ANNOUNCEMENT

The University of Pennsylvania Law Review takes pleasure in announcing the election and induction into office of Louis J. Goffman as Secretary and member of the Managing Board for the year 1934-1935.

NOTES

The Law School—The registration for the year 1934-35 is 423, 6 more than last year. This is the third year in which there has been a slight increase, although it is probably more accurate to say, in view of the slight variations in the last three years, that we have a new normal level of enrollment which is substantially below that of 1929.

Since the entire University is on a program restricted by the necessities of economy, little in the way of expansion of courses is to be noted. The course in Persons reappears and is being taught by Mr. Joseph J. Lawler, who is on his second year's work as Gowen Fellow. The new program in the field of Business Associations is shaping up very satisfactorily. An additional class hour has been given to Mr. Frey for one term of the Second Year work, and he and Mr. Finletter have divided the material for the advanced courses in the Business Associations field. Professor Dickinson continues in his position as Assistant Secretary of the Department of Commerce, and, as last year, continues to offer his courses in Constitutional Law, Administrative Law and Public Service Corporations.

Continued evidence of valuable help to the school from its graduates is shown by the formation of a new committee to assist young lawyers in obtaining positions. Last year a committee was formed to assist in placements in New York, Chicago, Washington, Pittsburgh, Harrisburg and Wilmington. This year President McCracken appointed a committee containing representatives of each class from 1900 to the present to cover the field in and about Philadelphia. Mr. Frederick H. Knight is Chairman of this committee and Mr. Thomas B. K. Ringe, Secretary. The committee is in touch with Philadelphia and neighboring offices which, from time to time, may be in need of young lawyers. It is also hoped that the committee may assist lawyers already established who wish to make changes in their connections or find office associates. In a solution of such questions the cordial response already received to the committee's initial efforts gives promise of great usefulness.

Herbert F. Goodrich.

<table>
<thead>
<tr>
<th>Class enrollment:</th>
<th>1932-33</th>
<th>1933-34</th>
<th>1934-35</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Year</td>
<td>180</td>
<td>185</td>
<td>172</td>
</tr>
<tr>
<td>Second Year</td>
<td>121</td>
<td>125</td>
<td>130</td>
</tr>
<tr>
<td>Third Year</td>
<td>105</td>
<td>98</td>
<td>102</td>
</tr>
<tr>
<td>Graduates, unclassified and hearers</td>
<td>9</td>
<td>9</td>
<td>19</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>415</strong></td>
<td><strong>417</strong></td>
<td><strong>423</strong></td>
</tr>
</tbody>
</table>

(55)
LEGAL SAFEGUARDS ABOUT TRANSACTIONS BETWEEN A DIRECTOR AND HIS CORPORATION—The growth of corporations has been both an offspring and a parent of the huge dealings in business and financial matters. The unfortunate position to which shareholders have been too often relegated seems a necessary attendant to the rise of the corporation to its place of gigantic power and influence. By necessity the corporate set-up has placed at its head a group of directors and officers into whose hands have been intrusted sole management of business policies together with the money necessary for their execution. This may be termed the cause. The effect has been equally apparent. Not only has there been a gravitation of these powers into the hands of a diminishing few, but all too frequently management has violated its duties toward ownership.\(^1\) For the prevention of these abuses the courts have built up certain so-called principles to govern the conduct of directors and officers in their relations with the corporation and shareholder.

The importance of having directors who will subordinate personal interests to the corporation's benefit cannot be overestimated. Directors, in the final analysis, have supreme power over corporate affairs. Shareholders are today placed in the anomalous position of owning the business, but, because of stock diffusion and the growth in the size of business units, having such ownership resolve itself into utter dependence on the honesty of the management.\(^2\)

### DEGREE DISTRIBUTION

<table>
<thead>
<tr>
<th>Class Admitted in 1934 According to Colleges</th>
</tr>
</thead>
<tbody>
<tr>
<td>University of Pennsylvania:</td>
</tr>
<tr>
<td>Gettysburg 2</td>
</tr>
<tr>
<td>College 34</td>
</tr>
<tr>
<td>Wharton 22</td>
</tr>
<tr>
<td>Grove City 1</td>
</tr>
<tr>
<td>Miscellaneous 3</td>
</tr>
<tr>
<td>Hamilton 1</td>
</tr>
<tr>
<td>Harvard 3</td>
</tr>
<tr>
<td>Other Institutions:</td>
</tr>
<tr>
<td>Albright 1</td>
</tr>
<tr>
<td>Holy Cross 1</td>
</tr>
<tr>
<td>Allegheny 2</td>
</tr>
<tr>
<td>Lafayette 10</td>
</tr>
<tr>
<td>Barnard 1</td>
</tr>
<tr>
<td>La Salle 1</td>
</tr>
<tr>
<td>Bucknell 2</td>
</tr>
<tr>
<td>Lebanon Valley 1</td>
</tr>
<tr>
<td>Colgate 2</td>
</tr>
<tr>
<td>Lehigh 3</td>
</tr>
<tr>
<td>Dartmouth 1</td>
</tr>
<tr>
<td>Loyola 1</td>
</tr>
<tr>
<td>Dickinson 2</td>
</tr>
<tr>
<td>Mt. Holyoke 1</td>
</tr>
<tr>
<td>Fordham 1</td>
</tr>
<tr>
<td>Muhlenberg 1</td>
</tr>
<tr>
<td>Franklin &amp; Marshall 4</td>
</tr>
<tr>
<td>Oberlin 1</td>
</tr>
<tr>
<td>Georgetown 1</td>
</tr>
<tr>
<td>Pennsylvania State 11</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>From University of Pennsylvania 1932-33</th>
<th>1933-34</th>
<th>1934-35</th>
</tr>
</thead>
<tbody>
<tr>
<td>31+%</td>
<td>28+%</td>
<td>33+%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>From other Colleges 1932-33</th>
<th>1933-34</th>
<th>1934-35</th>
</tr>
</thead>
<tbody>
<tr>
<td>68+%</td>
<td>71+%</td>
<td>65+%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>GEOPHAGICAL DISTRIBUTION</th>
<th>1932-33</th>
<th>1933-34</th>
<th>1934-35</th>
</tr>
</thead>
<tbody>
<tr>
<td>Philadelphia 38+%</td>
<td>41+%</td>
<td>47+%</td>
<td></td>
</tr>
<tr>
<td>Pennsylvania (outside Philadelphia) 48+%</td>
<td>49+%</td>
<td>40+%</td>
<td></td>
</tr>
<tr>
<td>Other States and Foreign Countries 13+%</td>
<td>12+%</td>
<td>11+%</td>
<td></td>
</tr>
</tbody>
</table>

1. "The growth of corporate enterprise has been drying up individual independence and initiative, drying up the life of the big town and the small town, and the hamlet. We are becoming a nation of hired men, hired by great aggregations of capital, theoretically controlled by absentee stockholders, who are however so numerous and whose individual interest is generally so small that their control is inarticulate and difficult to express. This corporate growth in large measure was inevitable and no doubt desirable. To attempt to reverse it would be like turning back the hands of the clock." Statement by R. C. Leffingwell, partner of J. P. Morgan & Co., before Banking Comm. of the United States Senate. The Philadelphia Evening Bulletin, Sept. 22d, 1934, at 2.

proxy machinery has been a material factor in relieving stockholders of the last vestige of control and placing it in the management's hands. The difficulty of removing directors reduces the degree of control of the true owners of the corporation still further. It lies in the judgment of the directors whether or not stock shall be issued for property, thus reducing the proportion of control a shareholder might still retain, and making pre-emptive rights of doubtful value. In addition, statutes permit the corporation to cut off pre-emptive rights by appropriate charter provisions. The valuation of property to be received for stock depends upon the judgment of directors. The time for the payment of dividends is within the discretion of the directors. Finally, control over the issuance of the corporation's financial statements further enhances the dominance of management.

