



8-1-1949

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Recommended Citation

Louis F. DiGiovanni, E. A. Steffen, John L. Globensky & Lenton G. Sculthorp, *Contributors to the Summer Issue/Notes*, 24 Notre Dame L. Rev. 535 (1949).

Available at: <http://scholarship.law.nd.edu/ndlr/vol24/iss4/4>

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CONTRIBUTORS TO THE SUMMER ISSUE

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NOTES

INSURANCE—INCONTESTABLE CLAUSE AS A BAR TO REFORMATION OF LIFE INSURANCE POLICIES.—The United States Court of Appeals of the Ninth Circuit has recently decided, in *Richardson v. Travelers Insurance Company*,¹ that the incontestable clause in life insurance policies precludes the insurer, after the "contestable" period has run, from pursuing the traditional equitable remedy of reformation when there has been a mutual mistake in the integration of the contract.² This rule is in direct conflict with the rule previously announced by the Court of

¹ 171 F. (2d) 699 (C.C.A. 9th 1948).

² Reformation is appropriate, when an agreement has been made, or a transaction has been entered into or determined upon, as intended by all the parties interested, but in reducing such agreement or transaction to writing, either through the mistake common to both parties, or through the mistake of the plaintiff accompanied by the fraudulent knowledge and procurement of the defendant, the written instrument fails to express the real agreement or transaction. 3 POMEROY, EQUITY JURISPRUDENCE § 870 (5th ed. 1941).

Appeals of the Tenth Circuit, in the leading case of *Columbian National Life Insurance Company v. Black*.³ The rule of the *Richardson* case is also at variance with state decisions in which this point of law has been considered.⁴

A consideration of the original purpose, and the subsequent history and judicial construction of the incontestable clause should assist in an evaluation and comparison of the incompatible views set forth in the cases respecting the availability of reformation as a remedy after the contestable period has run.

I

A typical incontestable clause provides: "This policy shall be incontestable after two years from date of issue, except for non-payment of premiums." The clause was originally inserted in life insurance policies by the companies as a sales stimulant.⁵ The companies had found it necessary to counteract, in some manner, the public resentment which had grown up against the insurance companies because of the uncertainty and delay in the payment of death benefits under the policies. Often when the insured died after having paid premiums for a number of years, the policy would be contested and defeated by the insurer on the grounds, for example, that the policy had been procured by fraud or misrepresentation. The public came to realize that their position as insured parties, beneficiaries, and as other interested persons was not secure, and that prompt and full payment of benefits could not be expected with certitude. Although the contest of policies was often justified because of the actual fraud or misrepresentation of the insured, it is equally true that policies were frequently avoided after many years on some mere technicality attributable to the inadvertence of the insured. The susceptibility of life insurance policies to litigation and possible complete avoidance (after years of premium payment and after reliance on the validity of the policy) tended to defeat the very purpose of the contract: to secure, in accordance with the desires of the insured, a legally interested party or parties against the risk of loss occasioned by the death of the insured. For this reason the incontestable clause gradually became accepted as a standard clause in life insurance policies and is now required by statute in a majority of the states.

³ 35 F. (2d) 571 (C.C.A. 10th 1929).

⁴ *Mates v. Pennsylvania Mutual Life Insurance Co.*, 316 Mass. 303, 55 N. E. (2d) 770 (1944); *Neary v. General American Life Insurance Co.*, 140 Neb. 756, 1 N. E. (2d) 908 (1942); *Equitable Life Assurance Society of United States v. Rothstein*, 122 N. J. Eq. 606, 195 Atl. 723 (1937); *Buck v. Equitable Life Assurance Society of United States*, 96 Wash. 683, 165 Pac. 878 (1917).

⁵ *Malloy et al. v. New York Life Insurance Co.*, 103 F. (2d) 439 (C.C.A. 1st 1939).

II

In accordance with the purpose of the incontestable clause, the courts have held, almost without exception, that the clause will prevent the insurer from raising the defense of fraud or misrepresentation in order to avoid payment under the policy.⁶ However, in early cases the courts often loosely stated the general proposition that the incontestable clause should bar all defenses not specifically excepted therein.⁷ Nevertheless, as new and varied factual situations arose involving the clause, the courts in many instances refused to adopt such a general rule when its adoption would result in inequitable decisions or would operate in unexpected derogation of established legal principles. It would seem that the confusion surrounding the scope of the clause (specifically, as to what constitutes a "contest") was caused originally by the unfortunate general wording of the clause, by the subsequent generalizations of the courts, and later by the perpetuation in state statutes of the ambiguously worded clause. The combination of these factors has tended to result in an unnatural broadening of the essentially desirable principle of insurance law that the policy should be construed most favorably for the insured. Though, as pointed out, the clause was undoubtedly meant to apply to the defense of fraud or misrepresentation, it is equally true that the clause was never meant to operate as a warrant to confess judgment.⁸ Furthermore, the general and ambiguous wording of the clause renders frivolous any attempt to apply a misconceived notion of the "plain meaning" rule of construction, especially since other broad policy considerations, which will be discussed later, appear to be superior and controlling.

Some courts, recognizing the error of extending the clause to bar all defenses after the contestable period has run, have found that actions brought by the insured under certain circumstances are not "contests" within the meaning of the clause. Thus the courts have held

⁶ *Ostroff et al. v. New York Life Ins. Co.*, 104 F. (2d) 986 (C.C.A. 9th 1939); *Mutual Life Ins. Co. of New York v. Margolis et al.*, 11 Cal. App. (2d) 382, 53 P. (2d) 1017 (1936); *Morris v. Missouri State Life Ins. Co.*, 114 W. Va. 278, 171 S. E. 740 (1933); *Prudential Ins. Co. of America v. Connallon*, 106 N. J. Eq. 251, 150 Atl. 564 (1930), *reversed on other grounds*, 108 N. J. Eq. 316, 154 Atl. 729 (1931); *Harrison v. Provident Relief Ass'n. of Wash., D. C.*, 141 Va. 659, 126 S. E. 696 (1925); *Dibble v. Reliance Life Ins. Co. of Pittsburg*, 170 Cal. 199, 149 Pac. 171 (1915).

⁷ See *Northwestern Mut. Life Ins. Co. v. Johnson*, 254 U. S. 96, 97, 41 S. Ct. 47, 65 L. Ed. 155 (1920); *Missouri State Life Ins. Co. v. Cranford*, 161 Ark. 605, 257 S. W. 66, 67 (1923); *Commercial Life Ins. Co. v. McGinnis*, 50 Ind. App. 630, 633, 97 N. E. 1018 (1912). Slightly more restrictive than the dicta referred to in the above cases is the statement in *Sipp v. Philadelphia Life Ins. Co.*, 293 Pa. 292, 142 Atl. 221, 223 (1928), to the effect that the incontestable clause is an agreement not to contest the validity of the policy as written.

⁸ See Hyatt, *The Incontestable Clause in Life Insurance Policies — A Statute of Limitations, but not a Confession of Judgment*, 7 U. OF NEWARK L. REV. 130 (1942).

that the clause does not preclude the insurer from: avoiding the policy on the ground that the risk was not covered by the policy, since the death of the insured had occurred as a result of execution for a crime (in spite of the fact that the death occurred after the running of the contestable period, and that death under such circumstances was in no way provided for under the policy);⁹ setting up the defense of a third person's fraud in procuring the execution of the policy, as evidenced by the third person's intent to murder the insured and obtain the benefits of the policy;¹⁰ showing that the alleged policy never took effect as a contract;¹¹ proving that the insured was incapable of contracting under the insurance law;¹² disputing the amount the insured claimed under the policy;¹³ showing abandonment or failure to pay premiums;¹⁴ establishing the fact that someone other than the insured took the physical examination;¹⁵ showing that there was no insurable interest in favor of an assignee of the policy;¹⁶ proving that there was no period allowed the insurer to investigate for fraud.¹⁷ In none of the above mentioned cases was the defense allowed or the relief granted specifically excepted from the coverage of the clause.

III

As mentioned at the outset, the rule recently announced by the Court of Appeals in *Richardson v. Travelers Insurance Company*¹⁸ tends to broaden the scope of the incontestable clause. Having briefly discussed the history of the clause and the significance of generally relevant court decisions as indicating the accepted limits of the clause, the question

⁹ *Scarborough et al. v. American Nat'l Ins. Co.*, 171 N. C. 353, 88 S. E. 482 (1916).

¹⁰ *Columbian Mut. Life Ins. Co. v. Martin et al.*, 175 Tenn. 517, 136 S. W. (2d) 52 (1940).

¹¹ *McDonald v. Mutual Life Ins. Co. of New York*, 108 F. (2d) 32 (C. C. A. 6th 1939).

¹² *Ludwinski v. John Hancock Mutual Life Ins. Co.*, 317 Pa. 577, 178 Atl. 28 (1935).

¹³ *Sanders v. Jefferson Standard Life Ins. Co.*, 10 F. (2d) 143 (C. C. A. 5th 1925).

¹⁴ *Haas v. Mutual Life Ins. Co. of New York*, 90 Neb. 808, 134 N. W. 937 (1912).

¹⁵ *Maslin v. Columbian Nat. Life Ins. Co.*, 3 F. Supp. 368 (S. D. N. Y. 1932).

¹⁶ *Clement et al. v. New York Life Ins. Co.*, 101 Tenn. 22, 46 S. W. 561 (1898).

¹⁷ *Reagan v. Union Mut. Life Ins. Co.*, 189 Mass. 555, 76 N. E. 217 (1905). It is interesting to note that in at least one case the insurer has sought to avoid the effect of the incontestable clause by bringing an action at law for deceit after the contestable period has run, thus, as argued, "affirming" the policy rather than "contesting" it within the meaning of the clause. However, this novel attempt to avoid the effect of the clause was not successful. *Columbian Nat. Life Ins. Co. v. Wallerstein*, 91 F. (2d) 351 (C.C.A. 7th 1937).

