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Recent Decisions

RECENT DECISIONS

BILLS AND NOTES—PUBLIC POLICY—ESTOPPEL TO DENY ABSENCE OF CONSIDERATION.—The defendant was the holder of a mortgage on realty which was guaranteed by one Hall, an officer of the plaintiff bank, and on which $30,000 remained to be paid. The defendant's mother owed the plaintiff bank $34,666 on a promissory note. Upon default by the mortgagor the defendant demanded payment from Hall, who refused to pay. It was then agreed that the bank would accept an assignment of the mortgage held by defendant in partial satisfaction of the mother's note, and that the said note would be cancelled. To conceal from the bank examiner the fact that the mortgage had been substituted for the note on its books, the plaintiff procured the defendant to make and deliver to it an additional note for $30,000. It was agreed in writing that the defendant was not to be held liable on this note. Despite the agreement by the plaintiff that the said note would not be enforced, this action was commenced immediately upon default. *Held,* that the defendant, even if unaware that the note was to be used to deceive the bank examiner, was estopped on the grounds of public policy, from showing either that the bank had agreed not to enforce the note, or that no consideration had been given for it. Judgment reversed. *Mount Vernon Trust Co. v. Burgoff,* 272 N. Y. 192, 5 N. E. (2d) 196 (1936).

The question of the liability of one who gives his note to a bank to be used on its books as a fictitious asset has been dealt with by the courts chiefly from the following standpoints: (1) Is the bank barred from suing the maker because it is itself a party to an attempted fraud on the bank examiner? (2) If the bank's action is thus barred, is its receiver likewise precluded from recovering against the maker? (3) Can the maker show an oral agreement to the effect that he was not to be liable on the note, or is such proof properly excluded under the parol evidence rule? (4) Is the defense of an absence of consideration available to the maker, or is he estopped, as he was in the instant case, from proving that the note was *nudum pactum?*

There is considerable authority for the view that the bank, having taken the note in order to deceive a bank examiner, will not be permitted, since it is a party to an attempted fraud, to assert any right against the maker.[1] The agreement is regarded as having been illegal at its inception and the policy of the courts in many jurisdictions is to offer no aid to either party.[2] Recovery is generally allowed, however, when the bank is insolvent and the suit is brought by a banking commissioner or a receiver.[3] The courts, cognizant of the interests of innocent stockholders and creditors of the bank, have allowed the commissioner or receiver to assert rights of which the bank, being a party to a fraudulent transaction, would be deprived.

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1. Yates Center Nat. Bank v. Lauber, 240 Fed. 237 (D. C. Kan. 1915); First Nat. Bank v. Reed, 198 Cal. 252, 244 Pac. 368 (1926); First Nat. Bank v. Keown, 9 N. J. Misc. 892, 156 Atl. 3 (Sup. Ct. 1931); First Nat. Bank v. McKown, 73 Okla. 310, 176 Pac. 245 (1918).

2. National Bank v. All, 260 Fed. 370 (C. C. A. 4th, 1919); Atwood v. Fisk, 101 Mass. 363 (1869); New York & Pennsylvania Co. v. Cunard Coal Co., 286 Pa. 72, 132 Atl. 828 (1926); see Putnam v. Chase, 106 Ore. 440, 444, 212 Pac. 365, 367 (1923).

3. Iglehart v. Todd, 203 Ind. 427, 178 N. E. 685 (1931); German Amer. F. Corp. v. Merchants' State Bank, 177 Minn. 529, 225 N. W. 891 (1929); Engen v. Matthys, 50 N. D. 487, 196 N. W. 550 (1923). The federal rule, however, is that the receiver stands in no better position than the bank. Rankin v. City Nat. Bank, 208 U. S. 541 (1908); Andresen v. Kaercher, 38 F. (2d) 462 (C. C. A. 8th, 1930); Drake v. Moore, 14 F. Supp. 89 (E. D. Ill. 1936); *accord:* McConnell v. McCleish & Thomas, 159 Tenn. 520, 19 S. W. (2d) 251 (1929).

The cases are in sharp conflict as to whether one who has given his note with the oral understanding that he is not to be liable thereon, is precluded by the parol evidence rule from proving that agreement. The weight of authority holds that, at least between the original parties, oral proof may be offered to show either that the payee's right to enforce the note was subject to a condition precedent, or that the payee was never to have that right.[4] In a substantial minority of the jurisdictions, however, the courts have declined to receive this evidence.[5] This latter view can be attacked on the theory that the rule excluding parol evidence does not apply, since the proof is offered not to vary or explain the writing, but to show that no binding contract had ever been made.[6] It is submitted further, that these decisions are unsound interpretations of the Negotiable Instruments Law, which provides that a note is incomplete and revocable until delivered for the purpose of giving effect to it as a valid instrument.[7] It would appear that the scope of this statute is unreasonably narrowed by the minority view.

In some states it is held that no agent of a bank has the apparent authority to bind it to a stipulation that the maker is not to be liable.[8] The cases imply that the bank will be allowed to recover unless the agent who negotiates with the maker is actually authorized by a resolution of the board of directors to agree that payment will not be enforced on the note.[9] This view, as a practical matter disposes of the problem almost entirely, for since the transaction is a gross fraud, there is little likelihood that such actual authority can ever be proved.

The defense most often asserted by the makers of these notes is that they have received no consideration[10] for their signatures, and that the bank, not being a holder in due course, has no right to require payment.[11] Here again the courts have drawn

4. Bell v. McDonald, 308 Ill. 329, 139 N. E. 613 (1923); First Nat. Bank v. Keown, 9 N. J. Misc. 892, 156 Atl. 3 (Sup. Ct. 1931); Smith v. Dotterweich, 200 N. Y. 299, 93 N. E. 985 (1911). But *cf.* Girard Nat. Bank v. Brody, 122 Misc. 790, 204 N. Y. Supp. 832 (Sup. Ct. 1924).

5. First Nat. Bank v. Holmes, 213 Mich. 41, 181 N. W. 46 (1921); First Nat. Bank v. Sagerson, 283 Pa. 406, 129 Atl. 333 (1925); West Rutland Trust Co. v. Houston, 104 Vt. 204, 158 Atl. 69 (1932).

6. 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2406.

7. UNIFORM NEGOTIABLE INSTRUMENTS ACT, 5 UNIFORM LAWS ANN. (1896) § 16.

8. Prudential Trust Co. v. Moore, 245 Mass. 311, 139 N. E. 645 (1923); Markville State Bank v. Steinbring, 179 Minn. 246, 228 N. W. 757 (1930) (bank president's agreement that director should not be obligated on note given to enable bank to reopen, held beyond president's authority). *Contra:* Chelsea Exchange Bank v. LaHiff, 219 App. Div. 434, 220 N. Y. Supp. 238 (Sup. Ct. 1st Dep't 1927).

9. See State Bank v. Forsyth, 41 Mont. 249, 262, 108 Pac. 914, 917 (1910), 28 L. R. A. (N. S.) 501 (1910).

10. Where the maker of a note is an officer of the bank and has, therefore, a financial interest of his own at stake, the protection of that interest by the giving of the note has been held to satisfy the requirement of consideration. Bohning v. Caldwell, 10 F. (2d) 298 (C. C. A. 5th, 1926); People's State Bank v. Hunter, 216 Mo. App. 334, 264 S. W. 54 (1924); Union Bank v. Sullivan, 214 N. Y. 332, 108 N. E. 558 (1915). This argument seems somewhat unsound, for it holds, in effect, that the maker's own act of giving the note constitutes a valid consideration moving toward him.

11. UNIFORM NEGOTIABLE INSTRUMENTS Act, 5 UNIFORM LAWS ANN. (1896) § 28: "Absence or failure of consideration is matter of defence as against any person not a holder in due course."

an important distinction between the rights of the bank itself[12] and of its receiver in insolvency. The latter have generally been permitted to recover, the theory being that since the interests of innocent creditors of the bank were endangered, the maker was estopped from showing an absence of consideration.[13]

Only in rare instances, of which the case at bar is one, has an estoppel on the ground of public policy been invoked to permit the bank itself to recover.[14] It was held that in the instant case that because the financial condition of banks is of great public concern, one who lends his signature to the falsification of the accounts of a bank will not later be heard to repudiate the written obligation. This policy of strict liability will undoubtedly prove to be an effective deterrent to fraud, but considerable difficulty arises in justifying the decisions on the basis of strict legal theory.[15] The bank here was permitted to profit by its own wrong and recovered on a note for which it had given no consideration. Had its creditors suffered any damage as a result of the fraud, the position of the court might be more readily explainable on established principles. In the event of such actual harm to innocent third parties the elements of an orthodox estoppel *in pais,* namely, an act that induces reliance thereon, with resulting actual damage, would have been present.[16] The court in the principal case, however, expressly decided that where matters of public concern were involved an estoppel would be applied even though reliance and actual

12. The general rule is that a failure of consideration defeats the bank's recovery. Rankin v. City Nat. Bank, 208 U. S. 541 (1907); First Nat. Bank v. Felt, 100 Iowa 680, 69 N. W. 1057 (1897); Carter v. Vine Grove State Bank, 236 Ky. 191, 32 S. W. (2d) 973 (1930); Central Bank & Trust Co. v. Ford, 152 S. W. 700 (Tex. 1912).

13. Niblack v. Farley, 286 Ill. 536, 122 N. E. 160 (1919) (receiver in insolvency permitted to recover); Prudential Trust Co. v. Moore, 245 Mass. 311, 139 N. E. 645 (1923) (action brought by bank commissioner in name of insolvent bank and recovery allowed); Lyons v. Benney, 230 Pa. 117, 79 Atl. 250, 34 L. R. A. (N. S.) 105 (1911).

14. Cedar State Bank v. Olson, 116 Kan. 320, 226 Pac. 995 (1924); Bay Parkway Nat. Bank of Brooklyn v. Shalom, 270 N. Y. 172, 200 N. E. 685 (1936) (case of first impression in New York and distinguishable from that at bar in that in former instance bank examiner was actually deceived); Mars Nat. Bank v. Hughes, 265 Pa. 75, 100 Atl. 542 (1917); Bangor Trust Co. v. Chrisrine, 297 Pa. 64, 146 Atl. 545 (1929).

15. The maker might, theoretically, rely on the defense that the bank is the accomodated party and, therefore, cannot bring the action against its accomodator. It is generally held, however, that the bank does not stand in the position of an accomodated party within the accepted meaning of that term. " 'To call such a transaction the mere execution of an accomodation note for the benefit of the bank is an euphemism which might satisfy a Machiavelli or a Talleyrand, but lawyers and judges would hardly be justified in the use of language so lacking in definitive precision.' " Cedar State Bank v. Olson, 116 Kan. 320, 322, 226 Pac. 995, 996 (1924) (recovery by bank); Schmid v. Haines, 115 N. J. L. 271, 178 Atl. 801 (1935) (receiver permitted to recover). *Contra:* Smouse v. Waterloo Sav. Bank, 198 Iowa 306, 199 N. W. 350 (1924); People's Bank v. Yager, 221 Mo. App. 955, 288 S. W. 954 (1926).

16. For a discussion of estoppel *in pais* in relation to the present problem see N. Y. L. J., Jan. 29, 1937, p. 492, col. 1.

It has been argued that, since the doctrine of estoppel is essentially equitable, recovery should be limited to compensation for the actual loss shown to have been sustained by the bank, regardless of the amount of the note. (1937) 50 HARV. L. REV. 687. This argument fails to recognize the fact that in these cases the courts are not invoking an estoppel *in pais,* but a new kind of estoppel in which public policy and not actual damage to the plaintiff is the essential element.

harm could not be proved. One is led to conclude from the unequivocal language of the instant opinion that the true effect of the decision is the introduction into the law of an estoppel based on public policy, a doctrine heretofore not generally recognized. The precise meaning and scope of this estoppel must depend for more accurate definition upon the decisions that are to follow.[17]

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—POWER OF THE CONGRESS TO REGULATE INTERSTATE TRANSPORTATION OF PRISON-MADE GOODS.—The petitioner, which used convict labor to manufacture horse collars, harness and strap goods, tendered to the respondent, a common carrier, twenty-five separate shipments of such goods for transportation in interstate commerce. Fifteen of the shipments were consigned to customers in states the laws of which either prohibited the sale of prison-made goods within their respective borders or required that the goods be plainly marked to show that they were made by convicts. To aid such states in the enforcement of their declared public policy, the Congress enacted the Ashurst-Sumners Act[1] which purports to regulate the interstate transportation of these articles. The Act makes it unlawful, in interstate or foreign commerce, knowingly to transport prison-made goods into any state where the goods are intended "to be received, possessed, sold, or in any manner used" in violation of state laws.[2] It also requires that all packages containing such goods, regardless of the law of the state of destination, must be plainly labeled in a specified manner.[3] In compliance with this Act, the respondent refused to accept the tendered shipments, none of which was labeled as required. The petitioner then instituted suit asking for a mandatory injunction to compel the transportation and asserting that the Act was unconstitutional on the ground that, under the commerce clause,[4] the Congress has no authority to prohibit the movement in interstate commerce of useful and harmless articles, even though made by convict labor, or to require that prison-made goods be labeled as such. A decree was issued denying the relief sought and dismissing the bill.[5] On *certiorari* to the United States Circuit Court of Appeals,[6] which affirmed the decree, *held,* that the Act was constitutional in its entirety. Judgment affirmed. *Kentucky Whip & Collar Co. v. Illinois Cent. R. Co.,* 57 Sup. Ct. 277 (1937).

17. The instant case was cited and followed in Tarrytown Nat. Bank & Trust Co. v. MacMahon, 293 N. Y. Supp. 513 (App. Div., 2d Dep't 1937).

1. 49 STAT. 494-495, 49 U. S. C. A. §§ 61-64 (1935).

2. *Id.* at 494, 49 U. S. C. A. § 61 (1935).

3. *Id.* at 494, 49 U. S. C. A. § 62 (1935). All such packages "shall be plainly and clearly marked, so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced wholly or in part may be readily ascertained on an inspection of the outside of such package."

4. U. S. CONST. Art. I, § 8, cl. 3.

5. Kentucky Whip & Collar Co. v. Illinois Cent. R. Co, 12 F. Supp. 37 (W. D. Ky. 1935). The district court, in dismissing the bill, sustained the separable labeling requirement but declared invalid the provision which prohibited the transportation of prison-made goods into states which proscribed their sale or possession. For a criticism of this case, see (1936) 49 HARV. L. REV. 466.

6. The circuit court affirmed the judgment dismissing the bill but sustained the Act in its entirety. Kentucky Whip & Collar Co. v. Illinois Cent. R. Co., 84 F. (2d) 168 (C. C. A. 6th, 1936).

It is well established that the constitutionally delegated power to regulate interstate commerce embraces the power to prohibit the interstate transportation of both persons[7] and commodities.[8] While the federal government has no police power as such, the question of whether or not a congressional regulation of interstate commerce violates due process[9] is determined by the same test of reasonableness as would be applied to an exercise by a state of its police power.[10] Hence, exclusion from interstate commerce of either persons or commodities must be reasonably necessary in the circumstances in order to prevent the misuse of such commerce from spreading a recognized evil from one state to another. Having thus established the reasonable necessity for the absolute prohibition of the interstate transportation, the articles may be excluded by the Congress without regard for their inherent nature or character. The nature of the evil which the federal legislation seeks to remedy and the relation of the excluded articles to that evil would seem to be the important considerations. Articles intrinsically harmful and unfit for commerce have been excluded as an evil in themselves.[11] But articles useful and harmless in their nature have also been excluded when it has appeared that their transportation would spread an evil connected with their ultimate disposition[12] or aid in the frustration of valid state laws.[13]

Each state, alone and unaided by the federal government, can control an evil within its own borders by exercising its police power.[14] In so doing, the state,

7. Hoke & Economides v. United States, 227 U. S. 308 (1913) (white slaves); Caminetti v. United States, 242 U. S. 470 (1917) (women for immoral purposes); Gooch v. United States, 297 U. S. 124 (1936) (kidnaped persons).

