T. Phillimore, in *Le Sueur v. Le Sueur*, L. R. 1, P. D. 139, where the court assumes "that

treatment,⁸ and the court concludes that the "only safe course is to keep close to the well-established rule that the domicile of a husband and wife, undivorced and unseparated, is one and the same." The House of Lords stands pat.

That the married woman always had her husband's domicile, and could have no other, was a necessary conclusion from the position the common law took with regard to the wife; her "very being or legal existence * * * is suspended during the marriage, or at least incorporated and consolidated into that of the husband."⁹ It would be pedantry to demonstrate that this brutal fiction has vanished.¹⁰

It is said, however, that, despite the fact that the wife's person is no longer identified with that of her husband, the family is still the unit upon which our civilization is built; that the family must be organized—located—and some one must determine where its headquarters are to be. Since the husband usually bears the responsibility for the family support, he should determine the location of the family home.¹¹

Members of a family ordinarily do have a common home, and it is situated where its head, the husband and father, establishes it. A fictitious unity of person is unnecessary to give legal effect to this fact. The wife, upon marriage, takes, by law, the husband's domicile.¹² She need go to the place to acquire it.¹³ And, normally, when the husband changes his domicile that of the wife will change, too.¹⁴ Does it necessarily follow that the law shall say that she cannot acquire a separate domicile when she does in fact couple physical presence with an intent to make a permanent abode at a place other than the domicile of the husband?

American courts have already gone a long way in recognizing the possibility of a separate domicile for the wife. If the husband deserts her, he cannot move her domicile with his, to deprive her of the privilege to sue

desertion on the part of the husband may entitle the wife, without a decree of judicial separation, to choose a new domicile for herself"; *In re Mackenzie*, [1911], 1 Ch. 578.

⁸ Viscount Haldane thinks that there is no authority for holding that a married pair may have separate domiciles, and that the consequences would be extraordinary. Viscount Finlay believes the statement in the *Le Sueur* case is wrong. Lord Dunedin regards Lord Cranworth's remarks (*supra*) as self-contradictory.

⁹ 1 BLACKSTONE, 442. And this was the reason assigned by the decisions. *Williamson v. Osenton*, 232 U. S. 619; *Jenness v. Jenness*, 24 Ind. 355, 87 Am. Dec. 335; *Harteau v. Harteau*, 14 Pick. 181; *Dutcher v. Dutcher*, 39 Wis. 651.

¹⁰ Though Viscount Cave, in *Lord Advocate v. Jeffrey*, says that it appears to him that the rule as to the wife's domicile following that of the husband's "is a consequence of the union between husband and wife brought about by the marriage tie."

¹¹ This is admirably set out by Professor Beale in an article in 2 SO. L. QUART. 93.

¹² *Kennedy v. Kennedy*, 87 Ill. 250; *Parrett v. Palmer*, 8 Ind. App. 356, 35 N. E. 713; *Mason v. Homer*, 105 Mass. 116; *Hackettstown Bank v. Mitchell*, 28 N. J. L. 516; *In re Hartman's Est.*, 70 N. J. Eq. 664, 62 Atl. 560. *Contra*: *Thompson v. Love*, 42 Ohio St. 61, 80.

¹³ *Kashaw v. Kashaw*, 3 Cal. 312; *Christies Succession*, 20 La. Ann. 383; *Stevens v. Allen*, 139 La. 658, 71 So. 936; *Smith v. Smith*, 19 Neb. 706, 28 N. W. 296; *Yelverton v. Yelverton*, 1 Sw. Tr. 574.

¹⁴ *Loker v. Gerald*, 157 Mass. 42, 31 N. E. 709.

for divorce at their last common domicile.¹⁵ Most courts go further, and say she may establish a separate domicile of her own to sue for divorce.¹⁶ And the modern tendency seems to say that she may have this domicile, not for purposes of a divorce alone, but for any purpose.¹⁷ And finally, some decisions say she may have a separate domicile when living apart from her husband without wrong on her part.¹⁸