¹⁸ Note 1 *supra*.

remains whether a proper basis for the rule of the *Richardson* case can be found in a consideration of the previous decisions exactly in point respecting the availability of reformation,¹⁹ in controlling equities between the parties in the case itself, or in broad principles of public policy.

According to the facts of the *Richardson* case, the insured applied to the plaintiff company for a policy of life insurance in the amount of \$10,000. Through an alleged mistake the company issued a policy under which the insured was entitled to receive benefits in twice the amount afforded by the policy applied for. The premiums paid during the life of the policy amounted to only slightly more than one-half the amount the insured would normally be required to pay for the policy actually issued. The policy contained a standard clause making the policy incontestable after one year from the date of issue except for non-payment of premiums. After the policy had been in force for twenty years,²⁰ the insurance company first became aware of the alleged mistake and brought an action for reformation of the insurance contract. The lower court decided that the suit for reformation was not a contest of the policy. Reformation was granted in accordance with customary equitable principles, the court having found sufficient evidence of mutual mistake in the integration of the insurance contract to warrant granting the relief prayed for. In reversing the lower court the court of appeals stated that the wording of the incontestable clause was clear and unambiguous and that the coverage of the clause should logically extend to and thus bar an action for reformation of the policy.

The facts of the *Richardson* case do not seem in any substantial respect distinguishable from *Columbian Life Insurance Co. v. Black*²¹ or from other recently decided cases on this subject.²² The same issue was raised in all of these cases: whether or not the incontestable clause should be extended so as to bar action for reformation after the contestable period has run. In one instance, for example, the cash surrender value was misstated in the policy as issued; reformation was allowed

¹⁹ Note 4 *supra*.

²⁰ Laches of the insurer has largely been ineffective to defeat actions for equitable relief, even though twenty years or more may have passed since issuance of the policy. See *Columbian Nat. Life Ins. Co. v. Black*, 35 F. (2d) 571 (C.C.A. 10th 1928); *Buck v. Equitable Life Assurance Society of United States*, 96 Wash. 683, 165 Pac. 878 (1917). The unwillingness of the courts to give effect to the defense of laches in these cases is not in accord with the general rule that, if in an equitable action, the period has passed under which an action at law would be barred by the Statute of Limitations, the Statute of Limitations will be applied by analogy. *Kelley et al. v. Boettcher et al.*, 85 Fed. 55, 56 (C.C.A. 8th 1898). Thus in the *Richardson* case, a plea of laches would likely have been of no avail, despite the fact that twenty years had passed since the issuance of the policy.

²¹ Note 3 *supra*.

²² Note 4 *supra*.

to correct the policy after the contestable period had run.²³ In another case a policy which through a clerical error provided for too large a cash settlement was held to be subject to reformation.²⁴ Correction and adjustment of the policy for misstatement of age was held not to be a contest of validity within the meaning of the incontestable clause.²⁵ In the *Black* case, an insured who applied for an ordinary life policy, but who received an entirely different policy on which he paid premiums for an ordinary life policy, was not able to invoke the incontestable clause as a defense when the insurer brought an action for reformation.²⁶ A mistake in the cash reserve valuation of an insurance policy was held to be corrected by a letter from the insurer to the insured, although no other action was taken by the insurer within the contestable period.²⁷

As has been indicated above, a majority of the cases specifically in point have ruled that an action for reformation is not a "contest" within the meaning of the incontestable clause and thus is not barred by the clause. A further examination of the *Richardson* case does not disclose any controlling equities between the immediate parties to the suit which would support the decision reached by the court. Substantial justice could have been achieved by resorting to the usual requirements for reformation. If the court had seen fit to decide the case on the customary equitable principles, and had found that the evidence warranted granting the relief prayed for, it would merely have made the benefits as provided for in the written instrument conform to the benefits for which the insured had actually contracted (and paid). The alleged reason for the rule of the *Richardson* case fails. The purpose of the incontestable clause — that the insured get what he bargained for without fear of a belated avoidance of the policy—would not be defeated by granting relief in the form of reformation to the insurer. Public policy does not favor a rule which would contradict the principle that nothing more should rightfully be given to a contracting party than the benefits to which he is entitled "in law and in fact."²⁸ It might be argued that, under the rule of the *Black* case, for example, a substantial contest of a policy *could*, in another case, be made under the guise of reformation; but the danger of prejudice to the substantial rights of the insured in such a case is obviated by the stringent evidential requirements for reformation: the burden of proof which rests upon the party asking for reformation cannot be satisfied by mere

²³ *Mates v. Pennsylvania Mut. Life Ins. Co.*, note 4 *supra*.

²⁴ *Neary v. General American Life Ins. Co.*, note 4 *supra*.

²⁵ *Equitable Life Assurance Society of United States v. Rothstein*, note 4 *supra*.

²⁶ *Columbian Nat. Life Ins. Co. v. Black*, note 3 *supra*.

²⁷ *Buck v. Equitable Life Assurance Society of United States*, note 4 *supra*.

²⁸ See *Buck v. Equitable Life Assur. Society of United States*, note 4 *supra* at 879.

preponderance of the evidence; evidence of proof of mutual mistake must be of the clearest and most satisfactory character.²⁹

Of course it would be highly desirable, in deference to the insured, his beneficiaries, and other interested parties, that any litigation concerning the validity of the policy as written should be required to take place within a relatively short period of time after the issuance of the policy. However, it is submitted that reasons of public policy weigh heavily in favor of preserving the traditional equitable remedy of reformation in these cases, even after the contestable period has run. Though the insurance policy (the words being those of the insurer) is to be construed most strongly against the company and most favorably for the insured,³⁰ this rule should not be extended to prevent reformation; since the results would in many cases be unreasonable. For example, if the incontestable clause should be held to preclude reformation in an action brought by the insurer, it would seem that the clause should likewise bar an action brought by the insured for reformation.³¹ Thus if a \$10,000 policy were applied for and the policy as written was for \$100.00 because of the inadvertence of a clerk in placing a decimal point, the insured would not be able to reform the policy after the contestable period had run; and of course an insurance company would be prevented from changing a policy which improperly called for the payment of \$10,000 in benefits to the \$100.00 policy actually agreed upon. The incongruity of these results is obvious. These would not seem to be "chamber of horrors" arguments, since they involve practical considerations and situations which may easily arise in the future.

IV Conclusions

Despite the unfortunate wording of the incontestable clause, the early generalizations of the courts, and the subsequent adoption of the clause by statute as originally worded, the courts, as has been pointed out, have gradually defined certain circumstances under which the incontestable clause will not bar traditional remedies and defenses. The decision in the *Richardson* case is not in accord with this trend, and does not recognize the limits which the courts have already set upon the coverage of the clause.³² Since the incontestable clause in its present form is not likely to disappear overnight, it would seem prudent to continue to recognize the limits of the clause which have been set

²⁹ See *Philippine Sugar Estates Development Company v. Government of The Philippine Islands*, 247 U. S. 385, 38 S. Ct. 513, 62 L. Ed. 1177 (1918).

³⁰ *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 3 S. Ct. 207, 27 L. Ed., 932 (1883).

³¹ See *Columbian Nat. Life Ins. Co. v. Black*, note 3 *supra*, at 577.

³² It is to be noted that in the *Richardson* case there were no previous California decisions exactly in point, so that the court was free to adopt a rule in accordance with the *Black* case and the other state cases on the subject.

by judicial construction. Rules and decisions which may result in legal and equitable absurdities will thereby be avoided. Specifically should the courts avoid adoption of a rule which is in derogation of the historic remedy of reformation. The court in the *Richardson* case emphasized that since the incontestable clause precludes raising the defenses of fraud and misrepresentation, which are inceptional defenses, the clause should logically be extended to bar an action for reformation based on mistake, which is also an inceptional defense; but it should be remembered that in the inexact science of judge-made law, the pursuit of pure logic as a controlling criterion for deciding cases can lead to legally ludicrous and equitably pernicious results.

Louis F. DiGiovanni

E. A. Steffen, Jr.

DEFAMATION—LIBELOUS PER SE—IMPUTATION THAT ONE IS A COMMUNIST.—In the past decade such a stigma has become attached to the name "Communist" in the United States that the courts have almost unanimously held it libelous per se falsely to impute that one is a Communist; yet, concurrent with these decisions, the Communists have functioned as a political party, with the privilege of a place on the ballot in many states.

The Communist party is not—as yet, at least—prohibited by law; but the courts, in affirmatively protecting anyone unjustly accused of being a Communist, have taken judicial notice of the repugnance with which Communism is generally viewed and have recognized realistically that the fundamental problem is the significance of the name in the mind of the typical American citizen.

To say that the name Communist, when falsely applied to a person, is libelous per se, denotes that the law assumes that anyone called a Communist suffers serious damage to reputation. It is not the purpose of this article to become involved in the controversy concerning the use of the terms "libelous per se," "defamatory per se," or "actionable per se." Actually the courts use these terms interchangeably, meaning that the name or words published concerning the plaintiff are of such a nature that a cause of action is stated without any necessity of showing special damages, the inference being that as a matter of law anyone so libeled must have suffered damage.¹ All that must be proved is the false publication by the defendant. The important factor is the reaction that most people have to the name Communist. To call a person a Com-

¹ *Sweeney v. United Feature Syndicate, Inc.*, 129 F. (2d) 904 (C.C.A. 2nd 1942); *Jerald v. Huston*, 120 Kan. 3, 242 Pac. 472 (1926); *Mattice v. Wilcox*, 147 N. Y. 624, 42 N. E. 270 (1895).

munist is actionable per se if the populace of a community, section, or nation consider the name to expose a person to ridicule, disgrace, contempt, hatred, or disdain.

