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Recent Decisions

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anything to render them liable to harm through nervous shock caused by the sight or apprehension of damage to third persons." The *Hambrook* case has been criticized as being an arbitrary extension of the duty of the users of highways and liability of a defendant in a negligence case. The reason being that had the mother been told merely of the injury to her children rather than having been virtually an eyewitness there could have been no recovery. This was recognized in the case.

The general rule is then that there can be no recovery for injuries resulting wholly from mental shock or fright not accompanied by any physical injury. In some cases denial of recovery for physical injuries due to the peril of another caused by a third person is on the ground that there was no wilful and wanton negligent act directed toward the plaintiff. Others that there has been no invasion of any right of the plaintiff and others that the plaintiff has suffered from no "impact," though, as seen before, some cases say that there does not have to be an impact for recovery for fright due to negligence of defendant, deny recovery in the case where the injury is caused by the fright caused by peril of another person, due to defendant's negligence.

William F. Langley.

RECENT DECISIONS

CORPORATIONS—EFFECT OF DISSOLUTION—REORGANIZATION UNDER SECTION 77B OF THE BANKRUPTCY ACT.—In a recent Illinois case three persons, who had acquired all of the shares of the respondent corporation from the former stockholders, held stockholders' and directors' meetings and passed a resolution authorizing the filing of a petition for the reorganization of the respondent corporation under Section 77B of the Bankruptcy Act. This corporation had been involuntarily dissolved upon action by the State of Illinois four years prior to the filing of this petition for reorganization. Two months after this decree of dissolution, certain mechanics' liens were foreclosed, and a sale of the property was made pursuant to the foreclosure decree. Also, two months later suit was brought in the state court to foreclose the liens of a first and a second mortgage. A receiver was appointed, who took possession of the property, and was in possession thereof at the time this case was heard in the federal district court for reorganization of this dissolved corporation. The proceedings in the state court by the receiver were authorized by the statutes of Illinois, which provided: "All corporations organized under the laws of this State, whose powers may have expired by limitation or otherwise, shall continue their corporate capacity for two years for the purpose only of collecting debts due such corporation and selling and conveying the property and effects thereof. Such corporations shall use their respective names for such purposes and shall be capable of prosecuting and defending all suits at law or in equity." The federal district court found that the respondent corporation had legal capacity to file this voluntary petition in bankruptcy praying for a reorganization; and that the petition was sufficient to confer jurisdiction upon the court over respondent and the property in question. The district court appointed a temporary trustee,

required the state-court receiver to turn over the property to the trustee, and restrained further prosecution of the foreclosure proceedings. This order was affirmed by the Circuit Court of Appeals. *In re Forty-one Thirty-Six Wilcox Bldg. Corp.*, 86 Fed. (2d) 667. However, on certiorari to the Supreme Court of the United States, the majority of the Court held that since, by the power of the state which had created the corporation, the corporation had been dissolved, its existence ended, except for the statutory privilege which the state had given the corporation to continue a special kind of life for two years after its dissolution to wind up its corporate affairs. The corporation now, two years after its wind-up privileges and total death, had no existence so as to be capable of invoking the powers of a court of bankruptcy under Section 77B. The court interpreted the Statute of Illinois to read that, after two years, no proceedings could be *initiated* on behalf of the corporation in either the state or federal courts, but such proceedings as had been instituted during that period in any of these courts might be prosecuted to completion. This petition in bankruptcy was not such a proceeding. It was also decided that the state receivership proceedings still pending at the time of the petition in bankruptcy were not equity receiverships, indicating corporate life, within the meaning of the Section 77B, but were incidental to the foreclosure suits, and therefore limited and special. The dissenting opinion of Justice Cordozo, concurring with two other justices, tended toward great liberality by giving the respondent corporation power to invoke the aid of Section 77B. The opinion was based upon the proposition that a fragment of corporate power and life was left untouched by dissolution inasmuch as with the license of the State of Illinois, the respondent corporation was actively defending suits for the foreclosure of mortgages on its property when it went into the federal court for relief in bankruptcy. According to the minority, the body that retained this corporate power in the form of completing the defense of pending suits was still a corporation within the definition of the Bankruptcy Act: "'Corporations' shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships." *Chicago T. & T. Co. v. Forty-one Thirty-six Wilcox Bldg. Corp.*, 58 S. Ct. 125 (1937).