8. Reid v. Colorado, 187 U. S. 137 (1902) (diseased live stock); Champion v. Ames, 188 U. S. 321 (1903) (lottery tickets); Hipolite Egg Co. v. United States, 220 U. S. 45 (1911) (adulterated eggs); Seven Cases v. United States, 239 U. S. 510 (1916) (food and drugs not properly labeled); Clark Distilling Co. v. Western Maryland R. Co., 242 U. S. 311 (1917) (intoxicating liquors); Brooks v. United States, 267 U. S. 432 (1925) (stolen automobiles); Oregon-Washington R. & N. Co. v. Washington, 270 U. S. 87 (1926) (diseased plants).

9. The due process clause of the Fourteenth Amendment, because of its wording, applies only to the states. But the federal government is limited by the due process clause of the Fifth Amendment. Police power, legitimately exercised in the interest of the general welfare, does not violate due process. New York & N. E. R. R. v. Bristol, 151 U. S. 556 (1894); see Atlantic Coast Line R. R. v. Goldsboro, 232 U. S. 548, 558 (1914).

10. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196 (1885); Hoke & Economides v. United States, 227 U. S. 308 (1913); see Seven Cases v. United States, 239 U. S. 510, 515 (1916); Brooks v. United States, 267 U. S. 432, 436 (1925).

11. Reid v. Colorado, 187 U. S. 137 (1902) (diseased live stock); Hipolite Egg Co. v. United States, 220 U. S. 45 (1911) (adulterated eggs); Oregon-Washington R. & N. Co. v. Washington, 270 U. S. 87 (1926) (diseased plants).

12. Champion v. Ames, 188 U. S. 321 (1903) (lottery tickets); Seven Cases v. United States, 239 U. S. 510 (1916) (food and drugs not properly labeled); Brooks v. United States, 267 U. S. 432 (1925) (stolen automobiles).

13. The exclusion of intoxicating liquors was upheld on this theory. Clark Distilling Co. v. Western Maryland R. R., 242 U. S. 311 (1917); United States v. Hill, 248 U. S. 420 (1919); McCormick & Co., Inc. v. Brown, 286 U. S. 131 (1932). That intoxicating liquors were recognized as useful and legitimate articles of commerce, see Leisy v. Hardin, 135 U. S. 100, 110 (1890); Louisville & Nashville R. Co. v. F. W. Cook Brewing Co., 223 U. S. 70, 82 (1912).

14. Foster v. Kansas, 112 U. S. 201 (1884); Mugler v. Kansas, 123 U. S. 623 (1887);

to protect its own citizens, can regulate the importation of inherently harmful[15] or fraudulently misrepresented[16] articles originating outside the state—even though this imposes an incidental restraint on interstate commerce[17]—provided the state statute is not discriminatory or in conflict with any federal regulation.[18] However, the state is powerless to exclude useful and harmless articles produced outside the state in a manner or at a price contrary to its laws, because this is a direct and unconstitutional interference with interstate commerce.[19]

In such a situation, the power of the federal government to cooperate with the states, within prescribed limits, has previously been established. In the child labor cases, it was pointed out that the Congress cannot interfere with the purely internal affairs of the states by enacting, as a regulation of commerce, legislation which attempts to formulate and impose a desirable state public policy.[20] But the intoxicating liquor precedents upholding the Webb-Kenyon Act,[21] which have been closely followed in the legislation regulating prison-made goods,[22] established a constitutional method of dual control. If and when the states have enacted valid laws regulating the intrastate aspects of an evil, then the national government can regulate the interstate ramifications and shape its policy to aid the states—even to the extent of excluding, when that is reasonably necessary, intrinsically useful and harmless articles from interstate transportation.[23] Since the Congress has this power, the requirement that all articles thus regulated be labeled for purposes of identification,

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Fischer v. St. Louis, 194 U. S. 361 (1904); Reinman v. Little Rock, 237 U. S. 171 (1915); Hadacheck v. Sebastian, 239 U. S. 394 (1915); Thomas Cusack Co. v Chicago, 242 U. S. 526 (1917); Packer Corp. v. Utah, 285 U. S. 105 (1932); Nebbia v. New York, 291 U. S. 502 (1934).

15. State regulation of the importation of unhealthy cattle has been upheld. Asbell v. Kansas, 209 U. S. 251 (1908); Mintz v. Baldwin, 289 U. S. 346 (1933). And of injurious foods. Crossman v. Lurman, 192 U. S. 189 (1904); Savage v. Jones, 225 U. S. 501 (1912); Price v. Illinois, 238 U. S. 446 (1915).

16. Plumley v. Massachusetts, 155 U. S. 461 (1894); Hebe Co. v. Shaw, 248 U. S. 297 (1919); Hygrade Provision Co., Inc. v. Sherman, 266 U. S. 497 (1925).

17. That a valid state regulation can affect interstate commerce incidentally, see Plumley v. Massachusetts, 155 U. S. 461 (1894); Hennington v. Georgia, 163 U. S. 299 (1896); Hygrade Provision Co. v. Sherman, 266 U. S. 497 (1925); Packer Corp. v. Utah, 285 U. S. 105 (1932); Bradley v. Public Utilities Comm'n, 289 U. S. 92 (1933); Mintz v. Baldwin, 289 U. S. 346 (1933).

18. See Baldwin v. Seelig, 294 U. S. 511, 513 (1935).

19. Baldwin v. Seelig, 294 U. S. 511 (1935). For this reason, a state could not exclude intoxicating liquors even though it could control them within its borders. Bowman v. Chicago & Northwestern R. Co., 125 U. S. 465 (1888); Leisy v. Hardin, 135 U. S. 100 (1890); Rhodes v. Iowa, 170 U. S. 412 (1898); Louisville & Nashville R. Co. v. F. W. Cook Brewing Co., 223 U. S. 70 (1912).

20. Hammer v. Dagenhart, 247 U. S. 251 (1918); Bailey v. Drexel Furniture Co., 259 U. S. 20 (1922).

21. 37 STAT. 699, 27 U. S. C. A. § 122 (1913), held constitutional as a regulation of interstate commerce in Clark Distilling Co. v. Western Maryland R. Co., 242 U. S. 311 (1917). See also United States v. Hill, 248 U. S. 420 (1919); McCormick & Co., Inc. v. Brown, 286 U. S. 131 (1932)

22. See Kentucky Whip & Collar Co. v. Illinois Cent. R. Co., 57 Sup. Ct. 277, 282 (1937).

23. See note 12, *supra*.

regardless of the law of the state of destination, is manifestly necessary and reasonable in order to accomplish the legitimate exclusion.[24]

It would seem, therefore, that the instant case is really a restatement of established principles. That the labor cost in producing goods ordinarily represents a substantial portion of the cost of production and hence largely determines the subsequent market price, is axiomatic in economics. It follows that goods made by enforced and unpaid or underpaid prison labor can successfully undersell, in the open market, goods manufactured and produced by free labor properly compensated. A large number of states have enacted laws prohibiting the sale of convict-made goods within their borders to protect free labor from this unfair competition, which is widely recognized as an economic and social evil.[25] Moreover, their power to so regulate their internal commerce has been sustained.[26] But this control is insufficient and ineffective because of the very nature of the articles involved in the traffic. The necessity for federal assistance becomes apparent when it is realized that presumably all of the goods made by convicts under the strict supervision of prison authorities are of the useful and harmless type and that, therefore, the states cannot constitutionally forbid their importation. To deny the power of the national government to exclude these articles from interstate commerce would not only be contrary to established precedent but would tend to emphasize unduly the impotence of the dual sovereignties, as now constituted, to deal adequately with recognized evils.

The predominantly interesting aspect of the instant decision would seem to be that it rediscovers a possible constitutional solution of other pressing problems. A similar combination of national and state statutes has already been suggested as the basis of a plan, alternative to the controversial and long neglected amendment, to outlaw child labor.[27] Because of the recent liberal holding overruling the widely criticised conservative decisions which denied the power of a state to enact valid laws on the subject, the same type of cooperative effort would seem to provide a likely pattern for minimum wage legislation.[28] And finally, a new approach to the

24. Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192 (1912); United States v. Freeman, 239 U. S. 117 (1915); Seven Cases v. United States, 239 U. S. 510 (1916); Weeks v. United States, 245 U. S. 618 (1918).

25. See the Senate committee report recommending the passage of the Ashurst-Sumners Act. SEN. REP. No. 906, 74th Cong., 1st Sess. (1935). For a discussion of statutes restricting the sale of convict-made goods, see Legis. (1931) 44 HARV. L. REV. 846.

26. Whitfield v. Ohio, 297 U. S. 431 (1936). For a discussion of this case, see (1936) 49 HARV. L. REV. 1007; (1936) 24 GEO. L. J. 1013.

27. The Nunan-Moffat bill was recently introduced in the New York legislature. It prohibits the sale in the state of any goods produced wholly or in part by the use of the labor of minors, less than eighteen years old, with certain exceptions. A federal law, patterned after the Ashurst-Sumners Act, has also been introduced in the Congress by Representative Bacon of New York. This law makes it unlawful to transport in interstate commerce goods, manufactured or produced wholly or in part through the use of child labor, into any state having laws prohibiting their sale and requires that such products be labeled to identify them. It is claimed that these two measures taken together would effectively outlaw in New York the sale of child labor products wherever produced or manufactured. N. Y. Times, March 11, 1937, p. 1. It is also reported that Senator Wheeler of Montana has introduced in the Senate at Washington a similar bill which would make "the products of child labor subject to the laws of the state into which they are shipped." N. Y. Times, March 25, 1937, p. 1.

28. Adkins v. Children's Hospital, 261 U. S. 525 (1923); Morehead v. People *ex rel.* Tipaldo, 297 U. S. 702 (1936). These cases were overruled by West Coast Hotel Co. v.

price-fixing problems in the control of milk and related articles is suggested by the approved plan underlying the prison-made goods legislation. The first requisite for such a plan in the field of price regulation—the power of the state to enact a valid law establishing a system of minimum prices to be paid by dealers to producers within the state—has already been upheld.[29] It is submitted that the present inadequacy of this power, resulting from the state's inability to regulate even incidentally the importation of underpriced articles,[30] could be overcome by the enactment of federal legislation paralleling the Ashurst-Sumners Act and supporting in interstate transportation the minimum price policy of the state.

CONSTITUTIONAL LAW—SEPARATION OF POWERS—DELEGATION TO PRESIDENT OF POWER TO DECLARE AN EMBARGO.—The defendant was indicted for conspiring to violate the provisions of a Joint Resolution[1] of Congress and the Presidential Proclamation[2] issued pursuant thereto. The Joint Resolution provided that the President might declare an embargo on arms and munitions of war, under such limitations and exceptions as he should prescribe, "if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reëstablishment of peace between those countries." The District Court sustained a demurrer to the indictment on the ground that there had been an invalid delegation of legislative power.[3] On appeal, *held*, one justice dissenting, that the power of the President to conduct foreign affairs warrants a delegation of legislative power resulting in a wider discretion than might be permitted in domestic affairs. Judgment reversed. *United States v. Curtiss-Wright Export Corp.*, 57 Sup. Ct. 216 (1936).

After almost a century and a half of virtually unquestioned user,[4] the discretionary

Parrish, U. S. Supreme Court, March 29, 1937, which validated the law establishing minimum wages for women in the state of Washington. New York Times, March 30, 1937, p. 14.

29. Nebbia v. New York, 291 U. S. 502 (1934); Hegeman Farms Corp. v. Baldwin, 293 U. S. 163 (1934). *Cf.* Borden's Farm Products Co., Inc. v. Baldwin, 293 U. S. 194 (1934).

30. Baldwin v. Seelig, 249 U. S. 511 (1935). Obviously, this lack of power to control the prices paid to producers outside the state for goods imported and sold in the state frustrates, at least partially, the state price policy and permits the imported goods to undersell the regulated state products.

1. 48 STAT. 811 (1934).

2. 48 STAT. 1744 (1934).

3. United States v. Curtiss-Wright Export Corp., 14 F. Supp. 230 (S. D. N. Y. 1936).

4. As early as the Act of June 4, 1794, 1 STAT. 372, Congress conferred upon the President a broad discretion in the matter of declaring embargoes. Numerous similar resolutions, subsequently passed by Congress, are enumerated in the principal case. Twice, in the intervening period, has the validity of such a delegation been involved in cases before the Supreme Court, yet in neither case was the problem satisfactorily answered. In The Brig Aurora v. United States, 11 U. S. 382 (1813), the revival of an embargo was made to depend upon a presidential finding that edicts had been so revoked or modified as "that they shall cease to violate the neutral commerce of the United States." In United States v. Chavez, 228 U. S. 525 (1913), a delegation was tacitly upheld wherein the proclamation of an embargo depended upon a finding that "conditions of violence exist which are promoted by the use of arms or munitions procured from the United States." 37 STAT. 630 (1912). It is noteworthy that the statute now reads "which are or *may be* promoted," and is hardly distinguishable from the resolution involved in the principal case. 42 STAT. 361, 22 U. S. C. A. 236 (1926).

power of the President to declare an embargo, pursuant to a resolution of Congress, has been explained and affirmed by the Supreme Court. To reach a conclusion which expediency dictated,[5] and time had sanctioned, the court was faced with alternatives. It could uphold this delegation of power either by pushing precedents to the breaking point, or by establishing a new point of departure. It wisely chose the latter course. The District Court held the delegation invalid on the ground that, by the terms of the resolution, the exercise of the power by the President was conditioned, not upon a true finding of fact,[6] by him, but upon the mere formation of an opinion as to future possibilities.[7] In criticism of the District Court's decision it has been suggested that the existence of a definite standard, and not the distinction between findings of fact and mere opinion, is the correct test of a valid delegation,[8] and that a contrary result might have been attained under existing precedents.[9] It is true that the validity of a delegation of legislative authority is dependent upon how well defined the limits are, which circumscribe an otherwise unfettered discretion. And therefore a delegation of power will not be invalid if even though action under it is conditioned merely by an opinion as to when a given state of facts exists—if some definite standard of judgment is indicated.[10] But an opinion as to future possibilities is quite different, for here there is no objective norm; the criterion is purely subjective. The suggestion that a contrary result might have been reached under existing precedents is highly debatable; it would seem that one must look to the dissenting opinion of Mr. Justice Cardozo in *Panama Refining Co. v. Ryan*[11] to support

5. Matters affecting foreign relations, being essentially diplomatic, require both secrecy and a mobility of activity. It is therefore necessary that the President possess a broad discretion in such affairs.

6. The delegatee of the legislature may be called upon either to pass rules and regulations referable to and in effectuation of a definite standard, or to find those facts which will warrant that a predetermined mode of activity be called into being. The former situation is based upon the notion that where a reasonably definite standard is set up, the power to fill in details may be delegated because such regulations are purely administrative. Buttfield v. Stranahan, 192 U. S. 470 (1904); United States v. Grimaud, 220 U. S. 506 (1911). The delegation failed for definiteness in Panama Refining Co. v. Ryan, 293 U. S. 388 (1935). In the latter situation, where the delegatee pulls the trigger, as it were, it is maintained that there is no invalid delegation for the will of the legislature, and not of the delegatee, is exercised when the facts are found. Union Bridge Co. v. United States, 204 U. S. 364 (1907); Hampton, Jr., & Co. v. United States, 276 U. S. 394 (1928).

7. ". . . the Executive was empowered to make up the legislative mind as to the future efficacy of the law, as the reason for giving vitality to it (and apparently this was done without according a hearing to anyone likely to be affected). . . . Stated in lowest terms, it is conceived to be the duty of Congress alone to conclude whether a given law will work." United States v. Curtiss-Wright Export Corp., 14 F. Supp. 230, 235 (S. D. N. Y. 1936). See Schechter Poultry Corp. v United States, 295 U S. 495, 538 (1936).

8. (1936) 36 COL. L. REV. 1162.

9. (1937) 50 HARV. L. REV. 691, citing Field v. Clark, 143 U. S. 649 (1892), and Hampton, Jr., & Co. v. United States, 276 U. S 394 (1928).