The Communist epithet has not always been so loathsome in the public mind. Not until 1929 did a case appear warning of any possible liability for writing of another as a Communist. Then the highest court of New York merely indicated that it might have been libelous if the plaintiff had been called a Communist.²

It is probable that individuals were erroneously identified as Communists prior to this occasion. Nevertheless, throughout that period a charge of "Communist" was not an ineradicable blemish on reputation, since Communism was regarded as a mere political and economic theory in the embryonic stage. Previously courts in diverse jurisdictions had established the appellations of Anarchist,³ Socialist,⁴ or Red⁵ as libelous per se. These groups were associated in the public mind with revolutionary "bomb throwing" forces, denoting violence. They were regarded as contemptible factions using gangster methods to sabotage and overthrow the American political and economic system. Similarly, in the turbulent years before and during World War II, writing falsely of one as a Nazi, or Fascist, was libelous per se. Considering the aroused public sentiment toward anything Nazi⁶ or Fascist⁷, the consequence of being characterized as an adherent of one of these groups meant immediate loss of reputation and prestige, with exposure to hatred and possible violence.

In *Garriga v. Ritchfield*,⁸ decided in 1940, the first significant decision appeared relating the false charge of Communism to libel per se. A New York lower court directly faced the question "... whether the statement that one is affiliated with the Communist Party—even though it be false—constitutes a libel per se?" The court, in a lucid decision based on the premise that so long as the Communist party is accorded a legal political status, it is inconsistent to regard a fallacious, written charge that a person is a Communist as libelous per se, stated:⁹

The fact remains, however, that the Communist Party, under existing law, may function as a political party. It may

² *Hayes v. American Defense Society*, 252 N. Y. 266, 169 N. E. 380 (1929).

³ *Von Gerichten v. Seitz*, 94 App. Div. 130, 87 N. Y. S. 968, (1904); *Cerveny v. Chicago Daily News Co.*, 139 Ill. 345, 28 N. E. 692 (1891).

⁴ *Ogren v. Rockford Star Printing Co.*, 288 Ill. 405, 123 N. E. 587 (1919).

⁵ *Toomey v. Jones*, 124 Okl. 167, 254 Pac. 736 (1926).

⁶ *Derounian v. Stokes*, 168 F. (2d) 305 (C. C. A. 10th 1948); *Levy v. Gelber*, 175 Misc. 746, 25 N. Y. S. (2d) 148 (1941).

⁷ *Devany v. Quill*, 187 Misc. 698, 64 N. Y. S. (2d) 733 (1946); *Luotto v. Field*, 49 N. Y. S. (2d) 785, (1944); *Holden v. American News Co.*, 52 F. Supp. 24 (E. D. N. D. 1943); *Territory of Hawaii v. Crowley*, 34 Hawaii 774 (1939).

⁸ 174 Misc. 315, 20 N. Y. S. (2d) 544 (1940).

⁹ *Id.* at 549, 20 N. Y. S. (2d) 544.

place upon our ballots its candidates for public office—even for the highest in the land—and seek popular support for them. It may, like any other established political party, proclaim its principles and invite public approval of them. At least while it possesses that status and those rights, it cannot be held that it is defamatory per se to say of one that he is affiliated with, or a member of, the Communist Party, any more than it would be to say that he is a member of any other legally recognized political party.

The reasoning in this case has not been followed in subsequent decisions in New York or other jurisdictions. Yet the very fact of its isolated position has served to make it conspicuous, and the opinion merits close scrutiny. If the Communist faction is de facto a true American political party, the name should not be considered libelous per se. The court apparently erred in not fully considering society's antipathy toward Communism and society's refusal to consider the Communist party as an American political organization. The fact is that most Americans regard the Communist party as linked with Moscow and as working contrary to the very foundation of the American government.¹⁰ To them, Communism is more than a political theory. It is a way of life diametrically opposed to American concepts of religion, politics, economics, fair play, and common decency. That such is the common opinion of Communism is apparent from the discriminatory attitude of the Federal Government, as expressed both in Executive Orders¹¹ and in legislation.¹²

10 For a discussion on this point: see Note, 23 NOTRE DAME LAWYER 577 (1948). It is interesting to note the words of J. Edgar Hoover in his address to the American Legion Convention at San Francisco, October 1, 1946, that the party "is not a true political party," but "is working against our people;" and remarks of Louis Francis Budenz, former Communist editor, before the House Committee on Un-American Activities, that "the Communist Party in the United States is a direct arm of the Soviet foreign department." N. Y. Times, April 4, 1946, § 1, p. 19, col. 6. Also see 45 MICH. L. REV. 518 (1947).

11 Presidential order outlining a procedure for the discharge of those employees as to whom reasonable grounds exist for the belief that the person involved is disloyal to the government: Exec. Order No. 9835, Part V, § 1, 12 FED. REG. 1938 (1947); for a comment on this order, see 7 LAW GUILD REV. 68 (1947).

12 The public attitude toward Communists was beginning to be reflected in Federal Legislation as early as 1940, and continued thereafter. The Nationality Act of 1940 provides that "No person shall hereafter be naturalized as a citizen of the United States . . . (b) Who . . . is a member of or affiliated with any organization . . . that believes in, advises, advocates, or teaches—(1) the overthrow by force or violence of the Government of the United States. . . ." 54 STAT. 1137 (1940), 8 U. S. C. § 705 (1946). The Selective Training and Service Act of 1940, 54 STAT. 885 (1940), as amended, 56 STAT. 723 (1942), 50 U. S. C. App. § 308 (i) (1946), states that: "It is the expressed policy of the Congress that whenever a vacancy is caused in the employment rolls of any business or industry by reason of induction into the service of the United States of an em-

In January, 1941, seven months later, another New York lower court expressed an opinion conflicting with the *Garriga* decision, in *Levy v. Gelber*,¹³ a suit involving an attorney charged with being both a Nazi and a Communist. The court stated:¹⁴

Whatever doubt there may have been in the past as to the opprobrious effect on the ordinary mind of such a charge . . . recent events and legislation make it manifest that to label an attorney a Communist or a Nazi is to taint him with disrepute.

In November of the same year, a California court in substance adopted the view expressed in *Levy v. Gelber*, and rejected the political party doctrine of *Garriga v. Richfield*. The court assiduously refrained from holding that an article referring to the plaintiff as an active member of the Communist party was actionable per se; but concluded nevertheless that the complaint, with the alleged defamatory statement and innuendoes, was sufficient in law to sustain a cause of action.¹⁵

In June, 1942, a year and a half after the decision of *Levy v. Gelber*, the New York courts were again confronted with the Communist-libel query. Upon review of the two prior divergent New York decisions, the court in *Boudin v. Tishman*¹⁶ adopted without opinion the holding of *Levy v. Gelber*. Despite the summary nature of the *Boudin* decision, it is generally regarded as determining the New York law on the subject.

ployee pursuant to the provisions of this Act, such vacancy shall not be filled by any person who is a member of the Communist party or the German-American Bund." The Emergency Relief Appropriation Act of 1941 (General and Special Provisions) has a similar interdiction against the employment of Communists and members of any Nazi Bund organization on any public works project provided for in that legislation. 54 STAT. 611 (1941). The Civil Service Law bars any person from employment in the Civil Service who advocates the overthrow of the Government. 53 STAT. 1148 (1939), 18 U. S. C. § 611 (1946). The provision of the Taft-Hartley Act relative to filing of non-Communist affidavits is another example: 61 STAT. 136 (1947), 29 U. S. C. § 159 (h) (Supp. I). "The Committee on Un-American Activities, as a whole or by subcommittees, is authorized to make from time to time investigation of (i) the extent, character, and objects of Un-American propaganda activities in the United State, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation." Legislative Reorganization Act of 1946, 60 STAT. 828 (1946).

¹³ 175 Misc. 746, 25 N.Y.S. (2d) 148 (1941), 8 U. CHI. L. REV. 799 (1941), 26 IOWA L. REV. 893 (1941).

¹⁴ *Id.* at 149, 25 N. Y. S. (2d) 148.

¹⁵ *Gallagher v. Chavalas*, 48 Cal. App. (2d) 52, 119 P. (2d) 408 (1941).

¹⁶ 264 App. Div. 842, 35 N.Y.S. (2d) 760 (1942).

No cases in point appear thereafter until 1945, when in *Sack v. New York Times Co.*,¹⁷ the court indicated their favorable impression of the reasoning in *Levy v. Gelber*, by saying:¹⁸

Whether to charge one with being a communist is libelous per se is, in these days at least, not free from doubt. *Cf. Levy v. Gelber* . . . The question need not be decided for plaintiff clearly has not been so charged.

In *Grant v. Reader's Digest Ass'n.*,¹⁹ the Federal Circuit Court of Appeals of the Second Circuit, motivated by the authoritative sanction of previous New York decisions, acknowledged the substantive law of the state as recognizing the application of libel per se to a false publication in which the plaintiff is alleged to be a Communist. The court extended the application of the doctrine by maintaining that any difference between saying that a man is a Communist, and saying that he is a party agent or sympathizer, is one of degree only:²⁰

. . . those who would take it ill of a lawyer that he was a member of the Party, might no doubt take it less so if he were only what is called a "fellow-traveler"; but, since the basis for the reproach ordinarily lies in some supposed threat to our institutions, those who fear that threat are not likely to believe that it is limited to party members. Indeed, it is not uncommon for them to feel less concern at avowed propaganda than at what they regard as the insidious spread of the dreaded doctrines by those who only dally and coquette with them, and have not the courage openly to proclaim themselves.

