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Recent Decisions

RECENT DECISIONS

DECEDENT'S ESTATE—MORTGAGEE'S RIGHT OF EXONERATION—MORTGAGEE'S RIGHT TO WAIVE LIEN AND SUE ON BOND ALONE.—Appellants held a past due bond and mortgage on real property. Foreclosure was prevented by the Moratorium Laws.[1] The bond and mortgage had been assumed by William F. Burrows who died leaving an estate of which his brother, Leo Placid Burrows, was executor and sole beneficiary. Upon his executrix devolved the duty of administering both estates. Appellants attempted to waive the mortgage security and sought payment on the bond alone.[2] In the alternative, they requested the Surrogate to order, pursuant to Section 207 of the New York Surrogate's Court Act, a reservation of a sum sufficient to pay their contingent and unliquidated claim for a deficiency upon foreclosure. The surrogate forbade the attempted waiver on the ground that the realty was the primary fund for the payment of the debt. In a subsequent proceeding he adjudged the then market value[3] of the premises in question to be in excess of the amount of the bond obligation and declined to set aside from the estate assets any sum to meet a possible deficiency.[4] The Appellate Division in a *per curiam* memorandum affirmed. On appeal by permission to the Court of Appeals, *held,* one judge dissenting, the executrix must make a "reservation of sufficient moneys" to pay the appellants' contingent and unliquidated claim for a deficiency. The decree of the Surrogate and the order of the Appellate Division were reversed. *Matter of Burrows,* 283 N. Y. 540, 29 N. E. (2d) 77 (1940).[5]

In view of the unfortunate practical effect of the decision on the expeditious settlement of estates, an examination of the basis of the ruling would seem to be in order.

Prior to the application to the Surrogate's Court, the mortgagees had sued in the Supreme Court for an injunction restraining distribution of the estate assets until the expiration of the moratorium period. That action was ultimately dismissed without prejudice,[6] and the plaintiffs were referred to the Surrogate's Court as the appropriate tribunal for the presentation of their claim.

The court in dismissing the action ventured a *dictum*[7] as to the rights of the mort-

1. N. Y. CIV. PRAC. ACT § 1077 (a) *et seq.*

2. As provided for in NEW YORK SURROGATE'S COURT ACT, § 212 regulating the payment of debts of the deceased by the executor or administrator.

3. See N. Y. CIV. PRAC. ACT, §§ 1083, 1083 (a), 1083 (b) defining the procedure for the obtaining of deficiency judgments on foreclosure and fixing "the fair and reasonable market value of the mortgaged premises" or "the sale price of the property whichever shall be the higher" as the basis for determining the amount of the deficiency.

4. For earlier cases see Matter of Concklin, 150 Misc. 53, 268 N. Y. Supp. 348 (Surr. Ct. 1933), and Matter of Quintana, 158 Misc. 701, 286 N. Y. Supp. 418 (Surr. Ct. 1936), both applying a similar procedure for determining the amount to be reserved.

5. The earlier reports are: Matter of Burrows, 167 Misc. 1, 3 N. Y. S. (2d) 449 (Surr. Ct. 1938) holding that the mortgagees must foreclose their lien; Matter of Burrows, 170 Misc. 78, 9 N. Y. S. (2d) 913 (Surr. Ct. 1939) fixing the present market value of the realty as the basis for determining the amount to be reserved; Matter of Burrows, 258 App. Div. 807, 15 N. Y. S. (2d) 956 (2d Dep't 1939) affirming the final decree based on both of the above reports.

6. Prime v. Nichols, 252 App. Div. 446, 299 N. Y. Supp. 629 (2d Dep't 1937).

7. Prime v. Nichols, 252 App. Div. 446, 447, 299 N. Y. Supp. 629, 630 (2d Dep't 1937).

gagees in the Surrogate's Court. They could, said the opinion, waive their mortgage lien, refuse to foreclose and file a claim on the bond alone, as for an ordinary unsecured indebtedness. The claim would be paid on the eventual distribution of the estate. In support of this it cited *Matter of Bowes*.[8] If on the other hand, said the court, the mortgagees desire to retain their lien, they may file a contingent claim for a possible deficiency on foreclosure under Section 207 of the New York Surrogate's Court Act.[9]

However, citing Section 250 of the New York Real Property Law,[10] the Surrogate held that the mortgagees could not waive their lien;[11] they must, by foreclosing their mortgage, look first to the real property for the satisfaction of their claim. Only the deficiency upon foreclosure was to be paid from the personal estate. To this extent he has been upheld by the Appellate Division and the Court of Appeals.