10. For example, see Mutual Film Corp. v. Ohio Industrial Comm., 263 U. S. 230 (1915) (motion picture censoring board was to pass only those pictures which were of a "moral, educational or amusing and harmless character"); Union Bridge Co. v. United States, 204 U. S. 364 (1907) (power given to remove bridges which unreasonably obstructed navigation). See also, Mahler v. Eby, 264 U. S. 32 (1924); Federal Radio Comm. v. Nelson Bros., 289 U. S. 266 (1933).

11. 293 U. S. 388 (1935). "This court has held that delegation may be unlawful

it. The tenor of the Supreme Court decision would seem to indicate that this result would not have been reached had principles governing regulation of internal affairs been applied.[12]

The Supreme Court, in reversing the District Court, took recourse to a novel argument to establish a new point of departure. The stretching of precedents to fit this delegation would have established a new frontier whence further excursions might be made into the fastnesses of unwarranted legislative delegation. The court placed internal and external affairs in separate categories. It argued that the Federal Government, by virtue of its sovereignty, is possessed of a power over external affairs, independent of the affirmative grants of the Constitution, but that this power is significantly limited in that its exercise is confined to the President who alone has the power to represent the United States in its relations with foreign nations. As a consequence, when Congress, by virtue of its power to regulate commerce with foreign nations,[13] delegates to the President the discretionary power to declare an embargo, a broader latitude is permissible than would be the case were internal affairs alone concerned. The decision is not clear as to whether this subsidiary power of the President[14] justifies the delegation of a wider discretion, or whether the combination of powers adds up to a broader discretion.[15] The court buttressed its position by using the argument that the unquestioned delegation and user of a power from the very beginning of our government is persuasive of its constitutionality.[16] Though this last argument has merit, it gives rise to the somewhat anomalous

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though the act to be performed is definite and single, if the necessity, time and occasion of performance have been left in the end to the discretion of the delegate. *Panama Refining Co.* v. *Ryan, supra.* I thought that ruling went too far. I pointed out in an opinion that there had been 'no grant to the Executive of any roving commission to inquire into evils and then, upon discovering them, do anything he pleases.' 293 U. S. at p. 435. Choice, though within limits, had been given him 'as to the occasion, but none whatever as to the means'." Cardozo, J., in Schechter Poultry Corp. v. United States, 295 U. S. 495, 551 (1936).

12. See United States v. Curtiss-Wright Export Corp., 57 Sup. Ct. 216, 221, 223 (1936).

13. U. S. CONST. Art I, § 8, cl. 3.

14. The plenary power of the President in the field of international relations must be exercised in subordination to the applicable provisions of the Constitution. United States v. Curtiss-Wright Export Corp., 57 Sup. Ct. 216, 221 (1936).

15. The fact that by U. S. CONST., Art. I, § 8, cl. 3, Congress might itself declare an embargo, lends support to the view that Congress here delegates a wider discretion. Yet the view that the discretion results from an addition of powers bulks large if we consider that an embargo is essentially a regulation of commerce for a political end. The powers of Congress and the President would here seem to interlock. Thus the court in the instant case said: "We are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." United States v. Curtiss-Wright Export Corp., 57 Sup. Ct. 216, 221 (1936). Unless this latter view be accepted, nebulous as it is, one can hardly account for the clear-cut distinction made between internal and external affairs. Otherwise, one would be confronted with the principle that the standard may vary to meet the necessities of the situation. "In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination." Hampton, Jr., & Co. v. United States, 276 U. S. 394, 406 (1928).

16. This argument is premised upon the notion than an unconstitutional power would

situation that all intervening delegations of power to declare an embargo are sanctified, as it were, by the very decision they assist in bringing about.

Although the decision in the instant case sets down no landmarks whereby the validity of a delegation of power with respect to external affairs may be determined, it is safe to draw one conclusion at least. In such case the President may be delegated practically unlimited authority to decide *whether* or *when* the act authorized by Congress is to be performed, even if the decision is dependent upon an opinion as to future possibilities. In view of the fact that the *Schechter* Case[17] was not cited, and that the *"Hot Oil"* Case[18] and *Field v. Clark*[19] were cited, but not on the question of delegation of powers, the Supreme Court has clearly set up two distinct categories, internal and external affairs. Notice has been served on the constitutional lawyer who would cite *United States v. Curtiss-Wright Export Corp.* in a case involving internal affairs, that the energy will be spent in vain.

DOMESTIC RELATIONS—SEPARATION ACTION—SEQUESTRATION OF NON-RESIDENT DEFENDANT'S PROPERTY SEIZED AFTER COMMENCEMENT OF ACTION.—The plaintiff and the defendant were married in New York in 1918, and thereafter resided in Japan. The defendant still is a resident of Japan. Returning to New York in 1931, the plaintiff wife started an action for separation there,[1] and served the husband personally with the summons and complaint in March 1932 while he was in California. At the same time the defendant was also served with an order to show cause why his property in New York should not be sequestrated pursuant to Section 1171-a of the New York Civil Practice Act. The sequestration order was not entered until one month after the service of the summons and complaint and no property of the defendant was actually or constructively seized until after this date. On the defendant's default, the plaintiff received a decree of separation together with $3,000 a month for the support of the wife and her children payable out of the sequestrated property. On appeal from an order directing a disinterested stakeholder to turn over to the receiver all money due or to become due to the defendant, *held,* that the attachment of the property after the institution of the separation action did not deprive the defendant of his property without due process of law. Judgment affirmed. *Geary v. Geary,* 272 N. Y. 390, 6 N. E. (2d) 67 (1936).

It is bromidic to restate the familiar axiom that a court lacking jurisdiction both

not have been exercised, or, if exercised, would have been attacked at a time when the framers of the Constitution were still alive. See McCulloch v. Maryland, 17 U. S. 316, 401 (1819); Knowlton v. Moore, 178 U. S. 41, 56 (1900). There is also to be considered the judicial repugnance to invalidating a power which has been conferred for a century and a half.

17. Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935).

18 Panama Refining Co. v. Ryan, 293 U. S. 388 (1935).

19. 143 U. S. 649 (1891).

1. Jurisdiction to award a separation decree is conferred by the N. Y. CIV. PRAC. ACT (1921) § 1162. Such an action is maintainable where both parties are residents of the state when the action is commenced; where the parties were married within the state and the plaintiff is a resident thereof when the action is commenced; where the parties having been married without the state, have become residents of the state, and have continued to be residents thereof for at least a year and the plaintiff is such a resident when the action is commenced. *Ibid.* See McDonald v. McDonald, 265 N. Y. 546, 193 N. E. 313 (1934).

in personam and *in rem* can render no valid judgment.[2] However, much confusion has arisen from the application of this principle[3] to matrimonial actions which are denominated as *quasi in rem* due to the absence of a material *res*.[4] In such actions the marital status is treated as the *res*.[5]

Since no warrant of attachment could be obtained in a matrimonial action in New York[6] the legislature provided the remedy of sequestrating[7] a non-resident husband's property located within the state.[8] Lacking jurisdiction over the defendant, it is a condition precedent to the acquisition of *quasi in rem* jurisdiction that specific property be constructively brought before the court by an order of attachment at the beginning of the action.[9] It is the seizure of such property at the commencement of the action which gives the court jurisdiction to the extent of the property so seized.[10]

In the instant case the New York court, for the first time, entered a decree for the support of a wife out of a non-resident husband's property when the attachment was made *after* the commencement of a separation action by the wife. Inasmuch as this phase of the proceeding was solely for a money judgment for support, the decision at first blush, would seem to be in conflict with the above mentioned rule of the United States Supreme Court, that property must be attached when an action is started where the court has not *in personam* jurisdiction. It was on this ground that the husband based his appeal. The *rationale* of the holding seems to be that as the jurisdiction of the court over the separation action was *in rem*[11] jurisdiction,

2. Cheshire National Bank v. Jaynes, 224 Mass. 14, 112 N. E. 500 (1916); Hanna v. Stedman, 230 N. Y. 326, 130 N. E. 566 (1921). For a discussion of this proposition see, Corwin, *The "Full Faith and Credit" Clause* (1933) 81 U. OF PA. L. REV. 371.

3. Professor Beale, in dealing with the general incorporeal nature of status, criticises a New York decision, People v. Baker, 76 N. Y. 78 (1879) wherein the matrimonial relation is given an "over-materialistic" treatment. In that case the court treated the domestic status as an objective reality. See 2 BEALE, CONFLICT OF LAWS (1935) 666-667.

4. Rigney v. Rigney, 127 N. Y. 408, 28 N. E. 405 (1891); see MINOR, CONFLICT OF LAWS (1901) § 87.

5. Thompson v. Tanner, 287 Fed. 980 (App. D. C. 1923); Blackinton v. Blackinton, 141 Mass. 432, 5 N. E. 830 (1886). See MINOR, *op. cit. supra* note 3, at § 88.

6. Before 1923 a warrant of attachment could only be obtained in common law actions to recover money in contract, conversion of personal property, negligence and death actions. N. Y. CIV. PRAC. ACT (1921) § 902.

7. The purpose of this statute was to provide unfortunate wives with a means of getting at the property of misbehaving husbands who absconded from the state or hid themselves to escape personal service. See Matthews v. Matthews, 240 N. Y. 28, 32, 147 N. E. 237, 238 (1925).

8. N. Y. CIV. PRAC. ACT (1923) § 1171-a: "Where in an action for divorce or separation it appears to the court that the defendant is not within the state, . . . the court may at any time . . . make any order or orders without notice directing the sequestration of his property, . . . within the state, ... The property thus sequestrated . . . may be applied . . . under the direction of the court . . . for the support of the wife . . . ."

9. Pennoyer v. Neff, 95 U. S. 714 (1877); Dimmerling v. Andrews, 236 N. Y. 43, 139 N. E. 774 (1923).

10. *Ibid.*

11. The distinction between the marital *res* and the *res* or subject matter of the property sequestrated must be constantly kept in mind. In no event could independent jurisdiction be based on the property sequestrated in this action because it was not attached at the start of the action.

the sequestration of the defendant's property was not an independent process but merely auxiliary to the main action. It is beyond cavil that if jurisdiction is had of the main action, a subsequent attachment or sequestration is incidental thereto and valid.[12] This court found that the legislature in its wisdom worded this statute so as to permit an attachment after the start of the principal action,[13] such sequestration being considered a mere incident to the main matrimonial action.

But in criticism it may be urged that the court did not have *in rem* jurisdiction of the marital *res*, a *sine qua non* for the validity of the money judgment obtained against an absentee husband.[14] A separation action is preeminently *in personam* rather than *in rem*.[15] For a matrimonial action to be one *in rem* the decree must affect the marital status.[16] The relationship of husband and wife includes a domestic status, that is, a personal permanent relationship in which the state is interested and which is not terminable at the will of the parties.[17] There is authority for the proposition that a judicial separation does not affect this status[18] because it does not dissolve the marriage relation but rather temporarily suspends certain rights and duties arising out of the marital contract.[19] A reconciliation may at any time put an end to the effectiveness of the decree;[20] the parties still remain husband and wife. Something more is required to affect this domestic status than a decree which can be disregarded by the parties when they desire to resume their connubial felicity. One eminent writer urges that jurisdiction of a separation action is neither *in rem* because it does not affect the marital status; nor *in personam* because process

12. Rounds v. Cloverport Foundry and Machine Co., 237 U. S. 303 (1915). In this case an action was started after personal service on the defendant for the price of improvements made by plaintiff on defendant's ship. Subsequently the vessel was attached pursuant to a state statute. The defendant argued that the attachment was invalid on the ground that only the federal courts have maritime jurisdiction. The court decided that the attachment of the ship by the state court was valid as an incident to the main action in which *in personam* jurisdiction had been obtained.

13. In Matthews v. Matthews, 240 N. Y. 28, 32, 147 N. E. 237, 238 (1925) the court pointed out that the words of N. Y. CIV. PRAC. ACT (1923) § 1171-a, "in an action" must refer to an action pending or already started.

14. If the court had no jurisdiction of the matrimonial *res*, there would be no *res* at all before the court.

15. See notes 18 and 21, *infra*.

16. Delanoy v. Delanoy, 216 Cal. 27, 13 P. (2d) 719 (1932); Wilson v. Smart, 324 Ill. 276, 155 N. E. 288 (1927); Coffey v. Coffey, 71 S. W. (2d) 141 (Mo. 1934); MINOR, CONFLICT OF LAWS (1901) § 87.

17. 2 BEALE, CONFLICT OF LAWS (1935) § 119.1.

18. Pettis v. Pettis, 91 Conn. 608, 101 Atl. 13 (1917); State v. Ellis, 50 La. Ann. 559, 23 So. 445 (1898); Dean v. Richmond, 22 Mass. 461, (1827); McGuiness v. McGuiness, 72 N. J. Eq. 381, 68 Atl. 768 (1906); see Armytage v. Armytage, [1898] P. 178, 196; WESTLAKE, PRIVATE INTERNATIONAL LAW (5th ed.) 79; note (1895) 65 Am. Dec. 360. *Contra:* Blackinton v. Blackinton, 141 Mass. 432 (1886) (such a proceeding regulates the status); Thompson v. Tanner, 287 Fed. 980 (App. D. C. 1923) (is an exception to the general rule that a decree of alimony based on constructive service is void).

19. McWilliams v. McWilliams, 216 Ala. 16, 112 So. 318 (1927); Roberts v. Roberts, 160 Md. 513, 154 Atl. 95 (1931); People *ex rel.* Comm. v. Cullen, 153 N. Y. 629, 47 N. E. 894 (1897); People v. Jansen, 264 N. Y. 364, 191 N. E. 17 (1934); RESTATEMENT, CONFLICT OF LAWS (1934) § 114.

20. Dean v. Richmond, 22 Mass. 461 (1827); Barrere v. Barrere, 4 Johns Ch. 187, 197 (N. Y. 1819); KEEZER, MARRIAGE AND DIVORCE (1923) § 199.

against the husband is unnecessary.[21] He further suggests that such jurisdiction is not judicial at all but rather in the nature of a police measure to protect the petitioner from marital aggression and to preserve the peace.[22]

The reasoning of such authorities is unanimously repudiated by the Court of Appeals in the instant case. The holding necessarily implies that a separation action is fundamentally a proceeding *in rem;* otherwise there would be no *res* before the court at the beginning of the action and the award of alimony out of the sequestrated property would be void because of complete lack of jurisdiction. It is submitted that the marital status, the legal concept of the marriage relationship, is not affected by a separation decree. The material relationship admittedly is affected by the change in the duties and the obligations of the parties. But these are mere incidents of the basic domestic status which still exists although suspended within the state of the separation decree but otherwise unimpaired. While public policy argues for the seizure of the delinquent husband's property within the state, the characterization of a separation action as a proceeding substantially *in rem* is not free from doubt.

HOMICIDE—CULPABLE NEGLIGENCE—DEGREE OF NEGLIGENCE REQUIRED.—The defendant was indicted for manslaughter in the second degree[1] for having with culpable negligence smoked a cigarette so as to set fire to a dwelling causing the death of an occupant therein. The evidence received by the grand jury showed that the defendant had been smoking in bed, that "some of the fire bumped off the cigarette" and "fell on the floor on the rug" and that the accused had fallen asleep. He was awakened by smoke and heat and rushed from the premises without warning any of the other occupants. On a motion to dismiss the indictment on the ground that the legal evidence received by the grand jury was insufficient to support it, *held,* culpable negligence amounts to more than blameworthy conduct and accordingly the indictment is dismissed, with leave to the district attorney to resubmit the case to the grand jury. *People v. Hoffman,* N. Y. L. J., Feb. 25, 1937, p. 949 (Gen. Sess.).

The novel facts in the instant case presents again for judicial appraisement the difficult problem concerning the negligence necessary to constitute culpable negligence. Courts have always found it a troublesome task to state a judicial guide for measuring negligence,[2] and the refinement necessary to separate negligence into different degrees, in order to determine criminal liability has caused much uncertainty.[3]

For an act to constitute culpable negligence more is required than the slight negligence necessary to support a civil action for damages.[4] It has been defined as a dis-

21. See 1 BEALE, CONFLICT OF LAWS (1935) § 114.1.

22. *Ibid.*

1. N. Y. PENAL LAW (1887) § 1052 provides: "Such homicide is manslaughter in the second degree, when committed without a design to effect death: . . .