It is a common statutory provision that the directors must be shareholders in the corporation. The purpose is obvious—to give directors some measure of personal interest in corporate affairs. But the result in too many instances shows an overabundance of enthusiasm for the protection of that interest. The methods by which this may be done are manifold. Profits may be shifted from a parent corporation to a subsidiary in which the controlling group has a large interest. In distributing such profits as are made, profits may be diverted from one class of stock to another. The management's self interest may go to the extreme of wrecking a corporation for their own advantage at the expense of the security holders. In market operations "inside information" may be used to buy low from present shareholders and sell high to future shareholders. The directors may make contracts with the corporation, obtaining preferences which no stranger could. Profit sharing plans may result in wasting the assets of the corporation which rightfully belong to the shareholder. The limitations upon these methods are only those placed upon human guile and inventiveness. The last refuge of the shareholder lies in the legal safeguards placed upon the director's actions by the courts. Thus an examination of the most important safeguards is revealing—though confusing if an attempt is made to apply logically the customary legal language.

A favorite postulate of the courts in this respect is that a director stands in a fiduciary relationship to the corporation and cannot represent both himself and it. Accordingly, such transactions are said to be voidable at the option of the corporation merely because of the relationship of the parties and without regard to whether the corporation has been injured, the contract is fair or unfair, or the officer has acted in good or bad faith.

3. PA. STAT. ANN. (Purdon, 1933) tit. 15, §2852-611.
5. Wardell v. Union P. R. R., 103 U. S. 651 (1880); Sparrow v. Bement & Sons, 142 Mich. 441, 105 N. W. 881 (1905); UPTON SINCLAIR, UPTON SINCLAIR PRESENTS WILLIAM FOX (1933) 315.
6. BERLE AND MEANS, op. cit. supra note 4, at 123.
7. Id. at 122.
8. Note (1931) 41 YALE L. J. 109; Note (1933) 42 YALE L. J. 419; Note (1933) 46 HARV. L. REV. 828; (1933) 17 MINN. L. REV. 433.
10. Mobile Land Imp. Co. v. Gass, 142 Ala. 520, 39 So. 229 (1904); Massoth v. Central Bus Corp., 104 Conn. 634, 134 Atl. 230 (1926) (salaries were found to be reasonable); 3 FLETCHER, op. cit. supra note 9, §924.

3. PA. STAT. ANN. (Purdon, 1933) tit. 15, §2852-611.
5. Wardell v. Union P. R. R., 103 U. S. 651 (1880); Sparrow v. Bement & Sons, 142 Mich. 441, 105 N. W. 881 (1905); UPTON SINCLAIR, UPTON SINCLAIR PRESENTS WILLIAM FOX (1933) 315.
6. BERLE AND MEANS, op. cit. supra note 4, at 123.
7. Id. at 122.
8. Note (1931) 41 YALE L. J. 109; Note (1933) 42 YALE L. J. 419; Note (1933) 46 HARV. L. REV. 828; (1933) 17 MINN. L. REV. 433.
10. Mobile Land Imp. Co. v. Gass, 142 Ala. 520, 39 So. 229 (1904); Massoth v. Central Bus Corp., 104 Conn. 634, 134 Atl. 230 (1926) (salaries were found to be reasonable); 3 FLETCHER, op. cit. supra note 9, §924.
or the corporation was injured. Hence, the rule merely resolves itself into saying that where the director undeservedly profits, the corporation unnecessarily suffers, or no such contract would have been entered into with a stranger, such transaction will be set aside. While some courts still adhere to the strict letter of the rule regardless of the fairness of the transaction to all parties concerned, such a prophylactic doctrine is neither the tendency nor desirable. It is obvious that not all transactions in which a director is one of the parties and the corporation the other is or should be set aside without a careful scrutiny of the facts of the case. The sole reason advanced for such an arbitrary holding in those cases where the facts disclose no fraud or conduct tantamount to it or injury to the corporation, is to prevent conflicting interests from tempting human failings. In other words, such considerations as absolute fairness to the corporation, or actual benefit to it in the sense that the director may be the only one available to enter into a necessary contract, and the demand for secrecy regarding the corporate needs, are all subordinated to the fear of temptation. And it is interesting to note that in most cases the courts are prompted to express their fear of tempting the directors not because advantage might be taken, but because that has already occurred.

If the strict rule is adopted, then the courts are given an opportunity to voice another much-quoted bit of legalistic thought. It is this: “where the cor-

1. Wardell v. U. P. R. R., 103 U. S. 651 (1880) (directors formed a new corporation in an effort to get favorable contracts); Hook v. Ayers, 80 Fed. 978 (C. C. A. 7th, 1897) (no disclosure by president); Burns v. Burns, 132 Fed. 485 (W. D. Mo. 1904) (no disclosure that directors were to profit); Fulkerson v. Nat. Union Fire Ins. Co., 291 Fed. 784 (D. Mont. 1923) (agent of the insurance company mailed a binder of his own policy after the damage was done); Memphis & C. R. R. v. Woods, 88 Ala. 630, 7 So. 108 (1889) (fraud on directors' part at shareholder's expense); Consumers' Ice & Coal Co. v. Security Bank and Trust Co., 170 Ark. 530, 286 S. W. 677 (1926) (mismanagement by directors for own benefit); Western States Life Ins. Co. v. Lockwood, 166 Cal. 185, 135 Pac. 496 (1913) (secret arrangement with employee to share profits); Gilman, C. & S. R. R. v. Kelly, 77 Ill. 426 (1875) (directors entered into stock transactions with company with which corporation did business, by which directors were to profit); Ryan v. Leavenworth, A. & N. W. Ry., 21 Kans. 365 (1879) (concealment of essential facts); Hill v. Marston, 178 Mass. 285, 59 N. E. 765 (1901) (president gave preference to himself when company went insolvent); Old Mfg. & Fin. Co. v. Pasadena Land Co., 244 Misc. 426, 216 N. Y. 922 (1928) (terms of transaction were unfair to shareholders); Leonard v. Citizens Bank of Ulysses, 56 Neb. 38, 76 N. W. 452 (1898) (partners indebted on a note became officers of corporation holding the note and renewed it so as to discharge themselves); Pearson v. Concord R. Corp., 62 N. H. 537 (1883) (managers of road bought control of rival to get favorable contracts).


California has been particularly severe on directors' transactions with the corporation, due largely to the application of trust rules from its Civil Code. Note (1931) 19 CALIF. L. REV. 304. But this has been greatly modified by statute. CAL. CIVIL CODE (Deering, 1931) c. 862, § 311. See Ballantine, Questions of Policy in Drafting a Modern Corporation Law (1931) 19 CALIF. L. REV. 405, 475, et seq.