Originally the personal estate was the primary fund for the payment of all of decedent's obligations. The right of the devisee or heir of encumbered realty to have the mortgagee's claim discharged out of the personal assets—commonly called the right of exoneration—was abolished by a statute which is now Section 250 of the Real Property Law.[12] This is the obvious intent of the statute. It is submitted that there were available, however, alternative methods of effectuating this intent. One

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These remarks were expressly characterized as *dicta* by the same court in Matter of Burrows, 258 App. Div. 807, 15 N. Y. S. (2d) 956 (2d Dep't 1939).

8. 164 Misc. 190, 229 N. Y. Supp. 626 (Surr. Ct. 1937).

9. The section states: ". . . Whenever at the death of any person there shall be a contingent or unliquidated claim against his estate . . . a claimant . . . shall have the right to file with the executor or administrator of the estate of the deceased . . . an affidavit setting forth the facts upon which such contingent or unliquidated liability is based and the probable amount thereof, and there shall be no distribution of the assets of said estate without the reservation of sufficient moneys to pay such contingent or unliquidated claim when the amount thereof is finally determined. . . . If such contingent or unliquidated claim has not become . . . fixed and liquidated, the decree on a final accounting shall direct that a sum sufficient to satisfy the claim, or the proportion to which it is entitled, be retained in the hands of the accounting party for such period or periods as the court may deem proper for the purpose of being applied to the payment of such claim when fixed and liquidated; and that so much of such sum as is not needed for such purpose be afterwards distributed according to law."

10. This section reads: "Mortgages and other charges on real property inherited or devised. . . . Where real property subject to a mortgage executed by any ancestor or testator . . . descends to a distributee or passes to a devisee, such distributee or devisee must satisfy and discharge the mortgage . . . out of his own property, without resorting to the executor or administrator of his ancestor or testator, unless there be an express direction in the will of such testator, that such mortgage . . . be otherwise paid."

11. Matter of Burrows, 167 Misc. 1, 3 N. Y. S. (2d) 449 (Surr. Ct. 1938); Matter of Burrows, 170 Misc. 78, 9 N. Y. S. (2d) 913 (Surr. Ct. 1939). The Surrogate distinguished Matter of Bowes, 164 Misc. 190, 229 N. Y. Supp. 626 (Surr. Ct. 1937), where a claim on the bond alone had been allowed, on the ground that there the claimant was a second mortgagee whose security had been lost by the foreclosure of a prior lien, on which there had been a deficiency. See also Weisel v. Hagdahl Realty Co. Inc., 241 App. Div. 314, 271 N. Y. Supp. 629 (2d Dep't 1934).

12. See note 10 *supra* and 3 REV. STAT. (2d ed. 1836) 600 § 5, quoted in the instant case.

method would have permitted the mortgagee to retain his right to waive the lien and sue on the bond—a right which he still possesses while his mortgagor-debtor remains alive. This has been rejected by the great weight of authority.[13] The other method—the one adopted in the cases construing the section—removed this right.

In equity, says the court, in *Hauselt v. Patterson*,[14] perhaps the leading case in support of the Court of Appeals' interpretation of Section 250, a waiver of the lien cannot be permitted, for it will operate to the prejudice of other creditors. The mortgagee, it is argued, has two funds for the satisfaction of his debt—the realty and the personal estate. Unsecured creditors must look for payment to the latter source alone. It is clearly unjust, this view holds, to permit the mortgagee to diminish this source of payment, when he can first resort to the realty. Other cases, similarly, have explicitly rested the rule of the *Hauselt* case on this equitable doctrine of marshaling of assets.[15] The contention undoubtedly has merit when the estate is insolvent. But when, as in the instant case, the personalty available is conceded to be more than ample to satisfy all claims, including that of the mortgagees, the argument is clearly inapplicable.

