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Recent Decisions

RECENT DECISIONS

CONFLICT OF LAWS—STATUTE OF LIMITATIONS APPLICABLE IN A SURVIVAL ACTION.—Plaintiff's infant son was injured and died in Michigan on February 3, 1944 as a result of the taking fire of a cowboy play suit worn by him which had been allegedly manufactured by the defendants, New York corporations, and sold to a Michigan retailer. Having been appointed administrator of the decedent child's estate by a Michigan court in August, 1948, plaintiff brought this action on January 26, 1949 and alleged that the material used in the suit was highly inflammable, and that the defendants knew of its inherently dangerous quality. The District Court granted defendant's motion for summary judgment dismissing the complaint on the ground that it was outlawed by the two year statute of limitations as set forth in Section 130 of the Decedent Estate Law. Plaintiff appealed on the ground that the Michigan Statutes allowing this action to be brought within six years of the decedent's death were controlling, and that Section 130 of the Decedent Estate Law had no application where the injury causing the death occurred outside of the State of New York. On appeal, *held,* judgment reversed on the grounds that Section 130 of the Decedent Estate Law did not apply and that the action was permitted by Section 48 (2) of the New York Civil Practice Act, the appropriate New York statute, and by the Michigan Statutes pleaded by the plaintiff; but the court expressly declined from deciding whether the *lex loci delicti* or the *lex fori* should be applied in this case. *Janes v. Sackman Bros. Co.* et al., 177 F. 2d 928 (2d Cir. 1949).

It is clearly settled that the law of the place of the wrong determines whether an action for personal injury survives the death of the injured person.[1] It was essential then that the plaintiff in the principal case establish his right of action under the Michigan death statutes. Because of this requirement it might be argued that the Michigan statutes of limitations on death and survival actions also should be controlling, but the principles of conflicts of law do not permit such a simple solution.

Generally, a limitation upon the time within which a particular action may be brought is treated as a limitation upon the remedy, and the law of the forum is held to be determinative of the plaintiff's rights regardless of where the cause of action arose.[2] But, if by the *lex loci delicti* a statute of limitations extinguishes the right of action, it is extinguished everywhere.[3] Thus, on the basis of the language of the various statutes of limitations, they have been divided into two classes; those which generally bar the bringing of an action after the expiration of the statutory period and are considered remedial;[4] and those which extinguish the right of action

1. State of Maryland v. Eastern Air Lines, 81 F. Supp. 345 (D. D. C. 1948); Kruutari v. Hageny, 75 F. Supp. 610 (W. D. Mich. 1948); Baldwin v. Powell, 294 N. Y. 130, 61 N. E. 2d 412 (1945); RESTATEMENT, CONFLICT OF LAWS § 391 (1934).

2. GOODRICH, CONFLICT OF LAWS 240 (3d ed. 1949).

3. The Harrisburg, 119 U. S. 199 (1886); Moore v. Atlantic Coast Lines R.R., 153 F. 2d 782 (2d Cir. 1946).

4. Townsend v. Jemison, 9 How. 406 (U. S. 1850); McElmoyle v. Cohen, 13 Pet. 311 (U. S. 1839); Obear v. First Nat. Bank, 97 Ga. 587, 25 S. E. 335 (1895); Connecticut Valley Lumber Co. v. Maine Cent. R.R., 78 N. H. 553, 103 Atl. 263 (1918).

In Davis v. Mills, 194 U. S. 451 (1886), the Supreme Court stated that the fact that the limitation is not in the same chapter or section, which creates the liability, does not prevent it from being substantive, and that it would still be substantive even though, ". . . the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right." *Id.* at 454.

everywhere or are so related to the right itself that they are treated as substantive.[5] If the statute of the place of the wrong is related only to the remedy, it will not be applied in the forum.[6] If the statute of the place of the wrong is treated as substantive, usually it will be applied in the forum. But if it allows a longer period in which the action may be brought than is allowed by the *lex fori* for the same cause of action, the jurisdictions differ as to which law should apply.[7]

In *Rosenzweig v. Heller*[8] an action for wrongful death was brought in Pennsylvania fourteen months after the plaintiff's husband had been killed in New Jersey due to the negligence of the defendant, a Pennsylvania resident. The Pennsylvania statute of limitations on actions for wrongful death was one year, and the limitation on such actions under New Jersey law was two years. The court held that the Pennsylvania statute was controlling. The court adopted the *lex fori* on the theory that statutes of limitations should apply with uniformity to all litigants suing in a particular forum. The court held that it would be inequitable to enlarge the remedy for causes of action arising outside of the state and to impose the stricter limitation of the state's own statutes for causes of action arising within the state.[9] In a similar case the United States Court of Appeals for the Seventh Circuit supported its application of the *lex fori* by saying that ". . . while the courts will enforce a limitation established under the law of another state, when applicable, it does not do so to the exclusion of the law of the forum."[10] In these cases the courts appear to be treating their own public policy as a supervening element which will not accede to the substantive law of a foreign state when the law of the foreign state operates to the detriment of local residents.

On the other hand, in the frequently cited case of *Negaubauer v. Great Northern Ry.*[11] a Minnesota court applied the *lex loci delicti* and allowed recovery even though the limitation under the *lex fori* had already expired. The court based its decision on the ground that the statute giving the right of action and the statute limiting it were parts of the same act, and were intended to be construed together. The court treated the limitation as a part of the right granted even though the right and the limitation were placed in different sections of the act of the legislature.[12] In *Theroux v. Northern Pac. R.R.*[13] the same issue arose as in the

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5. Pope v. McCrady Rodgers Co., 164 F. 2d 591 (3d Cir. 1947); Colell v. Delaware, L. & W. R.R., 80 App. Div. 342, 80 N. Y. Supp. 675 (2d Dep't 1903); Dailey v. New York, O. & W. Ry., 26 Misc. 539, 57 N. Y. Supp. 485 (Sup. Ct. 1899); RESTATEMENT, CONFLICT OF LAWS § 397 (1934); RESTATEMENT, CONFLICT OF LAWS, N. Y. ANNOT. § 605 (1935).

6. See note 4 *supra.*

7. *E.g.,* Platt v. Wilmot, 193 U. S. 602 (1904); Hutchings v. Lamson, 96 Fed. 720 (7th Cir. 1899); Rosenzweig v. Heller, 302 Pa. 279, 153 Atl. 346 (1931). *Contra:* Brunswick Terminal Co. v. National Bank, 99 Fed. 635 (4th Cir. 1900); Theroux v. Northern Pac. R.R., 64 Fed. 84 (8th Cir. 1894); Negaubauer v. Great Northern Ry., 92 Minn. 184, 99 N. W. 620 (1904).

8. 302 Pa. 279, 153 Atl. 346 (1931).

9. *Id.* at 281, 153 Atl. at 348.

10. Hutchings v. Lamson, 96 Fed. 720, 721 (7th Cir. 1899).

11. 92 Minn. 184, 99 N. W. 620 (1904).

12. *Id.* at 185, 99 N. W. at 621.

13. 64 Fed. 84 (8th Cir. 1894).

Negaubauer case and the court held that the Minnesota statute (the *lex fori*) could only apply to causes of action which originated in Minnesota.[14]

In the principal case the court expressed a similar reason for refusing to apply the two year limitation period set forth in Section 130 of the New York Decedent Estate Law.[15] That ruling is based upon reliable case authority.[16] Hence it will be noted that New York is not among those states which as a matter of public policy will refuse to allow a longer period in which to bring the action than is allowed by the *lex fori* (*i.e.*, the law of New York) *for the same cause of action.* But this deference to the *lex loci delicti* is not without certain reservations; for Section 13 of the Civil Practice Act provides: "Where a cause of action arises outside of this state [in favor of a non-resident] an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action. . . ."[17] Thus the courts of New York will not entertain an action after the time set forth in the state's own general statute of limitations has expired, and furthermore, if the law of the state where the cause of action arose provides for a shorter period than the general statute of limitations of New York, then the foreign law will be applied. This construction of Section 13 of the Civil Practice Act is accurately illustrated by the case of *McConnell v. Caribbean Petroleum Co.*[18] In that case suit for personal injuries was brought under the Employers Liability Act of Venezuela, and the law of Venezuela (where the cause of action arose) provided that such actions may be brought within twenty years of the date of the injury. The New York Court of Appeals held that the suit was dependent upon a statutory liability, and applied the six year limitation set forth in Section 48 (2) of the Civil Practice Act rather than the longer period allowed by the *lex loci delicti* because of the obvious restrictions imposed by Section 13.

In view of the provisions of Section 13 the problem which confronted the court in the principal case was whether the statutes of Michigan required the action to be brought within a shorter time than is allowed by Section 48 (2). Section 48 (2) allows a period of six years in which an action to recover upon a liability created by statute may be brought, except as otherwise provided by law. The limitation statutes of Michigan which are applicable to wrongful death and survival actions are set forth in two sections of Chapter 9 of the Compiled Laws of Michigan, 1948. Section 609.13 (2) provides that actions to recover damages for personal injuries shall be brought within three years of the date of accrual; Section 609.18 provides that if the person entitled to bring the action for personal injury should die before the expiration of the three year period, the action may be commenced by the administrator of the deceased person at any time within two years after the granting of letters of administration, but that in no event shall the administrator be allowed to bring the action more than three years after the expiration of the three year period allowed to the injured party by Section 609.13 (2). Since the party injured in the principal case died before the expiration of the three year period set forth in

14. *Id.* at 87.

15. 177 F. 2d 928, 930 (2d Cir. 1949).

16. Cooper v. American Airlines, Inc., 149 F. 2d 355 (2d Cir. 1945); Baldwin v. Powell, 294 N. Y. 130, 61 N. E. 2d 412 (1945); Sharrow v. Inland Lines, Ltd., 214 N. Y. 101, 108 N. E. 217 (1915).

17. N. Y. Civ. Prac. Act § 13.

18. 278 N. Y. 189, 15 N. E. 2d 573 (1938).