Like-wise it is doubtful whether Munson v. Syracuse G. & C. R. R., supra, is still the prevailing New York view. See Note (1929) 29 COLUM. L. REV. 338, 342.

13. BALLANTINE, PRIVATE CORPORATIONS (1927) § 123, where it is said, "This is the application of the 'prophylactic principle' in its most extreme form, and may seriously hamper honest corporate business."

14. It is usually expressed that, "Humanity is so constituted that when these conflicting interests arise the temptation is usually too great to be overcome, and duty is sacrificed to interest." Pacific Vinegar & Pickle Works v. Smith, 145 Cal. 352, 356, 78 Pac. 550, 554 (1904). See Wardell v. Union P. R. R., 103 U. S. 651, 658 (1880).

15. In Pacific Vinegar & Pickle Works v. Smith, 145 Cal. 352, 78 Pac. 550 (1904), the interested directors concealed facts essential to the board's knowledge. In Wardell v. Union P. R. R., 103 U. S. 651 (1880), the directors tried to divert new business to a corporation of their own.
poration in a transaction with a director acts through other officers, the corporation may have the contract set aside only on proof of unfairness causing actual injury to the corporation or of bad faith of the officers." 18 Thus, where the director represents himself and the corporation the transaction is voidable merely because of the relationship, 17 but where disinterested officers, i.e., others, represent the corporation, such transaction may be set aside only on proof of unfairness. This principle merely states the converse of the first, and is likewise of doubtful value in deciding different factual situations. The sole effect is to put emphasis on the question of who represents the corporation. Irrespective of this question the courts have, while ascertaining the interests of the directors who have acted in order to see if their relationship to the transaction may be called interested, examined the fairness of the entire transaction. This seems to be the ultimate problem. If any unfairness to the corporation is present, or the directors will gain a benefit which a third person could not, the transaction will be upset no matter who represents the corporation. 18

An interested director represents the corporation when he takes part in making or authorizing the contract or other transaction, or his vote is necessary to bind the corporation. 19 Hence, while it has been held that where the director does not vote on the transaction or is absent from the meeting, the transaction is binding unless unfairness or actual injury to the corporation be proved, 20 the proper emphasis belongs upon the part played by the director who is the motivating force behind the transaction, rather than upon his mere presence at the meeting. It is in this particular situation that rigid scrutiny by the court is important. 21 And whenever the motivating director stands to profit unduly as a result of the deal, the courts will unhesitatingly refuse to enforce the transaction. 22

---

16. 3 Fletcher, op. cit. supra note 9, § 931; see Note (1931) 19 Calif. L. Rev. 304, 305.
17. Supra note 9.
18. Schemmel v. Hill, 91 Ind. App. 373, 169 N. E. 678 (1930) (the corporation purchased property at an unfair price); Baker v. Helner Realty Co., 265 Mich. 625, 251 N. W. 793 (1932) (land transferred to president before the directors met to authorize the transfer); Williams & Miller Gin Co. v. Knutson, 63 S. W. (2d) 576 (Tex. Civ. App. 1933) (president agreed to cancel director's note which corporation held); Hein v. Forney, 164 Wash. 309, 2 P. (2d) 741 (1931) (trustee of corporation made payment on notes he held against it to renew running of Statute of Limitations).
19. Beers v. New York Life Ins. Co., 66 Hun 75, 20 N. Y. Supp. 788 (1892). In Anderson v. Galley, 33 F. (2d) 589 (N. D. Ga. 1929), the director's vote was the deciding one on the question of whether or not the corporation should sue him. In Hinkley v. Sagemiller, 191 Wis. 512, 210 N. W. 839 (1927), the director's vote was the deciding one on the question of whether or not he should be suspended from office for misconduct. It is submitted that such "interest" should be distinguished from being merely a party to a contract. 3 Fletcher, op. cit. supra note 9, § 936.
21. See text infra page 61.
If the statement that the director stands in a fiduciary relationship to the corporation means anything, it is obvious that the relationship exists whether the director votes or not. The director occupies his position solely for the purpose of expressing his opinion on corporate business, and to refrain purposely from voting when he is probably in the best position of any of the board to pass on a question, seems a direct violation of his duty to the corporation or the shareholders. Yet this is what a strict interpretation of these principles, in effect, advocates. There is no sound reason why a contract should not be upheld when the director makes full disclosure of his interest to the other members of the board and takes no advantage of his position. Thus, where the interested director does vote in favor of a contract, whether or not there is a majority without his vote should not be the deciding test on the question of voiding the contract, merely because of the relationship, and without a further examination of the fairness. To do so stamps as fraudulent every contract in which the director has an interest while every other contract or transaction entered into by other members of the board is prima facie entirely fair. The situation becomes paradoxical when it is recalled that these men have been voted into office because of their ability and honesty, given huge sums of money and responsibilities, and yet, for example, are not allowed to sell a bit of land to their corporation because they are interested in the transaction and represent it too.

One possible objection to permitting the court to evaluate the fairness of a particular transaction may arise in this way. Of necessity, the effect of the court's scrutiny may be to substitute its own judgment for that of the directors in entering into a particular transaction. Hence, where the directors believe that a particular contract with one of themselves, for instance in the purchase of property, may be advantageous in the near future, and their judgment is wrong, a trouble-seeking shareholder may have the entire transaction avoided. But

23. Supra note 10. The directors' "... superior position imposed upon them, some duty to the plaintiff as well as to the corporation at least not to take advantage of the opportunity afforded by their position to wrong her ... and to refrain from intentionally abusing that power. ..." Von Au v. Magenheimer, 126 App. Div. 257, 110 N. Y. Supp. 629 (1908).

24. Where it doesn't appear that the directors interested in the transaction voted, and the fact of their voting would render the transaction voidable merely because of the relationship, "... it should be presumed that he or they did not vote, and that his or their vote was not necessary to the passage of the resolution, so that the transaction cannot be avoided except for cause other than the mere relationship of the parties." 3 Fletcher, op. cit. supra note 9, § 934. In Barrett v. Smith, 185 Minn. 596, 242 N. W. 392 (1932) the directors whose salaries were raised purposely absented themselves from the meeting which was to ratify the increase, but the court properly threw the transaction out because of the control exercised over the rest of the board.


26. This is the rule used in Cardin Bldg. Co. v. Smith, 125 Okla. 300, 258 Pac. 910 (1927), but the result was reached because of the fairness of the conveyance by the corporation to the director. The better view was taken in Clark v. American Coal Co., 56 Iowa 436, 53 N. W. 291 (1892) ; Budd v. Walla Walla Print. Co., 2 Wash. Terr. 347, 7 Pac. 896 (1885). In both cases the court considered the fairness of the transaction rather the necessity of the interested directors' vote to constitute a majority, and held both transactions fair.

27. "What boots it to say in one breath that as a matter of law the director may deal with the corporation as a stranger, and in the next to say that merely because he is a director he must as a matter of law be deemed prima facie to have cheated or acted in bad faith to his corporation?" Gager, J., dissenting in Jordon v. Jordon, 94 Conn. 384, 398, 109 Atl. 181, 520 (1920).