When the problem was again entertained, a state court of New York merely gave tacit approval to the astute extension of the doctrine of *Grant v. Reader's Digest Ass'n.* Thus, the court in *Mencher v. Chesley*²¹ avoided taking an affirmative stand, and negatively backed into the question by holding that, as a matter of law, it could not be said that to write of the plaintiff as the campaign manager for a Communist candidate for public office, was not libelous per se; but held that it was for the jury by its verdict to reflect the effect of the statement upon the ordinary reader of average intelligence, considering public attitude today towards Communism and towards those in political and ideological fellowship with it. This decision has an os-

¹⁷ 56 N. Y. S. (2d) 794 (1945), *aff'd*, 270 App. Div. 401, 59 N. Y. S. (2d) 888, (1946).

¹⁸ *Id.* at 794, 56 N. Y. S. (2d) 794.

¹⁹ 151 F. (2d) 733 (C. C. A. 2nd 1945), *cert. denied*, 326 U. S. 797, 66 S. Ct. 492, 90 L. Ed. 485 (1946).

²⁰ *Id.* at 735, 151 F. (2d) 733.

²¹ 270 App. Div. 1040, 63 N. Y. S. (2d) 108 (1946), 45 MICH. L. REV. 518 (1947).

tensibly frustrating effect, as it is difficult to determine whether the majority felt that a direct charge of Communism was not libelous per se, or that the complaint failed to allege such a charge.

In another Federal court decision, *Wright v. Farm Journal, Inc.*,²² the Circuit Court of Appeals of the Second Circuit, emphatically reaffirmed the now crystallized law of New York. The court declined to undertake any "jurisprudential gymnastics" to avoid the patent doubt emanating from the *Mencher v. Chesley* decision. In following their previous reasoning, the court found libelous per se a publication charging that the president of the New York State Farm Union was a member of the Communist party. In the opinion it was emphasized that the jury should have been instructed that the publication was libelous per se and that their only function was to determine its validity and assess the damages.

In *Spanel v. Pegler*,²³ the Federal Circuit Court of Appeals of the Seventh Circuit unequivocally concurred with the Second Circuit, holding:²⁴

A reading of these cases forces us to the conclusion that in Illinois it is libelous per se to write of a man or a corporation that they are Communists or Communist sympathizers, because the label of "Communist" today in the minds of many average and respectable persons places the accused beyond the pale of respectability and makes him a symbol of public hatred, in violation of the statute. Ill. Rev. Stat. 1945, c. 38 § 402.

The case was not so easily disposed off, however. A subtle and delicate political libel problem was before the court. Westbrook Pegler, through a syndicated column, had blasted Communism. The plaintiff was referred to in this column, which was entitled:²⁵

As Pegler Sees It.
Communists Go 'Big Business'
to Trick U. S.
By Westbrook Pegler.

A thorough and analytical study of the portion of the article set forth in the complaint leads to the conclusion that Pegler's purpose probably was two-fold: (1) to convey to the public that Spanel was a Communist or a Communist sympathizer, and (2) by astute and diligent draftsmanship to refrain from direct accusations, thus avoiding liability for libel. The court realistically swept aside the flimsy veil,

²² 158 F. (2d) 976 (C. C. A. 2nd 1947), 26 NEB. L. REV. 105 (1947).

²³ 160 F. (2d) 619 (C. C. A. 7th 1947), 13 MO. L. REV. 113 (1948), 32 MINN. L. REV. 80 (1947), 14 U. OF CHI. L. REV. 697 (1947).

²⁴ *Id.* at 622, 160 F. (2d) 619.

²⁵ *Id.* at 620, 160 F. (2d) 619.

declaring that although Pegler did not actually state that Spanel was a Communist or Communist sympathizer, the ordinary reader could understand the article to mean that Spanel was, in fact, one or the other. The court emphatically stated, however, that it did not hold that this was the only interpretation, but that where two possible meanings—one libelous and the other not—could be imputed to the article, it was the province of the jury to decide which meaning reasonable persons would infer.²⁶

In the most recent consideration of the problem, a *nisi prius* court in Ohio²⁷ faced the question squarely: "Is it libelous per se to write of one that he is a Communist?" With an adroit opinion including a comprehensive review of existing decisions the court answered the question affirmatively, saying:²⁸

Whether language has that tendency [libelous per se] depends upon several factors; upon the temper of the times, the current of contemporary public opinion, with the result that words, harmless in one era, in one community, may be highly damaging to reputation at another time or in a different locality.

If skepticism dominated the Communist libel issue in 1940, no discernable inconsistencies exist in the law today. An inexorable pattern of decisions leads to the conclusion that this problem is solved. The *de jure* political party argument has been refuted through the courts' recognition of the general public disfavor in which Communism is held today.²⁹

²⁶ For a similar holding on same facts, see *Spanel v. Pegler*, 70 F. Supp. 926 (Conn. 1946).

²⁷ *Burrell v. Moran*, 82 N. E. (2d) 334 (Ohio Com. Pl. 1948).

²⁸ *Id.* at 335.

²⁹ Many recent events and expressions of prominent groups and persons reflect public opinion. The Catholic War Veterans, New York County Chapter, urged the outlawing of the Communist Party. N. Y. Times, January 25, 1948, § 1, p. 22, col. 4. Outlawry was urged by the American Legion of New York State at a recent convention. N. Y. Times, January 28, 1948, § 1, p. 6, col. 5. Cardinal Spellman appealed to the United States to save the world from Communism. N. Y. Times, February 7, 1948, § 1, p. 5, col. 6. The Pope addressed the Roman Cardinals urging all Catholics to carry on a world fight against Communism. N. Y. Times, June 3, 1948, § 1, p. 1, col. 4. Recent Army regulations barred the wearing of service uniforms at Communist events. N. Y. Times, November 14, 1948, § 1, p. 14, col. 2. It was stated in the U. S. House of Representatives that the Communist party's purposes are espionage and treason. N. Y. Times, January 28, 1949, § 1, p. 1, col. 2. Representative Walter proposed a bill to strip United States citizenship from any citizen joining the Communist party. N. Y. Times, March 11, 1949, § 1, p. 22, col. 6. Communist control bills were proposed by Senator Ferguson and by Senator Mundt and Representative Nixon, with provisions including the registration of Communist front organizations, labeling of their propaganda, establishing a peace-time espionage control ban, banning the appointment of Communists to Federal office and the issuance of passports to

The resultant solution leads, ironically enough, to a new policy question. The nation is now confronted with a novel but serious problem — the rigorous enforcement of libel per se as to charges of Communism on one hand, versus the exigency of exposure of subversive activities on the other. The peremptory need of ferreting Communists and party sympathizers from beneath the protective bulwarks of pseudonyms, underground cells, spy schools and other conspiratorial devices,⁸⁰ to an exposed position before public scrutiny, is a proposition which few non-Communists will deny. It is before the public scrutiny and only there, that the Communists' avowed purpose of violent revolution to set up a Soviet dictatorship can be thwarted.⁸¹ Yet, harassed by litigation, one attempting to expose Communists may encounter almost insurmountable obstacles in proving the truth of publication, although the accused be in reality a Communist. These obstacles form a shield of immunity for Communists and fellow-travelers who, under the guise of Americanism, prey upon society, sowing seeds of discontent.

In conflict with the public fervor to expose Communists is the necessity of protecting non-Communist, left-wing liberals. Without the deterrence of libel per se, these Americans — advocates of economic and social changes within the form of the Constitution — would be afforded scant protection against the unscrupulous who would ruin reputations for political gain.

The solution to this paradox will not be facilely determined, as the law here is closely allied with world politics and ideologies. Of momentous import will be the results of the current trial involving the top Communist leaders in the United States.⁸²

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them; also making the sections prescribing the penalties, and conspiracy provisions more specific than in the 1948 bill. *N. Y. Times*, March 9, 1949, § 1, p. 1, col. 8; commented on March 13, 1949, § 4, p. 7, col. 1. A bill was passed by the Illinois Senate making membership in the Communist party a felony and members subject to imprisonment. *N. Y. Times*, March 23, 1949, § 1, p. 7, col. 5.

⁸⁰ Testimony by surprise witness at Communist trials indicated that the Communist party had received orders to obtain maps of forty defense plants in the United States. *N. Y. Times*, April 27, 1949, § 1, p. 1, col. 2.

⁸¹ See testimony of witness for Government at Communist trials as to post-war Communist teaching and advocacy of violent destruction of American Democracy on instructions from Premier Joseph Stalin. *N. Y. Times*, April 13, 1949, § 1, p. 22, col. 1.

⁸² Party Chairman W. Z. Foster and 11 other leaders were indicted on a charge of conspiring to overthrow the United States Government. *N. Y. Times*, July 21, 1948, § 1, p. 1, col. 8.