Section 609.13 (2), the administrator received the benefit of the extension provided for by Section 609.18, and the fact that the administrator was appointed four and a half years after the cause of action arose would not affect his right. Under the maximum six year period provided for in Section 609.18, the plaintiff had one year and six months within which to bring this action after the date of his appointment. Plaintiff brought this action six months after his appointment, and therefore had complied with all the requirements of the *lex loci delicti*, and the question of whether the law of New York or the law of Michigan should control became academic for this court. But, in a proper case, it is submitted that the Michigan statutes should be found to be exclusively applicable because in a proper case those statutes could confine the bringing of suit to a period less than the six year period allowed by Section 48 (2) of the Civil Practice Act. For example, if the administrator had been appointed in the same year that the child died, he would thereby be barred from bringing the action after the expiration of two years from the date of his appointment. In such a case Section 13 would come into operation and the New York court would be bound to apply the law of Michigan.

In addition to the question discussed above was the decision of the court that the plaintiff did not have to obtain ancillary letters because the Michigan statute gave him a standing in court by making him a trustee of the amount due for the wrongful death.[19] It would not appear that this is a correct interpretation of the Michigan Statute, for the recovery was not for wrongful death but for pain and suffering prior to death. Thus, since the decedent was the one damaged and not the relatives named in the statute, the compensation would inure to the benefit of the decedent's estate. Substantiating this view is the fact that the statute specifies that distribution should be made according to intestacy laws.[20]

However, it is submitted that the result reached on this point was correct, since the infant was never in New York and since there were no domestic creditors.[21]

CONTRACTS—REAL ESTATE BROKER'S COMMISSIONS—MEETING OF MINDS ON ESSENTIAL TERMS—PURCHASER, READY, WILLING AND ABLE.—Plaintiff was allegedly engaged as a real estate broker to secure a purchaser for defendant's property at $150,000, all cash with no other terms stated. It was contended that defendant agreed to pay the plaintiff broker a five percent commission. Plaintiff advised the defendant that he had a purchaser ready, willing and able to pay $150,000 for the realty, but defendant refused to enter into negotiations with the purchaser. Evidence brought forth at the trial showed that the purchaser procured by the plaintiff had never possessed $150,000 in cash, although he had dealt in various real estate transactions involving larger sums and had the backing of a third party of unlimited means, who knew of the proposed purchase from the defendant, but with whom the purchaser had no binding agreement. Plaintiff instituted suit on the theory of com-

19. Janes v. Sackman Bros. Co. *et al.*, 177 F. 2d 928, 933 (2d Cir. 1949).

20. Money recovered for pain and suffering of the deceased "shall be distributed according to the intestate laws." 4 MICH. COMP. LAWS § 691.582 (1948).

21. In Wiener v. Specific Pharmaceuticals, Inc., 298 N. Y. 346, 83 N. E. 2d 673 (1949) the court stated that, "the rule barring foreign administrators from our courts is just and reasonable *only* if applied in cases, first, where there are domestic creditors, and, second, where the foreign administrator sues to recover a fund in which such creditors may share." *Id.* at 351, 83 N. E. 2d 677.

pleted performance for the amount of the agreed commissions. On appeal from a verdict in favor of plaintiff, *held,* two justices dissenting, judgment affirmed. *Mengel v. Lawrence,* 276 App. Div. 180, 93 N. Y. S. 2d 443 (1st Dep't 1949).

A broker's contract to sell realty is either an exclusive sales contract or an ordinary listing agreement.[1] The exclusive sales contract is considered bilateral in that the seller promises to deal only with a purchaser produced by the broker and the broker in turn promises to use reasonable efforts in procuring a purchaser.[2] In the ordinary listing agreement, on the other hand, no exclusive rights are given to the broker and such agreements generally are held to be only offers of unilateral contracts.[3]

Two possible situations may arise under an ordinary listing agreement and the legal implications of each are somewhat different.[4] In the one, the broker is given all the essential and material terms upon which the seller wishes to sell; in the other, *all* the essential and material terms are not disclosed to the broker.[5] It is the latter situation which faced the court in the principal case. In the first situation the broker is entitled to his commission when he produces a buyer who is ready, willing and able to buy on the proffered terms.[6] In the second situation the broker is not entitled to his commission until his prospective buyer becomes acquainted

1. Greenberg, *Right of Real Estate Brokers to Compensation,* 22 CONN. B. J. 410 (1948). Some courts make a distinction between an exclusive *agency* contract and an exclusive *sale* contract. Basically they are identical except that in the former the owner reserves the right to make a sale to a vendee procured through his own efforts as well as through the broker's efforts. Blumenfeld v. Vermette, 20 N. Y. S. 2d 674 (Sup. Ct. 1940). Since the brokerage contract is for personal services and not for the sale of land it is not within the Statute of Frauds and need not be in writing unless a written contract is required by statute in a particular jurisdiction. Wiederman v. Verschleiser, 95 Misc. 276, 159 N. Y. Supp. 226 (Sup. Ct. 1916). Alabama, California, Minnesota, Missouri, Oklahoma and South Dakota are among the states which require a written memorandum.

2. Gaillard Realty Co. v. Rogers Wire Works, 215 App. Div. 326, 213 N. Y. Supp. 616 (1st Dep't 1926); Slattery v. Cothran, 210 App. Div. 581, 206 N. Y. Supp. 576 (4th Dep't 1924); Leibow v. Tilson, 124 Misc. 743, 209 N. Y. Supp. 224 (Sup. Ct. 1925).

3. Note, 28 ORE. L. REV. 248 (1949); RESTATEMENT, AGENCY § 445 (c) (1933). In Siegel v. Rosenzweig, 129 App. Div. 547, 114 N. Y. Supp. 179 (2d Dep't 1908) the court said: ". . . no right of action exists in favor of the owner against the broker for the latter's failure to exercise a degree of diligence in obtaining a purchaser which the owner might deem reasonable." *Id.* at 549, 114 N. Y. Supp. at 181.

4. This discussion excludes from its purview those brokerage agreements in which there is contained a special provision requiring a fully executed sale as a condition precedent to the payment of commissions. Under such a contract no commission is payable until an enforceable and completed sale has been realized. Stern v. Gepo Realty Corp., 289 N. Y. 274, 45 N. E. 2d 440 (1942); Felleman v. Von Luckner, 234 App. Div. 787, 253 N. Y. Supp. 567 (2d Dep't 1931).

5. Arnold v. Schmeidler, 144 App. Div. 420, 129 N. Y. Supp. 408 (1st Dep't 1911).

6. House v. Hornburg, 267 App. Div. 557, 47 N. Y. S. 2d 341 (4th Dep't 1944); Walsh v. Braden, 252 App. Div. 621, 300 N. Y. Supp. 614 (1st Dep't 1937); Gallagher v. Dullea, 199 App. Div. 119, 191 N. Y. Supp. 439 (3d Dep't 1921); Strout Farm Agency, Inc. v. De Forest, 192 App. Div. 790, 183 N. Y. Supp. 119 (3d Dep't 1920); Brocher v. Olcott, 130 Misc. 859, 224 N. Y. Supp. 715 (City Ct. 1927). See also Hoggatt v. John, 185 La. 227, 169 So. 69 (1936).

with all the essential and material terms and is then ready, willing and able to buy on these terms.[7] A dictum in *Strout Farm Agency, Inc. v. De Forest*[8] indicates that there might be a quasi-exception to the second category—even if all the essential terms were not listed by the seller, the broker might still be entitled to his commission if the evidence was such as to indicate "an ability and willingness on the part of the proposed purchaser to comply with any reasonable terms which the owner might exact."[9] This argument, however, appears to be more theoretical than real, since a buyer could hardly be held to assent in advance with a sufficient degree of certainty to unknown terms to be proposed by the seller in the future.

Since the broker is not entitled to his commission and the contract of sale between the seller and buyer is not completed under the second situation noted above until there is a meeting of the minds on all the essential terms and also until the buyer is ready, willing and able to carry out his part of the agreement, it would seem that the seller should have the right, before acceptance is completed, to terminate his offer at any time[10] without incurring liability.[11] This rule has been generally followed by the courts and has been held applicable even if a sale is thereafter made by the seller to a buyer with whom the broker had been negotiating.[12] The commonly recognized exception to this right of the seller to withdraw his offer and conclude the brokerage arrangement occurs when the termination is brought about by bad faith on the part of the seller. This element of bad faith seems to turn upon the question of whether or not there was an intention to avoid the payment of commissions.[13]

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7. *Ibid.*

8. 192 App. Div. 790, 183 N. Y. Supp. 119 (3d Dep't 1920).

9. *Id.* at 793, 183 N. Y. Supp. at 121.

10. Siegel v. Rosenzweig, 129 App. Div. 547, 114 N. Y. Supp. 179 (2d Dep't 1908). "It is entirely apparent, therefore, that the owner may, without notice to the broker, absolutely revoke the authority in certain cases, provided, of course, it is done without the purpose of defeating the broker in the collection of commissions which he has already actually earned, and no one will assert that the broker has a right of action against the owner for selling to the first party who offers the price asked, even though the broker at that time has negotiations under way which bear the appearance of being successful, and even though the broker has not been accorded what might be deemed a reasonable time in which to find a purchaser." *Id.* at 549, 114 N. Y. Supp. at 181. O'Hara v. Murray, 144 App. Div. 113, 128 N. Y. Supp. 1009 (1st Dep't 1911). It has been held in some cases that the broker should be allowed a reasonable time to procure a purchaser. Goodman v. Marcol, 261 N. Y. 188, 184 N. E. 755 (1933); Donavan v. Weed, 182 N. Y. 43, 74 N. E. 563 (1905).

11. Sibbald v. Bethlehem Iron Co., 83 N. Y. 378 (1881); Globus Realty Corp. v. Fleetwood Terrace, Inc., 275 App. Div. 34, 87 N. Y. S. 2d 141 (1st Dep't 1949). Note, 28 ORE. L. REV. 248, 249 (1949). "The owner may revoke the offer at any time prior to acceptance, he may list the property with other brokers, or he may sell it to a purchaser procured by himself or another without liability to the broker. Thus ordinary listings, with respect to the real-estate broker are attended with all the apparent inequities and hardships connected with unilateral offers. It does not matter how much time, money, and effort the realtor has expended in advertising and showing the property. . . ."

12. Gardner v. Pierce, 131 App. Div. 605, 116 N. Y. Supp. 155 (1st Dep't 1909); *see* Sibbald v. Bethlehem Iron Co., 83 N. Y. 378, 383 (1881).

13. Goodman v. Marcol, 261 N. Y. 188, 184 N. E. 755 (1933); *see* Sibbald v. Bethlehem Iron Co., 83 N. Y. 378, 383 (1881).