Having gone this far, is there good reason for inquiry into the question of the rightfulness of the woman's conduct in setting up her separate abode? Acquisition of domicile is, generally, a legal consequence of presence in a place plus the requisite intent. Two reasons might be urged why the ordinary legal consequence should not follow when the domicile in question is that of a married woman. The first is her legal incapacity because of coverture. That is hardly permissible argument nowadays, when a married woman may vote, serve on juries, hold, manage, and transfer property, sue and be sued, as freely as her husband. The other is that the policy of preserving family unity demands that legal recognition be denied the actual fact of separate residence.¹⁹ There are several answers to this point. It is not incompatible with the existence of the family ties that there be continuous cohabitation.²⁰ It also remains to be shown that denying legal effect to a separate residence by the wife will have any effect in deterring her from establishing one. No injustice is done the husband by recognizing the wife's separate domicile. If she has wrongfully left him he is not liable for support.²¹

Recognition of that legal relation between a person and a place which is called domicile does not in general depend upon the purity of a party's conduct. He may secure one where not authorized;²² motives are imma-

¹⁵ *Harteau v. Harteau*, 14 Pick. 181; *Burtis v. Burtis*, 161 Mass. 508, 37 N. E. 740, leaving it an open question whether the wife could acquire a new domicile.

¹⁶ *Hanberry v. Hanberry*, 29 Ala. 719; *Jenness v. Jenness*, 24 Ind. 355, 87 Am. Dec. 335; *Stevens v. Allen*, 139 La. 658, 71 So. 936; *Sworoski v. Sworoski*, 75 N. H. 1, 70 Atl. 119; *Colvin v. Reed*, 55 Pa. St. 375; *Ditson v. Ditson*, 4 R. I. 87; *Craven v. Craven*, 27 Wis. 418.

¹⁷ *Williamson v. Osenton*, 232 U. S. 619; *Watertown v. Greaves*, 112 Fed. 183; *Gordon v. Yost*, 140 Fed. 79; *Fitch v. Huff*, 218 Fed. 17; *Shute v. Sargent*, 67 N. H. 305, 36 Atl. 282; *White v. Glover*, 116 N. Y. S. 1059. Contra: *Estate of Wickes*, 128 Cal. 270, 60 Pac. 867. Professor Beale disapproves of these enlargements of the doctrine. See the discussion, 2 So. L. QUART. 93.

¹⁸ *Cheever v. Wilson*, 9 Wall. 108, *semble*; *McKnight v. Dudley*, 148 Fed. 204 (husband becomes insane, wife may choose domicile); *Shute v. Sargent*, 67 N. H. 305, 36 Atl. 282, *semble*; *In re Geiser's Will*, 82 N. J. Eq. 311, 87 Atl. 628, *semble*; *Licht v. Licht*, 150 N. Y. S. 643 (separation by agreement); *Saperstone v. Saperstone*, 131 N. Y. S. 241 (wife in New York permanently, husband refused admittance to the United States); *In re Crosby's Estate*, 148 N. Y. S. 1045 (long separation, cause not shown); *Rundle v. Van Inwegen*, 9 N. Y. Civ. Proc. R. 328; *In re Florance*, 7 N. Y. S. 576 (long separation); *Buchholz v. Buchholz*, 63 Wash. 213, 115 Pac. 88 (wife may have separate domicile "where there has been a mutual abandonment of the marriage relation").

¹⁹ See article by Professor Beale (note 7), and discussion by Albert Hewitt, 91 CENT. L. JOUR. 4, 14.

²⁰ See 28 HARV. L. REV. 196.

²¹ *Ogle v. Dershem*, 86 N. Y. S. 1101.

²² *Harral v. Harral*, 39 N. J. Eq. 279.

rial.²³ No one ever questioned the power of a husband to acquire a new domicile, even when deserting his family. Such acquisition does not confer privileges only; it also brings burdens as well. The question should be settled without regard to the sex or marital condition of the actor.²⁴

Iowa City, Iowa.

H. F. G.

ADVERSARY PARTIES—SAME PERSON AS BOTH PLAINTIFF AND DEFENDANT.—Under the regulations promulgated by the Railroad Administration in 1918, all actions for injury to persons or property growing out of the possession or control of any railroad or system of transportation by the Director General of Railroads were required to be brought against the Director General. ORDER No. 50. Some courts refused to follow this order on the ground that it was contrary to the statute creating federal control. *Lavalle v. Northern Pacific Railway Company*, (1919), 143 Minn. 74; *Franke v. Chicago & N. W. Ry. Co.*, (1919), 170 Wis. 71.