THE FEDERAL ESTATE TAX—PRESENT STATUS OF THE "POSSESSION OR ENJOYMENT" PHRASE.—Few, if any, provisions of the Internal Revenue Code have vexed courts and commentators more than that portion of Section 811(c) which requires including in the decedent's gross estate the value of all property transferred *inter vivos* which was "intended to take effect in possession or enjoyment at or after his death." This phrase first appeared in a Pennsylvania statute enacted in 1826, taxing collateral inheritances,¹ and with minor variations has been a part of the federal estate tax law since the Revenue Act of 1916.² *In limine* it is well to state that the phrase itself is perplexingly ambiguous and readily admits of several equally plausible interpretations. Unfettered by prior judicial and juridical expositions which have closed this particular avenue of interpretation, it might well be argued that the presence of the word "intended" in the statute clearly implies a subjective test to determine whether in transferring property during his life time, the decedent actually intended the transferee to obtain possession or enjoyment of the property only at or after his death. The companion phrase "in contemplation of . . . death" undeniably demands a subjective test to determine the decedent's motive at the time of the transfer.³ As indicated, however, little attempt has been made to apply other than an objective test in the decisions which have interpreted this portion of the statute.⁴

In the federal courts, at least, the form of this objective test has centered upon the meaning of the word "transfer" and the battle has been waged over the types of transfers that necessarily fall within the provision. The Supreme Court of the United States at first placed emphasis upon whether or not "something passed" from the decedent at his death,⁵ its reasoning being influenced largely by legalistic common law property concepts. Burdened by these rules of property law, a unanimous court in *May v. Heiner*⁶ ruled that the retention by

¹ Pa. Acts 1825-6, c. 72, approved April 7, 1826. See Note, 56 YALE L. J. 176 (1946).

² Revenue Act of 1916 § 202(b), 39 STAT. 756, 777-78 (1916), reads in part as follows: ". . . That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property . . . (b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death. . . ." INT. REV. CODE § 811(c) now reads in part as follows: ". . . To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death. . . ."

³ United States v. Wells, et al., 283 U. S. 102, 51 S. Ct. 446, 75 L. Ed. 867 (1931).

⁴ See note 25 *infra*.

⁵ Reinecke v. Northern Trust Co., 278 U. S. 339, 49 S. Ct. 123, 73 L. Ed. 410 (1929).

⁶ 281 U. S. 238, 50 S. Ct. 286, 74 L. Ed. 826 (1930).

a decedent of a contingent life estate in trust property was not a "transfer" includable in the gross estate under the applicable provisions of the Revenue Act of 1918.⁷ This decision represented the minority view of the lower federal courts at the time, and rejected the construction placed upon the statute by long-standing Treasury Department Regulations.⁸ Likewise, it was opposed by numerous state decisions interpreting similar provisions of inheritance tax statutes.⁹ Nevertheless the court reaffirmed its stand in three *per curiam* decisions less than a year later.¹⁰ The day following these decisions, on the eve of adjournment, Congress amended this portion of the statute by adding a provision to the existing language which expressly includes transfers where in the decedent has reserved a life estate.¹¹ The legislative history of this amendment clearly indicates it was not to receive retroactive application,¹² and the Supreme Court held accordingly in a later case which presented this exact question only.¹³ The state courts refused to adopt this restrictive interpretation engendered by an adherence to legal subtleties, but continued to apply the more realistic economic tests when interpreting similar provisions of their respective death tax statutes, thereby rendering the phrase more meaningful as a check upon tax avoidance.¹⁴

⁷ Revenue Act of 1918, § 402(c), 40 STAT. 1097 (1916).

⁸ U. S. Treas. Reg. 37, Art. 24 (1919); U. S. Treas. Reg. 37, Art. 24 (1921); U. S. Treas. Reg. 70, Art. 18 (1926); U. S. Treas. Reg. 70, Art. 18 (1929).

⁹ See cases collected and discussed in 49 A. L. R. 864, 878-892 (1927), and 67 A. L. R. 1247, 1250-1254 (1930). The Pennsylvania court as early as 1884, in construing the progenitor of all similar clauses (note 1 *supra*), placed stress upon the word "enjoyment" when the settlor had retained the income for life, saying in part: "... One certainly cannot be considered as in the actual enjoyment of an estate, who has no right to the profits or income arising therefrom ... The policy of the law will not permit the owner of an estate to defeat the plain provisions of the collateral inheritance law, by any device which secures to him, for life, the income, profits and enjoyment thereof; it must be by such a conveyance as parts with the possession, the title, and the enjoyment in the grantor's life time." *Reish, Adm'r. v. Commonwealth*, 106 Pa. 521, 526 (1884). However, at least two commentators have indicated that a distinction should be drawn when state inheritance tax statutes are being interpreted, since they place a tax upon the right to receive property while the federal estate tax is levied upon the right to transfer property. See Surrey and Aronson, *Inter Vivos Transfers and the Federal Estate Tax*, 32 *Col. L. Rev.* 1332 (1932).

¹⁰ *Burnet v. Northern Trust Co.*, 283 U. S. 782, 51 S. Ct. 342, 75 L. Ed. 1412 (1931); *Morsman v. Burnet*, 283 U. S. 783, 51 S. Ct. 343, 75 L. Ed. 1412 (1931); *McCormick v. Burnet*, 283 U. S. 784, 51 S. Ct. 343, 75 L. Ed. 1413 (1931).

¹¹ 46 STAT. 1516-1517 (1931), now embodied in the Code. INT. REV. CODE § 811(c).

¹² See comments of Mr. Garner, member of Committee on Ways and Means, 74 *CONG. REC.* 7198-7199 (March 3, 1931).

¹³ *Hassett v. Welch*, 303 U. S. 303, 58 S. Ct. 559, 82 L. Ed. 858 (1938).

¹⁴ *Blodgett v. Guaranty Trust Co.*, 114 Conn. 207, 158 Atl. 245 (1932), *aff'd*, 287 U. S. 509, 53 S. Ct. 244, 77 L. Ed. 463 (1933); *Hackett v. Banker's Trust Co.*, 122 Conn. 107, 187 Atl. 653 (1936); *In re Kutsche's Estate*, 268 Mich. 659, 256 N. W. 586 (1934); *Rising's Estate v. State*, 186 Minn. 56, 242 N. W. 459 (1932).

In *Klein v. United States*¹⁵ it was held that the grant of a life estate to A with reservation of the fee in the grantor, coupled with a grant of the fee to A should he survive the grantor was a taxable "transfer" within the meaning of the pre-1931 language of the statute because, under the applicable Illinois law, the legal title remained vested in the grantor after the deed was executed. Four years later, the Court again delved into the subtle diversities of conveyancing in the *St. Louis Union Trust Co.* cases,¹⁶ and there determined that a transfer in trust for the benefit of A and her children or descendants, but providing for reversion to the settlor in the event of the death of A during the life of the settlor, was not taxable as part of the settlor-decedent's gross estate. The Court in those cases was careful to distinguish the factual situation from that presented in the *Klein* case, and clearly indicated that taxability under the "possession or enjoyment" phrase would henceforward rest upon the "elusive technicalities of the art of conveyancing." In other words, if the trust were construed to create a vested remainder, the settlor could successfully avoid the imposition of an estate tax, even though express provision were made for a reverter in the event the beneficiaries pre-deceased the settlor or the property returned to the settlor by the operation of a resulting trust.

Recognizing that this doctrine ignored the substance and rewarded the form of *inter vivos* transfers, the Court in *Helvering v. Hallock*¹⁷ disregarded property concepts and held the incidence of the estate tax to depend upon whether the decedent had retained a valuable interest the final disposition of which was postponed until after his death. The trust in this case expressly provided for a reversion of the property to the settlor-decedent should he outlive the beneficiaries. In effect the decision held that any transfer expressly conditioned on survivorship was a "transfer intended to take effect in possession or enjoyment at or after death." Through the over-ruling of the *St. Louis Union Trust Co.* cases and the abolition of the tenuous distinctions there engrafted upon the earlier *Klein* case, the "possession or enjoyment" phrase became an effective instrument to frustrate estate tax avoidance, and for the first time in its twenty-four year existence, approached the obvious purpose of its enactment.¹⁸ The *Hallock* case was followed by two

¹⁵ 283 U. S. 231, 51 S. Ct. 398, 75 L. Ed. 996 (1931).

¹⁶ *Helvering v. St. Louis Union Trust Co.*, 296 U. S. 39, 56 S. Ct. 74, 80 L. Ed. 29 (1935); *Becker v. St. Louis Union Trust Co.*, 296 U. S. 48, 56 S. Ct. 78, 80 L. Ed. 35 (1935).

¹⁷ 309 U. S. 106, 60 S. Ct. 444, 84 L. Ed. 604 (1940).

¹⁸ The subsequently issued U. S. Treas. Reg. 105, § 81.17 (1942), as amended by T. D. 5512, 1 CUMM. BULL. 264 (1946), provides that a transfer falls within the scope of this phrase if both of the following conditions exist: "... (1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and (2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise)."

cases¹⁹ in which the principal question was the proper valuation to be placed upon the interest retained by the grantor in pre-1931 transfers. Since there were no outstanding life estates, the Court in both cases held the entire value of the transferred property includable in the decedent's gross estate.

In two recent cases,²⁰ the Supreme Court granted certiorari to consider the tax status of pre-1931 transfers where the only interest retained by the settlor-decedent was a remote possibility of reverter by operation of law. (The Church trust also reserved the income to the settlor for life.) Since the Hallock trust had expressly provided for a reversion to the settlor should he outlive the named beneficiaries, the lower federal courts, the Tax Court and the Treasury Department were in disagreement on this problem.²¹ After argument and consideration of the two cases during the October 1947 Term, doubt arose as to the continuing validity of *May v. Heiner*,²² and thereafter the cases were restored to the docket with the request that the counsel address their discussion on reargument to specific questions set forth by the Court.²³

¹⁹ *Fidelity-Philadelphia Trust Co. v. Rothensies*, 324 U. S. 108, 65 S. Ct. 508, 89 L. Ed. 782 (1945), involved a reservation of a contingent power of appointment coupled with a life estate. *Commissioner v. Estate of Field*, 324 U. S. 113, 65 S. Ct. 511, 89 L. Ed. 786 (1945), expressly provided for a reversion should the beneficiaries pre-decease the settlor in addition to reservation of the income for life.