28. A minority of courts hold a sale of corporate property to a director voidable even though it is fair and the corporation is represented by disinterested directors. Morgan v. King, 27 Colo. 539, 63 Pac. 416 (1900).
the value of the rule of fairness cannot be doubted in the long run and it has
been made statutory law in at least one jurisdiction.29

The cases cited in support of the proposition that a transaction is voidable
merely because of the relationship where the director’s vote is needed to make
up a quorum or a majority to pass the resolution authorizing the transaction,30
are likewise fraught with examples of unfairness to the corporation or of unde-
served benefit to the director.31 Thus once more the emphasis properly belongs
not on the fact that the director’s vote was needed to pass the resolution but
on the unfairness on the part of the director in seeking to benefit himself unduly,
or on a possible injury to the corporation. More important than the factor of
the director’s presence or vote is the degree of control he may exercise over the
remaining members of the board even when absent.32

The futility of attempting to classify the cases, either on the basis that the
director dealt with himself or with other directors who represented the corpo-
rati on, is best illustrated by a different situation where the director represents
the corporation in a transaction with third persons, but nevertheless the interest
of the participating director is quite obvious. Thus, in South Georgia Holding
Co. v. Hiatt,33 the court sustained a transaction in which the director voted to
issue stock in cancellation of the corporation’s obligation in defendant’s hands
plus wiping out of the director’s obligation. In Kleinsasser v. McNamara,34
the directors who had acquired leases and options adjoining the corporation’s
property, voted to sell the corporate holdings to a buyer who would not accept
their own land without a sale of the corporate property. And in Mitchell v.
The Highland-Western Glass Co.35 the directors voted to sell the business to
another corporation in which they were to receive the same salaries as had been
paid them in the selling corporation. In these cases the courts upheld the trans-
actions and said the directors were not dealing with themselves but were transact-
ing business with third persons; but the underlying rationale was in the court’s
finding that the price was fair and the transactions beneficial to the corporation.
Once more the motivating factor seems to be the fairness of the transaction
which caused the court to overlook the fact that the directors did benefit solely
through their connections.

Recent cases permitting dealings between director and corporation reveal
a tendency on the part of courts not to confine the management as closely as
prior decisions did.36 Today, by the liberal and preferred rule the corporation
and the director can transact business on nearly the same basis as if the director

29. CAL. CIVIL CODE (Deering. 1931) c. 862, § 311; see Ballantine, loc. cit. supra note 12.

30. See cases collected in 3 Fletcher, op. cit. supra note 9, § 936, and cases cited
in note 26, supra.

(president renewed his mother’s note); Rugger v. Mt. Hood Electric Co., 143 Ore. 193,
20 P. (2d) 412 (1933) (the director whose contract was accepted by the corporation was
to give stock bonus to two of the four directors who voted to accept it); see supra note 22
and the specific illustrations cited there.

32. Zeckendorf v. Steinfeld, 12 Ariz. 245, 100 Pac. 784 (1909); Globe Woolen Co. v.
Utica Gas & Elec. Co., 224 N. Y. 483, 121 N. E. 378 (1918); Barrett v. Smith, 185 Minn.
596, 242 N. W. 392 (1932).

33. 2 F. Supp. 91 (M. D. Ga. 1933).

34. 129 Cal. App. 49, 18 P. (2d) 423 (1933).

35. 19 Del. Ch. 326, 167 Atl. 831 (1933).

36. See Note (1929) 20 Col. L. Rev. 338; Note (1931) 19 CALIF. L. REV. 304; James,
Interested Directors in Corporate Transactions (1931) 6 IND. L. J. 413, in which the trend to
liberalize the principles hitherto governing is approved.
were a stranger. The sole difference lies properly in the rigid scrutiny such transactions must undergo by the courts; only the guilty need fear this. The same tendency towards liberalization is visible in cases involving the cognate problem of transactions between corporations having interlocking directorates.

It is well settled that a director can lend money to his corporation and take as security an obligation which can be enforced against the corporation. The weakness of any argument against allowing such loans is best exposed in a quotation from the leading case of Twin-Lick Oil Co. v. Marbury.

"Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously and best qualified to judge of the necessity of that aid, and to the extent to which it may safely be given."

The same result has been reached even where a majority of the directors were interested in the transaction.

Since the better view, as previously stated, is to permit more freedom in transactions between corporation and director, it might appear that the interests of shareholders and creditors would be jeopardized. However, the all-important qualification that such transactions must be free from fraud or other unfairness makes the position of the shareholder relatively safe. This is achieved by the court’s careful scrutiny of the transactions “if not with suspicion, at least with the most scrupulous care,” and its readiness to set it aside “upon much slighter grounds” than if the corporation dealt with a stranger. These principles are not mere words, for Equity will resolve no doubts in favor of the director. Rather, the ancient suspicion cast on director’s dealings will cause the adoption of that construction of a contract most favorable to the corporation. So, in the recent case of Alexander v. Theleman, where both the corporation and a director gave options on shares in the corporation, and the court could have found either way on the question which of these was exercised by the optionee, the corporation was given the benefit of the doubt.

The same care is exercised in watching other transactions. In the much-discussed case of Rogers v. Hill, it was held that even where there was no inference of actual or constructive fraud in making bonus payments under a by-law, the profits may make these amounts so large as to warrant investigation in a court of equity in the interests of the company. This far-reaching decision is indicative of the broad scope of equitable powers which safeguard the share-

37. Among other things, directors and officers can lend money to the corporation and take security, infra note 39, vote salaries to themselves, infra note 52, sell property to the corporation, Milwaukee Cold-Storage Co. v. Dexter, 99 Wis. 214, 74 N. W. 976 (1898); vote on a contract to buy from another corporation in which a director is also a member of the board, Hines v. Lausterer, 137 Misc. 397, 238 N. Y. Supp. 276 (1931); lease property to the corporation, Harris v. United Service Co., 132 Ark. 779, 32 S. W. (2d) 618 (1930).
40. 91 U. S. 587, at 589 (1875).
45. 69 F. (2d) 610 (C. C. A. 10th, 1934).
46. 289 U. S. 582 (1933); see Note (1933) 46 HARV. L. REV. 828; (1933) 17 MINN. L. REV. 433.
holder: a by-law passed in 1912 under which the payments were sought to be justified, was of no avail where the sums paid became so large "as in substance and effect to amount to spoliation or waste of corporate property." 47 Hence it is clear that such plans are reviewable as to reasonableness, 48 and will be approved only where the sums paid are found fair. 49 In the same vein it has been held that the payment of large bonuses to the officers of a corporation paying only moderate dividends, is prima facie evidence of a misappropriation of funds. 50 Equity further demands in this situation that the bonus payments bear a relation to the value of the services for which they are given, or else "it is a gift in part, and the majority stockholders have no power to give away corporate property against the protests of the minority." 51

Likewise, Equity carefully scrutinizes the voting of salaries to directors and officers by themselves. The burden of proving the reasonableness of such salaries is placed upon the directors. 52 Whether the officers themselves are the majority shareholders or not, compensation will be reduced to a sum which the court deems reasonable. 53 Also, before any increase in salary will be permitted, the amount of business done must warrant it, 54 and the work done by the directors and officers must likewise be deserving. 55 Nor are large profits alone a ground for high salaries. 56 In considering what is reasonable Equity looks to the amount of salaries paid elsewhere in similar businesses in order to gain a fair picture of the circumstances involved. 57 The courts apply the same rule to salaries as they do to bonus payments. In either case the absence of fraud is immaterial. "The right of recovery for the benefit of the corporation rests upon the excessive payment to a director. This conclusion is supported by the great weight of authority." 58