The abolition of the right of exoneration[16] need not, where the estate was solvent, have destroyed the mortgagee's right to waive the lien and sue on the bond alone. He might still, without violating the language of Section 250 of the Real Property Law, have been permitted to prosecute his claim to a money judgment. The section does not in terms require the mortgagee to satisfy his debt only out of the encumbered real property. Nor, it is again submitted, is such a construction a necessary inference from either the phraseology or purpose of the enactment.

One case indeed has held that the power to elect this remedy of a suit on the bond was not in fact affected and permitted the mortgagee to recover a money judgment against the heirs of the realty.[17] A further step might have been taken. Prior to distribution the mortgagee could be permitted to collect his claim from the personal assets.[18] No preference would thus be given to the heir or devisee of the realty,

13. Johnson v. Corbett, 11 Paige 265 (N. Y. 1844); Halsey v. Reed, 9 Paige 446 (N. Y. 1842); Olmstead v. Latimer, 9 App. Div. 163 (2d Dep't 1896) *modified* in 158 N. Y. 313, 53 N. E. 5 (1899); Hauselt v. Patterson, 124 N. Y. 349, 26 N. E. 937 (1891); Erwin v. Loper, 43 N. Y. 521 (1871); Rice v. Harbeson, 63 N. Y. 493 (1875); Glaucius v. Fogel, 88 N. Y. 434 (1882); Matter of Horner, 149 Misc. 695, 268 N. Y. Supp. 74 (Surr. Ct. 1933); Matter of Weissman, 140 Misc. 360, 250 N. Y. Supp. 500 (Surr. Ct. 1931); Matter of Rosenbaum, 157 Misc. 316, 283 N. Y. Supp. 519 (Surr. Ct. 1935); Matter of Perkins, 122 Misc. 593, 204 N. Y. Supp. 667 (Surr. Ct. 1924); *cf.* Cochrane v. Hawver, 54 Hun 556, 7 N. Y. Supp. 907 (1889).

14. 124 N. Y. 349, 26 N. E. 937 (1891).

15. Rice v. Harbeson, 63 N. Y. 493 (1875); Matter of Dell, 154 Misc. 216, 276 N. Y. Supp. 960 (Surr. Ct. 1935). See also Matter of Weissman, 140 Misc. 360, 250 N. Y. Supp. 500 (Surr. Ct. 1931); Matter of Rosenbaum, 157 Misc. 316, 283 N. Y. Supp. 519 (Surr. Ct. 1935).

16. For a discussion of the common law rule see 72 A. L. R. 709 (1931); 120 A. L. R. 577 (1937).

17. Roosevelt v. Carpenter, 28 Barb. 426 (N. Y. 1858).

18. In Darr v. Thomas, 127 Mo. App. 1, 106 S. W. 95 (1907), a statute providing explicitly that a mortgagee shall not be entitled to payment out of the estate assets until his security has been exhausted was held not to bar an administratrix from paying his claim out of the personal estate, when the rights of unsecured creditors were not thereby

since logically the estate representative would then be subrogated to the mortgagee's rights as creditor and said representative could demand from the heirs or devisees of the realty subject to the mortgage, the amount of his payment, at least to the extent of the value of the realty.

Neither Section 250 nor its predecessor statutes are, to repeat, in terms applicable to a mortgagee. There is on the face of the statute no reason to suppose that the traditional right of the creditor to waive the mortgage security and to sue on the bond has been impaired in any way. It has nevertheless been so construed. One of the remedies available to the mortgagee while his debtor remains alive is thus eliminated on the latter's demise. A single remedy remains thereafter—foreclosure of the lien on the realty. Even this remedy has been suspended in many cases, including the present one, by the operation of the Moratorium statutes. Even when foreclosure is permissible the creditor may now look to the personal estate only for payment of his deficiency judgment.

Given, however, the interpretation of Section 250, long since established, it is difficult on practical grounds to support the holding of *Matter of Burrows*. In holding that a reserve must be made the opinion of the majority lays great stress upon the phrase "finally determined" in Section 207 of the Surrogate's Court Act. There could, said the court, be no *final* determination of the mortgagee's claim for a deficiency until a foreclosure. Until that time, a reservation of "sufficient moneys" to meet it was mandatory under the statute. The Surrogate may not determine the amount to be set aside on the basis of the *present* market value of the realty.