This decision opens a new trend in the law of Bankruptcy, and throws a new light upon the nature of a corporation and the effect of involuntary dissolution upon its corporate life. Section 77B of the Bankruptcy Act, under which this case was decided, is a 1933 Amendment to the Bankruptcy Act. Consequently, until the decision in this case, comparatively few of the possibilities under this Amendment to the Bankruptcy Act were explored or anticipated. Although the majority opinion is logical and consistent with precedent, still the minority opinion shows what might be done in the future. The minority opinion has advanced far from the common-law rules governing the dissolution of corporations and their powers.

Early decisions in the United States, based upon the common law, strictly enforced the rule that the power of a corporation to sue and be sued is extinguished when its existence is terminated, and that this extinction involves, as a matter of procedure, the abatement of any action to which it may be a party, either at the time of its dissolution or thereafter, and has been affirmed frequently with respect to actions pending at the time when the dissolution took effect. *Bank of United States v. McLaughlin*, Fed. Cas. No. 928 (1810). A clearly reasoned case from West Virginia held that a garnishment proceeding pending against a corporation whose charter expired fell with the dissolution of the corporation, and that any right which the creditor had by virtue of the garnishment proceeding depended upon maintaining it and concluding it before dissolution of the corporation, and before the assets went into the court of equity for distribution among the shareholders and creditors. *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 8 S. E. 600, 13 Am. St. Rep. 903 (1888).

However, even in the early cases effect was given to the frequent statutory provisions of the various states which gave the corporation a definite limited life

after dissolution to wind up its affairs. The rule was established that after the expiration of the period of existence specified in the charter of a corporation it becomes incapable of exercising any powers except those which may have been conferred upon it by statute, for the purpose of winding up its affairs. *Clark v. American Cannel Coal Co.*, 165 Ind. 213, 73 N. E. 1083 (1905). Similar to this is the rule established where the corporation is dissolved by the action of the state. In *Saltmarsh v. Planters' & Merchants' Bank of Mobile*, 17 Ala. 761, 766 (1850), it was asserted: "After the charter of a corporation is declared forfeited by competent authority, its existence is at an end; it can then do no act by which rights can be acquired, nor can a suit be maintained in its name to recover those acquired during the continuance of its charter, unless its powers and capacities be continued by statute, after its existence as a corporation is ended, for some certain purposes."

Furthermore, where the statutes gave dissolved corporations a limited life to wind up the corporate affairs, the courts have consistently held that at the termination of the extended period of existence, allowed by a statute for the purpose of settling corporate affairs, actions pending at the termination of this period abated. *Dundee Mortgage & Trust Investment Co. v. Hughes*, 77 Fed. 855 (C. C., D. Ore. 1896). This rule was vividly declared in *Maine Shore Line R. Co. v. Maine C. R. Co.*, 122 Me. 476, 43 Atl. 113 (1899), where the court said: "It is stoutly contended that the plaintiff's corporate existence continues after the expiration of the three years (the statutory period), and until judgment shall be recovered. The statute does not say that it shall. Its only corporate existence is by virtue of that statute, and that continued its life three years, and no more. The legislature has not seen fit to intervene, and the court cannot vivify that which the legislature has allowed to expire. The plaintiff has no corporate existence and can neither recover judgment nor suffer one against itself. Its action has abated, and there is no one who can revive it. It must be dismissed from the docket."

It seems apparent also, that the appointment of a receiver for a dissolved corporation for some special purpose does not, during the existence of such receivership, affect the life or prolonged existence of the corporation to settle its affairs, but that such receivership serves only in the nature of an administration of a deceased estate. Such is the view of the authorities, which assert that it is a general proposition that, where a business corporation has been dissolved, or has, for any reason lost its charter, and there is no statute governing the disposition of its property and effects or the payment of its debts, a court of equity will, upon proper application to it for such purpose, lay hold of its property and effects, and administer them for the benefit of its creditors and stockholders, if such course is shown to be necessary for their protection; and such court will also appoint a receiver, if it is shown that one is needed. 54 A. L. R. 1128; 23 R. C. L. 36.