The corporation can recover from the director a commission received from a broker for the sale of the corporation's bonds. 59 An agreement between an officer and an employee will not be enforced where the latter in consideration of being given a job is to pay the officer a share of his salary. 60 On the other hand, Equity will not interfere where it deems additional services, authorized by the by-laws or board, to be worth extra compensation. 61 And where a nominal director acted as broker for his corporation in the purchase of property, he was permitted to receive fees from both seller and buyer where no fraud or unfairness was shown. 62

Another type of transaction deserving of comment is that where the director deals with a shareholder in buying shares or sells shares of his own to a pro-

---

47. Id. at 591.
53. Note (1933) 42 Yale L. J. 419, 423. But where the directors are the sole shareholders they can vote themselves salaries without ratification. Bates Street Shirt Co. v. Waite, 130 Me. 352, 156 Atl. 203 (1931).
54. Tampa Waterworks Co. v. Wood, 97 Fla. 493, 121 So. 789 (1929).
spective shareholder. Courts invariably hold that the director is or is not in a fiduciary relationship with the shareholder, and hence, is or is not under an obligation to reveal what he knows, depending on the result that has already been determined in the court's mind. Such language expresses a result rather than the reason. The majority of the courts refuse to impose any obligation on a director to disclose to a shareholder information which he has affecting the value of the shares in the near future, saying that no fiduciary relationship exists toward the shareholder.63 This is in direct contrast to the attitude frequently taken by courts in discussing contracts or other transactions made by directors with the corporation. There is an inconsistency, for the director should not be bound by the ties of his position to the corporation only and be able to ignore the people who are behind the entity. A minority which has at least intellectual support is just as vehement in imposing such a duty.64 It is true that the minority rule has grown up in cases where the facts involved would have merited no other result because of the presence of actual fraud, misrepresentation, etc.65 These decisions refuse to allow a director who has been placed in a position of trust by the shareholders for the purpose of protecting their interests to utilize information gained from his position to their disadvantage. The anomaly of the situation is especially striking since that information is not available to them because the director who has first access to it controls its release. It is primarily for this reason that the rule of "special circumstances" has been adopted in the federal courts,66 which, while unwilling to impose flatly a duty of disclosure, recognize that the circumstances of the case may make the failure to reveal known information grounds for an action by the shareholder. On the other hand, a too strict observance of the minority rule may place the director between the Scylla of his duty to the corporation not to disclose too much and the Charybdis of his obligation to the shareholder, not to disclose too little. In Hotchkiss v. Fisher,67 the director in reply to the question, truthfully said that he did not know whether a dividend would be declared and gave the shareholder the corporation's latest financial statement. But it was held there should have been "summation by defendant of the information disclosed by the statement, and the furnishing of any other information he possessed specifically on the subject of likelihood of declaration of a dividend."68 The fear of thus burdening the director has been instrumental in cases reaching an opposite result.69 Likewise, where the shares are bought on the stock exchange, the impracticability of disclosure has led courts to refrain from imposing such duty.70 To hold that the director must reveal everything he knows or should know regarding the true value of the stock is an arbitrary requirement, hinging too largely on the edge of the director's own opinion, and thus making the rule too vague for effectiveness. Further, it must be

63. Walker, The Duty of Disclosure by a Director Purchasing Stock From His Stockholders (1923) 32 YALE L. J. 637; Berle, Publicity of Accounts and Directors' Purchases of Stock (1927) 25 MICH. L. REV. 827; see notes following.
64. Wilgus, Purchase of Shares of Corporation by a Director from a Shareholder (1910) 8 MICH. L. REV. 267; and see notes infra.
65. Oliver v. Oliver, 118 Ga. 362, 45 S. E. 232 (1903); Saville v. Sweet, 234 App. Div. 235, 254 N. Y. Supp. 768 (1932); see the excellent case study by Wilgus, supra note 64. See (1930) 39 YALE L. J. 582, where it is questioned whether the fiduciary relationship would have been discovered in the absence of the director's duplicity.
66. Strong v. Repide, 213 U. S. 419 (1909) (the special circumstances were that the defendant was a director, owned three-quarters of the shares, was administrator-general, did the negotiating with the government for the sale of land).
67. 136 Kans. 530, 16 P. (2d) 531 (1932), (1933) 46 HARV. L. REV. 847.
68. Id. at 536, 16 P. (2d) at 534.
69. Walker and Berle, both supra note 63.
realized that certain pending transactions which may affect the value of the stock cannot be disclosed prematurely for fear of revealing information to competitors.\textsuperscript{71} Under the minority view the whole facts of the particular case must be scrutinized by the court to see whether the director did withhold information which properly could have been disclosed at that time. Such an attitude compares favorably with the liberal one advocated regarding contracts made by the director with the corporation.

Some of the courts adhering to the majority rule state that the director must not withhold something of "substantial consequence".\textsuperscript{72} Others say that the director is not bound to volunteer information unless he is asked, and can treat the shareholder as a stranger.\textsuperscript{73} But by requiring disclosure if asked, the prevailing thought is that the information obtained by the director through his position belongs to the shareholder. Adherence to the majority rule in recent years has generally been confined to cases where the shareholder with whom the director dealt was also a director and thus should have known for himself the true state of affairs,\textsuperscript{74} or had worked for the corporation and was familiar with the stock's possibilities,\textsuperscript{75} or the director had acted fairly in selling the shares for the shareholder at the latter's price and had made no commission himself.\textsuperscript{76}

In other words, the facts of these cases justify the result regardless of whether or not there is a fiduciary relationship existing between director and shareholder. But those courts holding there is a fiduciary relationship to the corporation alone, and not to the shareholder, with the result that directors can be sued only if the corporation is injured, ignore the important fact that the directors may injure the shareholder without injuring the corporation, as where the director falsifies accounts so that the shareholder pays higher prices than the stock is worth,\textsuperscript{77} or where the president contracts with a firm selling the corporate shares to get a percentage of the profit realized from the shares sold.\textsuperscript{78}

The latest effort to prevent directors from profiting through their inside knowledge is the provision in the Securities Exchange Act of 1934. This requires all directors to register the amount of shares owned and to report monthly any changes in such ownership. Any profit realized by the director from transactions with these shares within any period less than six months from the sale or purchase of shares is recoverable by the corporation.\textsuperscript{79} The practical value of this remains to be seen, but its failings may be mentioned. First, it cannot include transactions which the director can sponsor in another's name; second, profits may be taken after holding the shares for six months; and third, it still ignores the shareholder who has sold his stock and lost the profit. But the provision does have the effect of preventing wholesale traffic in the corporate shares by the directors who may embroil themselves so that manipulation may be resorted to. Moreover, it is a realization of the problem and an opening wedge for its solution.\textsuperscript{80}