The practical import of the reversal is not quite clear. Apparently the Surrogate will be compelled to withdraw from the assets of the mortgagor's estate on distribution an amount equal to the entire indebtedness, the theoretic maximum of the deficiency. The unfortunate effect of the decision on the expeditious settlement of estates during the moratorium period hardly requires comment. The wheels of justice will be yet further slowed. To be sure the moratorium is scheduled to expire on July 1, 1941.[19] But thus far it has been extended four years beyond its original date of expiration. The possibility of further extension cannot be excluded.

The court in the instant case, however, obviously felt itself bound by the language of the statute itself, Section 207 of the Surrogate's Court Act. It has more than once reminded litigants that arguments of policy are to be addressed to the legislature. Conceding this point, the situation is plainly one which calls for an amendment of the statute.

In cases decided heretofore,[20] the Surrogate has calculated the amount to be set aside in terms of the then existing market value of the premises. The decree founded on this procedure in the instant case has been reversed. Examination of the former rulings will reveal that great emphasis is placed on the creditor's right to pursue the distributed assets, under Section 170 of the Decedent Estate Law, should the failure

unfavorably affected. *Contra,* Gates v. Rice, 320 Mo. 580, 8 S. W. (2d) 614 (1928); Hannibal Trust Co. v. Elzea, 315 Mo. 485, 286 S. W. 371 (1926), both in accord with the New York rule of Hauselt v. Patterson, 124 N. Y. 349, 26 N. E. 937 (1891). Similarly, Swetland v. Swetland, 100 N. J. Eq. 196, 134 Atl. 822 (1926) *aff'd* 102 N. J. Eq. 294, 140 Atl. 279 (1928) is explicitly in accord with the New York construction.

19. N. Y. Civ. Prac. Act § 1077 (g).

20. Matter of Quintana, 158 Misc. 701, 286 N. Y. Supp. 418 (Surr. Ct. 1936); Matter of Concklin, 150 Misc. 53, 268 N. Y. Supp. 348 (Surr. Ct. 1933). See also, Matter of Horner, 149 Misc. 695, 268 N. Y. Supp. 74 (Surr. Ct. 1933).

to make a reserve prove prejudicial. Here the legatees are non-residents and such a remedy might prove difficult and expensive to enforce. Should this ground of distinction be taken in later cases, *Matter of Burrows* may be limited to its precise facts and applied only where the personalty is to be distributed to beneficiaries outside the State of New York.

DOMESTIC RELATIONS—FOREIGN DECREES—AUTHORITY TO QUESTION AUTHENTICITY OF RESIDENCE.—A wife domiciled in New York secured a Nevada decree of divorce in 1934, her husband voluntarily appearing at the trial through an attorney. In 1937 she married a citizen of California. This marriage was annulled in the California court on complaint of her second husband on the ground that she had a husband living at the time of the marriage from whom she was not divorced. On appeal by wife from a judgment of the superior court, *held,* the residence of the wife in Nevada was not *bona fide.* She was a mere sojourner within the state and therefore the decree was not entitled to full faith and credit as a matter of law or comity. *Brill v. Brill,* 38 Cal. App. (2d) 741, 102 P. (2d) 534 (1940).

Under the rule of *Haddock v. Haddock*[1] decrees of divorce granted by sister states entitled to recognition under the full faith and credit clause of the United States Constitution were divided into three classifications, 1) where both parties are domiciled in the state granting the divorce,[2] 2) where one party is domiciled in the state of the matrimonial domicile and he or she procures a divorce there whether on personal or substituted service,[3] 3) where one party is domiciled or resides in the state granting the decree with personal service on the defendant or an appearance on his part.[4] The case at bar seems at first glance to fall under the third category. But it must first be clear that the wife was a *bona fide* resident[5] of the state of

1. 201 U. S. 562 (1906). It was held that the New York courts could, without infringing the Constitution, refuse recognition to a Connecticut decree of divorce granted at the domicile of the husband, which was not the matrimonial domicile, the wife being domiciled in New York and served only by publication.