Consequently, it is easy to conclude that never before the recent decision in the principal case has the existence of a receivership after dissolution of the corporation, or during the statutory period of its extended life or thereafter, influenced the court in determining whether a corporation possessed artificial life and existence for any purpose.

From a view of the authorities, it is easy to determine that the receivership is not a method in law to prolong the life of a corporation or affect it in any way. This can be inferred from the power which equity has to appoint a receiver. In a recent case, *Laumeier v. Sun-Ray Products Company*, 50 S. W. (2d) 640, 84 A. L. R. 1435 (Mo. 1932), it was stated: "A court of equity has inherent power to appoint a receiver for a corporation only when such appointment is ancillary to and in aid of an action pending for some other purpose, in which there is a prayer for other and final or ultimate relief which the court has power and jurisdiction to grant." And, in regard to dissolved corporations, it is asserted: "A court of equity, unless so empowered by statute, is without jurisdiction to appoint a receiver to wind up the affairs of a corporation and dissolve it."

Hence, we might conclude that the majority opinion of the principal case is unassailable and founded upon fundamental legal propositions, especially recognizing the power and right of the state to declare the death-knell of the artificial being, the corporation, which it has the power and right to create. However, the minority opinion sways to the side of recognizing the paramount authority of the Bankruptcy Act over all conflicting state laws. The minority believe that Section 77B of the Bankruptcy Act, by giving "Any corporation" the right to reorganize by voluntary petition in bankruptcy, includes those dissolved corporations which show a semblance of life or almost completely suspended animation, even though the state which created it declares that it is dead for all intents and purposes. Although the minority does not so allude, they are probably influenced in their opinion by the greater expediency of federal bankruptcy administration over similar insolvency administration in the state courts by the receivership device.

The minority view is supported in a few recent cases. In *Partan v. Niemi*, 192 N. E. 527 (Mass. 1934), it was held that the conditional dissolution of a corporation by statute does not deprive a federal district court of jurisdiction subsequently to adjudge the corporation, on its petition, a voluntary bankrupt, and to appoint a trustee in bankruptcy for it, where the dissolution is made subject to statutory provisions declaring that a dissolved corporation shall be continued as a body corporate for three years for the purpose of prosecuting and defending suits and of enabling it to close its affairs and dispose of its property, but not for the purpose of continuing the business for which it was established; that a receiver may be appointed in such cases to do all acts which might be done by the corporation, if in being, and necessary for the settlement of its business; that the powers of the receiver and the "existence of the corporation" may be continued as long as the court finds necessary for such purpose, and that there may be a revival of the corporation under certain circumstances. The word "suit," in this Statute, was interpreted as embracing a voluntary petition in bankruptcy. This case is distinguishable from the principal case in that in this case the statute declared that the corporation was only conditionally dissolved, and consequently kept a conditional life for three years, within which the voluntary petition in bankruptcy was brought. But in the principal case the state declared the corporation absolutely dead after two years from the decree of dissolution, even though it did allow receivership proceedings to continue after this period of extension. The minority contended that this sign of life rebutted the declarations of death by the state. If we are to take the view of the minority, that receivership proceedings by their nature indicate corporate life and personality, which the majority denies, the same conclusion must be reached that the existence of a corporation is to be judged by its manifestations and not by the state decrees.

An even stronger case to substantiate the opinion of the minority is the important case of *Hammond v. Lyon Realty Co.*, 59 Fed. (2d) 592 (C. C. A. 4th, 1932), which held the absolute dissolution of a corporation by appropriate state action did not deprive the federal court of jurisdiction in involuntary bankruptcy proceedings subsequently instituted. The statute in this case declared that the life of a corporation was completely ended upon a decree of dissolution. The only basis of distinction between this case and the principal case is that in the latter the petition in bankruptcy was a voluntary petition. But is this difference important? Legally, it is not. Practically, it might be just as important for the corporation to reorganize voluntarily under Section 77B, as it is to be reorganized upon the involuntary petition filed by creditors. Another difference in the cases is that in the *Hammond* case the dissolution of the corporation resulted from the insolvency of the corporation. However, the cause of dissolution should have no bearing upon determining the existence of a corporation for the purposes of being within the jurisdiction of the Federal Bankruptcy Act. It is the nature of the corporation's existence that should determine whether or not the federal court can gain jurisdiction over the dissolved corporation for the purposes of its reorganization.