It is in the light of these established and governing principles that we must consider the questions presented in the principal case: May the plaintiff-broker recover his commission even in the absence of an agreement between the buyer and the seller (1) as to the amount to be paid upon the formal execution of the contract and (2) as to the time for closing the title? Both the majority and minority opinions in the principal case found that these were material and essential terms;[14] the minority opinion pointing out that in *Ansorge v. Kane*[15] the New York Court of Appeals held that the amount of down payment was an "important element" of the complete contract and that the *law will imply nothing* as to such terms. However, the majority opinion concluded that a complete agreement on all the essential terms of the contract of sale would have been reached had there not been a prevention by the defendant.[16] Thus, it held the broker was entitled to his commissions and the seller was effectively estopped from declaring there was no meeting of the minds since such a meeting was thwarted by the seller's own capricious conduct.

The majority holding appears to be unsound in implying that an agreement between the parties would have been reached had the negotiations been continued and thus in forming a contract for the buyer and seller which was never in fact negotiated. All the essential and material terms of the agreement were not made known to the prospective purchaser by the seller and in giving judicial cognizance to the dictum in the *Strout* case the majority of the court in the instant case was treading on delicate and somewhat impractical ground. As the dissent pointed out, the proposed purchaser testified that it might entail between sixty and ninety days delay before any closing might be arranged and that no seller, anxious to make a sale, would be "willing to tie up such property for that length of time with no down payment and upon such an indefinite arrangement."[17] This reasoning of the dissent is supported by the decision in *Haase v. Schneider*[18] where a disagreement arose as to the time of the transfer of the property and other matters of detail and the plaintiff-broker attempted to show an alleged custom in relation to the time of taking title where no time has been agreed upon between the parties. The court held: ". . . we are clearly of opinion that even though there was such a custom, it could not give the plaintiffs any rights in this action. In order that the plaintiffs might recover in this action, it was necessary for them to show that the parties *actually reached an agreement as to the terms and conditions of the sale,* and this they have failed to do, because it appears that the parties never agreed to the conditions which the defendant named, and which he had a perfect right to insist upon."[19]

The majority opinion, citing the *Strout* case[20] as authority, indicated that the plaintiff could have recovered on a *quantum meruit* basis had he wished to proceed

14. Mengel v. Lawrence, 276 App. Div. 180, 183, 187, 93 N. Y. S. 2d 443, 446, 449 (1st Dep't 1949).

15. 244 N. Y. 395, 399, 155 N. E. 683, 685 (1927). In House v. Hornburg, 267 App. Div. 557, 47 N. Y. S. 2d 341 (4th Dep't 1944) the time for the closing of the transaction and the time for the turning over possession were held to be such essential questions that even though the sale was for cash, as in the instant case, the broker was not entitled to his commissions when such matters were not agreed upon.

16. Mengel v. Lawrence, 276 App. Div. 180, 182, 93 N. Y. S. 2d 443, 446 (1st Dep't 1949).

17. *Id.* at 186, 93 N. Y. S. 2d at 449.

18. 112 App. Div. 336, 98 N. Y. Supp. 587 (2d Dep't 1906).

19. *Id.* at 337, 338, 98 N. Y. Supp. at 587, 588 (italics supplied).

20. 192 App. Div. 790, 183 N. Y. Supp. 119 (3d Dep't 1920) In that case, although

on that theory. Applying the basic precepts of contract law relating to unilateral offers, the defendant in a case such as the instant one should not be allowed to recover on such a theory.[21] It has been constantly reiterated that the broker is never entitled to recover under the ordinary listing for unsuccessful efforts, regardless of the time he had expended or expenses he had incurred.[22] Cases which have allowed a recovery *quantum meruit* are those where there was an exclusive sale or agency contract[23] or where a definite time was fixed for the duration of the agency.[24]

Even if the majority holding was correct in concluding that the proposed purchaser consented to all the essential and material terms of the agreement, the plaintiff should not have recovered because he did not produce a purchaser who was "ready, willing and able." Generally "to be able" means to be in a position financially to meet the terms of payment specified by the seller.[25] Therefore, the terms of the sale have a determinative effect on whether a purchaser is able. For if the terms provide for a cash sale as in the instant case, it is compulsory that the purchaser have the legal tender with which to pay. The fact that he has property out of which the required payment may be made is not sufficient.[26] Nor is the proposed purchaser "able" when he is depending on a third party who is in no way bound to furnish the funds to make the purchase.[27] In the principal case the purchaser himself testified that he never had $150,000 in cash; that he had no contract with the third person mentioned under which the latter would be obligated to provide the necessary amount in cash and, therefore, cannot be said to have the financial ability, even though the third person knew of the proposed purchase of the property.

On the facts in the instant case, it is submitted that the judgment of the lower court should have been reversed and a judgment entered for defendant. Under the principles of unilateral contracts, the acceptance by the broker must be completed before the seller is under a duty to render performance in the form of payment of commissions. It is suggested that the most prudent policy in similar situations would be for the seller to insert a clause in the contract requiring a completed sale before brokerage commissions are due. This would undoubtedly result in a reduction of unnecessary litigation for both parties.

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the brokerage contract was of the ordinary listing type, the court ignored the implications of a unilateral contract, and concluded that the seller had wrongfully terminated the broker's contract, thus allowing a recovery *quantum meruit*. However, that reasoning has not been applied in any other case since that decision.

21. RESTATEMENT, CONTRACTS, N. Y. ANNOT. § 45 (1933).

22. Sibbald v. Bethlehem Iron Co., 83 N. Y. 378 (1881); Siegel v. Rosenzweig, 129 App. Div. 547, 114 N. Y. Supp. 179 (2d Dep't 1908); RESTATEMENT, AGENCY § 445 (c) (1933).

23. Slattery v. Cothran, 210 App. Div. 581, 206 N. Y. Supp. 576 (4th Dep't 1924); Bathrick v. Coffin, 13 App. Div. 101, 43 N. Y. Supp. 313 (2d Dep't 1897).

24. Baker v. Angell, 46 Hun 679 (N. Y. 1887).

25. Pellaton v. Brunski, 69 Cal. App. 301, 231 Pac. 583 (1924).

26. Reynor v. Mackrill, 181 Iowa 210, 164 N. W. 335 (1917); Schnitzer v. Price, 122 App. Div. 409, 106 N. Y. Supp. 767 (2d Dep't 1907). In Watters v. Dancey, 23 S. D. 481, 122 N. W. 430 (1909) the court held that where the contract with the broker provided for a sale of the property for "all cash over the encumbrance", the proof must show that the proposed purchaser had the cash in hand; and evidence that he had an abundance of property out of which the required payment might be made is not sufficient.

27. McGavock v. Woodlief, 20 How. 221 (U. S. 1857); Abbott v. Floyd, 136 Cal. App. 365, 28 P. 2d 929 (1934); Mattingly v. Pennie, 105 Cal. 514, 39 Pac. 200 (1895).

CORPORATIONS—ALLOWANCE OF PROFIT TO DIRECTORS ON CORPORATE BONDS PURCHASED DURING INSOLVENCY.—Unable to meet its obligations a corporate debtor filed a petition proposing an arrangement under Chapter XI of the Bankruptcy Act. The arrangement provided for a dividend of 43.61% of the principal amount of the corporate bonds. Under this plan the respondent bondholders would receive a dividend of $64,237.53 on bonds having a face value of $147,300.00 which they had purchased for $10,195.43 before the petition for arrangement had been filed but while the debtor, though insolvent, was a going concern. The petitioner, as a creditor for fees and disbursements owed it as indenture trustee and as original indenture trustee, objected to the allowance on the respondents' bonds under the plan of arrangement on the ground that the respondents, close relatives and an office associate of directors, acquired their bonds under circumstances which should limit their recovery to the actual consideration paid for the bonds plus interest. The District Court affirmed the referee's dismissal of petitioner's objection. Upon affirmance by a divided Court of Appeals, petitioner, with the Securities and Exchange Commission as *amicus curiae,* appealed. *Held,* two Justices dissenting, affirmed on the ground that where there is good faith and fair dealing the directors of an insolvent but going concern will not be limited to the purchase price in enforcing claims against the corporation purchased at a discount. *Manufacturers Trust Co. v. Becker,* 338 U. S. 304 (1949).

A director or officer of a corporation does not stand, in the true sense, in a trust capacity with the corporation.[1] The general rule is, therefore, that such officers and directors may take part in transactions with or concerning their corporation on which a profit results to them personally.[2] But this non-prohibition against profiting in such transactions is not unlimited; the director cannot deal at arm's length with his corporation.[3] His dealings must be in good faith and inherently fair. The courts use the language that a director may profit in transactions with or concerning his corporation, *e.g.,* buying corporate bonds or obligations, "when the transaction is fair to the corporation and involves no competition with it";[4] but not where "there is overreaching or injury to the corporation."[5]

1. The Court in the instant case held inapplicable the strict rule laid down in Magruder v. Drury, 235 U. S. 106 (1914) that a trustee can make no profit from his trust since corporate assets during insolvency are not trusts.

2. In Securities and Exchange Commission v. Chenery Corp., 318 U. S. 80 (1943) it was held that purchases of preferred stock during reorganization by officers and directors was not a violation of their fiduciary duty according to equitable principles or established judicial doctrine. The Court reversed a ruling of the Securities and Exchange Commission that the " 'duty of fair dealing' which the management owes to the stockholders is violated if those in control of the corporation purchase its stock, even at a fair price, openly and without fraud." *Id.* at 87. Seymour v. The Spring Forest Cemetery Ass'n, 144 N. Y. 333, 39 N. E. 365 (1895).

3. "A director is an officer of a corporation. As such, he represents the corporation, and all of his dealings with the corporation will be carefully scrutinized. He will be held to the highest degree of honesty and the best of faith in all of his dealings with the corporation." Monroe v. Scofield, 135 F. 2d 725, 726 (10th Cir. 1943).

4. Ripperger v. Allyn, 25 F. Supp. 554, 555 (S. D. N. Y. 1938) (directors not permitted to profit on claims which they purchased when such purchases were in competition with their corporation's purchases). *In re* McCrory Stores Corp., 12 F. Supp. 267 (S. D. N. Y. 1935).

5. *In re* Philadelphia & Western Ry., 64 F. Supp. 738, 739 (E. D. Pa. 1946).