\textsuperscript{71} McMynn v. Peterson, 186 Wis. 442, 201 N. W. 272 (1924); see Percival v. Wright, 2 Ch. 421, 426.
\textsuperscript{72} Hacker v. Kyle, 211 Wis. 585, 248 N. W. 134 (1933). While thus holding with the majority, the court realizes that some duty is owed to the shareholder.
\textsuperscript{73} Waller v. Hodge, 214 Ky. 705, 283 S. W. 1047 (1926).
\textsuperscript{76} Blabon v. Hay, 269 Mass. 401, 169 N. E. 268 (1929).
\textsuperscript{77} See Ottinger v. Bennett, 144 App. Div. 525 (1911), rev'd, 203 N. Y. 554 (1911).
\textsuperscript{78} Western State Life Ins. Co. v. Lockwood, 166 Cal. 185, 135 Pac. 496 (1913).
\textsuperscript{79} P. L. No. 291, 73d Cong. (1934) § 16 (a) (b).
A corollary to the greater freedom of transaction between director and corporation is the recognition of the obsolescence of the so-called principles which have hitherto governed their relations. It is by no means certain that shareholder's interests are secure from the designs of the unscrupulous director. But that security is in no way achieved or even assured by ancient restrictions on directors' dealings with the corporation. To allow circumstances of each case to govern rather than to abide by a rule disregarding the fairness of the case will accomplish more in securing benefits to the shareholder.

But that alone is not sufficient. Publicity of all corporate affairs is of immense importance. This is especially true with regard to corporate loans to officers, remuneration, shares traded, and affiliations of all directors with other corporations. England has associations to investigate abuses of shareholders' rights, which wield powerful force in uncovering corporate dishonesty. Much can yet be done, but nothing is more necessary than to discard outmoded and superfluous rules which disregard the factual situations involved and actually prove detrimental to legitimate corporate transactions.

LIABILITY OF A HUSBAND FOR THE TORTS OF HIS WIFE—With the recent appointment by the Lord Chancellor of England of a committee to re-examine the dogma that a husband is liable for the torts of his wife, that doctrine would seem from present indications to stand in imminent likelihood of serious excision in the place of its birth. Particularly so, if a cue is to be taken from the fate suffered by the rule in the country of its adoption, where the ambition to further the legal emancipation of women has obscured the more appropriate social aim of providing a not too remote source of compensation for plaintiffs injured by the tortious conduct of married women.

Whatever its origin may have been, it is quite certain that the rule imposing liability on a husband for the actionable misconduct of his wife was most rigorously applied in England from the earliest times, the only question about which the courts concerned themselves being whether a marital relation in fact existed between the joint defendants at the time that liability was sought to be imposed. Thus, in one of the first cases dealing with this type of vicarious liability it was held to be immaterial that the husband and wife had separated by private agreement or that her misconduct had occurred while they were estranged. The liability, existing solely by reason of the marriage, lasted so long as the marriage endured, and was extinguished by a divorce a vinculo matrimoni or by death of the wife. While the husband's liability extended to antenuptial

81. "The existence of bonuses, of excessive commissions and salaries, of preferential lists and the like, may all be open secrets among the knowing, but the knowing are few. There is a shrinking quality to such transactions; to force knowledge of them into the open is largely to restrain their happening. Many practices safely pursued in private lose their justification in public." Frankfurter, The Federal Securities Act: II (Aug. 1933) 3 Fortune 53, 55.
82. The Banking Act of 1933 prohibits interlocking interests with companies which make certain types of loans to persons other than their own subsidiaries, and also loans by any member bank to its executive officers. See 48 Stat. 194 12 U. S. C. A. VII § 78 (Supp. 1933) ; 48 Stat. 182, 12 U. S. C. A. § 375a (Supp. 1933).
83. Douglas, supra note 2, at 1330.

1. Paget v. Read, 1 Vern. 143 (Ch. 1682). Accord: Head v. Briscoe, 5 Car. & P. 484, 486 (N. P. 1833) ("And whether their separation be permanent or temporary it does not affect the question").
2. Capel v. Powell, 17 C. B. N. S. 743, 748 (1864) ; In re Beauchamp, [1904] 1 K. B. 572 ; see Head v. Briscoe, 5 Car. & P. 484 (N. P. 1833). In Burdett v. Horne, 28 T. L. R. 83 (C. A. 1911) the court stated that where a judicial separation was obtained for the very purpose of avoiding liability, the fact that the marriage was dissolved would not be sufficient to defeat the plaintiff's claim against the husband.
as well as to post nuptial torts, it was recognized that the wife was not relieved of her liability and she had to be joined as a necessary party defendant, so that, if the husband died, the suit did not abate, but continued against her alone.

Although the rules defining the scope of a husband's responsibility were the subject of almost undeviating judicial repetition, neither the reason for the doctrine, nor its origin was ever clearly or consistently enunciated in the cases. Most of the explanations seem merely to have been inserted as a matter of legal tradition inherited by the incumbent bench from its predecessor, and repeated without regard to their actual validity. Perhaps the most frequently reiterated "reason" was that "the husband, in truth, was only joined for the sake of conformity, and not with the view of asserting any individual right against him." Granted that a wife at common law was under a procedural disability to be the sole party to a suit, and that this gave rise to the practise of joining her husband, the practical result of what purported only to be procedural circumstance was to impose a tort liability on him. The judgment rendered was against both husband and wife, but it was his property that was subject to execution. If the difficulty present in the common law mind was a purely procedural one, there would seem to be no valid reason for prosecuting the joiner of husband and wife in such a manner as to create a substantive liability against the husband. On the contrary, in Drury v. Dennis, although the formality of joining both spouses was complied with, the court refused to enter a judgment on a verdict which found only the wife guilty of the alleged trespass, and exonerated the husband. Such a verdict was considered imperfect, and could only be cured by finding both spouses either guilty or innocent.

Another commonly expressed rationale for the husband's liability was the obviously superficial one that a wife was incapable of committing a tort; "they are the torts of her husband, and therefore she creates as against her husband a liability." This, is no more than the restatement of a conclusion: if the tort is that of the husband, then he should be liable, but the reason for attributing the independent act of a wife to her husband is still left without answer. Nor was the effect of such reasoning ever applied by the courts. Were the tort that of the husband, then his liability should continue even after the death of his wife; but the contrary position was settled law.

Closely resembling the view last expressed, was the theory that the husband was liable because he permitted his wife to commit the tort. This view,

4. In re Beauchamp, [1904] 1 K. B. 572, 581. This was settled law, although contradictory to Wainford v. Heyl, L. R. 20 Eq. 321 (1875), where the court's theory was that a wife is incapable of committing a tort—the fiction being that it was her husband who committed it.
6. That the joining of both spouses was more than a formality was clearly recognized by Fletcher Moulton, L. J., in Cuenod v. Leslie, [1909] 1 K. B. 880, 887.
7. To the common law lawyer it was inconceivable that a wife should be capable of suing or being sued in her name alone. Drury v. Dennis, Yelv. 106 (K. B. 1608). But that this should be the primary reason for transferring the liability itself to the husband, as was intimated by Viscount Cave in Edwards v. Porter, [1925] A. C. i, 7, does not seem tenable.
10. See cases cited supra note 2, and criticism of this reasoning by Viscount Cave in Edwards v. Porter, [1925] A. C. i.
likewise, is without legal support. The husband's responsibility extended to torts though committed out of his presence and while living apart from his wife when he could not possibly have prevented the commission of the wrong. The very fact that he could not, for example, enjoin her from wrongfully pledging his credit, should have been sufficient judicial pronouncement belying the concept that he maintained that degree of enforceable control over her necessary to make him liable for her misconduct. Indeed, in assuming that a husband can always exert his superior influence to deter the acts of a recalcitrant wife even when she is in his presence, the law spoke with the naïve inexperience of bachelorhood.