"3. By any act, procurement or culpable negligence of any person, which, according to the provisions of this article, does not constitute the crime of murder in the first or second degree, nor manslaughter in the first degree."

2. ". . . courts must continue . . . to find their anchors somewhere in the vacillating, nebulous limitations and definitions of degrees of human care which seem to have no legalistic formula for division save that of each case for itself to be met as each presents itself." Seitz v. Yates Lehigh Coal Co., 142 Misc. 366, 367, 255 N. Y. Supp. 279, 281 (Sup. Ct. 1931).

3. Unfortunately legislative enactments can be of little assistance in distinguishing the types of negligence because each case must be decided on its particular facts.

4. People v. Adams, 289 Ill. 339, 124 N. E. 575 (1919); State v. Young, 56 Atl. 471

regard of the consequences which may ensue from an act, and indifference to the rights of others.[5] Whether this is present, depends on the particular facts of the case and so rests in the decision of the jury, with the exception that, as in the principal case, where the evidence discloses only a slight degree of negligence the trial judge may decide, as a matter of law, that there is no culpable negligence. However, in New York, the negligence of the wrongdoer may be so gross as to amount to murder in the first degree as an "act imminently dangerous to others".[6] The distinction between the negligence necessary for this crime and culpable negligence is often difficult to perceive. Wherein lies the difference between an act which evinces a disregard of its consequences and indifference to the rights of others and one that "evinces a depraved mind, regardless of human life"?[7] Since to convict for first degree murder the element of malice and general felonious intent must be present,[8] it is submitted that the difference between a negligent killing which will make first degree murder and a negligent killing that is merely second degree manslaughter lies in this: the act evincing a depraved mind is one, in which there is probable danger of loss of human life and the actor was *actually* conscious of the risk involved in his conduct, but should the act involve a risk less than probable loss of human life or should the jury believe that the actor was not actually conscious of the risk to human life,[9] then it does not evince a depraved mind.[10] Those acts not falling to the depths

(N. J. Sup. Ct. 1903); People v. Pace, 220 App. Div. 495, 221 N. Y. Supp. 778 (4th Dep't 1927); State v. Rountree, 181 N. C. 535, 106 S. E. 669 (1921).

5. People v. Angelo, 246 N. Y. 451, 457, 159 N. E. 394, 396 (1927). This is the leading case in New York on the doctrine of culpable negligence.

6. N. Y. PENAL LAW (1897) § 1044 provides: "The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed . . .

"2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual." Note that the Penal Law says dangerous to "others" and Darry v. People, 10 N. Y. 120 (1854) held that merely endangering the life of one other person was not murder under such a provision. In People v. Ludkowitz, 266 N. Y. 233, 194 N. E. 688 (1935), on the authority of Darry v. People, the court held that firing into a crowd and killing an individual would not constitute murder under this Section as the assailant intended to kill the deceased. It may be argued that the statute, while not requiring an intent to effect death, does not bar it and the presence of intent to kill a specific person does not preclude him from possessing a "universal malice" toward the crowd.

The same conduct would warrant a conviction of first degree murder under ALA. CODE (1928) § 4454; GA. CODE (1933) § 26-1002; ILL. REV. STAT. (1935) c. 38, § 358; KY. STAT. (1936) § 1149; LA. REV. STAT. (1920) § 784; ME. REV. STAT. (1930) c. 129, § 1; MISS. CODE (1930) § 985; N. M. STAT. (1929) § 35-304; S. C. CODE (1932) c. 68, § 1101; S. D. COMP. LAWS (1929) § 4012; UTAH REV. STAT. (1933) § 103-28-3; WASH. REV. STAT. (1932) § 2392.

7. See note 6, *supra*.

8. People v. Jernatowski, 238 N. Y. 188, 144 N. E. 497 (1924).

9. The "reasonable prudent man" test which would find negligence even in the absence of actual knowledge if the defendant ought as a reasonable man to have that knowledge is rejected when the charge is first degree murder for if the jury found as a fact that the actor did not know of the danger of loss of life, his acts would not be evidence of malice and depravity of mind.

10. Both the act of culpable negligence and the act imminently dangerous are characterized with an "I don't care" attitude but generally the "act imminently dangerous" is more deliberate.

of depraved acts will be acts either of slight negligence or culpable negligence. It is submitted that if the act involves a risk of death or serious bodily harm, it is the amount of care in the actor's conduct that determines whether it will be denominated culpable or slight. Both types of conduct fall below the standard of reasonable prudence.[11] That which is recklessly imprudent and rash is culpably negligent.

It would seem in the case at bar that the negligence of the defendant may be divided into two parts (1) the smoking in bed and the dropping of live ashes upon the rug and (2) the act of omission, the failure to warn the other occupants of the building of the impending danger. Few will dissent with the view of the court that the first acts of negligence do not amount to more than blameworthy conduct.[12] The State's case might have been stronger had the attention of the grand jury and the court been directed to a New York City ordinance[13] which, it appears, was violated by the defendant. This factor would not by itself furnish sufficient evidence to warrant a finding of culpable negligence for when the infringement of a statute or an ordinance is made the basis of such a charge, it is required that the law violated be *malum in se* and not merely *malum prohibitum*[14] as is the case in this instance.[15] Nor will the failure of the defendant to give warning upon discovering the fire make him criminally liable. Authorities require that to constitute culpable negligence by an act of omission there should be a duty imposed by law or contract to do the act.[16] There is clearly no duty imposed by contract and law cannot enforce one when the decision of whether to warn or dash out of the danger zone was a matter of discretion.

Even the thoroughly reprehensible conduct of the defendant in failing to assume

11. The "reasonable prudent man's" standard of care is used in determining culpable negligence.

12. The court includes in its opinion the evidence of the Tenement House Commission which found the premises to be in a hazardous condition. It is not clear why the court incorporates this fact. Since it was found that there was no culpable negligence, it is not relevant on the question of proximate cause. It would seem that this factor was discussed as evidence of contributory negligence on the part of a third party lessening the guilt of the accused. If this is true, the court may be criticized for the inclusion of this fact—since contributory negligence has no place in culpable negligence unless to prove that the defendant's act was not the cause. State v. Campbell, 82 Conn. 671, 74 Atl. 927 (1910); Schultz v. State, 89 Neb. 34, 130 N. W. 972 (1911); People v. Scanlon, 132 App. Div. 528, 117 N. Y. Supp. 57 (1st Dep't 1909).

13. N. Y. C. Code of Ordinances, c. 12, art. 1, § 7: "No person shall throw away any lighted match, cigar or cigarette within any building or structure . . . unless it be to deposit the same in a suitable container of metal or other non-combustible material provided for the reception thereof."

14. Commonwealth v. Adams, 114 Mass. 323 (1873); Estell v. State, 51 N. J. L. 182, 17 Atl. 118 (1889); Note (1910) 28 L. R. A. (N. S.) 770. But the contrary has been held where the statute violated was designed to prevent injury to the person. State v. McIver, 175 N. C. 761, 94 S. E. 682 (1917); State v. O'Mara, 105 Ohio 94, 136 N. E. 885 (1922).

15. There is authority for the proposition that when an ordinance or statute is broken the question of culpable negligence is for the jury. Thompson v. State, 131 Ala. 18, 31 So. 725 (1902); Silver v. State, 13 Ga. App. 722, 79 S. E. 919 (1913); People v. Davis, 1 Ill. C. C. 245 (1906). However, this is not the prevailing rule.

16. Thomas v. People, 2 Colo. App. 513, 31 Pac. 349 (1892); People v. Beardsley, 150 Mich. 206, 113 N. W. 1128 (1907); People v. Smith, 56 Misc. 1, 105 N. Y. Supp. 1032 (Sup. Ct. 1907).

the simple, moral duty of calling "Fire" as he dashed from the dwelling will not make him penally responsible in any degree, as it would be impossible to find that this omission was directly and immediately connected with the death as is required for a conviction for manslaughter. In view of the law making a driver of a vehicle, who leaves the scene of an accident guilty of a misdemeanor,[17] it seems that a measure should be enacted imposing upon a person who negligently starts a fire a duty to take all reasonable means, short of risking serious injury, to give warning to those whose lives he has placed in jeopardy.

INSURANCE—AUTOMOBILE LIABILITY INSURANCE—LIABILITY OF INSURER TO INJURED ASSURED.—The defendant had issued to the plaintiff its policy of automobile liability insurance by which it agreed to settle or defend up to specified limits ". . . claims resulting from the liability imposed upon the Assured by law for damages on account of bodily injuries, accidentally sustained by any person or persons . . . ," subject to certain immaterial exceptions. The plaintiff was injured by the negligent operation of his own automobile by *D*, to whom he had given permission to operate the car. He brought suit against *D* and recovered a judgment by default, the present defendant-insurer having refused to defend. Judgment was returned unsatisfied and this action was brought, the plaintiff contending that inasmuch as *D* was an assured within the "omnibus clause" of the policy,[1] the policy by its terms was available to satisfy this judgment obtained against him. The trial court set aside a verdict for the plaintiff and dismissed the complaint.[2] On appeal, *held,* one judge dissenting, judgment and order dismissing the complaint reversed.[3] *Johnson v. Employers' Liability Assur. Corp., Ltd.,* 249 App. Div. 906, 292 N. Y. Supp. 913 (3d Dep't 1937).

The question of recovery by a named assured on his own policy, while novel,

17. N. Y. VEHICLE AND TRAFFIC LAW (1933) § 70 sub. 5-a. It is true that this statute only requires reporting the accident and exhibiting the driver's license, but in effect it is a step toward insuring aid for those who are injured.

1. "OMNIBUS COVER. This Policy shall cover the Assured named in the Policy, and any person or persons while riding in or legally operating any of the automobiles described herein and the protection granted by this Policy is so extended as to be available in the same manner and under the same conditions as it is available to the named Assured, to any person, firm or corporation legally responsible for the operation of such automobiles, provided such use or operation is with the permission of the named assured. . . ."

2. Johnson v. Employers' Liability Assur. Corp., Ltd., 158 Misc. 758, 285 N. Y. Supp. 574 (Sup. Ct. 1935). The trial court was of the opinion that the plaintiff could not divorce himself from his status as a contracting party, to assume the rôle of a beneficiary. The court was als omotivated in setting aside the verdict and dismissing the complaint by the suspicion that the transaction smacked of fraud and collusion. For a review of the evidence on this point, see *id.* at 759-63, 285 N. Y. Supp. at 575-80. The court's efforts to prove its thesis on this point were misdirected, however, since the judgment in the prior action, as pointed out on appeal, was *res adjudicata.* See *infra,* note 16.

3. On appeal three judges agreed that the verdict by the jury on the issue of cooperation by the plaintiff and with *D* the defendant was against the weight of evidence, and therefore ordered a new trial. Three judges thought dismissal of the complaint erroneous, one thought it proper, and one did not vote on the question.

is not one of first impression. Turning upon nice points of interpretation, dependent in the main upon the wording of the insuring clause in the policy in suit, recovery has been both allowed[4] and denied.[5] Seemingly the liability of the insurer may be regarded as fixed where it contracts to insure the driver against claims brought by "any person" or by "any person or persons."[6] However, recovery has been denied where the pertinent clause insured the owner, or one operating the vehicle with his consent, against injury to "others."[7] But this result is readily reconcilable with the decision holding the insurer liable to the named assured, because of the different phraseology employed. Where, as in all other decided cases, the policy does not expressly preclude the named assured from recovery, the well-settled rule that the language of the policy must be construed in favor of the assured[8] seems definitely to have added another class—the named assured—to the risks intended to be assumed by the insurer.[9]

It cannot be questioned that the driver of an automobile ordinarily is immunized from personal liability by the "omnibus clause" when he comes within its purview, evidently on the theory of a donee-beneficiary contract.[10] Thus if the driver, as an assured, pays the judgment recovered against him by the named assured, in all likelihood his demand for indemnification by the insurer would not go unheard

4. Farmer v. United States Fidel. & Guar. Co., 11 F. Supp. 542 (M. D. Ala. 1935); Bachman v. Independence Indem. Co., 214 Cal. 529, 6 P. (2d) 943 (1931); Union Automobile Ins. Co. v. Samelson, 71 Colo. 479, 207 Pac. 1113 (1922) *semble;* see 6 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW & PRACTICE (Perm. ed. 1935) § 3995. *Cf.* Howe v. Howe, 87 N. H. 338, 179 Atl. 362 (1935); Archer v. General Cas. Co., 219 Wis. 100, 261 N. W. 9 (1935).

5. Cain v. American Policyholders Ins. Co., 120 Conn. 645, 183 Atl. 403 (1936); MacBey v. Hartford Acc. & Indem. Co., 197 N. E. 516 (Mass. 1935).

6. See cases cited note 4, *supra.* In Howe v. Howe, 97 N. H. 338, 179 Atl. 362 (1935), and Archer v. General Cas. Co., 219 Wis. 100, 261 N. W. 9 (1935), injuries were sustained by one spouse through the negligent operation of the vehicle by the other spouse. In each instance both spouses were named assureds in the policy, and in each instance the injured spouse was allowed recovery, as being within the class of "any person."

7. The Massachusetts Compulsory Insurance Law [MASS. GEN. LAWS (1932) c. 90, § 34A] provided: ". . . insurance which provides indemnity for or protection to the insured and any person responsible for the operation of the insured's motor vehicle with his express or implied consent against loss by reason of the liability to pay damages *to others* for bodily injuries. . . ." (Italics supplied.) It was accordingly held not to be within the legislative intention that the named assured should recover, as falling within the class of "others" designated by the statute. MacBey v. Hartford Acc. & Indem. Co., 197 N. E. 516 (Mass. 1935). See also Cain v. American Policyholders Ins. Co., 120 Conn. 645, 183 Atl. 403 (1936) (construing a Massachusetts contract).

8. RICHARDS, INSURANCE (4th ed. 1932) § 113; *cf.* Kaifer v. Georgia Cas. Co., 67 F. (2d) 309 (C. C. A. 9th, 1933).

9. *Cf.* Howe v. Howe, 87 N. H. 338, 342, 179 Atl. 362, 364 (1935): ". . . we believe that it was the intention of . . . the contracting parties to include [the named assured] with coverage. . . ." Such an intention on the part of the insurer seems doubtful, to say the least.

10. Ocean Accid. & Guar. Co. v. Schmidt, 46 F. (2d) 269 (C. C. A. 6th, 1931); see Comment (1935) 83 U. OF PA. L. REV. 765, 766. The English rule of donee-beneficiary does not permit recovery in such an instance. Vandepitte v. Preferred Acc. Ins. Corp. of N. Y., [1933] A. C. 70 (P. C.), (1933) 33 COL. L. REV. 749; *cf.* Corbin, *Contracts for Benefit of Third Persons* (1930) 46 L. Q. REV. 12.

in the courts.[11] Yet the fact that payment is really made by the insurance company to the assured complicates the situation and it can be safely predicted that liability insurers will not welcome the instant decision with open arms. Undoubtedly there is some justification for an argument that the holding is not consonant with the spirit of the policy, even though it may be drawn from the letter. The essence of a public liability policy of this type is its third party coverage,[12] and the risk hereby superimposed was probably not within the contemplation of the parties.[13] The effect of the decision is, of course, to convert a liability policy into one of accident insurance of limited coverage.[14] Further, it may be pointed out that a door for convenient fraud is flung wide. The primary action by the named assured against the driver seems generally to go undefended, and on settled principles of *res adjudicata* the insurer cannot thereafter question the validity of the default judgment recovered at the inquest.[15] Thus, realizing that in all probability this hypertechnical policy interpretation will not be relaxed in their favor, liability insurers have wisely added the named assured to the risks excluded from the coverage of the policy.[16] Within the near future the question of recovery by the named assured in a situation comparable to this will be of merely academic interest.[17]

INSURANCE—EQUITY—ADEQUACY OF INSURER'S REMEDY AT LAW AS BAR TO SUIT FOR CANCELLATION.—The petitioner issued two policies of life insurance on February 23, 1932, in each of which one of the respondents was named as beneficiary. Each of the policies contained a one-year incontestability clause.[1] On May 31, 1932, the in-

11. "It was conceded upon the oral argument, and we think advisedly, that, if Archer [the driver] had paid the judgment, he could recover from the defendant." Archer v. General Cas. Co., 219 Wis. 100, 103, 261 N. W. 9, 10 (1935); see also concurring opinion of Malbie, C. J., in Cain v. American Policyholders Ins. Co., 120 Conn. 645, 655, 183 Atl. 403, 407 (1936).