In the leading case of *Seymour v. The Spring Forest Cemetery Ass'n*,[6] the court stated the following rule: "Unless some special fund has been provided, or some special liquidation has been ordered, the director owes no duty to his company to discharge or buy in the outstanding bonds, and may purchase for himself because no inconsistent trust duty has arisen."[7] When this duty of fair dealing is questioned, "the burden is on the director . . . not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein."[8]

The prohibition against profit-producing transactions on the part of a corporate director or officer does arise in a limited number of situations, *i.e.*, where the director owes a *duty* to his corporation which develops from his relationship to the corporation. Two such situations in which this *duty* is said to exist (and thus constitute exceptions to the general rule) are: (1) where he is under a duty to buy claims against the corporation for the benefit of the corporation;[9] (2) when the corporation is insolvent. From the cases it appears that insolvency in itself is not sufficient to preclude a director from profiting in such transactions. The position of the corporation must be that it *is expecting or is in* a proceeding under the Bankruptcy Act.[10] Under such conditions the courts refuse a profit to corporate officers to insure that they will act in the best interests of their corporation, rather than a possible personal interest. Justice Burton, in his dissenting opinion in the instant case, gave an excellent example of such a conflict of interests: "It may be necessary for them [the directors] to choose between a corporate policy of reorganization which might be best for the corporation and one of liquidation which might yield more certain profits to them as noteholding directors."[11] This statement of a Kentucky court, "human nature is not so constituted that the same person can fairly represent opposing sides of the same question—cannot be both creditor and debtor. . . . The policy of the law is to insure fidelity of trustees to their trusts by making it impossible for them to profitably neglect or abuse them,"[12] was quoted with approval by

6. 144 N. Y. 333, 39 N. E. 365 (1895).

7. *Id.* at 344, 39 N. E. at 367.

8. Pepper v. Litton, 308 U. S. 295, 306 (1939).

9. *In re* Franklin Building Co., 178 F. 2d 805 (7th Cir. 1949), a member of a bondholders committee was limited to the purchase price in his recovery on bonds of the insolvent corporation purchased during insolvency; in Kroegher v. Calivada Colonization Co., 119 Fed. 641 (3d Cir. 1902), a director was not allowed to profit on claims against the corporation which he purchased in breach of an express trust which constituted him an agent of the corporation to purchase claims against the corporation; Ripperger v. Allyn, 25 F. Supp. 554 (S. D. N. Y. 1938), where the directors had prevented the corporation from purchasing claims against itself in order to profit on the purchases personally; *In re* McCrory Stores Corp., 12 F. Supp. 267 (S. D. N. Y. 1935).

10. *In re* Franklin Building Co., 178 F. 2d 805 (7th Cir. 1949); Monroe v. Scofield, 135 F. 2d 725 (10th Cir. 1943); *In re* Norcor Mfg. Co., 109 F. 2d 407 (7th Cir. 1940); *In re* Los Angeles Lumber Products Co., 46 F. Supp. 77 (S. D. Cal. 1941). In the above cases the corporation was in either bankruptcy or reorganization proceedings.

11. 338 U. S. 304, 316 (1949).

12. Bramblet v. Commonwealth Land and Lumber Co., 26 Ky. L. 1176, 1179, 83 S. W. 599, 602 (1904).

the court in In re *Los Angeles Lumber Products Co.*[13]

As a general rule where a fiduciary is barred from enforcing a claim his wife is also barred.[14] The same rule is applied where a director procures another to act for or with him in a transaction which is a breach of his fiduciary duty.[15] Where relatives or close associates of a director of a corporation buy claims against the corporation in their own names and with their own funds, which they seek to enforce at a profit, they are not limited in their recovery if they can establish that they are not acting for the director.[16]

In the instant case the petitioner asserted that directors of a corporation are precluded from profiting on claims against their corporation purchased at a large discount while the corporation was insolvent, and that the respondents, because of their relationship to the directors, should likewise be limited to the actual price which they paid for the bonds plus interest. The Court rejected this contention because the material facts presented no circumstances under which the directors themselves would be limited if they had purchased the bonds in question.

The majority opinion, considering the principal case as one in between the case where a purchase is made during solvency of the corporation and one where insolvency proceedings are expected or have begun, found it unnecessary to determine precisely at what point the dividing line would be reached, since it was not reached in the case at bar.[17] Moreover, the findings negatived lack of good faith and competition with the corporation and disclosed efforts upon the part of the directors and respondents to benefit the corporation. The majority's conclusion is further strengthened by the findings of fact[18] that there was no use of inside information[19] or overreaching[20] in making the purchases.

Judge Learned Hand's dissenting opinion in the Court of Appeals and that of Justice Burton in the Supreme Court make it clear that to a great extent the difference between the majority and minority in both courts did not depend upon any fundamental dispute concerning the applicable substantive law but rather in the degree of the burden resting upon directors, or those closely connected with them, to negative the possibility of conflict of interests when the purchases were made.

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13. 46 F. Supp. 77, 91 (S. D. Cal. 1941).

14. Halmon v. Ryan, 56 F. 2d 307, 311 (D. C. 1932).

15. *In re* The Van Swerigen Co., 119 F. 2d 231 (6th Cir. 1941). "It seems soundly settled that one who knowingly joins a fiduciary in purchasing for profit the property of the trust estate in unlawful circumstances becomes jointly and severally liable with him for resultant profits." *Id.* at 234.

16. *In re* Franklin Building Co., 178 F. 2d 805 (7th Cir. 1949).

17. The majority opinion, commenting on Judge Learned Hand's dissenting opinion in the Court of Appeals, agreed that "if in fact liquidation had been imminent at the time of respondents' purchases or if it were fairly demonstrable, as a matter of experience, that a director free from all potential self-interest would be more likely to initiate liquidation proceedings or to effect a debt settlement than one not wholly disinterested, a court of equity should explore such issues and not dismiss them out of hand." 338 U. S. 304, 315 (1949).

18. Such findings may be found in the opinion of the District Court, 80 F. Supp. 822 (1948), and Court of Appeals, 173 F. 2d 944 (1949).

19. See 12 FORD. L. REV. 282 (1943).

20. Strong v. Repide, 213 U. S. 419 (1909).

DAMAGES—DESTRUCTION OF CHATTEL—LOST PROFITS AS PART OF DAMAGES.—Plaintiff's truck and bulldozer were destroyed in 1946 as a result of the negligent operation of defendant's vehicle. Plaintiff recovered the value of his vehicles at the time and place of the accident less salvage value plus the profit he would have made by their use during the period he was unable to replace them because of post-war shortages. Defendant appealed from that portion of the judgment which allowed plaintiff to recover for lost use. *Held,* affirmed on the ground that the measure of damages for the destruction or conversion of a chattel is not limited to value at the time and place of such destruction or conversion but may include other items of special damage if such are proved with certainty. *Guido* et al. *v. Hudson Transit Lines, Inc.,* 178 F. 2d 740 (3d Cir. 1950).

The object of the law of damages is to compensate the injured party for the wrong done him, *i.e.,* in the case of a tort to put him in the same position he would have been in if the tort had not occurred.[1] In the usual case of a conversion or destruction of a chattel this compensation is achieved by application of the general rule which fixes damages as the value of the chattel at the time and place of conversion or destruction.[2] This principle offers a workable formula for it establishes the precise amount of money plaintiff would have needed at the time of the wrong in order to replace the chattel and thus put himself in the same position he would have been in if the wrong had not been suffered. It is apparent, however, that such a measure of damages cannot make the plaintiff whole in every situation since it assumes that plaintiff has enough money on hand to replace his loss immediately, and also that immediate or same-day replacement can in fact be made. Thus it often happens that, due to the plaintiff's blameless inability to replace, a blind adherence to the general principle will result in losses greater than the actual chattel converted or destroyed.

Obviously, if there is no market value for the chattel in question or if the saleable value does not represent the true worth of the article,[3] *viz.,* wearing apparel or household goods, plaintiff is allowed to recover the value of the chattel to him.[4] Where the tort of conversion as opposed to the tort of negligence has been committed, courts usually discard the general rule which limits recovery to the value of the chattel at the time and place of conversion when the plaintiff can show special damages.[5] A requirement that defendant must have some knowledge of the special circumstances at the time of the tort has been made by some courts.[6] Special

1. RESTATEMENT, TORTS § 901a (1939).

2. RESTATEMENT, TORTS §§ 910, 927 (1940).

3. Lake v. Dye, 232 N. Y. 209, 133 N. E. 448 (1921). The expression "market value" is very frequently used in the broad sense of exchange value, *i.e.,* what a willing purchaser will pay a willing seller. *See* Standard Oil Co. v. Southern Pacific Co., 268 U. S. 146, 155 (1925). However, in order to apply market value as the precise measure of damages, simply proved by establishing the price in the market, there must be a market, *i.e.,* "a broad market with frequent trading in articles of an identical character with the article lost." McAnarney v. Newark Fire Ins. Co., 247 N. Y. 176, 182, 159 N. E. 902, 904 (1928).

4. Blauvelt v. Cleveland, 198 App. Div. 229, 190 N. Y. Supp. 881 (4th Dep't 1921).

5. 4 SUTHERLAND, DAMAGES § 1129 (4th ed. 1916).

6. McGuire v. Galligan, 57 Mich. 38, 23 N. W. 479 (1885); McKnight v. Carmichael, 7 Tex. Civ. App. 270, 27 S. W. 150 (1894). Such a requirement seems unsound since defendant in a wilful tort action is responsible for all the proximate consequences of his wrong whether or not they were foreseen. Vosburg v. Putney, 80 Wis. 523, 50 N. W. 403

damages which have been allowed under this exception to the general rule include reasonable expenses incurred in attempting to recover possession of the converted chattel whether successful or not;[7] profits or wages lost while the stolen chattel was gone;[8] and in the case where the chattel has been returned, the value of the lost use during the intervening period.[9] The court in the instant case held that the rule of damages for a negligent destruction of a chattel is the same as that for a conversion and that such rule should make defendant liable for all the injury proximately caused by his wrongful act if plaintiff can prove such with certainty.

In the principal case defendant sought to have the court adopt a distinction between the principles governing the measure of damages in cases of destruction and cases of injury to chattels. Case and text authorities are not lacking to support defendant's position.[10] Courts, which limit a plaintiff's recovery to the value at the time and place of destruction or conversion, allow a plaintiff, in the case of repairable injury to a chattel, to recover for lost use while the chattel is being repaired, in addition to the difference between the value immediately before and after the injury.[11] They reason that because of defendant's wrong plaintiff's investment is forced to lay idle while being repaired; but by allowing recovery of full value in the case of destruction or conversion, plaintiff's investment is fully restored.[12] Such a result indicates the impracticability of the assumption behind the

(1891). The rule of foreseeability more properly applies to breaches of contract. Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854).