However, running through many of the cases seems to be one very influential, if infrequently voiced, consideration. In one way or another, courts have indicated that if a substantive liability were not placed upon the husband, the aggrieved party would be without relief since all of the wife's property vested in her husband upon marriage. This, at least, seems to be a more realistic explanation, although an historical inquiry into the status of husband and wife reveals that it was not the basis for the common law rule.

Examining the marital relationship as it existed under the feudal system, it appears that husband and wife occupied respectively the positions of lord and vassal—more familiarly described in the language of that time as baron and feme. But there was no such assimilation by the baron of the personality of the feme as would justify the conclusion, so erroneously stated by jurists and commentators, that the two were but one individual. The identity of the wife was merely inferior to that of her husband, but each maintained individual legal personalities. By the marriage contract she "commended" herself to her lord, thereby promising to pay him service and obedience. In return, he undertook, as part of his feudal responsibilities, to provide her with subsistence and protection so long as the relation continued. In fulfillment of this, the husband was responsible for his wife's debts to the extent of his obligation to maintain her. His duty to protect her in a society that demanded "an eye for an eye and a tooth for a tooth" rendered him responsible for her torts. It is this same reciprocal relationship between a lord and his vassal that gave rise to the doctrine of respondeat superior.

Unmindful of the feudal origin of a husband's liability, but stimulated by the feeling that the burden imposed was, perhaps, too great, the English courts proceeded to engraft an arbitrary exception upon the common law rule. In Liverpool Adelphi Loan Association v. Fairhurst a wife entered into a surety contract with plaintiff, falsely representing that she was unmarried. On the

---

14. When Mr. Bumble was told that he was responsible for his wife's conduct, and that, in fact, he was the more guilty of the two in the eye of the law, for the law supposes that a wife acts under her spouse's direction, Mr. Bumble replied: "If that's the eye of the law, the law's a bachelor; and the worst that I wish the law is, that his eye may be opened by experience." CHARLES DICKENS, OLIVER TWIST.
17. Consequently a husband was not liable for his wife's torts after dissolution of the marriage, nor for debts beyond necessities.
19. 9 Ex. 422 (1854).
strength of this representation, plaintiff advanced money to X. When X defaulted, plaintiff discovered the misrepresentation and brought a tort action against both husband and wife, alleging the wife's fraud. The court refused to permit recovery on the theory that while a husband is generally liable for the tort of his wife, this applies only to "naked torts", and he is not responsible where the tort is directly connected with her contract and is the means of effecting it. This verbal distinction, however, is without substance, the whole being designed purely for the relief of husbands.\(^2\)

Once the courts had committed themselves to the major premise that a husband was liable for his wife's torts, then an application of the minor premise that fraud or misrepresentation was a well recognized tort could lead inevitably to the conclusion that a husband was liable for his wife's frauds or misrepresentations \textit{irrespective} of whether or not the misrepresentation induced a contract.

The tendency towards the alleviation of the husband's responsibility gathered its greatest impetus after the passage of the Married Women's Property Act,\(^2\) which provided, \textit{inter alia}, that:

"A married woman shall be capable of . . . suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant . . . and any damages or costs recovered against her in any action or proceeding shall be payable out of her separate property, and not otherwise."

Although this language would appear clearly to indicate the complete emancipation of married women and the purpose of abrogating the common law liability of husbands, \textit{Seroka v. Kattenburg},\(^2\) the first case clearly to decide the point, held otherwise. The court reasoned that since the Act did not in so many words state that a husband was no longer liable, it would be impossible to repeal the common law by mere implication. The only perceptible effect of the Act was

". . . to give [the plaintiff] the option of suing the wife where she has separate property, and there is a chance of the plaintiff being able to enforce a judgment against her; while in cases where there would be no chance of enforcing the judgment against the wife, the husband is left subject to his old common law liabilities."\(^2\)

Although this holding was substantially followed in the later cases,\(^2\) it aroused considerable disagreement among the judges.\(^2\) Against this view it was urged that, since the foundation of the husband's liability was the fact that his wife's property vested in him upon marriage, and that she could not be sued alone, there was no reason for continuing the rule in the face of an Act which removed these disabilities.\(^2\)


\(^{21}\) 45 & 46 Vict. c. 75, § 1 (2).

\(^{22}\) 17 Q. B. D. 177 (1886).

\(^{23}\) \textit{Id.} at 179. The exercise of the option is completely at the discretion of the plaintiff; there is no necessity of proof that the wife is judgment proof in order that the suit be maintainable against the spouses jointly.

Since the Act provided only that "husband need not be joined", this was not interpreted as a \textit{mandate} absolving him from responsibility.

\(^{24}\) Earle v. Kingscote, [1900] 2 Ch. 585, cited note 20, \textit{supra}.


Not until 1925 did the Act come before the House of Lords for interpretation in *Edwards v. Porter*. It was there held (two of the five judges dissenting) that the Act does not abrogate the common law liability except insofar as Section 14 provides that the husband is liable for his wife's antenuptial torts only to the extent that he acquires her property by reason of the marriage.

Much of the controversy, however, might well have been averted had the courts been more fully aware of the fact that the husband's liability was not dependent either on his wife's right to hold property or her immunity from suit without his joinder. While the Act removed her disabilities, in these respects, it in no way affected the reciprocal duties of service and protection which initiated the husband's responsibility. And so long as these remain, or, if under modern conditions there is present an equally valid basis for continuing the husband's liability, there is no reason for abolishing the doctrine still prevailing in England.

In the United States, the common law rule was followed without question for a considerable period. Like the English courts, no serious attention was paid by the American judiciary to the reason for the rule beyond a cursory repetition of legalistic shibboleth. Thus we find the courts echoing the theory of unity of person, control of the husband over the acts of his wife as well as her property, necessity for joinder as a matter of form—in a vain effort to explain the origin of the principle. Several of the courts quite frankly based their decisions on the ground that to hold otherwise would leave injured third parties without substantial redress, while other courts, equally frank, indicated their ignorance of the foundation for the rule.

Insofar as the scope of the husband's liability was concerned, the rule in most states did not differ materially from that applied in England. Several of the American cases, however, went so far as to exact punitive damages from a husband for the malicious tort of his wife. In at least one jurisdiction, it was declared that if the wrong was committed in the presence of the husband, and nothing more appears, the husband alone is legally answerable. But with the exception of such infrequent variations the English doctrine was followed explicitly even to the extent of relieving the husband where the tort was one "growing out of contract."