It will be interesting to observe in the future whether the federal courts will adopt the interpretation of the minority as to the existence of a corporation dissolved by state decree so that they might give the more uniform and beneficial advantages of the Federal Bankruptcy Act, as recently amended, to financially wrecked corporations, or whether they will adhere to the strict interpretation as to a dissolved corporation and thereby render only the sometimes inadequate and more expensive state insolvency laws applicable to these dissolved corporations, frequently wrecked financially.

Clifford Brown.

INSURANCE—EFFECT OF DELAY IN ACCEPTING APPLICATION OR OFFER.—Action to recover damages because of the negligence of an insurance company to seasonably and within a reasonable time forward and pass upon an application for insurance. One Pope secured from Mrs. Parkey an application for a "non-medical" policy of insurance on her life for the sum of $2,000, she, at the time paying Pope, the agent, the first premium required, but her signature was not affixed thereto. Pope failed to forward the application or premium to the company, but later handed it to another agent, one Thompson, with the request that he secure Mrs. Parkey's signature. This, Thompson failed to do, but did in effect destroy the application and made out another which was immediately forwarded by Thompson to the company. The insurer required that all questions in the application must be propounded directly by the agent, and that the report give two references through whom it might secure reliable information as to the applicant. This application was never accepted or rejected by the company, and was pending at the time of the death of Mrs. Parkey, on August 14, 1929. The application reached the insurance office on July 23, 1929. The plaintiff, a daughter of deceased, named as beneficiary, recovered on the theory that the insurance company was negligent in not acting on the application in a reasonable time. The decision was reversed on appeal three years later. *American Life Insurance Co. v. Nabors,* 48 S. W. (2d) 459 (1932), 76 S. W. (2d) 497 (Tex. Comm'n App. 1935). Recovery in the first instance was allowed on the theory that there was a duty on the part of the insurance company to act promptly on all applications, and, on failure to do so, there was liability in tort. In the later decision the court proceeded on the theory that there can be no tort without a breach of legal duty, and there was no duty to contract with deceased.

In considering the possibility of recovery, two principles must be regarded. There is a possibility of recovery *ex delicto,* and of recovery *ex contractu.*

An original and leading case holding that a tort arose from a failure to accept an offer to make a contract within a reasonable time, was *Duffie v. Bankers' Life Ass'n of Des Moines,* 160 Iowa 19, 139 N. W. 1087 (1913). The Iowa court, in referring to the doctrine that where the law imposes no duty to contract there is no such thing as negligence of a party in the matter of delay in rejecting or accepting an offer, held that applications for insurance are an exception to this general rule, on the theory that insurance companies operate under franchises from the state, and that their business is of such general public interest that the receipt of the application implies a "duty on the part of the insurance company to act on the proposed risk within a reasonable time under the circumstances surrounding the transaction." The Supreme Court of Oklahoma, in *Security Insurance Co. v. Cameron,* 85 Okla. 171, 205 Pac. 151 (1922), holds, in line with the *Duffie* case, that a tort arises from the failure of the insurance company to notify the applicant for insurance within a reasonable time of the acceptance or rejection of his application. In *Wilken v. Capital F. Ins. Co.,* 99 Neb. 828, 157 N. W. 1021 (1916),