7. Parroski v. Goldberg, 80 Wis. 339, 50 N. W. 191 (1891).

8. Smalling v. Jackson, 133 App. Div. 382, 117 N. Y. Supp. 268 (2d Dep't 1909); Djidics v. Wishnevsky, 179 N. Y. Supp. 99 (App. Term 1st Dep't 1919); Wilson v. Press Pub. Co., 14 Misc. 514, 36 N. Y. Supp. 12 (Gen. Term 1895).

9. Fields v. Williams, 91 Ala. 502, 8 So. 808 (1891). *Contra:* Flagler v. Hearst, 91 App. Div. 12, 86 N. Y. Supp. 308 (1st Dep't 1904).

10. Burrage v. Tri-State Transit Co., 149 So. 125 (La. 1933); Colonial Motor Coach Corp. v. New York Cent. R.R., 131 Misc. 891, 228 N. Y. Supp. 508 (Sup. Ct. 1928); Hayes Freight Lines, Inc. v. Tarver, 148 Ohio St. 82, 73 N. E. 2d 192 (1947); 1 SEDGWICK, DAMAGES § 178 (9th ed. 1920).

11. Parilli v. Brooklyn City R.R., 236 App. Div. 577, 260 N. Y. Supp. 60 (2d Dep't 1932). There are several rules in less-than-total-destruction cases varying with the details of the proof or the particular court's preference. When repair has actually been made before suit, plaintiff may recover the reasonable costs plus or minus the diminution or enhancement of the value. Langham v. Chicago, R. I. & P. Ry., 201 Iowa 897, 208 N. W. 356 (1926). When the chattel has not been repaired or is not expected to be repaired, plaintiff may recover the reasonable cost of repair plus or minus the change to be effected in the market value. Hopper, McGaw & Co. v. Kelly, 145 Md. 161, 125 Atl. 779 (1924). Regardless of the repair plaintiff may recover the difference between the value before and after the wrong with the actual cost of repair considered generally as evidence of this depreciation. Webb v. O'Kelly, 213 Ala. 214, 104 So. 505 (1925). In the jurisdictions which follow the first two rules enunciated above the value for lost use is always allowed while where the last recited rule obtains there are a few states which do not allow for lost use. Helin v. Egger, 121 Neb. 727, 238 N. W. 364 (1931). The Restatement allows plaintiff an election of any one of the three rules and grants value of lost use regardless of which theory is chosen. RESTATEMENT, TORTS § 928 (1940).

12. Burrage v. Tri-State Transit Co., 149 So. 125 (La. 1933); Colonial Motor Coach Corp. v. New York Cent. R.R., 131 Misc. 891, 228 N. Y. Supp. 508 (Sup. Ct. 1928); Hayes Freight Lines, Inc. v. Tarver, 148 Ohio St. 82, 73 N. E. 2d 192 (1947).

above discussed general rule for, though it does not assume that an injured chattel can be repaired immediately, it does assume that a plaintiff can immediately replace a destroyed chattel. But it has been suggested that there should be no difference between the two situations since in each the plaintiff's investment might be useless to him until either he has repaired it or has replaced it.[13] Even in injury cases where damages for lost use are allowed, plaintiff may not recover a sum totalling more than the actual value at the time and place of the injury.[14] Such limitation ignores the basic object of the law of damages by applying a general rule of thumb to cases where its application cannot requite the plaintiff for the injury which defendant has done him.[15]

It is submitted that a rule allowing special damages, if pleaded and proved, regardless of the type of tort in question does not overthrow the old rule of value at the time and place of conversion—for a plaintiff may always recover at least this—but merely holds that such rule is not absolute and must be discarded when special circumstances are shown. The theory of general tort law is consistent with recovery for all the proximate results of a negligent destruction of a chattel, as allowed in the instant case.[16] But on the strict theory of a tortious conversion, *i.e.*, a forced sale, it is technically inconsistent to allow more than the value of the chattel at time and place of conversion plus interest.[17] But since even on the theory it is a "forced" sale which is thrust on plaintiff it seems in accord with the spirit of the present law to make recovery dependent on the injury suffered and not on the form of action pursued.[18]

The holding in the instant case must be acclaimed for presenting a rule for determining the amount of recovery based solely on the relation between the wrong of the defendant and the resultant injury to the plaintiff; thus making recovery independent of the nature of the action brought and unfettered by the general rule of thumb which is necessarily determined by the injury that another plaintiff suffered from the wrong of another defendant in other circumstances.

DAMAGES—RECOVERY FOR MENTAL ANGUISH IN CONTRACT ACTION.—The plaintiff entered into a contract with defendant undertaker to inter the body of her deceased husband. The defendant allegedly defaulted in his agreement in that he failed properly to secure the lid of the vault into which the casket of the deceased had been laid. As a result, the vault, following a rainy spell of weather, had arisen above

13. Louisville & L. R.R. v. Schuester, 183 Ky. 504, 209 S. W. 542 (1919).

14. Magnolia Petroleum Co. v. Harrell, 66 F. Supp. 559 (W. D. Okla. 1946); Gass v. Agate Ice Cream, Inc., 264 N. Y. 141, 190 N. E. 323 (1934). *See* Brandon v. Capital Transit Co., 71 A. 2d 621, 623 (D. C. Mun. App. 1950).

15. See note 2 *supra.*

16. RESTATEMENT, TORTS § 917 (1940).

17. In the case of a negligent wrong to property an award of interest is in the discretion of the jury, while in an intentional wrong to property it is a matter of right. *See* Wilson v. City of Troy, 135 N. Y. 96, 105, 32 N. E. 44 (1892). *But see* Flamm v. Noble, 296 N. Y. 262, 268, 72 N. E. 2d 886, 888 (1947); Felder v. Reeth, 34 F. 2d 744, 748 (9th Cir. 1929).

18. If plaintiff sued in replevin for the return of the goods no sale would be effected and plaintiff could recover for the lost use. Tannenbaum Son & Co. v. C. Ludwig Baumann & Co., 261 N. Y. 85, 184 N. E. 503 (1933).

the level of the ground. Consequently reinterment became necessary. During this process, to which plaintiff was a witness, it was discovered that water and mud had entered into the vault and that the casket was wet. The plaintiff alleged that on seeing this she suffered extreme mental anguish. An action was commenced for breach of the contract to conduct the funeral and inter the body and for breach of warranty in the sale of the vault. The trial court dismissed the breach of warranty action and submitted to the jury this sole issue: "Did the defendants by their unlawful, wilful negligence and carelessness in the burial of the body of the husband of the plaintiff cause the plaintiff to suffer injury and damages as alleged?" The jury answered in the negative and judgment was thereby rendered for defendant. On appeal, *held,* one justice dissenting, judgment of the trial court reversed on the ground that it was error to submit the issue of negligence to the jury in that this was essentially an action in damages for breach of contract, not tort. Mental anguish is a proper element of damages in such an action. *Lamm v. Shingleton,* 55 S. E. 2d 810 (N. C. 1949).

Although mental anguish allegedly following a wilful tort or negligent act which results in an actual physical injury is now universally considered a compensable ground for recovery in tort,[1] no such precise uniformity exists when the same item of damage is alleged in a cause of action for breach of contract.

Generally damages for mental anguish are not recoverable when the cause of action is based on a commercial contract since the parties thereto are covenanting primarily on the basis of realizing some pecuniary or proprietary advantage and the law seeks to satisfy only this lost advantage in the case of a breach.[2] The lack of uniformity in the authorities pervades those contract actions where the agreement is for personal services in which one party is to be compensated for satisfying a purely personal need of the other. Such a contract is involved in the instant case.

The most simple and most sound approach to these cases is afforded by a realistic application of the principle set out in that landmark of the law of damages, *Hadley v. Baxendale*:[3] Where the parties knew or reasonably should have known at the time the contract was entered into that mental grievance would follow a breach, such damages should be compensable. This rule has been adopted in many jurisdictions[4]

1. LaSalle Extension University v. Fogarty, 126 Neb. 457, 253 N. W. 424 (1934); O'Brien v. Moss, 220 App. Div. 464, 221 N. Y. Supp. 621 (4th Dep't 1927); 1 COOLEY, TORTS § 73 (3d ed. 1906); 1 SUTHERLAND, DAMAGES § 21 (4th ed. 1916); RESTATEMENT, TORTS § 905 g (1939).

2. Smith v. Sanborn State Bank, 147 Iowa 640, 126 N. W. 779 (1910); Clark v. Life & Casualty Ins. Co., 245 Ky. 579, 53 S. W. 2d 968 (1932); MCCORMICK, DAMAGES § 145 (1935); 5 WILLISTON, CONTRACTS § 1340 A (rev. ed. 1937); *Developments in the Law—Damages 1935-1947,* 61 HARV. L. REV. 113, 141 (1947). *See* Beaulieu v. Great Northern Ry., 103 Minn. 47, 50, 114 N. W. 353, 354 (1907).

3. 9 Ex. 341, 156 Eng. Rep. 145 (1854). See also 5 WILLISTON, CONTRACTS § 1340 A (rev. ed. 1937); MCCORMICK, DAMAGES § 145 (1935).

4. Brown Funeral Homes & Ins. Co. v. Baughn, 226 Ala. 661, 148 So. 154 (1933); Becker Asphaltum Roofing Co. v. Murphy, 224 Ala. 655, 141 So. 630 (1932); Fitzsimmons v. Olinger Mortuary Ass'n, 91 Colo. 544, 17 P. 2d 535 (1932); Wright v. Beardsley, 46 Wash. 16, 89 Pac. 172 (1907).

Other well known decisions which apply the rule of *Hadley v. Baxendale* in allowing recovery for mental anguish are the telegraph cases: Western Union Telegraph Co. v. Hill, 163 Ala. 18, 50 So. 248 (1909); Western Union Telegraph Co. v. Redding, 100 Fla. 495, 129 So. 743 (1930); Young v. Western Union Telegraph Co., 107 N. C. 370, 11 S. E. 1044

and it is grounded in the firm concept that the recovery of any compensatory damages is a matter of fact depending not only on whether or not the damages were actually suffered, but also whether they were or should have been reasonably within the contemplation of the parties when they made their bargain. The court's charge eliminated the application of any such measure of damages.