But Order No. 50 has been generally observed, and actions arising under federal control have usually been brought against the Director General. He was declared to be the agent of the United States through which it exercised "no divided but a complete possession and control" of all railroads for all purposes. *Northern Pac. Ry. Co. v. North Dakota*, (1918), 250 U. S. 135, 148.

Under this situation a float belonging to the Central Railroad of New Jersey was rammed by a steam tug owned by the New York Central Railroad, and the Globe and Rutgers Fire Insurance Company, as insurer of the float, paid the loss and brought suit against the wrongdoer under its right of subrogation. According to Order No. 50, the wrongdoer was the Director General of Railroads, who was operating the New York Central Railroad and its steam tug. But since the insurer, as subrogee, stood in the shoes of the insured, and the insured, under federal control, was the Director General of Railroads, the action presented in controversy between the Director General of Railroads as operator of the Central Railroad of New Jersey and the Director General of Railroads as operator of the New York Central Railroad. But no one can sue himself, even in another capacity, so that the United States Circuit Court of Appeals for the Second Circuit held that the insured was absolutely without a remedy. *Globe and Rutgers Fire Insurance Co. v. Hines*, (1921), 273 Fed. Rep. 774.

The court here invokes a rule which has often been quoted in both legal

²³ *Williamson v. Osenton*, 232 U. S. 619; *Young v. Pollak*, 85 Ala. 439, 5 So. 279; *McConnell v. Kelley*, 138 Mass. 372.

²⁴ It is not claimed, of course, that the power of a wife to establish a separate domicile at all times is authoritatively established. See *Suter v. Suter*, 72 Miss. 345, 16 So. 673; *Hood v. Hood*, 11 Allen 196. The point is not even arguable until the wife becomes emancipated from the shackles placed on her by the common law. But there is a decision or two where, consciously or unconsciously, the court did go to the full extent of the position here suggested, and numerous dicta having the same tendency. See *Smith v. Smith*, 4 Mackey (D. C.) 255; *Thompson v. Love*, 42 Oh. St. 61, 80; *Colvin v. Reed*, 55 Pa. St. 375; *Prater v. Prater*, 87 Tenn. 78, 9 S. W. 361; *Dutcher v. Dutcher*, 39 Wis. 651, 659; *Buchholz v. Buchholz*, 63 Wash. 213, 115 Pac. 88.

and equitable actions, but it has usually been deemed sufficient to state it as a sort of axiomatic formula, without attempting to give any reason for it. Thus, in *Bryan v. Kales*, (1892), 3 Ariz. 423, the court said that the presence of adversary parties was so fundamental that if it appeared that the plaintiff was suing personally in a suit against himself as administrator, any judgment entered would be "utterly void." Similar views seem to have been entertained in *Barber v. Barber*, (1911), 32 R. I. 266, where a tax collector sued himself as town treasurer for services. In *Grahame v. Harris*, (1833), 5 Gill & J. (Md.) 489, on the contrary, the court said that, although a man cannot properly bring an action against himself, and therefore the same party cannot regularly be placed on both sides of the case, this objection is a technical one. The rule is stated in DICEY ON PARTIES TO ACTIONS (rule 5) that "The same person cannot be both plaintiff and defendant," and he says that this rule "scarcely requires explanation, and results immediately from the fact that it is impossible for a man himself to infringe upon his own rights." But in *Connell v. Woodward*, (1841), 5 How. (Miss.) 665, 670, the court seemed less impressed with the inherent impossibility of such an action, for it said the rule was confined in its operation to natural persons, which of course would destroy any claim it might have for being considered a fundamental concept of the law. Nor is the law entirely consistent in this respect when it asserts the *identity* of a party with himself in another capacity, when it seeks to defeat an action for want of adversary parties, and at the same time asserts *want of identity* where a person is joined with himself in another capacity when it seeks to defeat an action on the ground of misjoinder of causes of action. *Grahame v. Harris*, *supra*; 1 ENCY. PL. & PR. 178, Tit. Actions. In the same way, the law finds no difficulty in discovering a total lack of identity between a party in one capacity and the same party in another capacity when considering the effect of a judgment. As said in a recent case, *Chandler v. White Oak Creek Lumber Co.*, (1914), 131 Tenn. 47, 50:

"The reason that a judgment against a party suing as an individual is not an estoppel in a subsequent action in which he appears in another capacity or character is that in the latter case he is in contemplation of law a distinct person and a stranger to the prior proceedings and judgment. *Rathbone v. Hooney*, 58 N. Y. 463; *Jennings v. Jones*, 2 Redf. Sur. 95."