12. RYDER, AUTOMOBILE INSURANCE (1924) 30; HUEBNER, PROPERTY INSURANCE (2d ed. 1922) 422; RICHARDS, INSURANCE (4th ed. 1932) § 489.

13. *Cf.* note 10, *supra.*

14. See Cain v. American Policyholders Ins. Co., 120 Conn. 645, 653, 183 Atl. 403, 407 (1936); Johnson v. Employers' Liability Assur. Corp., Ltd., 158 Misc. 758, 764, 285 N. Y. Supp. 574, 580 (Sup. Ct. 1935).

15. It is certain that the insurer is bound by the judgment in the prior action as to issues which were, or might have been, litigated therein. Morin v. Travelers' Ins. Co., 85 N. H. 471, 160 Atl. 482 (1932); *cf.* Schuykill Fuel Corp. v. B. & C. Nieberg Realty Corp., 250 N. Y. 304, 165 N. E. 456 (1929).

16. The now current National Standard Automobile Liability Policy reads as follows: "*Definition of 'Insured.'* The unqualified word 'insured' [wherever used in describing the coverage of this policy] includes not only the named insured but also any person while using the automobile . . . provided . . . the actual use is with the permission of the named insured. The provisions of this paragraph do not apply: . . . (b) to any person or organization with respect to bodily injury to or death of any person who is a named insured. . . ."

17. This Standard Policy is now required by the insurance departments of the great majority of states, including New York. While the process of substituting these policies for older forms is lengthy as to time, advices from the New York Insurance Department indicate that this policy will be in universal use, by all companies licensed to do business in New York, by January 1, 1939.

1. "[This policy] . . . shall be incontestable, except for non-payment of the premium,

sured died. On September 3, 1932, the insurer brought suit in equity to cancel the policies, relying on certain fraudulent misstatements allegedly made by the insured in his application. The petition also set forth the incontestability clause and alleged that the beneficiary might delay the commencement of the action at law, or, having brought it, might discontinue and later renew it after the contestable period had expired. On September 26, the respondents moved to dismiss the bill for want of equity, and on October 11, they began actions at law upon the policies. The District Court, on July 28, 1933, denied the motion to dismiss the bill in equity but did not pass on the insurer's motion to enjoin the prosecution of the action at law. On August 29, the parties entered into a stipulation providing that the suit in equity was to be tried first, and on October 10 the beneficiaries filed answers in the equity action. Upon the trial of the suits in equity the District Court decreed the surrender and cancellation of the policies, which decree was reversed by the Circuit Court of Appeals.[2] On writ of *certiorari* granted by the Supreme Court, *held,* (1) the remedy at law was inadequate for the insurer because it existed only at the pleasure of the beneficiary who could withdraw it at will; (2) equity jurisdiction existing at the time the bill is filed is not destroyed merely because an adequate remedy at law may thereafter become available; (3) whatever contention the beneficiaries might have made as to the adequacy of the remedy provided by their actions at law was waived by entering into the stipulation that the equity action was to be tried first. The insurance company was declared entitled to a decree of surrender and cancellation of the policies. Reversed and remanded. *American Life Insurance Co. v. Stewart,* 57 Sup. Ct. 377 (1937).

That a suit in equity does not lie where there is a plain, adequate, and complete remedy at law is so well understood as not to require the citation of authorities. Difficulty arises, however, over what constitutes an adequate remedy at law. It has been variously held that it must be clear,[3] practical and efficient,[4] it must meet the ends of justice[5] and be freely available[6] to the party requiring it.[7] The principal case involves the question whether an insurer has an adequate remedy at law in resisting, on the ground of fraud, a policy containing an incontestability clause.

Determination of this question involves three considerations. *First,* has the beneficiary begun a suit at law upon the policy?[8] *Second,* if he has, does he have such control of the action as would render the insurer's remedy inadequate?[9] *Third,* what is the nature of a "contest" within the meaning of the clause in the policy?[10]

after one year from its date of issue if the Insured be then living, otherwise after two years from its date of issue."

2. Stewart v. American Life Ins. Co., 80 F. (2d) 600 (C. C. A. 10th, 1935), *rehearing denied,* 85 F. (2d) 791 (1936).

3. Bowers v. New York Trust Co., 9 F. (2d) 548, 550 (C. C. A. 2d, 1925).

4. Boyce v. Grundy, 28 U. S. 210, 215 (1830).

5. Pacific Tel. & Tel. Co. v. Seattle, 14 F. (2d) 877 (W. D. Wash. 1926).

6. Lincoln Nat. Life Ins. Co. v. Peake, 10 F. (2d) 366 (W. D. Mo. 1925).

7. One case has even gone so far as to hold that the remedy at law "must be a remedy which the party *himself* controls and can assert at the moment." Fredenburg v. Whitney, 240 Fed. 819, 823 (W. D. Wash. 1917). But if the court means that the remedy is adequate *only* when the aggrieved party may himself bring the action it is submitted, for reasons which will hereafter appear, that it goes too far.

8. Obviously if a remedy at law is to exist at all for the insurer it must originate with the beneficiary, for the insurer has no cause of action at law.

9. The remedy at law would be clearly inadequate for the insurer if the beneficiary had an *unqualified* right to discontinue his action at will.

10. This question is particularly pertinent since the insurer may preserve its defense

In the principal case, actions were begun at law by the beneficiaries about six weeks after the insurer had filed its bill in equity praying cancellation of the policies. Hence there was an action at law pending at the time the court granted the writ of *certiorari*. It was contended by the insurer, and the contention was supported by the Court, that the remedy provided by the pending legal action was inadequate because it was wholly dependent upon the will of the beneficiary. The Court cited numerous cases in support of the proposition that a remedy which depends upon the will of the adversary is inadequate; but it cited none to support its assertion that an action begun at law is in fact dependent on the will of the plaintiff. The rule was recently stated by the same tribunal to be as follows: "The general rule is settled for the federal tribunals that a plaintiff possesses the unqualified right to dismiss his complaint at law or his bill in equity *unless some plain legal prejudice will result to the defendant* other than the mere prospect of a second litigation upon the subject matter."[11] The clear implication of the language would seem to be that where a defendant's rights would be prejudiced by the plaintiff's discontinuance the latter has not an *absolute* right to withdraw his action. It is submitted that to deny the insurer the necessary opportunity to assert its defense before the contestable period expires is such a "plain legal prejudice" as would qualify the beneficiary's right to discontinue if, indeed, it would not foreclose the right entirely. It would seem justifiable to qualify the right at least to the extent of allowing the defendant-insurer to answer the complaint and thus interpose its defense.

The effect of such action upon the substantive rights of the insurer will be now considered in connection with the discussion of what constitutes a "contest" within the meaning of the incontestability clause of the policy. The true purport of the incontestability clause is best understood by examining the reason for its inclusion in the policy. Briefly stated, it is that the insured is encouraged to take out the policy by the knowledge that those whom he seeks to secure by it, cannot be deprived of that security at some remote date by the avoidance of the policy upon some ground as to which the beneficiary is totally ignorant and to which he can therefore offer no adequate defense.[12] The insurer says in effect: Unless we contest this policy within this brief period, you may thereafter rest securely in the knowledge that the proceeds will be paid to your beneficiary upon your death. Clearly, then, the insurer must bring notice of any alleged defense on the policy squarely home to the insured —or his beneficiary if he has died—before the expiration of the contestable period. For this purpose the great weight of judicial authority requires that the contest be an *open contest in court*, with the insurer either affirmatively asserting its claim in

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by engaging prior to the expiration of the contestable period in a "contest"; and even though the proceedings in which the "contest" occurred were not concluded, or were concluded adversely to the insurer, the defense is not thereby lost, *provided such conclusion did not involve an adverse adjudication of the merits of the insurer's defense.* New York Life Ins. Co. v. Hurt, 35 F. (2d) 92, 96 (C. C. A. 8th, 1929).

11. McReynolds, J., in Jones v. Securities and Exchange Commission, 298 U. S. 1, 19 (1936) (italics supplied). See also *Ex parte* Skinner & Eddy Corp., 265 U. S. 86, 92-93 (1923) and cases there considered. *Contra:* New York Life Ins. Co. v. Seymour, 45 F. (2d) 47, 48 (C. C. A. 6th, 1930) *semble.*

12. Great Western Life Ins. Co. v. Snavely, 296 Fed. 20, 22-23 (C. C. A. 9th, 1913); Wright v. Mut. Ben. Life Ass'n, 118 N. Y. 237 (1890); Killian v. Metropolitan Life Ins. Co., 251 N. Y. 44, 49, 166 N. E. 798 (1929). For a lengthy discussion of the nature and purpose of an incontestability clause, see Massachusetts Benefit Life Ass'n v. Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261 (1898). See also VANCE, INSURANCE (2d ed. 1930) 819, calling the clause "an inducement to prospective policy holders."

equity or presenting it as a defense in an action at law;[13] mere repudiation of the contract *in pais* being deemed insufficient.[14] It seems equally clear that the required litigation need not be prosecuted to a conclusion before it may be properly denominated a contest. On the contrary, it has been held that a contest exists as such from the time the *insurer* takes *its* first step in the litigation;[15] and this view would appear to be well-founded.[16]

Since it appears that service of an answer to a complaint at law is sufficient to constitute a contest within the meaning of the policy,[17] and since, in the instant case, an action had been brought and was pending at law, it is submitted that the insurer had an adequate remedy at law available merely by serving an answer in that action. For thus would a contest be instituted, the effect of which is to preserve the insurer's defense to it thereafter.[18] The remedy at law would seem adequate both for the

13. Northwestern Mut. Life Ins. Co. v. Pickering, 293 Fed. 496 (C. C. A. 6th, 1923); New York Life Ins. Co. v. Hurt, 35 F. (2d) 92 (C. C. A. 8th, 1929); Killian v. Metropolitan Life Ins. Co., 251 N. Y. 44, 166 N. E. 798 (1929); VANCE, INSURANCE (2d ed. 1930) 823; 8 COUCH, INSURANCE (1931) § 2155h.

14. Jefferson Standard Life Ins. Co. v. McIntyre, 294 Fed. 886 (C. C. A. 5th, 1923); Chun Ngit Ngan v. Prudential Ins. Co., 9 F. (2d) 340 (C. C. A. 9th, 1925); Lincoln Nat. Life Ins. Co. v. Peake, 10 F. (2d) 366 (W. D. Mo. 1925); Killian v. Metropolitan Life Ins. Co., 251 N. Y. 44, 166 N. E. 798 (1929). In Chun Ngit Ngan v. Prudential Ins. Co., *supra,* the court squarely held that a denial of liability, coupled with a tender back of the premiums paid and a demand for the return of the policy, does not constitute a contest, reviewing the authorities in support of this holding at pp. 341-342. In Killian v. Metropolitan Life Ins. Co., *supra,* it was said that "Repudiation of a policy is notice that a contest will ensue. . . . It is not a contest of itself." 251 N. Y. at 48, 166 N. E. at 800. *Contra:* Mutual Life Ins. Co. v. Hurni Packing Co., 280 Fed. 18 (C. C. A. 8th, 1922); Stiegler v. Eureka Life Ins. Co., 146 Md. 629, 127 Atl. 397 (1925); Feierman v. Eureka Life Ins. Co., 279 Pa. 507, 124 Atl. 171 (1924). But see VANCE, *op. cit. supra* note 13, wherein the author says (at p. 824 n. 2) "this point was not considered by the Supreme Court in affirming the judgment of the Circuit Court of Appeals. . . . In spite of the Hurni Case, it seems that the Federal courts are committed to the doctrine that contest implies court action. See Peake v. Lincoln Nat. Life Ins. Co. (C. C. A.) 15 F. (2d) 303 (1926)."

15. "A contest, then, begins when the insurer avoids, or seeks to avoid, the obligation of the contract by action or defense." Per Cardozo, C. J., in Killian v. Metropolitan Life Ins. Co., 251 N. Y. 44, 49, holding, further that, when an action at law on the policy is brought by the beneficiary, ". . . the contest takes its start when the insurer serves an answer disclaiming liability."

16. New York Life Ins. Co. v. Hurt, 35 F. (2d) 92, 95 (C. C. A. 8th, 1929), in which numerous cases are cited in support of the contention that this view represents the weight of authority.

17. See notes 16 and 17, *supra.* "In order to contest the policy it was required to file an answer to the suit brought by the beneficiary . . . no contest was made . . . until the insurance company filed an answer. . . ." Missouri State L. Ins. Co. v. Cranford, 161 Ark. 602, 610, 257 S. W. 66, 69 (1923). And such answer, once filed, constitutes a contest even though as a plea it was bad. Joseph v. New York Life Ins. Co., 308 Ill. 93, 139 N. E. 32 (1923); Romano v. Metropolitan Life Ins. Co., 271 N. Y. 288, 2 N. E. (2d) 661 (1936); 8 COUCH, INSURANCE (1931) § 2155g.

18. "Once having initiated a contest by judicial proceedings within the contestable period, the effect of such contest was, unless thereafter waived, to give the company the benefit thereof in the future, in that or other actions. . . ." New York Life Ins. Co. v. Hurt, 35 F. (2d) 92, 96 (C. C. A. 8th, 1929).

reason just advanced and for the additional reason that the beneficiary could not discontinue his action absolutely at will, and should, at least, be prevented from discontinuing it until this answer had been filed.

At this point we are confronted with the disturbing principle, applied by the Court in the instant case, that equitable jurisdiction, existing at the time the bill is filed, is not lost merely because an adequate legal remedy may subsequently have become available.[19] Though the rule is well established, the propriety of its application seems open to question when the result is to deprive a party of the valuable right to have a jury try the issue of fraud. The harshness of a mechanical application of the rule is particularly apparent where, as here, there is no evidence of any bad faith or dilatory tactics on the part of the one suing at law. It would seem that a rule so inflexible is repugnant to the spirit of equity jurisprudence. In *New York Life Ins. Co. v. Seymour*[20] the court held that the right of the insured to have a jury try the issue of fraud must bow before the necessity for equitable intervention on behalf of the insured, whose remedy at law was deemed inadequate. But it is significant to note that the holding was strongly predicated upon the theory that the party suing at law could withdraw his action at will regardless of any prejudice to the other party thereby.[21] If, then, we are to be confronted with a conflict of principles, it is submitted that the paramount principle is that which would prevent equity's exercise of its concurrent jurisdiction when the remedy at law is adequate,[22] and since we have predicated the adequacy of the legal remedy in this instance, the right to a trial by jury should prevail over a principle, the application of which would result in an unwarranted deprivation of that right.[23]

If the foregoing principles are to be denied and an action in equity be permitted on the instant facts a peculiar situation will result. An equity action is entertained solely on the ground that no opportunity has been or will be presented to offer the defense at law; thereafter an action at law is in fact begun by the adversary and the court is asked to enjoin it until the equity action (which originated on the premise of the non-existence of an action at law) shall be heard and determined. It is submitted that a theory inducing a conclusion so anomalous in untenable.[24]

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19. Dawson v. Kentucky Distilleries, 255 U. S. 288 (1921); Lincoln Nat. Life Ins. Co. v. Hammer, 41 F. (2d) 12 (C. C. A. 8th, 1930); New York Life Ins. Co. v. Seymour, 45 F. (2d) 47 (C. C. A. 6th, 1930).

20. 45 F. (2d) 47 (C. C. A. 6th, 1930) cited in the principal case in support of the rule.

21. The apparent inaccuracy of this unqualified statement has been considered heretofore, at p. 316.

22. ". . . the adequacy or inadequacy of the legal remedy is the sole and universal test." 5 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) § 2067.