²⁰ *Commissioner v. Church's Estate*,U. S., 69 S. Ct. 322 (1949); *Spiegel's Estate v. Commissioner*,U. S., 69 S. Ct. 301 (1949).

²¹ The Second, Sixth, Seventh, and Ninth Circuit Courts of Appeals had held that the mere existence of a possibility of reverter in the decedent, whether expressly retained or whether resulting from operation of law, irrespective of remoteness, caused the property to be included in his gross estate. See *Dominick's Estate v. Commissioner*, 152 F. (2d) 843 (C. C. A. 2nd 1946); *Commissioner v. Bayne's Estate*, 155 F. (2d) 475 (C. C. A. 2nd 1946); *Beach v. Busey*, 156 F. (2d) 496 (C. C. A. 6th 1946); *Commissioner v. Spiegel's Estate*, 159 F. (2d) 257 (C. C. A. 7th 1946), *aff'd*,U. S., 69 S. Ct. 301 (1949); *Commissioner v. Bank of California Nat. Assoc.*, 155 F. (2d) 1 (C. C. A. 9th 1946), *cert. denied*, 329 U. S. 725, 67 S. Ct. 73, 91 L. Ed. 628 (1946), *motion for rehearing denied*, 329 U. S. 827, 67 S. Ct. 184, 91 L. Ed. 702 (1946). The concurring view of the Treasury Department is parenthetically expressed in U. S. Treas. Reg. 105, § 81.17 (1942), as amended by T. D. 5512, 1 CUMM. BULL. 264 (1946); see note 18 *supra*. The Third Circuit Court of Appeals and the Tax Court had held to the contrary where remote possibilities of reverter by operation of law were involved: *Commissioner v. Church's Estate*, 161 F. (2d) 11 (C. C. A. 3rd 1947), *rev'd*,U. S., 69 S. Ct. 322 (1949); *Estate of Nettie Friedman*, 8 T. C. 68 (1947).

²² Following the *Hallock* case at least one perspicacious commentator advanced the view that its rationale had removed any existing support for *May v. Heiner*. See Note, 49 YALE L. J. 1118 (1940). However, its validity was still supported by others. See MONTGOMERY, *FEDERAL TAXES ON ESTATES, TRUSTS AND GIFTS* (1943-44) at 380, "In view of the changes in the Supreme Court, there can, of course be no certainty that the theory of *Reinecke v. Northern Trust Co.* and *May v. Heiner* will be followed. In the opinion of the author, however, the *Hallock* case, of itself, is not in conflict with those decisions."

²³ The nine questions are set out in footnote 5 of Mr. Justice Burton's dissenting opinion in the *Spiegel* case, 69 S. Ct. at 3089.

The Church trust, established in 1924, provided for payment of the income to the settlor for life and for the distribution of the corpus of the trust at his death to his surviving children, if any — otherwise to his surviving brothers or sisters or their children. No further disposition being made, dispute arose as to the operation of the applicable New York law in the unlikely event that all the beneficiaries should predecease the settlor. A majority of the Court, however, declined to rest their decision on this phase of the case, but ruled the reservation of life income to be the decisive factor, thereby upsetting *May v. Heiner* and casting aside whatever lingering vestige of property concepts remained in this portion of the estate tax law. Mr. Justice Black, speaking for the majority, reiterates the conviction of the present Court that taxability under the "possession or enjoyment" phrase depends upon the substance and not the form of the *inter vivos* transfer: ²⁴

How is it possible to call this trust transfer "complete" except by invoking a fiction? Church was the sole owner of the stocks before the transfer. Probably their greatest property value to Church was his continuing right to get their income . . . Looking to the substance and not merely to form, as we must unless we depart from the teaching of *Hallock*, the inescapable fact is that Church retained for himself until death a most valuable property right in these stocks—the right to get and to spend their income . . . He simply retained this valuable property, the right to income, for himself until death, when, for the first time the stock with all its property attributes "passed" from Church to the trust beneficiaries. Even if the interest of Church was merely "obliterated" in *May v. Heiner* language, it is beyond all doubt that simultaneously with his death, Church no longer owned the right to the income; the beneficiaries did. It had then "passed." It never had before. For the first time, the gift had become "complete."

The Spiegel trust, created in 1920, provided that the income therefrom be paid to the settlor's three children during his life, or if they should predecease him, to their surviving children, the corpus to be distributed at his death in the same manner. The effect of such a disposition under the Illinois law was not free from doubt; however, the Court refused to disturb the finding of the Court of Appeals of the Seventh Circuit that the property would revert to the settlor in the event he should survive the named beneficiaries. Acknowledging the remoteness of this possibility,²⁵ the majority, again speaking through Mr. Justice Black, stated in part as follows: ²⁶

²⁴ *Commissioner v. Church's Estate*,U. S., 69 S. Ct. 322, 328-329 (1949).

²⁵ Spiegel was survived by the three children living at the date the trust was created in addition to three grandchildren. The dissent of Mr. Justice Burton in

... In the *Church* case we stated that a trust transaction cannot be held to alienate all of a settlor's "possession or enjoyment" under § 811(c) unless it effects a "bona fide transfer in which the settlor absolutely, unequivocally, irrevocably, and without possible reservations, parts with all of his title and all of his possession and all of his enjoyment of the transferred property. After such a transfer has been made, the settlor must be left with no present legal title in the property, no possible reversionary interest in that title, and no right to possess or to enjoy the property then or thereafter. In other words such a transfer must be immediate and out and out, and must be unaffected by whether the grantor lives or dies." We add to that statement, if it can be conceived of as an addition, that it is immaterial whether such a present or future interest, absolute or contingent, remains in the grantor because he deliberately reserves it or because, without considering the consequences, he conveys away less than all of his property ownership and attributes, present or prospective. In either event the settlor has not parted with all of his presently existing or future contingent interests in the property transferred. He has therefore not made that "complete" kind of trust transfer that § 811(c) commands as a prerequisite to a showing that he has certainly and irrevocably parted with his "possession or enjoyment."

The dissent of Mr. Justice Burton in both the *Church* and *Spiegel* cases is based primarily upon the failure of the majority to consider the factual intent of the settlor,²⁷ and secondarily upon the belief that the law of New York and Illinois did not give rise to a possibility of reverter in either case. Insofar as this latter ground of dissent is based upon tenuous distinctions between vested and contingent interests, it is reminiscent of the decisions prior to the *Hallock* case. Mr. Justice Jackson's concurrence with the dissent in the *Church* case and Mr. Justice Frankfurter's combined dissent in both cases rest mainly upon the doctrine of stare decisis and the legislative history surrounding the

this case points out that the mathematical value of this possibility of reverter at the time the \$1,000,000.00 trust was created in 1920 was less than \$4,000.00. Its value at Spiegel's death in 1940 was about \$70.00.

²⁶ *Spiegel's Estate v. Commissioner*,U. S....., 69 S. Ct. 301, 303 (1949).

²⁷ Thus in *Spiegel's Estate v. Commissioner*,U. S....., 69 S. Ct. 301, 314 (1949), he states: "'Intended' should be given its normal factual meaning. To intend means to 'have in mind as a design or purpose. . . .' The question of intent is one of fact, difficult to determine, but determinable, nevertheless. Section 811(c) involves more than merely determining whether a transfer took effect, as a matter of law, at or after death or whether a 'string or tie,' as a matter of law was retained until death. There remains for determination the fact whether the settlor did actually intend that the 1920 transfer take effect in possession or enjoyment upon the expiration of the trust at his death."

Joint Resolution of March 3, 1931. Both stress the difficulties encountered when tax policy is controlled by interstitial court rulings, and both prefer to construe the failure of Congress to set aside the *May v. Heiner* doctrine as an implied sanction of the construction there applied to pre-1931 transfers with life income retained.

As yet the Treasury Department has given no indication that it will issue regulations to mitigate the hardship these decisions will work upon taxpayers who executed trusts in reliance upon *May v. Heiner*.²⁸ Reasonable belief that such regulations will be forthcoming is founded upon prior action of the Treasury Department in similar situations.²⁹ Regardless of such relief, all existing trust instruments should now be reviewed with meticulous care in light of the *Spiegel* case to insure that the settlor has not inadvertently retained some possibility of reverter which he does not wish to have.

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EQUITY—INJUNCTION—FREEDOM OF SPEECH AND OF THE PRESS—PUBLICATION OF LIBEL.—A rule which has persisted in American Jurisprudence since the last century states: *Equity will not enjoin the publication of a libel*.¹ The origin of this precept is generally attributed to a dictum of Lord Eldon in the 1818 case of *Gee v. Pritchard*.² However, it may be noted that Lord Eldon's view was not necessarily the traditional or prevailing law in England, there being decisions both before and after 1818 holding to the contrary.³ The strongest foundation

²⁸ Ample authority for such non-retroactive application of decisions upsetting prior doctrine is found in § 3791(b) INT. REV. CODE.

²⁹ U. S. Treas. Reg. 105, § 81.17 (1942), as amended by T. D. 5512, 1 CUM. BULL. 264 (1946), following the *Hallock* case, provided that where the transfer was made during the period between Nov. 11, 1935 and Jan. 29, 1940, and the Commissioner (whose determination is to be final) determines that such transfer is classifiable with the transfers involved in the *St. Louis Union Trust Co.* cases rather than with the transfer involved in the *Klein* case, and the property was finally treated for all gift tax purposes, then the property so transferred shall not be includable in the decedent's gross estate. This provision remains operative following the *Church* and *Spiegel* cases. Taxpayer reliance upon *May v. Heiner* is confined to approximately eight and one-half months.