When we turn to equitable suits, the courts are found to be less inclined to consider this objection as insuperable. To be sure, the same broad statement of the rule as an axiomatic proposition is often met with. Thus, in 64 SOLICITORS' JOURNAL, (March, 1920), 318, it is said:

"In the Annual Practice, under Ord. 16, rule 1, it is stated, 'The same person cannot be both a plaintiff and a defendant in the same action, or an applicant and a respondent to the same summons.' This is treated as, what most people would consider it, a self-evident proposition—at all events, no authority is cited for it. It is, however,

not uncommon to come across practitioners who suppose that the same person can be a plaintiff in one character and a defendant in another character in the same action."

A note in 5 MASSACHUSETTS LAW QUARTERLY, 467, (Aug. 1920), quoting the above statement, cites a number of Massachusetts cases where the same rule was stated, but it also mentions others where the rule was in fact ignored without comment from court or parties. Thus, in *Welch v. Blanchard*, (1911), 208 Mass. 523, each plaintiff is named three times as defendant on account of different interests in the trust fund.

The theory of parties in equity would seem to make it a matter of minor concern whether a party is present in different capacities on the same side or on different sides of the suit. Thus, in *Goss v. Suckling*, (1911), 30 N. Z. L. R. 543, 545, the court said: "It is *irregular*, as it is unnecessary, in an equity suit as at common law, to make the same person both plaintiff and defendant." So, in 2 TARDY ON RECEIVERS, 2045, the author says: "Although it is not good practice for a person in his representative capacity to sue himself in his individual capacity, as where a receiver of a corporation sues the directors, one of whom is himself, the bill is not demurrable on that ground alone." In support of this he cites *Murphy v. Penniman*, (1907), 105 Md. 452, where it is shown that, while prior Maryland cases had condemned the practice of a party being on both sides of the case, yet the practice had to some extent prevailed, and that in a court of equity, where the rights of parties can be considered without much regard to the side on which they appear, "the rule is not of such importance as to require the court in all cases to dismiss the bill or sustain a demurrer to it because such practice has been followed." Again, it has been pointed out that in partition suits, under modern statutes, it is immaterial that the groups of persons making up the parties plaintiff and the parties defendant contain a common member. *Blaisdell v. Pray*, (1878), 68 Me. 269; *Senter v. De Bernal*, (1869), 38 Cal. 637.

The case under discussion, against the Director General of Railroads, was one in which there was but a single party on each side, and therefore it was one where the situation did not overtax the capacity of a common law judgment. It was also an actual adversary proceeding, for the insurance company, having paid up its loss, was entirely divorced from any community of interest with the Director General. In every respect there was complete antagonism. There was, therefore, no chance of a collusive suit. If this action could not be maintained the insurance company was without a remedy. Should the court, therefore, in view of the somewhat technical character of the objection made, have looked to the substantial nature of the controversy, as common law courts have often done, for example, in actions by use-plaintiffs, and have allowed the action to proceed?

If, under the federal control act, the interests of the New York Central Railroad and of the Central Railroad of New Jersey were really antagonistic in the matter of the injury to the float, it would seem excessively technical to deny the only remedy possible merely because of the general rule