31. Henley v. Wilson, 137 Cal. 273, 70 Pac. 21 (1902); McElfresh v. Kirkendall, 36 Iowa 224 (1873).
35. Lombard v. Batchelder, 58 Vt. 558, 5 Atl. 511 (1886); cited note 29, *supra*; see Sergeant v. Fedor, 3 N. J. Misc. 832, 130 Atl. 207 (1923); McQueen v. Fulgham, 27 Tex. 463 (1864). No English case has been found where this point was decided.
36. The theory here is that the wife acts under her husband's coercion, but actual coercion need not be proved. Edwards v. Wessinger, 65 S. C. 161, 43 S. E. 518 (1902); see also McKeown v. Johnson, 1 M'Cord 578 (S. C. 1822).
But with the introduction of various married women’s acts, liberalizing the legal status of women,\textsuperscript{38} the first decisive step toward a wholesale abrogation of the common law rule was taken by American courts. In a large minority of the jurisdictions it was decided that legislation of this character completely abolished the husband’s liability.\textsuperscript{39} In the majority of states, however, the common law still prevailed,\textsuperscript{40} with only occasional modifications.\textsuperscript{41}

Such ingressing having been made, it was not long before the persuasion of the feminist movement resulted in an almost complete abandonment of the rule imposing liability on husbands. This was accomplished for the most part\textsuperscript{42} by express legislation.\textsuperscript{43} In general these statutes provided that a husband is only liable with his wife where he participates with, commands, or coerces her into commission of the tort. Or, as sometimes phrased, he is only liable where he would be jointly liable with her if no marriage existed between them.

At the present time there are only a very few states which have not abolished the common law rule, and even in those states its effect has been limited either by statute or judicial interpretation of the married women’s acts. In Texas, for

\hspace{1em}\hspace{1em}\hspace{1em}\hspace{1em}38. In general terms these provide that a married woman may take and hold property, sue and be sued, and in other respects act as if she were unmarried.

\hspace{1em}\hspace{1em}\hspace{1em}\hspace{1em}39. Bourland v. Baker, 141 Ark. 280, 216 S. W. 707 (1919); although previous cases in this state had held that the married women’s act had not affected the common law: Minor v. Mapes, 102 Ark. 351, 144 S. W. 219 (1912); Schuler v. Henry, 42 Colo. 367, 94 Pac. 360 (1908); Wolf v. Keagy, 33 Del. 362, 136 Atl. 520 (1927); Norris v. Corkill, 23 Kan. 409, 4 Pac. 852 (1884); Lane v. Bryant, 100 Ky. 138, 37 S. W. 584 (1896); Harris v. Webster, 58 N. H. 481 (1878); Culmer v. Wilson, 13 Utah 129, 44 Pac. 833 (1896). The reason advanced in these cases as the basis for the common law rule was either that the wife had no control over her property, or that she was under a disability to be sued \textit{sole}. Since the acts abolished these “reasons” for the rule, it was only natural that their effect should have been to abrogate the husband’s liability.

\hspace{1em}\hspace{1em}\hspace{1em}\hspace{1em}40. Henley v. Wilson, McElfresh v. Kirkendall, both \textit{supra} note 31; Choens v. Porter, 66 Ind. 194 (1879); Ferguson v. Brooks, 67 Me. 251 (1879); Pett-Morgan v. Kennedy, 62 Minn. 415, 46 N. W. 912 (1895); Nichols v. Nichols, 147 Mo. 387, 48 S. W. 947 (1898); Fitzgerald v. Quann, 109 N. Y. 441, 17 N. E. 354 (1888); Presnell v. Moore, 120 N. C. 390, 27 N. E. 27 (1897); Hitchcock v. Dick, 42 Ohio St. 23 (1884); Henderson v. Wendler, 39 S. C. 555, 17 S. E. 851 (1803); Zelliff v. Jennings, 61 Tex. 458 (1884).

\hspace{1em}\hspace{1em}\hspace{1em}\hspace{1em}41. In a few cases, the married women’s act was held to have the effect of relieving the husband to the extent that he was not liable for his wife’s torts arising out of the management of her separate estate or the conduct of her own business. Harrington v. Jagmetty, S3 N. J. L. 548, 83 Atl. 880 (1912).

\hspace{1em}\hspace{1em}\hspace{1em}\hspace{1em}42. Without reference to any legislation, the Nebraska court held that the common law rule did not exist in that state. Goken v. Dallugge, 72 Neb. 16, 103 N. W. 287 (1905).


example, no statute has ever been passed which expressly abrogates the responsibility of a husband; but under a married women's act it has been held that his responsibility is limited to the amount of his interest in the community property. His separate estate is immune from execution. In Nevada, on the other hand, the only limitation is that the spouses be living together. In Florida, there has been no legislative enactment affecting a husband's liability, and the common law remains in force unchanged either by any married women's act or by judicial mandate. Although it would seem, therefore, that only these few jurisdictions retain a semblance of the common law principle, there is still present in many of the states which have renounced the doctrine a perceptible tendency to impose liability on a husband in the guise of some other principle. One of the most popular methods of holding him liable is the family purpose doctrine, parading a little too obviously as a principle of agency. But even in a state where the family purpose doctrine is not in effect, some courts have gone to the length of finding a husband liable on the theory that his wife was acting as agent, when the facts clearly indicate that there is no basis for such a conclusion.

The reason for the adoption of these devices is to provide a more responsible source of relief for injured third persons, than a wife is likely to be.

Admitting that a modern wife no longer occupies the servile position of her Victorian sister, so that there is no "feudal" duty of service which she owes her husband, it is highly doubtful whether she has reached that stage of economic independence warranting a complete disregard of her husband as an important source of her financial responsibility. In few cases does the wife retain a separate estate out of the property acquired by the common industry of the spouses. And if financial responsibility is to be the basis for imposing a vicarious liability—as apparently it is—then there would seem to be good reason for holding a husband responsible, even today, for his wife's torts.

But, although the application of the common law rule would effect no hardship where the tort is committed by the impecunious wife of a wealthy husband, it might well shock the social conscience in those cases where the wife is of ample means but her husband is not. As a matter of practical effect, however, the hardship on the husband would be small for, the suit being jointly against both husband and wife, the plaintiff holding a judgment would in most cases satisfy it out of the property of the more responsible spouse. But to make assurance doubly sure, and perhaps to cover that case where both spouses have equal financial resources, the best solution would seem to be that adopted by several courts in the early cases.

Where a judgment is recovered execution should be permitted out of the husband's property only when the community property is insufficient, and the community property should be exempted until an unsuccessful attempt has been made to reach the wife's separate property.

46. Suit, however, may be brought against husband and wife jointly, against the wife alone, or against husband alone. Campbell v. Johnson, 284 S. W. 261 (Tex. Civ. App. 1926), cited note 46, supra.
47. Nev. Comp. Laws (Hillyer, 1929) § 8546.
50. Quick v. Miller, 103 Pa. 67 (1883); Choen v. Porter, 66 Ind. 194 (1879), cited note 40, supra; Nichols v. Nichols, 147 Mo. 387, 48 S. W. 947 (1898), cited note 29, supra.
However with the state of the law in the United States as it is today, there is but little hope that either the courts or the legislatures will reverse themselves to adopt such a technique. At most, courts will probably continue to distort factual situations to hold husbands responsible on some accepted theory where too great an injustice to injured parties would seem imminent. In England, however, there is a greater possibility that the prevailing doctrine will be retained, if only in modified form, by the Lord Chancellor's committee, but even that is open to serious doubt if the origin of the common law rule and its present adaptable utility continue to be obscured.

S. E.