1. See 32 C. J., Injunctions, § 432; 28 AM. JUR., Injunctions, § 118; 4 POMEROY, EQUITY JURISPRUDENCE § 1358 (5th ed. 1941); McCLENTOCK ON EQUITY §§ 156, 157 (2nd ed. 1948).

² 2 Swans. 402, 36 Eng. Rep. 670 (1818).

³ Even in *Gee v. Pritchard*, the court succeeded in avoiding its own rule, by granting the injunction and stating that such action was necessary for the protection of a property right. Commented Walworth, C., in *Brandreth v. Lance*, 8 Paige 24 (N. Y. 1839): "But it may, perhaps, be doubted whether his lordship in that case did not, to some extent, endanger the freedom of the press by assuming jurisdiction of the case as a matter of property merely, when in fact the ob-

for the rule is probably Blackstone's statement concerning freedom of the press:⁴

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying *no previous restraints upon publications* . . . Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publish what is improper, mischevious [sic], or illegal he must take the consequences of his own temerity. (Emphasis supplied).

Lord Eldon's principle is often more honored in the breach than in the observance.⁵ It is indeed strange that such a rule, founded only on a dictum and continuously avoided where convenient, should survive these many years. Indeed, never once has it been refuted directly in this country.⁶ This situation is made all the more odd by the fact that the doctrine no longer holds in England, the country of its birth. Under the judicature acts in effect there, the chancery courts now perceive no difficulty in granting injunctions against a libel.⁷

In 1916, Roscoe Pound expressed his feeling of confidence that "some strong court presently will take the direct course" in enunciating the rule that equity *has* jurisdiction in cases of libel.⁸ In 1949 we are still awaiting that "strong court." However, in viewing the many cases in which the existing standard has been circumvented, one may argue that the question is mainly academic, and a direct overruling of the principle is unnecessary. To refute this argument it is necessary only to review the vast majority of cases in which the precept has prevailed, oftentimes to the apparent contravention of justice.⁹

ject of the complainant's bill was not to prevent the publication of her letters on account of any supposed interest she had in them as literary property, but to restrain the publication of a private correspondence, as a matter of feeling only."

In 1810, Lord Ellenborough, in speaking of a picture, remarked *arguendo* that if it was a libel upon the persons introduced into it, "upon an application to the Lord Chancellor he would have granted an injunction against its exhibition." *DuBost v. Beresford*, 2 Camp. 511, 170 Eng. Rep. 1235 (1810).

While there are English cases decided after 1818 that uphold the right to enjoin publications, *Emperor of Austria v. Day*, 3 De G. F. & J. 217, 45 Eng. Rep. 861 (1861); *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551 (1868); *Dixon v. Holden*, L. R. 7 Eq. 488 (1869), they were overruled as to libel in *Prudential Assurance Co. v. Knott*, L. R. 10 Ch. 142 (1874), which was decided without reference to the Judicature Act, 1873, 36 & 37 Vict., c. 66, § 25.

⁴ 4 BL. COMM.* 151.

⁵ See *Hawks v. Yancey*, 265 S. W. 233, 237 (Tex. Civ. App. 1924).

⁶ Perhaps the closest any court in this country has come to an outright denial of the rule is this 1880 dictum: "We recognize the rule that a court of equity upon a proper case has the power to enjoin the publication and circulation of a libel." *Bell & Co. v. The Singer Manufacturing Co.*, 65 Ga. 452, 459 (1880).

⁷ See *Bonnard v. Perryman*, [1891] 2 Ch. 269.

⁸ Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 668 (1916).

⁹ See cases cited note 1 *supra*.

It is difficult to visualize a set of facts which would not give a court opportunity to avoid the strict rule, if it so desired. Pound himself stated: "So long as denial of relief in such cases rests on no stronger basis than authority our courts are sure to find a way out."¹⁰ True, the way has been found, but it is not often used.

There are various situations in which the courts in this country have afforded relief, and thereby conformed to justice, without directly controverting the precept in point. Often the courts have said that libel may not be enjoined, but if the libel forms an element of some other tort, that other tort may be enjoined, even though this in effect enjoins the libel. A typical case illustrating this point is *Old Investors' & Traders' Corporation v. Jenkins*.¹¹ The defendant had published false statements concerning the plaintiff and its business. The court said:¹²

While in the action at bar the court could not enjoin the mere publication of a libel, it could, provided the facts of the case warranted, issue an injunction against the defendants from mailing or otherwise sending to customers of the plaintiff false and misleading circulars or reading matter which would take away plaintiff's business by unfair means and deceive the public, and give such other and further relief as would to the trial court seem necessary to protect plaintiff's property rights.

The case in favor of granting an injunction may be strengthened in such situations if the court recognizes the threatened injury as irreparable.¹³ The courts are no doubt often influenced by the presence of bad faith on the part of the one committing the libel.¹⁴ In this same category (where libel is in effect enjoined by the injunction of some other tort) may be placed those cases in which the courts have issued injunc-

¹⁰ *Loc. cit. supra* note 8.

¹¹ 133 Misc. 213, 232 N. Y. S. 245 (1928), *aff'd*, 233 N. Y. S. 845 (1928).

¹² 232 N. Y. S. at 247. To the same effect are: *Bausch & Lomb Optical Co. v. Wahlgren*, 1 F. Supp. 799 (N. D. Ill. 1932), *aff'd*, 68 F. (2d) 660 (C. C. A. 7th 1934), *cert. denied*, 292 U. S. 639, 54 S. Ct. 774, 78 L. Ed. 1491 (1934); *Gibraltar Savings & Building Association v. Isbell*, 101 S. W. (2d) 1029 (Tex. Civ. App. 1937).

¹³ *Menard v. Houle*, 298 Mass. 546, 11 N. E. (2d) 436 (1937) (after the plaintiff refused the defendant's request to install new steering apparatus in an automobile which the defendant had bought from the plaintiff, the defendant tied lemons on the automobile and drove it about the city covered with writing stating that the automobile had been bought from the plaintiff and was no good, and made public statements to the same effect, knowing them to be false, and making them solely to injure the plaintiff and to extort money from him); *Yood v. Daly*, 37 Ohio App. 574, 174 N. E. 779 (1930) (two retail kosher meat dealers brought an action against a rabbi, to enjoin the latter from printing and distributing circulars and making speeches libeling and slandering the dealers in their businesses, by publishing that the meat sold by them was not kosher meat).

¹⁴ *Menard v. Houle*, 298 Mass. 546, 11 N. E. (2d) 436 (1937); *See Starns v. Success Portrait Co.*, 28 F. Supp. 711 (E. D. Tenn. 1939).

tions forbidding the publishing of circulars or statements the purpose of which is to induce customers to break their existing contractual relations with business firms.¹⁵

Many decisions have been rendered wherein the courts did not peg their jurisdiction on the presence of any other tort besides the libel involved, but considered it sufficient to warrant the intervention of equity that the injury was irreparable, or that the remedy at law was inadequate. In *Emack v. Kane*¹⁶ it was said: ¹⁷

I cannot believe that a man is remediless against persistent and continued attacks upon his business, such as have been perpetrated by these defendants against the complainant, as shown by the proofs in this case. It shocks my sense of justice to say that a court of equity cannot restrain systematic and methodical outrages like this, by one man upon another's property rights. If a court of equity cannot restrain an attack like this upon a man's business, then the party is certainly remediless, because an action at law in most cases would do no good, and ruin would be accomplished before an adjudication would be reached.

It is not necessary that the remedy at law be *totally* inadequate.

Jurisdiction in equity is not tested alone by the fact of a remedy existing at law, but, as stated in the early case of *City of Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 9 L. Ed. 1012 (1835), the jurisdiction may be sustained "upon the principle that equity can give *more adequate* and complete relief than can be obtained at law," cited in *Re Debs* [sic], 158 U. S. 587, 15 S. Ct. 907, 39 L. Ed. 1092 [1895].¹⁸ (Emphasis supplied.)

It is not difficult to appreciate the inadequacy of an action at law for damages when the defendant is insolvent.¹⁹

¹⁵ *American Malting Co. v. Keitel*, 217 Fed. 672 (S. D. N. Y. 1914); *National Life Insurance Co. of the United States v. Myers*, 140 Ill. App. 392 (1908); *Shevers Ice Cream Co. v. Polar Products Co.*, 194 N. Y. S. 44 (1921).

¹⁶ 34 Fed. 46 (C. C. N. D. Ill. 1888).

¹⁷ *Id.* at 50. To the same effect are: *Dittgen v. Racine Paper Goods Co.*, 164 Fed. 85 (C. C. E. D. Wis. 1908), *aff'd*, 171 Fed. 631 (C. C. A. 7th 1909); *Carter v. Knapp Motor Co.*, 243 Ala. 600, 11 So. (2d) 383 (1943); *Grand Rapids School Furniture Co. v. Haney School Furniture Co.*, 92 Mich. 558, 52 N. W. 1009 (1892); *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 77 N. W. 13 (1898); *Pratt Food Co. v. Bird*, 148 Mich. 631, 112 N. W. 701 (1907); *Burke Transit Co. v. Queen City Coach Co.*, 228 N. C. 768, 47 S. E. (2d) 297 (1948); *Carter v. Bradshaw*, 138 S. W. (2d) 187 (Tex. Civ. App. 1940).

¹⁸ *Dittgen v. Racine Paper Goods Co.*, 164 Fed. 84, 85 (C. C. E. D. Wis. 1905). To the same effect is *Maytag Co. v. Meadows Manufacturing Co.*, 35 F. (2d) 403 (C. C. A. 7th 1929), *cert. denied* 281 U. S. 737, 50 S. Ct. 250, 74 L. Ed. 1151 (1930).

¹⁹ *Shoemaker v. South Bend Spark-Arrester Co.*, 135 Ind. 471, 35 N. E. 280 (1893).