adverted to. But it appears that their interests were not antagonistic. Under the statute, 40 U. S. STAT. AT LARGE, Ch. 25, Sec. 12, all moneys received by the railroads during federal control became the property of the United States, and all operating disbursements, such as damages to be paid for injuries to property, were payable out of such moneys. Hence, when the insurance company paid the loss on the float the money went to the United States, and if the company were to be reimbursed as subrogee on its claim against the New York Central Railroad, the reimbursement would have to come out of money belonging to the United States. The United States, therefore, would in substance be required to pay back to the insurance company, by way of damages, the money which it had received from the insurance company by way of indemnity. The question is, therefore, much more than one of adversary parties. It raises the very substantial point as to whether the insurance company was subrogated to any rights against the insured, because of the latter's fault in connection with the loss. On this point the law is clear. If the property is damaged by the tortious act of the insured or its agents or servants, the insurer, if liable under its contract, has no right of subrogation. *Phoenix Ins. Co. v. Erie Transportation Co.*, (1885), 117 U. S. 312. In *Simpson v. Thompson*, (1877), 3 App. Cas. 279, it was held by the House of Lords that where two ships, the property of the same owner, collide, and the underwriters pay the loss, they have no right of action against the owner of the ship that did the mischief, as he himself had no right, inasmuch as, being the owner of both vessels, any right he had must be a right of action against himself, which is an absurdity and a thing unknown to the law. To the same effect, see *Globe Ins. Co. v. Sherlock*, (1874), 25 Ohio St. 50, 68.

In the case under review, therefore, the United States Circuit Court of Appeals appears to have come to the only possible decision, and the weakness in the plaintiff's case was not due to a technical rule as to parties but to the fact that the federal statute, by consolidating all the railroads under the unified operation and control of the United States, subjected all insurers of railroad property to the additional burden of being deprived of any recourse through subrogation for injuries caused by the tortious operation of any other railroad property. Congress might have expressly saved such right of recourse by authorizing actions by insurers in all cases where such right of action would have existed prior to federal control, but it did not do so. The plaintiff may, therefore, properly consider the loss of its right of subrogation one of the burdens chargeable to the war. E. R. S.

EVIDENCE—CONSTITUTIONAL LAW—SEARCHES AND SEIZURES.—The opinion of the Supreme Court of the United States in *Gould v. United States*, 41 Sup. Ct. 261, suggests this further examination of the leading cases in that court for the discovery of the status of the rule as to the admissibility of evidence secured through violation of the Fourth Amendment against unlawful searches and seizures. The opinion in *Adams v. New York*, 192 U. S. 585, following the much earlier case of *Boyd v. United States*, 116 U. S. 616,

left the profession in serious doubt as to whether, in cases where evidence was procured through violation of this Fourth Amendment, there was still opportunity for the application of the doctrine that illegality in procuring it does not go to admissibility of evidence.

In *Boyd's* case the production of evidence was coerced through an order of court based upon an unconstitutional statute, and against an appropriate objection of defendant, was admitted. The Supreme Court held that the proceeding violated both the Fourth and the Fifth Amendments. In the *Adams* case a search warrant was issued to find gambling paraphernalia, and in the execution of it certain private papers of the defendant, not covered by the warrant, were taken. So far as the opinion discloses, the question first came to the court upon the objection of the defendant to the admission in evidence of the papers so taken. In the Supreme Court it was held that the evidence was correctly admitted; that the principle that illegality in securing evidence does not go to its admissibility was controlling.

The question was again before the Supreme Court in the case of *Weeks v. United States*, 232 U. S. 383. Weeks was indicted for misuse of the mails in the carrying on of a lottery. In his absence from home, officers, acting without warrant, entered defendant's house and carried away certain private papers of his there found. Before trial he petitioned the court for an order directing the return of the papers so taken. The petition was granted as to all seized which were not material as evidence upon the trial, but as to such it was denied. The papers retained were admitted in evidence upon the trial against the objection of the defendant that his constitutional rights were violated in their seizure and use as evidence. It is held by the Supreme Court that the evidence was inadmissible because secured through an unlawful seizure, and because, upon petition before trial, which was made, its restoration should have been ordered. The principal reliance is the *Boyd* case. The *Adams* case is distinguished upon the ground that in that case no antecedent petition for return was made.

The *Silverthorne Lumber Co.* case (251 U. S. 385) followed. An officer, armed only with a subpoena *duces tecum*, seized certain private papers of a corporation. "As soon as might be," application was made to the court for the return of the papers seized. They were returned, but not till copies and photographs of them had been taken and a new indictment framed upon the basis of the information so gained. A new subpoena *duces tecum* was taken out and served, requiring the production on the trial of the original papers. The officers of the corporation served refused to produce them. The court then made a special order for their production, which was disobeyed, and contempt proceedings instituted, which were reviewed in the Supreme Court. It was held that the principle applied in the *Weeks* case forbids not alone the use upon the trial of the evidence gained through a violation of the Fourth Amendment, but any use of it for any purpose.