23. Where the party seeking to sue at law has been deprived of a trial by jury it has been put upon the ground that his own remissness—and not the intervention of equity—has brought about the privation. Keystone Dairy Co. v. New York Life Ins. Co., 19 F. (2d) 68 (C. C. A. 3d, 1927). It is to be noted that there was no evidence of bad faith or dilatory tactics on the part of the beneficiary in the principal case.

24. Woods, J., dissenting in Jefferson Standard Life Ins. Co. v. Keeton, 292 Fed. 53, 59-60 (C. C. A. 4th, 1923).

The further point made by the court in the principal case that the beneficiaries had stipulated away any right they might have had to urge the adequacy of the remedy provided by their law action will not be here considered because it is felt that the validity or invalidity of such a stipulation does not affect the principles here considered. It may be noted in passing, however, that in the Circuit Court it was held error for the District

LANDLORD AND TENANT—HOLDOVER TENANCY—TYPE OF TENANCY CREATED.—The tenant had a three year urban lease, on the expiration of which the parties agreed on a lease for six months at $60 per month, with an option to extend it for six months at the same rate. The arrangement went into effect July 1, 1933. On April 29, 1935, the landlord gave the tenant notice to vacate one month from May 1, 1935. The tenant remained on the premises and the landlord sued for unlawful detainer. The tenant claimed his tenancy entitled him to three months' notice. On appeal from a judgment for the plaintiff, *held,* two justices dissenting, that one month's notice was proper. Judgment affirmed. *Elkins Nat. Bank v. Nefflen,* 188 S. E. 750 (W. Va. 1936).

The theory of holdover tenancies is not a modern one. In the eighteenth century Lord Mansfield expressed the doctrine that when a tenant holds over after his lease has expired and the landlord consents thereto, "the law implies a tacit renovation of the contract."[1] There is little conflict as to the general rule at present where the original lease term was for a year or more. In such case the nearly universal opinion is that a tenancy from year to year is created.[2] However, when the lease is for a term less than one year, the weight of authority, as to the effect of a holdover, is less easily discernible. The cases show the conflict to be only two-sided, that is, some courts hold there is implied a renewal of the lease term,[3] while others believe a tenancy from month to month comes into being.[4]

Court to approve the stipulation because in so doing it was prescinding from its statutory duty to determine whether there was a ground for equity jurisdiction and not to sustain a suit in equity in any case in which an adequate remedy might be had at law. Stewart v. American Life Ins. Co., 80 F. (2d) 600 (C. C. A. 10th, 1935).

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1. See Right d. Flower v. Darby and Bristow, 1 T. R. 159, 162, 99 Eng. Reprints 1029, 1031 (K. B. 1786).

2. Goldsbrough v. Gable, 140 Ill. 269, 29 N. E. 722 (1892); Burbank v. Dyer, 54 Ind. 392 (1876); Laguerenne v. Dougherty, 35 Pa. 45 (1860); Amsden v. Atwood, 69 Vt. 527, 38 Atl. 263 (1897); Baltimore Dental Ass'n v. Fuller, 101 Va. 627, 44 S. E. 771 (1903).

New York differs from the weight of authority and has the rule that a tenancy for a year certain is created on a holdover. Schuyler v. Smith, 51 N. Y. 309 (1873); Adams v. City of Cohoes, 127 N. Y. 175, 28 N. E. 25 (1891); Haynes v. Aldrich, 133 N. Y. 287, 31 N. E. 94 (1892); Kennedy v. City of New York, 196 N. Y. 19, 89 N. E. 360 (1909). In connection with the New York law, it is interesting to note that legislation has been proposed to create a tenancy from month to month where there has been a holdover after a lease of a year or more under the terms and conditions of the previous lease. N. Y. L. J. Mar. 20, 1937, at 1389.

3. Hurd v. Whitsett, 4 Colo. 77 (1878); Prickett v. Ritter, 16 Ill. 96 (1854); Bright v. McQuat, 40 Ind. 521 (1872); Bollenbacker v. Fritts, 98 Ind. 50 (1884); Wood v. Gordon, 18 N. Y. Supp. 109 (C. P. 1892); Trustees of Leake and Watts Orphan House v. Hoyle, 79 Misc. 301, 139 N. Y. Supp. 1098 (Sup. Ct. 1913); Silverman v. Zucker, 181 N. Y. Supp. 349 (Mun. Ct. 1920); see Ketchum v. Ochs, 34 Misc. 470, 472, 70 N. Y. Supp. 268, 269 (Sup. Ct. 1901), *aff'd without opinion,* 74 App. Div. 626, 77 N. Y. Supp. 1130 (2d Dep't 1902). It should be noted that the cases are not always clear as to whether there is a renewal, strictly speaking, of the old term, which would require no notice on the expiration of each successive holdover term, or a periodic tenancy with the old lease term as the basis. In view of New York's unwillingness to create a periodic tenancy in holdovers on a lease of one year or more, it logically follows that where its courts have implied another term on the holdover, it should be a strict renewal.

4. Backus v. Sternberg, 59 Minn. 403, 61 N. W. 335 (1894); Eastman v. Richard &

Some courts have leveled their attention at the rent reserved and held this incident to be the criterion in determining the type of tenancy brought about by a holdover.[5] Hence if the lease stated the rent to be a stipulated sum per month, then, no matter what length of time the lease ran, a holdover would exist only from month to month.[6] However, if the lease provided for payment of a stipulated sum for the whole term, the holdover would be for a new term of the same length as the old term. Even if the stipulated rent for the term is payable in monthly installments the conclusion would be the same. The distinction between a lease for six months at $60 a month and one for six months at $360, payable in monthly installments of $60, is, to say the least, subtle.[7] The mere omission of the sum total of the periodic payments in the first lease does not seem to warrant treating it differently from the second lease. Quite different are those cases in accord with the dissent of the instant case, which are prone to disregard the above method,[8] and concentrate wholly on the original lease term—making the holdover tenant liable for at least another term.

It is fundamental in the field of contracts that the approach of the courts, in dealing with written contracts, has been to seek not the subjective intent of the parties, but the intent which the writing expressed. Where, on the other hand, the contracts were oral, the parties' subjective intent has been the criterion.[9] This approach would seem appropriate to the problem of holdover tenancies. Rather than impose on the landlord and tenant that which neither contemplated, it is submitted that the intention of the parties should be effected.[10] It is held that when the tenant

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Co., 29 Can. Sup. Ct. Rep. 438 (1899). Professor Walsh, in speaking of tenancies created by holding over, says "In New York, however, the courts hold that the tenancy arising from a holding over and acceptance of rent, or from a holding over and an election to hold the tenant for the rent on the part of the landlord, is a tenancy for a year certain or a month certain as the case may be." WALSH, REAL PROPERTY (1915) § 151.

5. Backus v. Sternberg, 59 Minn. 403, 61 N. W. 335 (1894) (where the written lease was for a half year, rent being reserved at $40 per month, the court held a holdover initiated a tenancy from month to month); Kaufman v. Mastin, 66 W. Va. 99, 66 S. E. 92 (1909); Whalen v. Whalen, 68 W. Va. 328, 69 S. E. 843 (1910). In JONES, LANDLORD AND TENANT (1906) § 215, in treating the holdover topic, are the words "So the real unit is not any particular period of time, but the rent period, whatever that may be in any given case."

6. Kaufman v. Mastin, 66 W. Va. 99, 66 S. E. 92 (1909). Here the lease extended for a period of a year with rent to be paid at $50 per month, still the court held a holdover created a tenancy from month to month. For a criticism of this case see Note (1910) 25 L. R. A. (N. S.) 857.

7. Elkins Nat. Bank v. Nefflen, 188 S. E 750 (W. Va. 1936); Farbman v. Meyers, 77 Leg. Intel. 642 (1897).

8. Hurd v. Whitsett, 4 Colo. 77 (1878); Prickett v. Ritter, 16 Ill. 96 (1854); Bright v. McQuat, 40 Ind. 521 (1872); Rothchild v. Williamson, 83 Ind. 387 (1882). For a discussion of the Indiana doctrine and an explanation of this last case, see JONES, LANDLORD AND TENANT (1906) § 215, where it is said "Such a conclusion might, perhaps, follow from the Indiana Statute, but at common law it does not seem to result either on grounds of policy or legal principles. A monthly rent was paid and the rent periods should have been the test as to the periodic tenancy arising from a holding over so that a tenancy from month to month would result." Waterman v. Le Sage, 142 Wis. 97, 124 N. W. 1041 (1910) (lease was identical with that of the instant case, but the court held a renewal of the prior term).

9. See 2 WILLISTON, CONTRACTS (1920) § 610.

10. 18 Am. & Eng. Encyc. of Law 201.

holds over his term, he does so at his peril, and that the owner may eject him or accept rent and continue to treat him as a tenant.[11] A tenant who holds over, mindful of this, must consider the lease advantageous and, it is submitted, by remaining has offered to lease for another term under the same conditions. The option then is with the landlord to accept or reject. In the absence of agreement, there appears little merit behind a rule which implies from an acceptance of rent that the parties intended a different relationship to be created than that which previously existed.[12] Yet this is what the holding of the instant case advocates. That the parties probably intend a renewal of the lease term gathers support from the holding in the analogous situation of an employment contract for a definite term. There, when the employee continues working after the end of the agreed time, the inference is said to be that the parties have tacitly agreed to another contract for a term of the same length and on the same conditions.[13]

PRACTICE—SUPPLEMENTARY PROCEEDINGS—EFFECT OF SERVICE OF THIRD PARTY ORDER ON SUBSEQUENT ASSIGNMENT FOR VALUE WITHOUT NOTICE TO JUNIOR JUDGMENT CREDITOR.—The defendant, a senior judgment creditor, served a third party order for examination in supplementary proceedings, containing the usual clause restraining the transfer of the debtor's property, upon a bank in which the judgment debtor had an account. Subsequently the plaintiff, a junior judgment creditor received an assignment of the account from the same judgment debtor, a copy of which was duly served upon the bank. Later, the bank, which had become insolvent, declared a dividend on the account. The plaintiff made claim to the dividend under the assignment. The bank refused to pay and an action was brought by the plaintiff. An order and a stipulation by all the interested parties provided for the substitution of the senior judgment creditor as party defendant. From an order denying plaintiff's motion for summary judgment, plaintiff appeals. *Held,* an assignment not otherwise invalid, by a debtor to his judgment creditor of a credit in a bank account does not become invalid or subordinate to a claim of a prior judgment creditor who has merely served upon such bank a third party order for examination in supplementary proceedings containing a restraining provision. Order reversed.[1] *Prospect Coal Co. v. Commercial Credit Corp.,* 161 Misc. 780, 293 N. Y. Supp. 231 (App. Term 1937).

The question presented by the instant case is of considerable practical importance.[2] It is unfortunate that the courts in this state have decided appeals on the question by mere affirmance or reversal without opinion. The trial courts are divided on the question. The prevailing view favors the judgment creditor, who commences supplementary proceedings, by awarding him a lien on the property of the judgment debtor disclosed thereby.[3] To hold otherwise, the courts contend, would open the

11. Schuyler v. Smith, 51 N. Y. 309 (1873); Providence Savings Bank v. Hall, 16 R. I. 154 (1888).

12. See Shipman v. Mitchell, 64 Tex. 174 (1885).

13. See 1 WILLISTON, CONTRACTS (1920) § 90.

1. The court decided this appeal in a short *per curiam* opinion without a statement of facts or authorities. The writer is indebted to the attorney for the plaintiff for the facts in the instant case.

2. See contributed article appearing in N. Y. L. J., Aug. 1, 1935, p. 330; *id.,* Aug. 2, 1935, p. 342.

3. Aetna Life Ins. Co. v. Asba Corp., 243 App. Div. 585, 277 N. Y. Supp. 510 (1st Dep't 1935) (mem. decision), *aff'd without opinion,* 268 N. Y. 504, 198 N. E. 376 (1935);

door to untold rascality and render idle and useless the entire machinery of supplementary proceedings.[4] Under the majority rule the plaintiff, being an assignee of a chose in action, would take subject to this equitable lien.[5] The minority view holds that it was never intended that the mere service of a third party order, which the judgment debtor is presumed to know nothing about, should deprive the judgment debtor of his property rights.[6]

It is submitted that the soundness of either rule may be analyzed in the light of certain pertinent statutory provisions of the Civil Practice Act.[7] These provisions the trial courts in their opinions have neglected to consider. Although the matter is one of statutory interpretation, it is the rule in this state that the service on a judgment debtor, or a third party, of an order for his examination in supplementary proceedings gives the judgment creditor an equitable lien on the personal property of the judgment debtor disclosed thereby.[8] By statutory provision this lien ripens into title in a receiver when one is appointed in the proceedings at the instance of the judgment creditor.[9] The statute also provides that the title of the receiver so appointed relates back and attaches to all the personal property, not otherwise exempt, at the time of the commencement of the proceedings.[10] It should be noted, however, that by statutory exception the title of a bona fide purchaser for a valuable consideration of the property of the judgment debtor or the payment of a debt

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Lebowitz v. Bowery Sav. Bank, 155 Misc. 567, 281 N. Y. Supp. 176 (Mun. Ct. 1935); Fox v. Vim Electric Co., 156 Misc. 621, 281 N. Y. Supp. 459 (Mun. Ct. 1935). *Accord:* McCorkle v. Herrman, 117 N. Y. 297, 22 N. E. 948 (1889).

4. See Fox v. Vim Electric Co., 156 Misc. 621, 623, 281 N. Y. Supp. 459, 461 (Mun. Ct. 1935).

5. Fox v. Vim Electric Co., 156 Misc. 621, 281 N. Y. Supp. 459 (Mun. Ct. 1935). In Central Trust Co. v. West India Imp. Co., 169 N. Y. 314, 323, 62 N. E. 387, 390 (1901) the court defined the present position of an assignee of a non-negotiable chose in action in the following words: "It is further the settled law of this state, though a different rule prevails not only in England, but in the Federal courts and in some of the states, that a *bona fide* purchaser for value of a chose in action takes it subject not only to the equities between the parties, but also to latent equities in favor of third persons. . . ."

6. Starkman v. Kelly (App. Term 1935), N. Y. L. J., Jan. 18, 1935, p. 320 (affirming without opinion the holding of the lower court); Tolk v. Corn Exch. Bank, 154 Misc. 296, 277 N. Y. Supp. 112 (Mun. Ct. 1935).

7. N. Y. Civ. Prac. Act (1935) §§ 807, 808; formerly N. Y. Civ. Prac. Act (1920) §§ 809, 810.

8. McCorkle v. Herrman, 117 N. Y. 297, 22 N. E. 948 (1889); *In re* Clover, 8 App. Div. 556, 558, 40 N. Y. Supp. 886, 887 (4th Dep't 1896), *aff'd*, 154 N. Y. 443, 48 N. E. 892 (1897); see Ward v. Petrie, 157 N. Y. 301, 307, 51 N. E. 1002, 1004 (1898). However, prior to the enactment of the N. Y. Code Civ. Proc. (1892) § 2469, there was a conflict in New York as to whether the commencement of supplementary proceedings gave the judgment creditor a lien upon the assets of the judgment debtor. To the effect that no lien was created: Becker v. Torrence, 31 N. Y. 631 (1864); Voorhees v. Seymour, 26 Barb. 569 (N. Y. 1857). *Contra:* Lynch v. Johnson, 48 N. Y. 27 (1871); Porter v. Williams, 5 How. Pr. 441 (N. Y. 1851), *aff'd*, 9 N. Y. 141 (1853); Deposit Nat. Bank v. Wickham, 44 How. Pr. 421 (N. Y. 1873).

9. N. Y. Civ. Prac. Act (1935) § 808. McCorkle v. Herrman, 117 N. Y. 297, 22 N. E. 948 (1899), was decided under the N. Y. Code Civ. Proc. (1892) § 2469, which was a substantial replica of the present § 808 of the Civil Practice Act.