Many jurisdictions have made no distinction between personal service and commercial contracts[5] and have steadfastly adhered to the somewhat unrealistic principle that no cause of action in contract, *ipso facto*, comprehends mental anguish as part of the damage. These courts maintain that the pecuniary consideration involved, however slight, overrides a contemplation of the largely personal and highly speculative mental condition of one of the parties.[6]

The *Restatement of Contracts* has advanced a rule for allowing recovery for mental anguish in contract actions without regard to the type of contract involved. Its test is: If there has been a wilful and wanton breach, the party suffering thereby should be compensated for any mental anguish actually resulting therefrom.[7] While its analogy to tort actions commends it, this approach is considerably weakened, if not nullified, by its own inconsistency with more settled principles of contract damages. The wilfullness of the breach has never been a consideration in contract actions, as the *Restatement* recognizes,[8] and the soundly established rule that only those damages should be weighed which the parties contemplated at the time the contract was made would be arbitrarily discarded in large measure by the addition of the rule of wilful breach.

Yet another solution to the problem of recovery for mental anguish in contrast is afforded by the New York courts. Here the general rule that no such damage is recoverable[9] is excepted to when the breach coincides with a public ejectment.[10] In *Aaron v. Ward*[11] the plaintiff, having purchased a ticket of admission to the defendant's bathing beach and having wrongfully been refused admittance, was publicly ordered to leave. Although she alleged no physical injury, the court distinguished the mental pain and humiliation she suffered at this breach from that

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(1890). *But cf.* Chase v. Western Union Telegraph Co., 44 Fed. 554 (N. D. Ga. 1890); Thompson v. Western Union Telegraph Co. 107 N. C. 449, 12 S. E. 427 (1890); Western Union Telegraph Co. v. Choteau, 28 Okla. 664, 115 Pac. 879 (1911). These decisions allowing recoveries for mental anguish, however, are in a class by themselves since the courts proceeded on both principles of tort and contract.

5. Wilcox v. Richmond & D. R.R., 52 Fed. 264 (4th Cir. 1892); Plummer v. Hollis, 213 Ind. 43, 11 N. E. 2d 140 (1937); Beaulieu v. Great Northern Ry., 103 Minn. 47, 114 N. W. 353 (1907); Norton v. Kull, 74 Misc. 476, 132 N. Y. Supp. 387 (Sup. Ct. 1911).

6. Wilcox v. Richmond & D. R.R., 52 Fed. 264, 266 (4th Cir. 1892). See *Developments in the Law—Damages 1935-1947*, 61 HARV. L. REV. 113, 138 (1947).

7. RESTATEMENT, CONTRACTS § 341 (1932).

8. RESTATEMENT, CONTRACTS § 342 (1932). See also Holland v. Spartenburg Herald-Journal Co., 166 S. C. 454, 165 S. E. 203 (1932); 5 WILLISTON, CONTRACTS § 1340 (rev. ed. 1937).

9. Kellogg v. Commodore Hotel, Inc., 187 Misc. 319, 64 N. Y. S. 2d 131 (Sup. Ct. 1946); Norton v. Kull, 74 Misc. 746, 132 N. Y. Supp. 387 (Sup. Ct. 1911).

10. Boyce v. Greeley Square Hotel Co., 228 N. Y. 106, 126 N. E. 647 (1920).

11. 203 N. Y. 351, 96 N. E. 736 (1911). It was in this case that the court made the distinction between the cases involving a public ejectment and those in which mental anguish is asserted on an independent basis.

anguish which is alleged to follow the breach of an ordinary contract. This limited recognition of the part which human feelings play in agreements of this sort is apparently as far as New York has gone in countenancing the award of damages for mental anguish. However the value of such recognition is minimized by its arbitrariness, which prevents its application to other situations wherein mental grievance is an obviously primary factor in the actual damage suffered. This arbitrariness is emphasized by the New York courts' former approach to the "heart-balm" suits, now abolished by statute.[12] In these cases the courts found no trouble in comprehending that the contracts were so predominantly personal that mental anguish was almost the sole damage contemplated by the parties when the contract was made.[13] Today this striking anomaly in New York law does not exist, but its unrealistic basis lingers on in the public ejectment cases and the lawyer is confronted with a general rule, though rigid, far more logical than its one exception.

The most realistic theory is the one suggested by the court in the instant case. It is not unreasonable to suppose that where only purely personal satisfaction is bargained for for a party or where his personal feelings are mutually considered to be of more importance to him than monetary gain, the breach of the other party will cause mental pain which should be recompensed.

STATUTES—EXTENT AND APPLICABILITY OF FEDERAL TORT CLAIMS ACT WITHOUT THE UNITED STATES.—An action for wrongful death was commenced against the United States under the Federal Tort Claims Act by the administratrix of the estate of a pilot killed in a plane crash at Harmon Field, Newfoundland. It was alleged that the United States was negligent in the operation of the leased base and a right of action existed under the Act, based upon Newfoundland's wrongful death statute, even though Newfoundland was not within the territorial limits of the United States. The district court held that Harmon Field was a foreign country within the meaning of the provision of the Federal Tort Claims Act excluding claims "arising in a foreign country" and consequently that no action existed without the government's consent to be sued. The judgment of the District Court was reversed by the Court of Appeals. The Supreme Court, reversing the Court of Appeals, *held,* that Newfoundland was a "foreign country" within the meaning of the statute. *United States v. Spelar,* 338 U. S. 217 (1949).

Not since the turn of the century when the famous Insular Tariff cases were decided have the federal courts until recently considered the controversial question of the extent and applicability of federal laws without the territorial limits of the United States. From the cases of *DeLima v. Bidwell*[1] and *Downes v. Bidwell*[2] the doctrine of territorial incorporation was developed, *i.e.,* if a territory was incorporated into the United States, the Constitution applied fully; if not, fundamental rights are guaranteed but not procedural rights. The purpose of the distinction was to allow Congress a large discretion in legislating for the latter areas with their separate and distinct concepts and customs.[3]

12. N. Y. CIV. PRAC. ACT § 61-a.

13. Chellis v. Chapman, 125 N. Y. 214, 26 N. E. 308 (1891)

1. 182 U. S. 1 (1901).

2. 182 U. S. 244 (1901). See also Balzac v. Puerto Rico, 258 U. S. 298 (1922).

3. Coudert, *The Evolution of the Doctrine of Territorial Incorporation,* 26 COL. L. REV.

The question reappears today as a result of territorial acquisitions during World War II, particularly the leased bases acquired from England for 99 years through the famous "destroyer deal."[4] The reversal by the Court of Appeals[5] stemmed from the decision of the Supreme Court in *Vermilya-Brown Co. v. Connell*[6] in which a divided court held that a leased Bermuda military base was a "possession" within the meaning of the Fair Labor Standards Act which was statutorily declared applicable to "any territory or possession of the United States."[7] By virtue of this holding employees of American contractors engaged in the construction of a military base in Bermuda were held to be covered by the Act. A majority of the Court argued that the term "possession" in the Act was of uncertain meaning and ambiguous, especially in view of the fact that the Fair Labor Standards Act was passed in 1938 when no thought was given to the status of possible leased bases and the applicability of the Act to such bases. The Court's approach then was to place a construction on the statute in the light of the policy of the Congress in enacting this legislation. Although recognizing that the leased area was under the sovereignty of Great Britain and that it was not a territory of the United States in a political sense, the majority nonetheless held the Act applicable since the dispute was between American subjects concerning an American statute in a geographical area where the United States had some measure of jurisdiction and control. It found that it was the purpose of Congress to regulate labor relations in an area vital to our natural prosperity and not to limit the coverage to places over which the United States exercised sovereignty.[8] Moreover, the Court deduced that since Congress has been held to have the power to regulate criminal actions of citizens in foreign countries directly affecting the United States without affecting "the dignity or right of sovereignty of another nation," that dignity would no more tend to be offended by the application of this federal statute.[9]

The dissent in the *Vermilya-Brown* case claimed that there was no ambiguity in the use of the term "possession"; rather the question was whether the Bermuda base came within the meaning of that term. Since this question was a political one,[10] its answer, the minority believed, should involve the political aspects of declaring a leased base to be a United States "possession." Our State Department had already made known its position[11] that enough ill-will had been engendered because of the happenings on and about these leased bases and warned against

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823 (1926); Note, *Applicability of Federal Statutes to Noncontiguous Areas*, 97 U. OF PA. L. REV. 866, 867 (1949).

4. 55 STAT. 1560 (1941), arts. XIV (1) C, XIII (1) (1941).

5. 171 F. 2d 208 (2d Cir. 1948). Previous federal court decisions had consistently held that occupied areas were "foreign countries" and not within the coverage of the Federal Tort Claims Act. Brewer v. United States, 79 F. Supp. 405 (N. D. Cal. 1948) (Okinawa); Straneri v. United States, 77 F. Supp. 240 (E. D. Pa. 1948) (Ghent, Belgium); Brunell v. United States, 77 F. Supp. 68 (S. D. N. Y. 1948) (Saipan). For a classification of areas, see Note, 97 U. OF PA. L. REV. 866, 867 (1949).

6. 335 U. S. 377 (1948).

7. *Ibid.*

8. *Id.* at 389.

9. *Id.* at 381. *See* Blackmer v. United States, 284 U. S. 421, 437 (1932); United States v. Bowman, 260 U. S. 94, 102 (1922).

10. Vermilya-Brown Co. v. Connell, 335 U. S. 377, 401 (1948) (dissenting opinion).

11. *Ibid.*

further breaking down our relations with Great Britain by declaring the bases our "possessions." Consequently, the dissent concluded that the bases should not be declared "possessions" of the United States within the meaning of the Fair Labor Standards Act.