an authorized agent of the insurer sent an application for a specified amount of insurance upon certain property to a bank, to be executed by the owners, who signed the application and left it with the bank to be returned by the agent; but the bank, through some oversight, failed to return the application for more than ten days, and during that time the property was destroyed by fire. The insurer refused to pay the loss solely because the application had not been received and approved and the policy issued before the fire, the delay of the bank in forwarding the application being considered the act of the agent, for which the insurer was responsible. In *Strand v. Bankers L. Ins. Co.,* 115 Neb. 357, 213 N. W. 349 (1927), the court said: "The view that there is a remedy based on negligence seems to be founded on reason and justice. Good faith and fairness of both parties are required in negotiations for insurance. The retaining of the money (premium) of the applicant beyond a reasonable time would deprive him of its possession and use during the delay. The use of money or interest is a valuable right. In addition an unreasonable delay and the retention of an unearned premium might deprive an insurable applicant of an opportunity to apply elsewhere for and to procure insurance. Furthermore, an insurance company transacts business under a charter from the state. It is now recognized that insurance is affected with a public interest. It is regulated by the government for the protection of the insuring public."

An insurance company, having sought and obtained an application for insurance, and having received payment of the fees or premiums exacted, should be bound to act upon the application within a reasonable time or suffer the consequences caused by its neglect to do so, as insurance companies are, by law, held to a greater legal responsibility than are parties to purely private contracts or transactions. This is based on the idea that such companies act under a franchise of the state, and the policy of the state in granting the franchise proceeds on the theory of the interest of the public. *Columbian Nat. L. Ins. Co. v. Lemmons,* 96 Okla. 228, 222 Pac. 255 (1923).

A leading decision in line with that in the principal case is *Savage v. Prudential Life Ins. Co.,* 154 Miss. 89, 121 So. 487 (1929), in which the court says: "We are unable to perceive how an action may be maintained in tort which so clearly cannot be maintained on any theory in the contract. The Prudential Life Insurance Company was under no duty to write insurance on the life of the appellant's intestate, because there was no statute in this state fixing such duty upon insurance companies. We can find no such rule at the common law. It is quite elementary that there cannot be a tort without a breach of a legal duty. It is true that the business of insurance is affected with a public interest, and it may be that under the State and Federal Constitutions the Legislature might impose upon insurance companies a duty in this behalf. But, unless and until the Legislature shall declare a legal duty on the insurance companies to an applicant for insurance, despite the terms of the application, this court is without the power or the desire to trench upon legislative authority." The appellant alleged the combined negligence of the insurance company and its agent, in carelessly and negligently failing to act upon and approve the application for life insurance for fifty-two days. The court decided in favor of the insurer, holding that the insurance company breached no legal duty which it owed to the plaintiff's intestate, and for which an action in tort might be sustained; and, if the insurance policies were unduly delayed, as claimed by appellant's intestate, he was at perfect liberty to seek insurance elsewhere, and was under no obligation to the insurance company. In *Metropolitan Life Ins. Co. v. Brady,* 174 N. E. 99 (Ind. App. 1930), the Indiana Appellate Court refused to recognize the doctrine of tort liability, as applied to an insurance company for negligent and unreasonable delay in acting upon an application for life insurance, where the application was received without any premium being paid. The applicant subscribed for life insurance on April 7th, but, on account of her health and family history, the application was rejected and a policy calling for an increased premium was mailed from the home office on April 27th, for submission

to the applicant. This policy arrived at the district office on April 29th; and the agent on calling at the applicant's home on May 7th, being informed of her illness, refused to deliver or submit the policy. The court said: "This Court cannot perceive how a tort liability can be predicated upon an insurance company to either accept or reject an application for insurance within a reasonable time. This legal duty must arise by virtue of some express provision of the statute or from the contractual relation existing between the parties whereby a legal duty, not a moral duty, devolves upon the insurance company to act within a reasonable time upon an application submitted." In *National Union Fire Ins. Co. v. School Dist. No. 55,* 122 Ark. 179, 182 S. W. 547 (1916), the court said: "Negligence and liability therefor cannot be predicated upon a state of facts that do not impose any legal duty." In *Thornton v. National Council Junior Order United American Mechanics,* 110 W. Va. 412, 158 S. E. 507 (1931), the opinion of the court is as follows: "No reason is apparent why an insurance contract should be regarded as of any more interest to the public than a contract of employment. It is of as much importance to the public that a person and his dependents have support during his lifetime (by wages or salary) as that his beneficiaries have a competency (through insurance) after his death. Yet it has never been held that delay in passing upon an application for employment affected the public interest to the extent that it made the employer liable for all damages arising from such delay."