2. Haddock v. Haddock, 201 U. S. 562, 570 (1906).

3. Atherton v. Atherton, 181 U. S. 155, 171 (1901), cited in Haddock v. Haddock, note 2 *supra,* at 571. *Accord*: Thompson v. Thompson, 226 U. S. 551 (1913). See also, Parks, *Some Problems in Jurisdiction to Divorce* (1929) 13 MINN. L. REV. 525. RESTATEMENT, CONFLICT OF LAWS (1934) § 113, Comment a: "A state can exercise through its courts jurisdiction to dissolve the marriage of spouses of whom one is domiciled within the state and the other is domiciled outside the state if the state is the last state in which the spouses were domiciled together as man and wife."

4. See Cheevers v. Wilson, 76 U. S. 108 (1869), cited in Haddock v. Haddock, note 2 *supra.* See annotations in 39 A. L. R. 603; 86 A. L. R. 1329; 105 A. L. R. 817. RESTATEMENT, CONFLICT OF LAWS (1934) § 113, Comment a: "A state can exercise through its courts jurisdiction to dissolve the marriage of spouses of whom one is domiciled within the state and the other is domiciled outside the state if the spouse who is not domiciled in the state is personally subject to the jurisdiction of the state which grants the divorce."

5. A state may reopen the question of domicile in a divorce action on the jurisdictional ground that the libellant is not truly domiciled in the divorce forum. See Walker v. Walker, 45 Nev. 105, 198 Pac. 433 (1921); Kegley v. Kegley, 16 Cal. App. (2d) 216, 60 P. (2d) 482 (1936); Latterner v. Latterner, 51 Nev. 285, 274 Pac. 194 (1929). It is

Nevada according to its laws. The principal case raises the question whether a court which is asked to recognize the decree of a sister state has the right to look into the record on the question of residence to ascertain whether a valid domicile was established or must it follow and adopt the decision of the sister state on this question. Although the Nevada court was satisfied that the woman in the case had fulfilled the residence requirements, the California court rejected its decision.

It is well settled in California that it is always competent to collaterally attack a decree of divorce rendered in another state by extrinsic evidence showing that the court procuring it did not have jurisdiction over either of the parties or of the subject matter. Thus the decree may be attacked on the ground that the court of the divorce forum had no jurisdiction because the petitioning party was not a *bona fide* resident of that state or that the alleged resident had not complied with the law of the sister state,[6] and this is so even though the defendant voluntarily appeared or is personally served within that state.[7] The justification for looking into the residence of the party procuring the divorce after the sister state has adjudicated upon it is that the community has an interest in the marriage and its continuance or dissolution. This flows from the theory that marriage is tripartite in character in that it vitally concerns the interest of the state as well as that of the contracting parties.[8] It is contended by the California courts that a jurisdictional defect in divorce cases is not cured by the appearance of the parties at the divorce forum since this appearance merely supplies jurisdiction over the persons but not over the subject matter.

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interesting to note that Andrews v. Andrews, 188 U. S. 14 (1903), approved a statute of the State of Massachusetts providing that if a citizen goes into another state of the country to obtain a divorce for a cause which occurred while the parties resided here or for a cause which would not authorize a divorce by the laws of this Commonwealth a divorce so obtained shall be of no force or effect in the Commonwealth. This decision seems to go further than the statute in that it applies the rule to persons who are not citizens of its state.

6. Delancy v. Delancy, 216 Cal. 27, 13 P. (2d) 719 (1932); Warren v. Warren, 127 Cal. App. 231, 15 P. (2d) 556 (1932). These cases hold in effect that where neither party to the action is domiciled in the state granting the divorce the court has no jurisdiction over the subject matter. See Ryder v. Ryder, 2 Cal. App. (2d) 426, 37 P. (2d) 1069 (1935); Howard v. Adams, 37 Cal. App. (2d) 122, 98 P. (2d) 1051 (1940), for a holding that the parties cannot confer jurisdiction on the court of divorce forum by consent. RESTATEMENT, CONFLICT OF LAWS (1934) § 111: "A state cannot exercise through its courts jurisdiction to dissolve a marriage when neither spouse is domiciled within the state." *Cf.* Gould v. Gould, 235 N. Y. 14, 138 N. E. 490 (1923).