An analogous question came before the Supreme Court in March of 1949 in *Foley Bros., Inc. v. Filardo*.[12] The issue presented was whether the Federal Eight Hour Law[13] was applicable to a contract between the United States and a private contractor for construction work on military bases in a foreign country not under lease to the United States, namely, Iraq and Iran. The Supreme Court held that the law was inapplicable; first, because nothing in the Act indicated that it was the *intention* of Congress that the law should extend its coverage beyond places where the United States has sovereignty or legislative control; second, that nothing in the legislative history which concerned domestic labor conditions indicated that the law was applicable to foreign military bases; and third, administrative interpretations of the law lent no support to the scope of its applicability. The reasoning of the Court seemed to indicate that the Court had backtracked somewhat from its position of statutory interpretation in the *Vermilya-Brown* case. In the *Filardo* case the words of the Statute, "*every contract* made to which the United States . . . is a party",[14] would have allowed the Court more freedom in applying a federal labor statute in a case involving American litigants than did the word "possessions" in the Fair Labor Standards Act, for in the latter the Court by a process of judicial legislation in effect had to annex the land of a foreign sovereignty. The Court, however, distinguished its holding in the *Vermilya-Brown* case.[15]

In order to emphasize the complicating difficulties and effects of the decision in the *Vermilya-Brown* case on the executive and administrative departments of the United States Mr. Justice Frankfurter added as an appendix to his concurring opinion in the *Filardo* case a letter written to the Solictor General of the United States by the Administrator of the Wage and Hour and Public Contracts Divisions of the United States Department of Labor.[16] In this letter it was stated that in considering the territorial aspects of wage-hour coverage in the past, the department has proceeded on the assumption *that traditional concepts of sovereign control* were implicit in the meaning of the phrase "any territory or possession of the United States" as that phrase is used in the Fair Labor Standards Act and gave particular weight to authoritative expressions of the State Department and other

12. 336 U. S. 281 (1949).

13. 27 STAT. 340 (1892), 40 U. S. C. § 321 (1946), as amended, 37 STAT. 726 (1913), 40 U. S. C. § 321 (1946).

14. 37 STAT. 137 (1912), 40 U. S. C. § 324 (1946), as amended, 62 STAT. 989, 40 U. S. C. § 324 (Supp. 1948).

15. "The situation here is different from that in Vermilya-Brown Co. v. Connell, where we held that by specifically declaring that the Act covered 'possessions' of the United States, Congress directed that the Fair Labor Standards Act applied beyond those areas over which the United States has sovereignty and was in effect in all 'possessions'. This Court concluded that the leasehold there involved was a 'possession' within the meaning of the Fair Labor Standards Act. There is no language in the Eight Hour Law, here in question, that gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control." 336 U. S. 281, 285 (1949).

16. Foley Bros., Inc. v. Filardo, 336 U. S. 281, 296 (1949) (appendix).

governmental agencies on the question of what areas are viewed as territories or possessions over which the United States exercises full sovereign rights. The letter then discussed the problems that will confront the department as a result of the *Vermilya-Brown* decision.

The Supreme Court was presented with an opportunity in the principal case to set at rest some of the uncertainty developing out of the *Vermilya-Brown* decision. Previous federal court decisions[17] had consistently held that occupied areas were "foreign countries" and not within the coverage of the Federal Tort Claims Act.[18] The Court of Appeals for the Second Circuit in the instant case,[19] however, held that since the Newfoundland base was a "possession" within the coverage of the Fair Labor Standards Act, it could not very well be held to be a "foreign country" within the exclusionary provision of the Federal Tort Claims Act.

The instant case presented the Supreme Court with an opportunity to reverse the questionable decision by a closely divided court which it had handed down in the *Vermilya-Brown case*. The expression "any territory and possession of the United States" used in the Fair Labor Standards Act, given its natural and normally understood meaning, seems clearly to refer to places over which the United States exercises sovereignty.[20] All the circumstances attending the leasing of the bases accorded with the express opinion of the State Department that sovereignty over the leased areas was never transferred from Great Britain to the United States. It seems rather far fetched to ascribe to Congress, when it enacted the Fair Labor Standards Act in 1938, an intention to extend its coverage to areas, subsequently acquired during the late hostilities, over which the United States never claimed sovereignty. Extension of coverage, if Congress so desired, should have been left to the legislative branch of the government. Congress may extend to the leased bases the provisions of any statute by amendment as it did in the case of the Longshoreman's and Harbor Workers Compensation Act.[21]

It does seem anomalous, as Justice Jackson observed in his concurring opinion in the principal case,[22] that a workman at a leased air base may maintain an action for overtime wages under the Fair Labor Standards Act—not, however, under the Eight Hour Law—and yet, if he is injured, may not recover damages against the United States under the Federal Tort Claims Act. Inasmuch as the leases on the bases have some ninety years to run, stability and constancy would seem to dictate a Congressional reversal of the majority opinion in the *Vermilya-Brown* case.

The decision in the principal case seems to be clearly sound. It deserves comment solely because it again points up the error committed in the *Vermilya-Brown* decision.

17. See note 5 *supra*.

18. 60 STAT. 845 (1946), 28 U. S. C. § 943 (Supp. 1948); New Title: 63 STAT. 444, 28 U. S. C. § 2680 (Supp. 1949).

19. 171 F. 2d 208 (2d Cir. 1948).

20. 338 U. S. 217, 219 (1949).

21. 55 STAT. 622 (1941), 42 U. S. C. § 1651 (1946).

22. 338 U. S. 217, 224 (1949). Only Justice Jackson seems to doubt the validity of the decision in Vermilya-Brown Co. v. Connell in the face of the holding in the instant case. *Id.* at 225. Justice Frankfurter concurs with the construction placed on the Federal Tort Claims Act for the reasons which supported his dissent in the *Vermilya-Brown* case. *Id.* at 224.

WILLS—DESCENT AND DISTRIBUTION—APPLICATION OF SECTIONS 18 AND 26 OF THE DECEDENT ESTATE LAW WHERE THIRD PARTIES ARE NAMED BENEFICIARIES UNDER WILL.—Testator willed one-half of his property to his widow and the remaining half to collateral relatives. An unprovided for child born after the making of the will and not mentioned in the will exercised his right under Section 26 of the Decedent Estate Law to take an intestate share of his deceased parent's estate. Thereupon the widow, foreseeing that she would get less than the statutory minimum provided her by Section 18 of the Decedent Estate Law (since the child's two-third share would be made up by taking two-thirds from the share of each beneficiary under the will), elected to take her one-third intestate share. In reconciling the conflict occasioned by the application of Sections 18 and 26, the Surrogate held that the estate should be distributed 1/3 to the widow, 8/15 to the child, and 2/15 in equal shares among the collaterals on the ground that both the shares of the after-born child and the collaterals are subject to the widow's right of election. *Matter of Vicedomini,* 195 Misc. 1057, 91 N. Y. S. 2d 472 (Surr. Ct. 1949).

The issue presented in the principal case was previously considered in *Matter of Wurmbrand.*[1] On substantially similar facts that court distributed the estate by awarding one-third to the surviving spouse under his right of election and two-thirds to the after-born child under Section 26. Though the holding in the *Wurmbrand* case gave a literal interpretation to Sections 18 and 26, it resulted in the complete exclusion of all collateral relatives and other devisees and legatees named in the will. Despite this apparent precedent, the court in the instant case held that a distribution which awarded the after-born child less than his intestate share (two-thirds) was not in conflict with the *Wurmbrand* case. It said of that case: "The parties did not put in issue before the Surrogate the question as to whether or not the after-born child should contribute proportionately to make up the deficit occasioned by operation of section 26."[2] While it is true that the Surrogate in the *Wurmbrand* case did not *expressly* decide that the after-born child did not have to contribute to make up the widow's deficit, such principle of law is implicit and essential to the result achieved by the court in that case.[3] It would seem, therefore, that the instant case is inconsistent with and opposed to the views implied in the Surrogate's opinion in the earlier case.

Upon analysis of the two cases it is apparent that their difference in result is due primarily to a difference in approach. The earlier decision hewed closely to the language of the Decedent Estate Law and completely disregarded the testamentary intent of the testator; the instant case endeavored to give some expression to the intention of the testator and yet comply with the relevant statutes. In both instances the courts were trying to extricate themselves from the horns of a dilemma: to give

1. 194 Misc. 203, 86 N. Y. S. 2d 705 (Surr. Ct. 1949), *aff'd without opinion,* 275 App. Div. 915, 90 N. Y. S. 2d 686 (1949).

2. Matter of Vicedomini, 195 Misc. 1057, 1063, 91 N. Y. S. 2d 472, 477 (Surr. Ct. 1949).

3. This was not an issue "lurking in the record"; the suit was specifically brought by the collaterals to establish a claim to a portion of the estate. The reasoning of the court in the instant case, that the *Wurmbrand* case did not establish the precedent that the after-born child does not have to contribute to make up the widow's deficit, is applicable only to the holding of the Appellate Division. For there only matters that were in issue were decided. However, in the Surrogate's Court whether or not the child should contribute was decided, and the result indicates that the Surrogate did not think the child should contribute.

full effect to the testamentary intent is to violate the statute, while to apply literally the statute would be to violate the command of the testator to dispose of his property as he had willed. The problem is, therefore, to determine which of the two results reached in the cases under discussion conforms with existing legal principles in the law of decedent estates.

Prompted by a motive to carry out the testator's expressed intent, the court in the instant case proceeded to consider the problem in a manner which would substantially comply with the statutes and yet give some force to the manifested testamentary intent. The method used to accomplish this aim appears to be procedural more than substantive; *i.e.,* the chronology in which the court distributed the estate necessarily brought about the desired result. Section 26 was applied first, the widow and the collaterals contributing to make up the after-born child's share. The logic of this order of procedure commends itself, since before the exercise of the child's right the widow's share was greater than the statutory limit allowable under her right of election. At this point the child had two-thirds, the widow one-sixth and the collaterals one-sixth. Next Section 18 was invoked to provide for the widow her one-third of the estate. To make up the widow's deficit, one-sixth, the child was forced to contribute pro rata with the collaterals since he was a beneficiary and required to contribute with those of his class.[4] The child's right was thereby subordinated to the widow's right of election but only in the sense that the child had to contribute to make up the widow's right of election. The court found support for this result in the wording of Section 18 which provides that after the widow has received her share the terms of the will shall *as far as possible* remain effective. Thus the consideration that the collaterals should receive something after the widow's share was provided seems to have some support.[5]

It would appear, however, that the court's reasoning in the instant case was not unassailable in trying to sustain the result on a literal view of Sections 18 and 26. Construing the sections strictly it is difficult to see in them any authority for giving effect to the testator's intent, for both sections permit a violation of the manifest intent of the testator. To attempt to reconcile the wording of the statutes with the testator's testamentary intent would appear unwarranted. On this basis the decision in the *Wurmbrand* case was more logical since it did not recognize the manifest intent of the testator.