We have already seen that some states allow recovery for delay in acting upon an application for insurance, but that doctrine has only been regarded in the light of a tort action for negligence in delay. It is an axiom in the law of contracts that an offer creates no duty of acceptance in the offeree. According to the great weight of authority, mere delay by the insurer in acting upon the application raises no implication of acceptance, nor does it estop the insurer to deny the existence of a contract. VANCE ON INSURANCE (2nd ed.) 188. Under this concept, therefore, courts have found it necessary to complete a contract of insurance on which to base a contractual duty. This has been accomplished through the doctrine of "constructive acceptance," "silence as acceptance," and even on the grounds that an agent was authorized to complete, and make the contract binding. RESTATEMENT OF THE LAW OF CONTRACTS § 72. In the majority of cases, however, the plaintiff maintained his action on the theory that the long silence of the insurance company constituted an acceptance of the offer contained in his application, or that from the silence the law would presume an acceptance. WILLISTON ON CONTRACTS § 91.

In *Witten v. Beacon Life Asso.,* 33 S. W. (2d) 989 (Mo. App. 1931), the plaintiff on the tenth day of July signed two applications for certificates of insurance in the defendant company, and paid the soliciting agent the premium on each application as a membership fee. The application was mailed to the home office the next day, and the policy was issued July 23rd, without any investigation of the application being made. The court held, in an action to recover by the plaintiff, as a result of being injured on July 20th, that there was such delay in issuing the policy as to raise a presumption of acceptance. In *Great Southern L. Ins. Co. v. Dolan,* 239 S. W. 236 (Tex. Civ. App. 1922), recovery was allowed on the basis of estoppel, where an agent of the insurance company received a premium from the applicant and sent it in with the application. The agent assured the applicant that the money would be returned in case he was rejected by the company. The plaintiff passed the examination and did everything required of him, but had received no notice for several months. The court held that it was reasonable for the plaintiff to believe and assume that he was insured, even though his application was held up by the medical examiner because a sample of urine had never reached him. But in *Brownwood Benev. Asso. v. Maness,* 30 S. W. (2d) 1114 (Tex. Civ. App. 1930), the court said: "An application for insurance does not become a contract unless and until it is accepted by the insurer. This is elementary. There is no contract without an offer and an acceptance. In the instant

case the application signed by the assured contained a stipulation that no liability should rest with the association unless the policy of insurance is issued and delivered to, and signed by the assured during his life time and while in good health."

It has been held, however, in a few jurisdictions, that mere retention of the premium and failure to notify the applicant within a reasonable time of the rejection of his application constitutes such acceptance as will complete a contract of insurance. This view was adopted by the court in *Preferred Acc. Ins. Co. v. Stone,* 61 Kan. 48, 58 Pac. 986 (1899). In *Continental Ins. Co. v. Haynes,* 10 Ky. Law Rep. 276 (1888), the court said: "A contract of insurance takes effect from the acceptance by the agent of the application, the cash premium and the premium notes, subject to the right of the company within a reasonable time to reject the application. If the application is not approved, it is the duty of the company to notify the insured and return the premium, and if it does this before loss, the contract is discharged; otherwise not. And the fact that the application provides that the policy is not to issue until the application is approved does not alter the liability."