7. Anthony v. Tarpley, 45 Cal. App. 72, 187 Pac. 779 (1919). In this case a resident of California went to Oregon. She remained there only for the purpose of obtaining a divorce with the intention of returning after the divorce had been granted. The husband appeared and defended the suit. The California court impeached the judgment, the residence not being *bona fide*. To the same effect are, *In re* McNutt, 36 Cal. App. (2d) 625, 98 P. (2d) 253 (1940); *In re* Davis, 38 Cal. App. (2d) 579, 101 P. (2d) 761 (1940); *In re* Bruneman, 32 Cal. App. (2d) 606, 90 P. (2d) 323 (1940).

8. See cases cited in notes 7 and 8 *supra*. Dean v. Dean, 241 N. Y. 240, 149 N. E. 844 (1925), recognized the status theory of marriage. To the same effect see Litowitch v. Litowitch, 19 Kan. 451, 27 Am. Rep. 145 (1878); Perkins v. Perkins, 225 Mass. 82, 113 N. E. 841 (1916); Dayette v. Dayette, 92 Vt. 305, 104 Atl. 232 (1918); Sure v. Landsfelt, 82 Wis. 346, 52 N. W. 308 (1892). See also 1 BEALE, CONFLICT OF LAWS (1935) § 111.1.

On this point the New York courts seem to differ in viewpoint with California. The case of *Glaser v. Glaser*[9] in conjunction with others serves to illustrate the disparity. It presented squarely to the New York Court of Appeals the same question that arose in *Brill v. Brill,* namely whether the *bona fide* quality of the residence should be reviewed by the court or treated as *res judicata.* New York in the exercise of its own public policy replied that the foreign decree could not be collaterally attacked on the ground of the defective domicile of the libellant at the divorce forum. Its theory is that since both parties appeared in the foreign state and submitted the essential facts to such courts with respect to the residence of parties, such joint appearance confers jurisdiction over the matrimonial res.

The decision of *Krause v. Krause,*[10] recently handed down in New York seems to follow the trend of the *Galser* case. There no longer seems to be a demand that foreign decrees not measuring up to our standards must be rejected. This is evidenced by the fact that a decree of divorce of Nevada was indirectly given effect

9. 276 N. Y. 296, 12 N. E. (2d) 305 (1938). Plaintiff and defendant were married in New York and resided there for many years. The defendant husband after becoming a resident of Nevada brought an action for divorce against his wife who appeared by attorney. New York refused to permit a collateral attack on the decree on the ground that the residence was not *bona fide.* Since both parties were present at the judicial proceeding and since the Nevada courts found residence "according to their laws" the decree was conclusive of the rights of the parties. In coming to this conclusion the New York court based its decision on Hess v. Hess, 276 N. Y. 16, 12 N. E. (2d) 170 (1937); Ansorge v. Armour, 267 N. Y. 492, 196 N. E. 546 (1935); Pearson v. Pearson, 230 N. Y. 141, 129 N. E. 886 (1920); Teidman v. Teidman, 225 N. Y. 709, 122 N. E. 892 (1919). It would seem that none of these decisions are based upon estoppel but rather on the theory that the appearance of the defendant confers jurisdiction when the plaintiff is a resident of the foreign divorce forum. Moreover it would seem that under the last mentioned decision the New York courts would not question the libellant's domicile when the libellee has appeared at the proceedings. It must be noted that the New York Court of Appeals did not explicitly say that this decision was required of them under the full faith and credit clause, and decision of Haddock v. Haddock, note 2 *supra.* The court placed emphasis on public policy and previous decisions.

For a complete discussion of Glaser v. Glaser, *supra,* see Howe, *The Recognition of Foreign Divorce Decrees in N. Y. State* (1940) 40 COL. L. REV. 373; (1938) 7 FORDHAM L. REV. 258; (1937) 22 MINN. L. REV. 880. *Cf.* Fairchild v. Fairchild, 53 N. J. Eq. 678, 34 Atl. 10 (1895).