It is submitted, however, that the decision in the instant case may be justified on another ground; *viz.,* the court was not limited to a literal interpretation of the statute. Where there is ambiguity or incompatibility in a statute the solution is to be found by looking for the intent of the framers of the statute, resolving conflicts in favor of their intent. In discussing a problem on statutory construction the Supreme Court of the United States said: "But in construing a statute we are not always confined to a literal reading, and may consider its object and purpose,

4. *In re* Finkelstein's Estate, 189 Misc. 180, 70 N. Y. S. 2d 596 (Surr. Ct. 1947).

5. That the clause "as far as possible" should operate to give the collaterals a share when Section 26 is applied as well as Section 18 would not appear to be justified by this phrase in Section 18 alone. It is more reasonable to conclude that the clause was inserted so that the operation of Section 18 would not work a revocation of the entire will. The same may be said for Section 26; the exercise of the right does not work a complete revocation of the will as does happen under the analogous statutes in Delaware, and in certain instances in Ohio and Kansas. See DEL. REV. CODE § 3251 (1935), OHIO GEN. CODE ANN. § 10504-49 (1926), KAN. GEN. STAT. ANN. § 22240 (1935).

the things with which it is dealing, and the condition of affairs which led to its enactment so as to effectuate rather than destroy the spirit and force of the law which the legislators intended to enact."[6]

The purpose of the legislators in enacting Section 18 was to provide a surviving spouse with an irreducible minimum of one-third of the deceased spouse's estate.[7] So the court in the instant case did not violate the spirit nor the literal meaning of this section.

It remains, then, to determine the object and purpose of the legislators in creating Section 26. At common law there was no limit on the right to disinherit.[8] Section 26 was enacted primarily to prevent disinheritance in certain circumstances; namely, where the disinheritance was deemed unintentional.[9] The rationale of the statute seems to be that there is a presumption that the parent would want to perform his duty to provide for the child. In this regard similar statutes which are extant in almost all American jurisdictions[10] prescind from the civil law which considered the silent will as a violation of social duty only and did not operate on any theory of presumed intent.[11]

6. American Tobacco Co. v. Werckmeister, 207 U. S. 284, 293 (1907). *See* Foley Bros., Inc. v. Filardo, 336 U. S. 281 (1948) where the court discusses canons of construction.

7. THE REPORTS OF THE DECEDENT ESTATE COMMISSION AND THE NEW LEGISLATION 86 (1930).

8. Davids in speaking of the origin of Section 26 has said: "This provision of statute was derived from a rule of the civil law, which, upon the subsequent birth of a child, unnoticed in the will, worked a nullification of the instrument. At common law the birth of a child subsequently to execution did not affect the disposition of the parent's estate; and the purpose of the enactment was to adopt the civil law principle." 1 DAVIDS, NEW YORK LAW OF WILLS § 547.

9. In Brush v. Wilkins, 4 Johns. Ch. 506 (N. Y. 1820), there was a marriage and the birth of a child after the making of testator's will. The court held that both elements worked such a change in testator's circumstances that the will was deemed entirely revoked. (This was the common law revocation by circumstances.) The court states that the subsequent birth alone would not have affected the testator's will: "It is the policy of the *English* law, to give to every man of competent will and understanding, the absolute control (however imprudently or improvidently he may at times exercise it) over the disposition of his estate; and the children are not considered as having a legal interest or property in the effects of the father. . . . Every person is permitted to make his own will, at his discretion; and he may even disinherit his children, if he should be so inclined, whether they deserved, or not, such extreme chastisement." *Id.* at 518. After this case, in the 1827-1828 meeting of the legislature, the statute on the after-born child was enacted. 2 N. Y. REV. STAT. ch. 6, t. 1, art. 3, § 49 (1827-1828). It only provided, however, that the after-born child could take an intestate share of the estate of his father. In 1869 the statute was amended to its present form making the child's right applicable to the estates of both parents. N. Y. Laws of 1869, ch. 22, § 1. As to marriage after the making of a will made before Sept. 1, 1930, Section 35 of the Decedent Estate Law now provides that such will is entirely revoked as to the surviving spouse unless provision has been made by an ante-nuptial agreement in writing. *In re* Van Hoecke's Will, 93 N. Y. S. 2d 19 (Surr. Ct. 1949).

10. Mathews in his analysis of American statutes states that only Florida, Maryland and Wyoming do not have provisions for an after-born child. Mathews, *Pretermitted Heirs,* 29 COL. L. REV. 748, 749 (1929).

11. *Id.* at 748.

Considering Sections 18 and 26 in this historical light, we find then that Section 18 gives a substantive right to a definite amount,[12] whereas Section 26 only intends to provide for the child as the law deems the parent would so desire. In this sense Section 26 becomes a provision of the testator's will; *i.e.*, in that it is a crystallization of the presumed intent of the testator.[13] In accord with such a view the problem is not one of chronology,[14] for the statutory minimum of the widow would necessarily be excluded from the computation whether Section 18 or Section 26 was applied first. The problem is in reality whether the child's share should be taken pro rata from the beneficiaries under the will, giving the child a proportion of his intestate share; or whether the entire shares of the beneficiaries should be given to the child, the child taking a full intestate share.

It is difficult to see a compelling necessity to give the child a full intestate share when the parent could have satisfied Section 26 by willing the child a lesser amount, or even by merely mentioning that the after-born child was to get nothing.[15] Yet Section 26, like Section 18, provides that the child should take an intestate share. With such vast differences in the natures of the rights under Sections 18 and 26 it would appear that some distinction should be made in their application.[16]

It is submitted that on the facts in the instant case a strict interpretation of "intestate share", which would not permit the unprovided for infant's share to be cut down, is unreasonable and unwarranted. In accord with the spirit of Section 26 the after-born child should be deemed to benefit under the will in an amount equal to an intestate share[17] but said share might be invaded under a spouse's right of election. This would appear sound, since it is the will which actually gives the child his right; *i.e.*, in that the presumed intent of the testator to provide for the child is made part of the will. In this manner the after-born child would be in a class with the collaterals and forced to contribute along with them.

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12. *In re* Van Hoecke's Will, 93 N. Y. S. 2d 19, 22 (Surr. Ct. 1949).

13. The Supreme Court of Texas in this manner construed a similar statute protecting the after-born child as ingrafted upon the will as an unwritten part thereof. Conroy v. Conroy, 130 Tex. 508, 110 S. W. 2d 568 (1937).

14. See 63 HARV. L. REV. 703, 705 (1950), where the instant case is criticized because of the reliance on "mere chronology".

15. Mere "mention" of the possibility of an after-born child avoids the child's right. *In re* Kraston's Will, 58 N. Y. S. 2d 364 (Surr. Ct. 1945). It should be noted that Section 26 also applies to children adopted after the making of a will, *In re* Griffin's Will, 159 Misc. 12, 287 N. Y. Supp. 514 (Surr. Ct. 1936), and to illegitimate children within the limits of Section 89 of the Decedent Estate Law, Bunce v. Bunce, 14 N. Y. Supp. 659 (1891).

16. The problem might be viewed more clearly if we substitute a second son in the place of one of the collaterals. In this instance the son within the contemplation of his parent—let us say because he was a faithful son—would get less than the unmentioned son only because the after-born son was unmentioned. (It is well to keep in mind that the after-born son might be a financially independent adult.) Such a result, however incongruous it might seem, would follow if the meaning of "intestate share" in Section 18 was applied to Section 26.

17. It must be noted, however, that the child's right is not dependent upon the will. In Smith v. Robertson, 89 N. Y. 555 (1882), where the executor sold realty as directed by the will, the after-born child was not confined to a pursuit of the proceeds of the sale but had an action in ejectment against the innocent grantee.

Furthermore, the right provided the after-born child should, in the wording of Section 26, be satisfied by a proportionate contribution.[18] Since no proportion of the shares held by the collaterals could yield a full intestate share to the child, the court would be exceeding the authority given in the statute if it applied the complete shares of the collaterals to make up the child's intestate share. So to do would work a total revocation of the testator's will and would be adverse to the spirit of the statute. On the other hand, it would appear that the result reached in the instant case is fairly within the terms of the statute and in complete conformity with the object and purpose of the statute. In 1869 the revisor of Section 26 stated its purpose as follows: "Whether the birth of a child after marriage is a revocation seems yet a matter of doubt. . . . Some legislative declaration seems expedient, and, while the consequences of an entire revocation are avoided by the above section, a just provision seems to be made for a probable oversight on the condition that the child is not mentioned or referred to in the will."[19]

When Section 18 was enacted in 1930 a substantial change was effected in our Decedent Estate Law. In large measure the problem in the instant case was occasioned by the failure of the legislators at this time expressly to qualify Section 26 as influenced by Section 18. The right of the after-born child is of no greater moment than the right given to a beneficiary to take property under a will. Both are statutory rights, both were in existence at the time of the enactment of Section 18, and both must be deemed affected by, and subordinated to, Section 18. At no time before the enactment of Section 18 could a situation have arisen under the application of Section 26, where the beneficiaries would suffer a complete loss of their testamentary gifts. Section 26 only contracted the rights of beneficiaries by requiring them to contribute to the after-born child. In turn, Section 18 was only another contraction of the rights of those entitled to a share in the decedent's estate, and since both the after-born child and those named in the will are in a broad sense "the beneficiaries", the rights of both should be deemed curtailed by Section 18.

It is submitted, however, that some legislative pronouncement is necessary to correct the discrepancy caused by the difference in results in the *Wurmbrand* case and in the principal case. A satisfactory solution, in full accord with the object of Section 26 could be obtained by amending Section 26 so that the after-born child would be entitled to a "just provision" to be determined by the court from the facts in each case.[20]

18. The relevant portion of Section 26 reads as follows: ". . . every such child [shall succeed to an intestate share] . . . and shall be entitled to recover the same portion from the devisees and legatees, in proportion and out of the parts devised and bequeathed to them by such will." See also Matter of Goldsmith, 175 Misc. 757, 25 N. Y. S. 2d 419 (Surr. Ct. 1940), where pro rata contribution is discussed.

19. Revisor's note quoted in Tavshanjian v. Abbott, 130 App. Div. 863, 865, 115 N. Y. Supp. 938, 940 (1st Dep't 1909).

20. In addition to solving the problem in the instant case this recommended change would do away with the hardship worked on a son named a beneficiary in the will. See note 17 *supra*.