Kukuska v. Home Mut. Hail-Tornado Ins. Co., 235 N. W. 403, 204 Wis. 166 (1931) (commented on, 7 WIS. L. REV. 48), is a recent and important case on this doctrine. The plaintiff made an application for insurance on July 2nd and received no further information as to rejection of application until about noon August 1st. About 4 o'clock in the afternoon on August 1st a violent hailstorm swept over plaintiff's farm, doing the damage complained of. Other insurance companies were writing hail insurance, and, if plaintiff had been notified of the rejection of his application within a reasonable time, he could have protected himself against such loss. Rosenberry, C. J., gave the opinion, saying: "Under such circumstances, having in view the nature of the risk against which the insurer seeks protection, is there not a duty upon the insurer to act upon the application within a reasonable time? Can the insurer, having pre-empted the field, retain control of the situation and the applicant's funds indefinitely? Does not the very nature of the transaction impose upon the insurer a duty to act? It is considered that there is a duty. If the insurer is under such a duty and fails to perform the duty within a reasonable time and, as a consequence, the applicant sustains damage, it is not vastly important that the legal relationship be placed in a particular category. If we say it is contractual, that is, there is an implied agreement under the circumstances on the part of the insurer to act within a reasonable time; or, having a duty to act, the insurer negligently fails in the performance of that duty; or that the duty springs out of a consensual relationship, and is therefore in the nature of a quasi-contractual liability, is not vitally important. Each view finds some support in the cases. It seems to be more in accord with ordinary legal concepts to say that it is a quasi-contractual duty."

David Gelber.

LIBEL AND SLANDER—PRIVILEGE—MISSTATEMENTS OF MATTERS OF PUBLIC INTEREST.—In *Washington Times Co. v. Bonner,* 66 App. D. C. 280, 86 Fed. (2d) 836, 110 A. L. R. 393 (1936), it was held that the privilege of fair comment on matters of public interest, which constitutes a defense to an action for defamation, does not extend to misstatements of fact, even though made without malice.

The instant case is a reassertion of the general rule that fair comment on and criticism of the acts and conduct of a public officer or candidate for public office are, in the absence of malice, privileged, but this does not apply to a false statement of fact. In the majority of jurisdictions a defamatory statement of fact concerning one in public life, or one who is a candidate for office, if false, is action-

able. Annotation, 110 A. L. R. 412. The reasoning in the opinion of *Davis v. Shepstone,* L. R. 11 App. Cas. 187 (1886), is often cited in support of the general rule: "There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment and criticism and allegation of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct." Harper puts forth the point that when a man enters public life, he subjects his entire life, his every act, and his every utterance to public judgment, and he cannot be heard to complain if the decision is not favorable to him. HARPER, LAW OF TORTS § 251.

The leading case for the majority rule perhaps gives the strongest reason for the rule's existence. In *Post Publishing Co. v. Hallam,* 59 Fed. 530 (C. C. A. 6th, 1894), it was said that "the danger that honorable and worthy men may be driven from politics and public service by allowing too great latitude in attack upon their characters outweigh any benefit that might occasionally accrue to the public from charges of corruption that are true in fact, but are incapable of legal proof." This case squarely puts forth the proposition that an honest belief upon reasonable ground is not enough, and that there is an absolute duty to state true facts. See, also, *Nevada State Journal Publishing Co. v. Henderson,* 294 Fed. 60 (C. C. A. 9th, 1923). Harper cites cases to show that opinions may not be written in such a way that they appear to be a presentation of facts; they must be written in such a way that will clearly appear as an opinion. The extreme of this rule is that the facts must be separately stated, in order that they will not become confused with the inferences from these facts. See HARPER, LAW OF TORTS, § 251.

There is, also, another difference of opinion as the rationale of the rule. Generally fair comment is regarded as a genuine privilege protecting the writer from liability. But some authorities have considered fair comment as entirely out of the range of libel and not libelous at all, on the theory that when there is no malice and the facts are true there can be no libel in matters of public concern. In *Merry v. Guardian Printing & Publishing Co.,* 81 N. J. L. 632, 80 Atl. 331 (1909), the court, while holding that fair comment on and criticism of the acts of a public officer are not actionable, said that comment of this kind is not "privileged" by reason of the occasion, in the strict legal sense of that term; that what is really meant is that fair comment on, and criticism of, matters of public concern are not libel, and that the words are not defamatory. Here the court placed its emphasis upon malice, and malice was to be proved by the falsity of the facts, whether it was due to honest mistake or not.