Now follows the case first mentioned, the *Goulded* case. Here certain private papers were taken by government officers by stealth and without warrant of any kind, and offered in evidence upon the trial of defendant

and admitted against his objection that they were seized in contravention of his privilege against unreasonable searches and seizures, and were being used in violation of his privilege against self-crimination. The Supreme Court sustained both objections and excused the failure to make application before trial for the return of the papers on the ground that the first notice of the taking came to defendant when they were offered in evidence. Other papers were taken while officers were executing search warrants. As to this latter taking, it is held that since the papers seized had only evidential value, their taking was an unlawful seizure; that a search warrant cannot be used to justify the entering of one's premises *for the purpose only of searching for evidence of crime, and of seizing it if found*; that such is not the office of the search warrant. In the language of the court,

"they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public, or the complainant, may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken."

A very elastic statement. What is that "interest which the public may have in property" which will justify a warrant? What is the condition "when a valid exercise of the police power" renders "possession by the accused unlawful"? Is it a wholly irrational interpretation of the language of the court to say that the public has a very real interest in the discovery, seizure and use of everything which may tend to establish guilt of crime?

Reference might be here made to the case of *Amos v. United States*, 41 Sup. Ct. 266, involving the unlawful seizure of whisky, and which was decided at the same time and upon the authority of the *Gould* case.

The court has not yet said that the fact alone that evidentiary materials have been unlawfully seized in violation of the Fourth Amendment will defeat the use of such materials in evidence. It has not yet said that if evidentiary materials are seized in violation of the Fourth Amendment, and the person from whom they are seized, having knowledge of the seizure, fails to take any step for their return before they are offered in evidence, that his objection to their use in evidence as in violation of his right, under either the Fourth or the Fifth Amendment, will be good. Indeed, the exact contrary is held in the *Adams* case. The court still seems to consider the *Adams* opinion as correctly stating the law. At least the court has never purported to overrule it, unless by inference in a paragraph in the *Gould* opinion, to be referred to later. The court in the *Adams* opinion discusses the *Boyd* case and attempts to show that it does not rule the state of facts presented in the *Adams* case, and yet the evidence allowed in that case was unlawfully seized. The *Weeks* opinion distinguishes the *Adams* case as being one where the court was first called upon to consider the effect of unlawfulness of the seizure at the time it was offered upon the trial, and holds that the court will not try the question of lawfulness upon the trial. The opinion in the *Silverthorne Lumber Co.* case states that the principle of

the *Adams* case is not applicable to the state of facts then before it, presumptively because the question was raised in an ancillary proceeding and not during the progress of the trial. In the *Gouled* case the court holds that the fact that the defendant did not know of the unlawful seizure till the evidence was offered on the trial excused him from raising the question in some ancillary proceeding, which in the *Weeks* case seems to have been regarded as necessary.

But the cure for all our troubles over this question lies in the rule announced in the latter part of the opinion in the *Gouled* case. The court is discussing the application of the rule, or alleged rule, that illegality in securing evidence does not affect its admissibility. The court says:

"We think, * * * that it is a rule to be used to secure the ends of justice under the circumstances of each case; and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission, or a motion for their exclusion, and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed, for any technical reason, to prevail over a constitutional right."

Verily, the line between what is legal and what is equitable is being lost in a not too unwelcome haze. The world moves and the legal section of it is catching on. It matters little what was said in Doe's or Roe's case. It matters not so much "what is the rule"; the concern rather is "what does the cause of justice call for." There is little danger yet, however, that the boast that ours is a government by law will become an idle one.

V. H. L.

THE USEFULNESS OF INTERVENTION AS A REMEDY IN ATTACHMENT.—While rules of procedure are not saved from the rude hand of the reformer by the "due process" guarantees of our constitutions, they do rest, nevertheless, under the very efficient protection of professional conservatism. Such rules are looked upon by the bench and bar as their own special concern, and innovations in this field must maintain the burden of proving their character before both the lawyer members of the legislature and the lawyers and judges who interpret them in the course of litigation. It would be natural, therefore, to expect that a proposed reform in procedure would have to meet at least the possibility of two shrinking processes, one at the hands of the legislature and the other at the hands of the court. An interesting case of the latter kind is found in *Chase v. Washtenaw Circuit Judge*, (Mich., 1921), 183 N. W. 63.