As in the category of cases where the libel was enjoined indirectly, there is evidence in this group of cases of the effect of bad faith on the courts. "The court is not prepared to say that a case may not be so saturated with fraud, falsehood and malice as to require the summary interference of a court of equity."²⁰ In fact, there are some situations in which the indicia of bad faith seem to be the persuasive factor in the court's determinations to grant injunctions.²¹

The decisions to grant equitable relief are sometimes induced by the fact that damages are often difficult either of proof²² or of accurate measurement.²³ And there is some basis for the holding that equity will enjoin the *further publication* of a libel after an action at law in which there was a verdict adverse to the defendant,²⁴ not to mention the numerous instances where the courts have granted injunctions *pendente lite*.²⁵

²⁰ *Adriance, Platt & Co. v. National Harrow Co.*, 98 Fed. 118, 119 (C. C. S. D. N. Y. 1899).

²¹ *A. B. Farquhar Co. v. National Harrow Co.*, 102 Fed. 714 (C. C. A. 3rd 1900), *reversing* 99 Fed. 160 (C. C. D. N. J. 1900); *Adriance, Platt & Co. v. National Harrow Co.*, 121 Fed. 827 (C.C.A. 2nd 1903); *Hudson Motor Specialties Co. v. Apco Manufacturing Co.*, 288 Fed. 871 (R. I. 1923), *aff'd*, 299 Fed. 19 (C.C.A. 1st 1924); *Hotel & Railroad News Co. v. Leventhal*, 243 Mass. 317, 137 N. E. 534 (1922); *Lawrence Trust Co. v. Sun-American Publishing Co.*, 245 Mass. 262, 139 N. E. 655 (1923); *H. E. Allen Manufacturing Co. v. Smith*, 224 App. Div. 187, 229 N. Y. S. 692 (1928).

²² *M. Steinert & Sons Co. v. Tagen*, 207 Mass. 394, 93 N. E. 584 (1911) (the defendant drove through the streets a wagon bearing placards announcing the existence of a strike, long after the strike had in fact ended. This was not shown to have caused any damage to the employer); *Wilner v. Bless*, 243 N. Y. 544, 154 N. E. 598 (1926) (the signs carried and the circulars distributed by the members of the defendant's local union did not honestly or fairly state the nature of the labor dispute between the plaintiff and the local. The purpose of the dissemination of the false or misleading information was to injure the plaintiff's business and so to coerce him to employ members of the defendant's local only).

²³ *Davis v. New England Ry. Publishing Co.*, 203 Mass. 470, 89 N. E. 565 (1909) (in order to obtain a monopoly in a certain department of the express business, persons controlling a majority of the general local express companies doing business in a city induced a publisher of a purportedly complete list of reputable express companies in the city to omit one such company, by making false representations to the publisher about the company, and by threatening injury to the publisher unless the company's name was omitted); *M. Steinert & Sons Co. v. Tagen*, 207 Mass. 394, 93 N. E. 584 (1911), cited *supra* note 22.

²⁴ *See Wolf v. Harris*, 267 Mo. 405, 184 S. W. 1139 (1916).

²⁵ *Casey v. Cincinnati Typographical Union No. 3*, 45 Fed. 135 (C. C. S. D. Ohio 1891); *Loewe v. California State Federation of Labor*, 139 Fed. 71 (C. C. N. D. Cal. 1905); *Evenson v. Spaulding*, 150 Fed. 517 (C. C. A. 9th 1907), *affirming* 149 Fed. 913 (C. C. E. D. Wash. 1906); *Electric Renovator Manufacturing Co. v. Vacuum Cleaner Co.*, 189 Fed. 754 (C. C. W. D. Pa. 1911), *aff'd, on rehearing*, 189 Fed. 1023 (C. C. W. D. Pa. 1911); *Atlas Underwear Co. v. Cooper Underwear Co.*, 210 Fed. 347 (E. D. Wis., 1913); *American Mercury v. Chase*, 13 F. (2d) 224 (Mass. 1926); *Adjusta Co. v. Alma Manufacturing Co.*, 36 F. (2d) 105 (S. D. N. Y. 1930); *Saxon Motor Sales v. Torino*, 166 Misc. 863, 2 N. Y. S. (2d) 885 (1938).

From a review of the foregoing it may appear that the general principle—equity will not enjoin the publication of a libel—has been completely overruled. However, it should be remembered that the illustrations offered are a summation of all the methods used to avoid the principle in every state of the union. Many states will recognize one of the exceptions to the rule, and ignore the others. Some states have as yet to recognize any of the exceptions. Although the courts are continually becoming more astute in discovering various means to avoid the doctrine when they feel that justice demands such action, the majority of these cases are still decided by a blind observance of the long prevailing standard.

The two main arguments against overruling this precept directly are *stare decisis* and the constitutional guaranty of freedom of speech, or of the press.²⁶ We have seen the weakness of *stare decisis* in this particular case.²⁷ The rule arose in a dictum, was in effect overruled in the very case in which it arose, and has been circumvented in numerous cases from its conception to the present time. The remainder of this article will deal with the freedom of speech aspect.

In contrast with Blackstone's view that "liberty of the press . . . consists in laying *no previous restraints upon publications*,"²⁸ (emphasis supplied) two eminent American authorities may be cited who hold otherwise. Justice Story stated: "The constitutional guaranty was intended to guarantee liberty of publishing the truth."²⁹ Cooley felt that the constitutional guaranty does not give one the right to publish whatever he pleases, including libels, but only what is not harmful in its character.³⁰

There is perhaps one other means whereby the courts in some states may circumvent the rule being discussed in this article. A 1924 Texas case arose from the following facts: A person with whom a woman had had illicit relations made statements against her, watched over her, imposed himself upon her on public streets, made false charges about her to public officials, and prevented her marriage to another. Upon the woman's demand for an injunction, the court said: "In our opinion it is not necessary that our determination of this question should be based solely on principles of equity, for the reason that ample authority is given our courts by article 4643, Revised Statutes, to protect by injunctive relief both property and personal rights. Subdivision 1 of this article authorizes the issuance of writs of injunction, 'where it shall appear that the party applying for such writ is entitled to the relief demanded, and such relief or any part thereof requires the restraint of some act prejudicial to the applicant.'

" . . . In view of the provision of article 4643 . . . , it is our opinion that the courts of this state are not required to search for rights of property on which to base jurisdiction to grant injunctions protecting personal rights, but are free to grant such relief whether property is, or is not, involved." *Hawks v. Yancey*, 265 S. W. 233, 237 (Tex. Civ. App. 1924).

²⁶ U. S. CONST. AMEND. I.

²⁷ See note 3 *supra*.

²⁸ 4 BL. COMM. *151.

²⁹ 2 STORY, CONSTITUTION §§ 1880, 1886.

³⁰ 2 COOLEY, CONSTITUTIONAL LIMITATIONS 883-86 (8th ed. 1927).

Does not Blackstone's view seem too strict when compared with these other two? Should the law hold that anyone has the absolute and inalienable right to speak, print, and disseminate libels and lies, which wreak destruction or irreparable injury to one's business or injure his reputation, provided the defendant is willing to pay for the privilege? ³¹ Should one be allowed to complain that he is being deprived of a constitutional right when he is prevented from libeling another and deliberately destroying that person's good name? ³²

The injustice of such a strict rule lies in the fact that the law is utterly incapable of awarding adequate damages. Where the libel is one that charges improper and immoral conduct, the damages cannot be computed in dollars and cents.³³ As has been stated: ³⁴

Unlike converted personal property, something similar or equivalent to it cannot be purchased with money, nor can it be restored like other matters of substance by the person who has wrongfully taken it. Reputation is necessary for a man to live as befits his nature; injury to it results often in irreparable damage to the individual's personal, economic, and social life. For that reason society owes an urgent duty to preserve it for the individual. Adequate protection can only be given by preventing the cause of damage; money damages are altogether inadequate, just as they are in the case of unique chattels. Today, will some court say that a good name and honor in the community, merit equitable protection?

What of the proud boast of equity that it will not suffer an injustice to be done where there is a remedy? And where a remedy is given, would it not be more honest to offer it directly, rather than under the guise of some other long recognized principle?

Most assuredly the Bill of Rights in the United States Constitution guarantees freedom of speech, but it also guarantees various other freedoms. Should not the different provisions be harmonized, so that "freedom of speech" cannot be used as a hiding place of wrong, injustice, and crime? ³⁵

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³¹ See Note, 11 VA. L. REV. 225 (1925).

³² See Note, 17 MARQUETTE L. REV. 132 (1933).

Blackstone's "strict view" is not the absolute law in the United States. "Freedom of expression is not limitless. For example, freedom of press does not protect the publication of immoral or indecent matter from legislative control. *People v. Most*, 171 N. Y. 423, 64 N. E. 175 (1902); nor does it prevent prohibitions upon publications dangerous to a warring nation. *Ex parte Vallandigham*, 1 Wall. 243 17 L. Ed. 589 (U. S. 1862); nor does it give immunity from contempt of court. *Respublica v. Oswald*, 1 Dall. 319, 1 L. Ed. 155 (U. S. 1788)." Note, 21 N. Y. U. L. Q. REV. 518 (1947).

³³ Note, 11 VA. L. REV. 225 (1925).

³⁴ Note, 17 MARQUETTE L. REV. 132, 137, 138 (1933).

³⁵ See *Ex parte Warfield*, 40 Tex. Crim. Rep. 413, 50 S. W. 933 (1899); *Hawks v. Yancey*, 265 S. W. 233 (Tex. Civ. App. 1924), cited *supra* note 25; note, 16 TEX. L. REV. 111 (1937).