10. N. Y. Civ. Prac. Act (1935) § 808. McCorkle v. Herrman, 117 N. Y. 297, 22 N. E. 948 (1889).

in good faith by the debtor without notice of the proceedings, is not affected by the equitable lien or the appointment of the receiver.[11] It has been held that the personal property to which the receiver takes title includes choses in action belonging to the judgment debtor at the time of the service of the order for examination in supplementary proceedings.[12] It may be authoritatively argued that if in the instant case the proceedings had advanced to the stage where a receiver had been appointed, the plaintiff, as a creditor, having been paid in good faith by the judgment debtor without notice of the service of the third party order, would prevail.[13] The fact that, in the instant case, no receiver was appointed, or that the plaintiff was paid by the assignment of a third party indebtedness owned by the judgment debtor should not make any material difference so long as the payment of the debt was made in good faith and without notice.

It would seem that it was never the legislative intent that a judgment creditor who institutes supplementary proceedings should be in a better position merely by the service of a third party order than he would be by pressing diligently onwards to the stage in the proceedings where a receiver is appointed. It is submitted that the majority rule, which favors the judgment creditor over a bona fide assignee without notice, reaches a just result but it appears untenable in the light of Section 808 of the Civil Practice Act, which protects the bona fide assignee without notice over the same diligent judgment creditor if a receiver had been appointed in the proceedings. On the other hand, the minority view which simply requires that the assignment be made in good faith is directly within the spirit of the excepting provision of Section 808 of the Act protecting payees in good faith without notice.

11. N. Y. Civ. Prac. Act (1935) § 808 reads "But this section does not affect the title of a purchaser in good faith without notice and for a valuable consideration, or the payment of a bona fide debt in good faith without notice, *in either of which cases the burden of proving the bona fides shall be on such purchaser or payee.*" The matter italicized is new and did not appear in the former N. Y. Civ. Prac. Act (1920) § 810. See note 13, *infra.*

12. McCorkle v. Herrman, 117 N. Y. 297, 22 N. E. 948 (1889); Weld v. Sage, 34 App. Div. 471, 54 N. Y. Supp. 253 (1st Dep't 1898). See N. Y. Civ. Prac. Act (1935) § 808.

13. Droege v. Baxter, 69 App. Div. 58, 74 N. Y. Supp. 585 (1st Dep't 1902), *aff'd without opinion,* 171 N. Y. 654, 63 N. E. 1116 (1902). In Dienst v. Gustaveson, 85 N. Y. Supp. 371 (App. Term 1903), the court said "The fact that the assignment was made after service of the order in supplementary proceedings upon the comptroller did not necessarily affect the right of the assignee." *Id.* at 372. The court cited the N. Y. Code Civ. Proc. (1892) § 2469, which contained the excepting provision protecting bona fide purchasers and payees without notice, now found in § 808 of the Civil Practice Act. That an honest purchaser without notice was protected under the N. Y. Code of Civ. Proc. (1892) § 2469, see *In re* Clover, 154 N. Y. 443, 448, 48 N. E. 892, 893, 894 (1897), in which the court declared "The question in this case is dependent upon and involves the construction and application of a statute. . . . Hence, the proper inquiry is, not whether the respondent acquired a good title under the law merchant, but whether he was a purchaser such as this particular statute protects." The author of the article appearing in the N. Y. L. J., Aug. 1, 1935, p. 330; *id.,* Aug. 2, 1935, p. 342, cites the case of Lynch v. Johnson, 48 N. Y. 27 (1871) as authority for the proposition that a judgment creditor who institutes supplementary proceedings by the service of an order prevails over an assignee who took his assignment subsequent to the service of an order. It should be pointed out, however, that the authority of Lynch v. Johnson, *supra,* may be questioned under the present § 808 of the N. Y. Civ. Prac. Act, since the case was decided under the N. Y. Code of Proc. (1849) §§ 292, 294, which sections did not contain the excepting provisions protecting bona fide payees without notice.

SURETYSHIP—CONTINUING GUARANTY—EFFECT OF GUARANTOR'S DEATH ON STIPULATION TO WAIVE NOTICE OF EXTENSIONS.—The deceased had signed a written guaranty for the existing indebtedness of her husband on a note to the plaintiff bank and for any future indebtedness up to $48,300. The plaintiff was authorized to grant extensions and take renewal notes without notice to the guarantor. The guarantor expressly reserved the right to revoke the offer by written notice to the plaintiff. At the time of the guarantor's death, there was an existing obligation of $29,090 owing from the husband. Two months later, the obligation being due, the plaintiff took a renewal note from the principal debtor. Four months thereafter, upon maturity of the renewal note, the debtor was in default and the plaintiff sued the estate of the guarantor. The administrator alleged as a defense that the taking of the renewal note and the surrender of the old constituted a payment and the creation of a new obligation upon which the estate was not liable. On appeal from a reversal of a judgment for the defendant, *held,* that the surrender of the old note and the taking of a renewal would be presumed a payment generally, but that when it is for the benefit of the creditor that the old note be kept alive, it is not to be deemed payment. Judgment affirmed. *First Nat. Bank v. McGowan,* 5 N. E. (2d) 5 (Mass. 1936).

The same general rules apply to continuing offers[1] of guaranty as are prescribed for other contractual offers,[2] and many mooted contract problems persist unsolved in this sphere of the law. What constitutes an acceptance of the offer[3] and the sufficiency of an act of revocation are questions which have split the authorities. Some would hold that the performance of the contemplated act, advancement of credit, is a satisfactory acceptance, but many jurisdictions require that the acceptor give the offeror actual notice of his assent in addition to the act. Several jurisdictions assert

1. Offers of guaranty are either temporary or continuous in their nature. STEARNS, LAW OF SURETYSHIP (4th ed., Feinsinger, 1934) § 59. Where they are restricted to a single transaction, or within a limited period of time, they are temporary. Hagedorn v. Zemuway, 28 Ga. App. 807, 113 S. E. 244 (1922); ARANT, SURETYSHIP (1931) § 21. Where the guaranty is by express terms a continuing one, the courts will so hold. Laurence v. McCalmot, 43 U. S. 426 (1844); Cochran v. Kennedy, 10 Daly 346 (N. Y. 1882); Whitalltatum Co. v. Manix, 61 Misc. 615, 113 N. Y. Supp. 1010 (Sup. Ct. 1909); La Rose v. Logansport Nat. Bank, 102 Ind. 332, 1 N. E. 805 (1885). Pam's Bkg. Co. v. Yates, [1898] 2 Q. B. 460. This is true notwithstanding there is a limitation as to the amount. Picker v. Fitzelle, 28 App. Div. 519, 51 N. Y. Supp. 205 (2d Dep't 1898).

2. 1 WILLISTON, CONTRACTS (rev. ed. 1936) c. 3.

3. In the federal courts where the offeror's knowledge of the acceptance is considered essential, notice is generally required; it is necessary to the inception of the contract. Russell v. Clark, 11 U. S. 69 (1812); Edmondston v. Drake, 30 U. S. 69 (1831); Davis v. Wells Fargo & Co., 104 U. S. 159 (1881). The law in Massachusetts is different. The contract is complete upon the doing of the act in question, and requires merely that the notice be given within a reasonable amount of time after acceptance; failure to give this notice terminates the agreement. Bishop v. Eaton, 161 Mass. 496, 37 N. E. 665 (1894); 1 WILLISTON, CONTRACTS (rev. ed. 1936) § 69. Under the English view, followed widely in this country, the contract is absolutely complete when the acts called for are performed; they are both the consideration and the overt manifestation of assent. London and S. F. Bank v. Parrott, 125 Cal. 472, 58 Pac. 164 (1899); Union Bank v. Coster's Ex'rs, 3 N. Y. 203 (1850); Yancey v. Brown, 3 Sneed 89 (Tenn. 1855); Somersall v. Barnaby, 1 Cro. Jac. 287, 79 Eng. Reprints 246 (K. B. 1611); Oxley v. Young, 2 H. Bl. 613, 126 Eng. Reprints 734 (C. P. 1796). The English rule is the most logical and reasonable. A man is the master of his offer. If he desires notice of the performance of the act he should so stipulate.

that if the offeror has the right to terminate his offer by actual notice to the offeree, where the death of the offeror occurs the offer is *ipso facto* revoked.[4] But the more prevalent view is that even in the event of the death of the offeror, the offeree must have actual notice of the fact to constitute a valid revocation.[5] This view would seem more practical since it relieves an offeree of the unwieldly burden of determining from moment to moment if the offeror is alive.[6]

In the instant case the offer may be divided into three parts:[7] first, a guaranty of the existing debts; second, a guaranty of future debts; third, a waiver of the right to notice of renewal or extension of the debts as they mature. The court committed itself to the minority rule[8] that a continuing offer is revoked by the death of the offeror, insofar as it has not previously been acted upon, but held that this revocation was effective merely to prevent any liability attaching to the estate of the deceased for advances made by the bank after the death. The effect of the death was not to revoke the waiver of notice of extension of the indebtedness existing at death. However, this result is open to criticism since it has been held that a contract of guaranty which involves a waiver by the guarantor creates a relationship of principal and agent between the guarantor and the maker of the note. The maker of the note is the agent of the guarantor to bind him to an extension of the time of the obligation without notice to the guarantor. Death will revoke this agency and consequently an extension granted by the creditor after the decease of the guarantor will

4. Aitkens v. Lang's Adm'r, 106 Ky. 652, 51 S. W. 154 (1899); Jordan v. Dobbins, 122 Mass. 168 (1877); Highland v. Habich, 150 Mass. 112, 22 N. E. 765 (1889); See Hand v. Mingle, 206 N. Y. 179, 183, 99 N. E. 542, 543 (1912); Note (1926) 42 A. L. R. 926.

In American Chain Co. v. Arrow Grip Mfg. Co., 134 Misc. 321, 235 N. Y. Supp. 328 (Sup. Ct. 1929) the court held that even where there was an express stipulation to the effect that death was not to terminate the offer, such an agreement was ineffectual, because the rule of law could not be avoided.

5. Garrett v. Trabue, 82 Ala. 227, 3 So. 149 (1887); Gay v. Ward, 67 Conn. 147, 34 Atl. 1025 (1895); Bedford v. Kelley, 173 Mich. 492, 139 N. W. 250 (1913); Bradbury v. Morgan, 1 H. & C. 249, 158 Eng. Reprints 877 (Ex. 1862). While this case is often cited for the rule that death *ipso facto* revokes the offer, the court points to the fact that the offeror was dead and offeree had knowledge of the fact; it also states that a continuing offer, which is revocable, may be revoked by death with notice of the fact on the part of the offeror.

Williston says that the resultant problem of whether death is adequate as a revocation or if actual notice to the offeree of the offeror's death is necessary is only due to the fact that some jurisdictions say there may be mental assent even if the offeror is nonexistent, and others say that there cannot be such mental assent as is required to form a contractual obligation unless the offeror is alive at the time the acceptance is made. 1 WILLISTON, CONTRACTS (rev. ed. 1936) § 62.

6. Gay v. Ward, 67 Conn. 147, 34 Atl. 1025 (1895); Nat. Eagle Bank v. Hunt, 16 R. I. 148, 13 Atl. 115 (1888); Bradbury v. Morgan, 1 H. & C. 248, 158 Eng. Reprints 877 (Ex. 1862).

7. "It is possible, however, to make a divisible offer requesting a series of acts or promises to be made from time to time. . . . If an offer is of this divisible character, it may be revoked not only before any acceptance but also as to any portion of the offer still unaccepted. . . ." 1 WILLISTON, CONTRACTS (rev. ed. 1936) p. 163; RESTATEMENT, CONTRACTS (1932) § 44; see Picker v. Fitzelle 60 App. Div. 451, 69 N. Y. Supp. 902 (2d Dep't 1901); Smith v. Diem, 223 App. Div. 572, 229 N. Y. Supp. 56 (4th Dep't 1928).

8. Jordan v. Dobbins, 122 Mass. 168 (1877).

be one to which he has not consented.[9] It might then be concluded that the act of renewal by which the plaintiff bound itself not to maintain suit for collection against the debtor until four months later, relieved the estate from all liability.[10] It constituted a material variation[11] of the principal contract and, since made without authority, impaired the guarantor's right of subrogation.[12] It would seem that this point of law, not treated by the court, might have readily justified a different result.

TAXATION—CONCEPT OF BUSINESS SITUS—JURISDICTION TO TAX STOCK EXCHANGE MEMBERSHIP.—The plaintiff, a resident of Massachusetts and domiciled therein, was the owner of a membership in the New York Stock Exchange. In 1929, each member became entitled to a "right" to a one-quarter interest in a new membership, which interest the plaintiff sold for $108,000. The State of New York taxed the profits of this sale under Sections 351 and 351(a) of the Tax Law.[1] The plaintiff

9. Brinker v. First Nat. Bank, 37 S. W. (2d) 136 (Tex. 1931).

10. Taking the note, draft, or check of the principal debtor, payable at a future date, suspends the creditor's right of action until its maturity and acts as a discharge of the party entitled to the right of subrogation. Place v. McIlvain, 38 N. Y. 96 (1868); this case is favorably cited in Syracuse Trust Co. v. First Trust & Deposit Co., 141 Misc. 603, 252 N. Y. Supp. 850 (Sup. Ct. 1931); Sturman v. Lomor Realty Co., 148 Misc. 279, 265 N. Y. Supp. 730 (Sup. Ct. 1933); and Matter of Paskett, 151 Misc. 417, 271 N. Y. Supp. 584 (Surr. Ct. 1934).

Extending the time of payment of the principal obligation after the guarantor's death is not binding upon the guarantor's estate. The Home Nat. Bank v. Waterman, 30 Ill. App. 535, *aff'd* 134 Ill. 461, 29 N. E. 503 (1890); National Eagle Bank v. Hunt, 16 R. I. 148, 13 Atl. 115 (1888).

11. A material alteration in the principal obligation made without the assent of the guarantor discharges the guarantor. Page v. Krekey, 137 N. Y. 307, 33 N. E. 311 (1893); Warren v. Lyons, 152 Mass. 310, 25 N. E. 721 (1890). It is obviously a material alteration of the principal obligation to extend the time of maturity another four months. The risk and uncertainty of the probable change in the solvency of the principal debtor is of vital interest to those secondarily liable. In Fellows v. Prentiss, 3 Denio 512 (N. Y. 1846), the court said that if the principal gives the creditor his note for the debt, payable one day after the date, the surety is discharged.

12. Subrogation is the substitution of another person in the place of a creditor so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt. 1 BRANDT, SURETYSHIP AND GUARANTY (3d ed. 1905) § 324. The right of the subrogee accrues at the time he assumes and pays the debt. Pacific Fire Insurance Co. v. L. A. D. Motors Corp., 136 Misc. 594, 240 N. Y. Supp. 372 (City Ct. 1930); ARANT, SURETYSHIP (1931) § 222.

1. N. Y. TAX LAW (1935) § 351: "A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income. . . . A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined except as hereinbefore provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state." N. Y. TAX LAW (1920) § 351a: "The tax provided for in section three hundred and fifty-one . . . is hereby reimposed with respect to the taxable income for the calendar year 1919 and for any taxable year ending during the year 1919 and for each year thereafter. . . ."

protested the tax, claiming the seat was not used for trading purposes and further that he was a non-resident; that the tax is extraterritorial and therefore unconstitutional since it contravenes the 14th amendment of the Federal Constitution. *Held,* the State of New York had jurisdiction to tax such profits as income since the dominant features of the membership were by its very nature localized at the Exchange. *People of New York* ex rel. *Whitney v. Graves,* 57 Sup. Ct. 237 (1937).

Once more the problem of determining which state shall have the right to tax stock exchange memberships and profits derived therefrom has been placed before the Supreme Court. Being in its very nature intangible personalty, the question of where the membership shall be localized for taxation purposes has led to the decisions which on their face appear to be in conflict. The Court, in the past, has held that the owner of such a "seat" might be taxed at his domicile.[2] It has also given the right to tax to the state within which the exchange is located.[3] However, since the Court did not sustain either tax to the exclusion of the other, the possibility of two jurisdictions taxing the same interest presented itself.