The minority rule as to this proposition of the qualified privilege of fair comment on public matters may be stated generally as follows: " . . . the privilege extends to misstatements of fact in a publication or communication relating to a public officer or a candidate for office, if the other conditions of a qualified privilege exist." Annotation, 110 A. L. R. 412, 435. The leading case for this view is *Coleman v. MacLennan,* 78 Kan. 71, 98 Pac. 281, 20 L. R. A. (W. S.) 561, 130 Am. St. Rep. 390 (1908), in which it was held that a publication is privileged although the matter contained in the article may be untrue in fact, and derogatory to the character of the candidate. The court said: "If the publisher of a newspaper publishes an article reciting facts and making comment relating to the official conduct and character of a state officer who is a candidate for re-election for the sole purpose of giving to the people what he honestly believes to be true information, and for the sole purpose of enabling the voters to cast their ballots more intelligently and the whole thing is done in good faith, the publication is privileged, although the matters contained in the article may be untrue in fact and

derogatory to the character of the candidate." This case was followed by *Good v. Higgins,* 99 Kan. 315, 161 Pac. 673 (1916), in which it was held that before statements concerning a candidate for office can be excused as privileged they must have been uttered in good faith in the sincere belief of their truth, in an honest endeavor to lay the facts before the electors.

Considered by and large, it would seem that the majority rule rests upon the sounder foundation. It is true that when one enters public life he lays before the public his every act and utterance, and this is only fair if the public is to judge his character and fitness as a public officer. But this should not include misstatements of fact, for by them nothing is gained. Yellow journalism thrives upon the nocuous seed of sensationalism. If a newspaper is to be permitted to defend itself upon the ground of honest belief, it will cease to be a purveyor of true news and become an instrument for the promulgation of scandalous falsehoods. The result of this will be that many men whose lives are irreproachable will shun public service because of an aversion to sacrifice their family's good name to a license which permits base falsehoods to be circulated. It must be remembered that it is extremely difficult for truth to overtake and overcome scandal that has been published, even though the scandal was false. It would seem that a newspaper that publishes material that may ruin the reputation and future of a respectable man and his family without assuring itself of the truth of the facts which it is about to print, comes dangerously close to malice in its haste to print "news."

Ernest L. Lanois.

RIGHTS IN LAND—ADVERSE POSSESSION—LIMITATIONS OF ACTIONS.—The entrance of a subterranean cavity, known as "Marengo Cave," was located on D's land, but the southeasterly portion of the cave extended under E's land, although this fact was unknown to either party. D had charged admission to tourists to view the cave and had held exclusive possession for twenty-one years after he had purchased the land. Not until 1932 was a survey made, as a result of which part of the cave was determined to be under E's land. *Held,* even though D's possession could be said to have been actual, exclusive, and continuous for the statutory period, it was not so visible that the injured party could discover it with reasonable diligence, so that the statute of limitations would begin to run. *Marengo Cave Co. v. Ross,* 10 N. E. (2d) 917 (Ind. 1937).

The general rule is that the adverse possession must be open, visible, public, and notorious, where there is no actual knowledge on the part of the true owner. The words "open" and "notorious" mean that the disseizor's claim of ownership must be evidenced by such acts as would put a man of ordinary prudence on notice of the adverse claim. *Bender v. Brooks,* 103 Tex. 329, 127 S. W. 168, Ann. Cas. 1913A, 599 (1910).

The principal case held that the rule of mistaken boundary does not apply, again because the adverse possession was not open and visible. The possession under mistaken boundary is based on the fact that it is *prima facie* sufficient that actual, visible, and exclusive possession is taken under a claim of right. *Rennick v. Shirk,* 163 Ind. 542, 73 N. E. 546 (1904). See, also, *St. Louis Ry. Co. v. Mulkey,* 100 Ark. 71, 139 S. W. 643, Ann. Cas. 1913C, 1339 (1911).

Underground adverse possession is a very unusual and peculiar circumstance, with very few cases being found on it. The case best in point, cited in the principal case, is *Lewey v. H. C. Frick Coke Co.,* 166 Pa. St. 536, 31 Atl. 261, 28 L. R. A. 283, 45 Am. St. Rep. 684 (1895), where it was held that the law does not require an owner of land to explore underground or to conduct surveys by mining