In that case the petitioner, who claimed that her property had been wrongfully attached as the property of another sought to intervene in the attachment suit for the purpose of freeing it from the lien of the wrongful levy. The Michigan statute passed in 1915 (C. L. 1915, Sec. 12362) allowed an intervention in any action by anyone claiming an interest in the litiga-

tion. The court held that the "petitioner does not assert any interest in the litigation, and only seeks to free her property from a claimed wrongful attachment." Therefore, it was held that she could not intervene, but must let the attachment proceedings take their course against her property.

A contrary decision would have secured to the people of Michigan a much needed simplification of procedure and could have been justified on both reason and authority much more easily than the decision that was made. A study of contemporary American practice in such cases discloses the following interesting features.

In the first place, it appears that the widespread recognition of the great practical value of intervention in attachment cases has resulted in the enactment of a large number of statutes expressly providing for intervention by the owner of property claimed to have been wrongfully attached as the property of another. Even such conservative jurisdictions as Illinois (*Juillard & Co. v. May*, (1889), 130 Ill. 87); Mississippi (*Dreyfus v. Mayer*, (1891), 69 Miss. 282); Florida G. S., 1906, Sec. 2129; Georgia (CODE, 1911, Secs. 5115, 5116), and West Virginia (*Capehart's Ex'r v. Dowery*, (1877), 10 W. Va. 130), which have refused to accept any thoroughgoing reform in pleading and still adhere to the common law system, have, nevertheless, enacted statutes expressly authorizing such intervention in attachment cases. Kansas (*Bodwell v. Heaton*, (1888), 40 Kan. 36); Arkansas (S. & H. Sr., 1894, Sec. 406), and Oklahoma (*Miller v. Campbell Commission Co.*, (1903), 13 Okla. 75), states usually more friendly to such reforms, have similar statutes.

In the next place, it appears that the value of such a remedy has appealed so strongly to a number of courts that they have, in the absence of any statute at all on the subject, authorized the practice as an exercise of their inherent power to regulate their own procedure. This was the case in *Sims v. Goettle*, (1880), 82 N. C. 268; in *United States v. Neely*, (1906), 146 Fed. 764, and in *Daniels v. Solomon*, (1897), 11 App. D. C. 163, the latter asserting the existence of a similar judicial attitude in Maryland. In the *Neely* case, *supra*, the court saw no difficulty in the matter at all, and approved the intervention on the simple ground that "in that way a decision can be reached much more quickly and economically than in any other."

Lastly, it appears that a large number of states have general statutes of intervention *substantially similar to the Michigan statute*, and the decisions of courts acting under these statutes have been almost unanimous in favor of allowing such an intervention in attachment cases. Such was the decision in each of the following cases: *Patton v. Madison Nat. Bank*, (1907), 126 Ky. 469; *City Nat. Bank v. Crahan*, (1907), 135 Iowa, 230; *Hannon v. Connett*, (1897), 10 Col. App. 171; *Dennis v. Kolm*, (1900), 131 Cal. 91; *Potlatch Lumber Co. v. Runkle*, (1909), 16 Ida. 192; *Field v. Harrison*, (1868), 20 La. Ann. 411; *Lee v. Bradlee*, (1820), 8 Mart. (La.) 20; *Houston Real Estate Inv. Co. v. Heckler*, (1914), 44 Utah, 64. The last case above cited contains a very thorough study of the question, and demonstrates the simplicity, directness and speed with which the conflicting claims to

attached property can be determined by this method. In two states alone, so far as we have discovered, Nebraska (*Dunker v. Jacobs*, (1907), 79 Neb. 435), and New Mexico (*Meyer & Sons Co. v. Black*, (1888), 4 N. Mex. 352), has this use of the remedy of intervention under general intervention statutes like that in Michigan been disapproved. E. R. S.