This might appear to be in opposition to a recent line of decisions[4] in which the Court scored double taxation and expressed itself in favor of a single tax per economic interest. But it must be remembered that this Court, in its treatment of taxes on income[5] and intangibles which have attained a "business situs,"[6] has apparently overlooked the possibilities of multiple taxation in its desire to attain equitable results. It would seem, therefore, that the stock exchange membership represents another instance of the situation in which the Court has cast aside its dread of multiple taxation.

In its endeavor to bring about a uniform and single tax upon intangibles[7] the Court has in the past resurrected the fiction of *mobilia sequuntur personam* which fixed the situs of intangibles, for tax purposes, at the domicile of the creditor.[8] This has been qualified, however, to the extent that when intangibles have acquired a "business situs" outside the state in which the creditor was domiciled, such other

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2. Citizens' Bank v. Durr, 257 U. S. 99 (1921).

3. Rogers v. Hennepin County, 240 U. S. 184 (1916). See Rottschaefer, *State Jurisdiction to Impose Taxes* (1933) 42 YALE L. J. 305, 326.

4. Safe Deposit Co. v. Virginia, 280 U. S. 83 (1929); Farmers' Loan Co. v. Minnesota, 280 U. S. 204 (1929); Baldwin v. Missouri, 281 U. S. 586 (1930); Beidler v. South Carolina, 282 U. S. 1 (1930); First National Bank v. Maine, 284 U. S. 312 (1932); Senior v. Braden, 295 U. S. 422 (1935).

5. In Lawrence v. State Tax Commission, 286 U. S. 276 (1932), a tax on income derived from without the state, was upheld on the basis of domicile alone. In Shaffer v. Carter, 252 U. S. 37 (1919) it was held that a state had a right to tax income which arose within its border, even though owner was a non-resident. See (1937) 6 FORDHAM L. REV. 143.

6. New Orleans v. Stempel, 175 U. S. 309 (1899); Bristol v. Washington County, 177 U. S. 133 (1900); Board of Assessors v. Compton, 191 U. S. 388 (1903); Metropolitan Life Ins. Co. v. New Orleans, 205 U. S. 395 (1907); Liverpool & L. & G. v. Board of Assessors, 221 U. S. 346 (1911).

7. "We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation accorded to tangibles." Farmers' Loan Co. v. Minnesota, 280 U. S. 204, 212 (1929).

8. State Tax on Foreign-Held Bonds, 82 U. S. 300 (1872); Kirtland v. Hotchkiss, 100 U. S. 491 (1879); Blodgett v. Silverman, 277 U. S. 1 (1927); Farmers' Loan Co. v. Minnesota, 280 U. S. 204 (1929); Baldwin v. Missouri, 281 U. S. 586 (1930).

state has the right to tax. The Court has held that where intangibles and credits are used in a continuous course of business within a given state, the owner being without the state, these intangibles attain a situs for taxation within the jurisdiction in which they are used.[9] The basis of the theory is that the intangibles are closely related to the given state and, being aided and protected by the state's law, should contribute to the support of that government.[10] Under this concept of "business situs" it might appear that there was merit in the plaintiff's contention in the instant case; that since there had been no actual usage of membership rights on the floor of the Exchange, plus non-residence, no "business situs" arose. However, it must be kept in mind that the concept of "business situs" is not static. This is exemplified by the recent case of *Wheeling Steel Corp. v. Fox.*[11] In the prior cases upholding a "business situs," the non-resident creditor, having its central offices without the state, used intangibles in a continuous course of business in the taxing state wherein the debtor resided.[12] In the *Wheeling Steel* case, however, the general business offices and commercial domicile of the corporation were in West Virginia and the credits arose therein. The presence or absence of the debtor within that state was not considered by the Court. In upholding the West Virginia tax on credits arising in the course of business of a corporation within that state, the Court said: "To attribute to Delaware, as the chartering State, the credits arising in the course of a business established in another State, and to deny the latter the power to tax such credits . . . is to make a legal fiction dominate realities. . . ."[13]

A stock exchange membership is a peculiar species of intangible personalty which confers many privileges on its owner. It gives a personal right to transact business on the exchange, a property right in the membership or its value, and an interest in the exchanges gratuity or insurance fund.[14] The exercise of these privileges by the member must, however, always be in accordance with, and in subjection to the constitution, by-laws, and rules of the Exchange.[15] A transfer of the membership

9. See note 6, *supra.*

10. "Persons are not permitted to avail themselves for their benefit of the laws of a State in the conduct of business within its limits and then to escape their due contribution to the public needs. . . ." Bristol v. Washington County, 177 U. S. 133, 144 (1900). "The cases are numerous . . . which recognize the right of the State, in view of the protection and remedial rights which its laws give to the owner of intangible property, such as notes and bills, to require from such property a contribution to the funds of the State, . . . for the purpose of maintaining and enforcing the laws which give force and effect to such obligations." Board of Assessors v. Comptoir National, 191 U. S. 388, 403 (1903).

11. 298 U. S. 193 (1936). For an interesting discussion of this case, see Lowndes, *The Tax Burden of the Supreme Court, 1935 Term* (1936) 5 FORDHAM L. REV. 426, 437.

12. New Orleans v. Stempel, 175 U. S. 309 (1899) (notes and mortgages in New Orleans in possession of agent there, who collected interest and principal and deposited in New Orleans bank); Bristol v. Washington County, 177 U. S. 133 (1900) (agent in Minnesota, collecting loans and making new ones while principal without state); Board of Assessors v. Compton National, 191 U. S. 388 (1903) (conducting of a loan business, with agent collecting old loans, renewing, or making new loans); Metropolitan Life Insurance Co. v. New Orleans, 205 U. S. 395 (1907) (insurance company conducting a loan-on-policy business through local agent).

13. 298 U. S. 193, 211 (1936).

14. MEYER, THE LAW OF STOCK BROKERS AND STOCK EXCHANGES (1931) 75.

15. N. Y. STOCK EXCHANGE CONST. art. XII, § 5: "No person, elected to membership, shall be admitted to the privileges thereof, until he shall have signed the Constitution

may be made only with the approval of the Exchange,[16] and the provisions of the constitution, by-laws, and rules are considered parts and conditions of all Exchange contracts.[17] The Exchange constitution aims at "furnishing exchange rooms and other facilities for the convenient transaction of their business by its members. . . ."[18] Thus the Exchange is seen to be a market place in which the privilege of buying and selling by its members, must be done in compliance with the constitution and at the Exchange itself. In the instant case the plaintiff admitted transaction of business with fellow members at a reduced commission, but denied actual user himself. Admitting that the privilege of trading was exercised, whether by himself or another member, he conceded that it was utilized on the floor of the Exchange—the only place it could have been employed. That he benefited from his membership, in receiving the reduced commissions, is an obvious conclusion.

The Court brushes aside the contention of the plaintiff that because of non-user no "business situs" arose, by referring to the term "business situs" as a mere indulgence in a metaphor. It points out that the idea of localization of intangibles may grow out of the actual transactions of a localized business or may be identified with a particular place because the exercise of a right is fixed at that place. It concludes by saying that the localization in the latter case may constitute a "business situs" as clearly as the conduct of the business itself. The reasoning of the Court is sound and represents an affirmance of the *Wheeling Steel* case in that it was not thought that the presence of the debtor was a prerequisite for jurisdiction to tax. It might also be construed as a more liberal attitude toward the proposition that if intangibles come within the jurisdictions of two states, both may tax. However, this latter thought must be qualified, to an extent, by the realization that a stock exchange membership is a peculiar type of intangible and is, of its very nature, localized at the Exchange.

WILLS—LOST WILL—PRESUMPTION OF REVOCATION BY TESTATOR.—The decedent executed a will prepared by his attorney and retained the instrument in his possession. About two years thereafter, he suffered a partial paralysis of his right side which necessitated his removal to a hospital where two months later he died. While so stricken he executed a codicil to the will. After the decedent's death, a thorough search was made for the will, but it was never found. There was no evidence to indicate that he had gained possession of the will while at the hospital. *Held*, that the will and codicil should be admitted to probate, there being sufficient proof to rebut the presumption of revocation which arose when the will was last known to be in his possession and could not be found at his death. In re *Pardy's Estate*, 161 Misc. 77, 291 N. Y. Supp. 969 (Surr. Ct. 1936).

The burden of establishing revocation rests upon the party who claims that the

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of the Exchange. By such signature he pledges himself to abide by the same as though same has been or shall be from time to time amended, and by all rules, and regulations adopted pursuant to the Constitution."

16. N. Y. STOCK EXCHANGE CONST. art. XIV, § 1: "A transfer of membership may be made upon submission of the name of the candidate to the Committee on Admissions and the approval of the transfer by 2/3 of the entire committee."

17. N. Y. STOCK EXCHANGE CONST. art. XV, § 3: "The provisions of the Constitution of the Exchange and of the rules adopted pursuant thereto, shall be a part of the terms and conditions of all Exchange contracts."

18. MEYER, THE LAW OF STOCK BROKERS AND STOCK EXCHANGES (1931) 16.

will has been revoked.[1] The contestant, however, as in the instant case, is at times aided by a presumption of destruction, *animo revocandi,* which arises when a will, last known to be in the custody of the testator, cannot be found at his death.[2] It would seem that this presumption conforms with the reasonable inference to be drawn from such a set of facts.[3] Although the authorities are in conflict on the question as to whether or not the presumption is one of law[4] or of fact,[5] it is not conclusive in either case, and may be rebutted.[6] The burden of overcoming the presumption is upon the party seeking to establish the will.[7] But the question of the type and character of evidence required to overcome the presumption is attended with difficulty. A reading of the cases would indicate that a mere preponderance of the evidence would not suffice to sustain the burden. Cases have said that the proof must be adequate,[8] or competent and satisfactory,[9] or clear and satisfactory,[10] or strong, positive, and free from doubt.[11] Since even the criminal law does not see fit to require that proof necessary to convict be free from doubt,[12] it would

1. Luther v. Luther, 211 Ala. 352, 100 So. 497 (1924); Cook v. Jeffett, 169 Ark. 62, 272 S. W. 873 (1925); *In re* Olmsted's Estate, 122 Cal. 224, 54 Pac. 745 (1898); *In re* Shelton's Will, 143 N. C. 218, 55 S. E. 705 (1906). The rule, however, is *contra* in Texas by statute. TEX. REV. CIV. STAT. (Vernon, 1936) art. 3348. This statute is to the effect that the proponent must prove that the will has not been revoked.

2. Bradway v. Thompson, 139 Ark. 542, 214 S. W. 27 (1919); Leemon v. Leighton, 314 Ill. 407, 145 N. E. 631 (1924); *In re* Staiger's Will, 243 N. Y. 468, 154 N. E. 312 (1926); *In re* Weber's Estate, 268 Pa. 7, 110 Atl. 785 (1920); *In re* Oswald's Will, 172 Wis. 345, 178 N. W. 462 (1920).

The presumption of revocation does not apply where the lost will was not in the possession of the testator. *In re* Musacchio's Will, 146 Misc. 626, 262 N. Y. Supp. 616 (Surr. Ct. 1933); *In re* Miller's Will, 49 Ore. 452, 90 Pac. 1002 (1907).

3. "In general, it may be assumed that a will is kept in the custody of the testator himself, or under his control, to be changed, modified, or revoked according to his good pleasure. If, at his decease, it cannot be found, it is more reasonable to presume that he himself has destroyed his will than that some other person has committed the crime, and incurred the penalty of secreting or destroying it." Behrens v. Behrens, 47 Ohio 323, 331, 25 N. E. 209, 211 (1890).

4. See Allen v. Scruggs, 190 Ala. 654, 674, 67 So. 301, 308 (1914); Leeman v. Leighton, 314 Ill. 407, 410, 145 N. E. 631, 632 (1924); *In re* Staiger's Will, 243 N. Y. 468, 472, 154 N. E. 312, 313 (1926).

5. It has been suggested that the better view would seem to be that the presumption is one of fact. See *In re* Hedgepeth's Will, 150 N. C. 245, 251, 63 S. E. 1025, 1027 (1909) and Minkler v. Minkler, 14 Vt. 125, 127-128 (1842) where the following language is found: "No doubt we would hold, as the English Ecclesiastical Courts have done, that the mere absence of the will did prima facie amount to a revocation; but we would hold this merely as a natural presumption, as a matter of fact, and imposing the duty upon him who asserted the contrary to support his assertion by proof."

6. Allen v. Scruggs, 190 Ala. 654, 67 So. 301 (1914); Leemon v. Leighton, 314 Ill. 407, 145 N. E. 631 (1924); *In re* Hedgepeth's Will, 150 N. C. 245, 63 S. E. 1025 (1909).

7. Thomas v. Thomas, 129 Iowa 159, 105 N. W. 403 (1905); Collyer v. Collyer, 110 N. Y. 481, 18 N. E. 110 (1888); *In re* Weber's Estate, 268 Pa. 7, 110 Atl. 785 (1920).

8. See Collyer v. Collyer, 110 N. Y. 481, 486, 18 N. E. 110, 112 (1888).

9. See McMurtrey v. Koppe, 250 S. W. 399, 401 (Mo. 1923).

10. See Cole v. McClure, 88 Ohio 1, 10, 102 N. E. 264, 266 (1913).

11. See Thomas v. Thomas, 129 Iowa 159, 160, 105 N. W. 403 (1905).

12. State v. Schweitzer, 57 Conn. 532, 18 Atl. 787 (1889); State v. Kimes, 145 Iowa

seem that such a requirement in a probate proceeding, which is civil in nature, is too stringent.[13]

On the question as to whether the declarations of the testator, when not a part of the *res gestae,* are admissible to rebut the presumption, there is authority supporting the language of the case at bar to the effect that such declarations are incompetent.[14] These courts evidently have attached great importance to the dangers which attend proof of this sort, that is, the danger that declarations might be misunderstood, imperfectly remembered, or intentionally misrepresented.[15] There is, however, considerable authority holding to the effect that such declarations are to be admitted.[16] It is submitted that these declarations should be admissible under the exception to the hearsay rule, which allows in evidence, declarations indicative of a state of mind.[17] Under this exception, declarations by a deceased to the effect that she had decided to make her permanent home in another state were admitted as evidence of an intention to change her domicile from New York to New Orleans.[18] Declarations of a testator in an action to probate a lost will might be admitted not as evidence of their truth, but as evidence of intention either to revoke or to continue in effect the will—thus having a direct bearing on whether there was a destruction *animo revocandi.* Admission of such evidence would tend to mitigate the severity of the burden borne by the proponent to probate a will which was last traced to the possession of the testator and cannot be found after his death.[19]

346, 124 N. W. 164 (1910); People v. McWhorter, 93 Mich. 641, 53 N. W. 780 (1892); People v. Downs, 123 N. Y. 558, 25 N. E. 988 (1890).

13. A preponderance of evidence should suffice to overcome the presumption and especially so does this appear when it is remembered that the proponent further has the burden of proving the due execution and contents of the lost will. Cole v. McClure, 88 Ohio 1, 102 N. E. 264 (1913); *In re* Hodgson's Estate, 270 Pa. 210, 112 Atl. 778 (1921); *In re* Borrow's Will, 123 Wash. 128, 212 Pac. 149 (1923).

14. Throckmorton v. Holt, 180 U. S. 552 (1901); Leslie v. McMurty, 60 Ark. 301, 30 S. W. 33 (1895); *In re* Kennedy's Will, 167 N. Y. 163, 60 N. E. 442 (1901).

15. See 1 PAGE, WILLS (2d ed. 1928) § 778.

16. Appeal of Spencer, 77 Conn. 638, 60 Atl. 289 (1905); Holler v. Holler, 298 Ill. 418, 131 N. E. 663 (1921); *In re* Steinke's Will, 95 Wis. 121, 70 N. W. 61 (1897).

17. Mutual Life Insurance Co. v. Hillmon, 145 U. S. 285 (1892); *In re* Newcomb's Estate, 192 N. Y. 238, 84 N. E. 950 (1908); Lake Shore & M. S. Ry. Co. v. Herrick, 49 Ohio 25, 29 N. E. 1052 (1892).

18. *In re* Newcomb's Estate, 192 N. Y. 238, 84 N. E. 950 (1908).

19. See note 13, *supra.*