LIABILITY OF MASTER FOR NEGLIGENCE OF SERVANT RETURNING FROM PERSONAL ERRAND.—It is clearly established by a long and uniform line of decisions that a master is liable for the result of his servant's negligence when the servant is acting within the scope of his employment. See collection of the judicial statements of this rule in LABATT ON MASTER AND SERVANT, Vol. 6, pages 6695 to 6698. This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. *Farwell v. Boston & W. R. Corp.*, 4 Met. (Mass.) 49, 55. It is not the rule itself, however, but its application, that gives rise to doubt in determining particular cases. The difficulty is in deciding when the servant is, and when he is not, acting within the scope of his employment, and it seems doubtful if any fixed formula could be worked out that would solve the question in all cases. With reference to establishing such a criterion of liability, it has been laid down that the servant's agency extends to doing everything reasonably necessary for the efficient performance of his master's business in the station to which his master has appointed him. *Cullimore v. Savage South Africa Company*, [1903], 2 I. R. 589. But such an attempt to establish a formula of liability cannot be of any great assistance in deciding cases, for it still leaves the question of reasonable necessity to be determined.

In a recent New York case, *Riley v. Standard Oil Co. of N. Y.*, (1921) 132 N. E. 97, a truck driver was ordered by the master to go from the mill to the freight yards for the purpose of loading some paint, and to return immediately. After loading the truck the driver found some waste pieces of wood which he loaded on the truck and carried to his sister's house, four blocks in the opposite direction. He started to return, on a course that would carry him past the freight yards, and before reaching the yards he negligently ran down the plaintiff. It was held, by a divided court, that the servant must be deemed on his master's business at some point in the return, which point, in view of all the circumstances, he had reached.

In an extremely forceful dissenting opinion Justice McLaughlin says, after speaking of the result reached by the majority of the court:

"I am unable to see how this conclusion can be reached as a matter of law. Nor do I think the facts would justify a finding to this effect. The uncontradicted facts show, as it seems to me, that Million, at the place where and time when the accident occurred, was not acting for the defendant. * * * He was doing an independent act of his own, and outside the service for which he had been employed."

The dissenting opinion would seem to present the better view on principle, and it is interesting to note the state of the authorities on this question. A marked conflict of authority is shown by an examination of the cases, even in the New York decisions. The case of *Jones v. Weigand*, 119 N. Y. Supp. 441, cited in the majority opinion, seems to support the conclusion reached, though in that case the driver merely took a circuitous route in reaching his destination, the purpose of his detour being to see a friend. *Williams v. Koehler et al.*, 58 N. Y. Supp. 863, seems to support the principle case. See also *Geraty v. National Ice Co.*, 160 N. Y. 658. In *Riordan v. Gas Consumers' Ass'n*, 4 Cal. App. 639, the master was held liable for injuries caused by a runaway horse which his servant, after having driven it to his own home during the lunch hour for his own accommodation, had negligently failed to fasten. But in that case the decision went off on the ground that the servant had charge of the horse for the defendant during the noon hour as well as during working hours. On almost the same state of facts the Supreme Court of Massachusetts has held the master not liable. *McCarthy v. Timmins*, 178 Mass. 378.

The case of *Schoenherr v. Hartfield*, 158 N. Y. Supp. 388, seems to be in direct conflict with the principal case. In that case the servant had taken the master's car for the purpose of visiting his wife. While returning, the car struck and killed the plaintiff's testator, and it was held that the owner was not liable. *Danforth v. Fisher*, 75 N. H. 111, is directly in point, and supports the view taken in *Schoenherr v. Hartfield*, *supra*. It was there held that where, at the time of the accident, the chauffeur is returning from an errand of his own to reach the place to which he had been directed to take the machine, the owner is not liable. To the same effect are *Provo v. Conrad*, 130 Minn. 412, and *Patterson v. Kates*, 152 Fed. 481. See also note in L. R. A. 1916 A957.

In *Pittsburgh, C. & St. L. R. Co. v. Kirk*, 102 Ind. 399, it was laid down by the court that "where a servant steps aside from his master's business, and does an act not connected with the business, which is hurtful to another * * * the master is not liable for such act." If this be the correct rule, it seems difficult to justify the principal case, for here the servant had stepped aside from his master's business to do an errand of his own not in any way connected with his employment. The court evidently held the view that the servant re-entered the master's service the moment he started on his return journey, and that there was no distinction between the facts presented and the case where the servant merely makes a detour in reaching his destination. It must be admitted that this view has some authority to support it, but the view taken in the dissenting opinion seems to be with the weight of authority.

P. W. G.

144732