10. Krause v. Krause, 282 N. Y. 355, 26 N. E. (2d) 290 (1940). Plaintiff sued her husband in New York for a legal separation. The defendant husband pleaded as a defence that his marriage with the plaintiff was void because of his incapacity. It appeared that he had been previously married and that while retaining his residence in New York had gone to Nevada and obtained a decree of divorce on constructive service. He subsequently married the plaintiff and lived with her for six years. The question before the court was the validity of the defence, *held,* invalid. Although the divorce obtained by the defendant in Nevada is unquestionably invalid in New York the defendant is precluded from questioning its validity. It is not open to the defendant in these proceedings to avoid the responsibilities which he voluntarily incurred. See, Kane, *Recognition of Foreign Divorce Decrees in New York—Krause v. Krause* (1940) 9 FORDHAM L. REV. 242. *Cf.* Anderson v. Anderson, 7 Cal. App. (2d) 265, 60 P. (2d) 290 (1936); Sullivan v. Sullivan, 219 Cal. 734, 28 P. (2d) 914 (1934).

although both parties continued to be residents of New York and the defendant in the Nevada action did not appear and was not personally served.

The decision in *Davis v. Davis*[11] while difficult to reconcile with other Federal authorities seems to support the decision of the New York Courts in *Glaser v. Glaser* to some degree. It treats the question as *res judicata* where both parties appear and litigate the issue despite the fact that the defendant alleged that she appeared "specially". It would seem then that New York presents a view of the present law more in accord with the ultimate authority, the United States Supreme Court.

The state should take an interest in the marital affairs of its citizens. Perhaps this interest should be confined to the occasions when they are unable to protect themselves as when they are served by publication. But when both parties appear at the court of the divorce forum, each is capable of safeguarding his rights. However it must be noted that the New York view fails to give a continuing effect to the fact that a marriage is a tripartite bargain in which the state is an interested party. Under the rule of *Glaser v. Glaser,* the state withdraws its right to intervene merely because the libellee elected to enter an appearance in a foreign divorce, and usually does not contest further the issue and thereby locks the door on New York reopening the question later.

The New York view has a tendency to facilitate the recognition of foreign decrees. Is such a result to be desired from the moral standpoint? We believe not. Divorce is a moral evil and as such should be curbed rather than fostered.

LANDLORD AND TENANT—INDEFINITE TERM—NOTICE TO QUIT.—The landlord brought an action to recover rent claimed to be due in advance for the month of November. The tenant paid rent for October in advance but did not give notice of his intention to leave at the end of the month. The landlord's agent testified that the tenant was a "month to month tenant" and had "no lease." On appeal from a judgment in favor of the landlord, *held,* there was no obligation on the part of the "month to month" tenant to give notice to terminate the tenancy. *T.I.B. Corporation v. Repetto,* 19 N. Y. S. (2d) 691 (Sup. Ct. 1940), reargument of appeal denied. 174 Misc. 501, 20 N. Y. S. (2d) 744.

Understanding this case presents some difficulty because of the tendency of the

11. Davis v. Davis, 305 U. S. 32 (1938). A Virginia divorce decree granted on the petition of the husband must be given full faith and credit when his wife, a resident of the District of Columbia, litigated the question in issue despite the fact that she claimed to have appeared specially. See, (1939) 52 HARV. L. REV. 683; (1939) 87 U. OF PA. L. REV. 346; (1939) 27 GEO. L. J. 227. In Andrews v. Andrews, 188 U. S. 14 (1903), the court said: "'We think it clear that the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution . . . and notwithstanding the averments contained in the record of the judgment itself.'" For similar holdings in other jurisdictions see Gildersleeve v. Gildersleeve, 88 Conn. 689, 92 Atl. 684 (1914), which holds that mere physical presence in a state does not constitute such residence or domicile as will confer jurisdiction. See also, Durden v. Durden, 184 Ga. 421, 191 S. E. 455 (1937); Langewold v. Langewold, 234 Mass. 269, 125 N. E. 566 (1920); Durham v. Durham, 162 Ill. 589, 44 N. E. 841 (1896); Gregory v. Gregory, 78 Me. 187, 3 Atl. 280 (1886).

courts to use the term, "month to month" tenancy, interchangeably with the term, "monthly" tenancy,[1] and because the term "month to month" may refer to a particular periodic tenancy. A periodic tenancy has been defined as follows: "An estate from period to period is an estate which will continue for successive periods of a year, or successive periods of a fraction of a year, unless it is terminated."[2]

For present purposes the periodic tenancies may be limited to two categories: 1. Where the parties expressly[3] or impliedly[4] create a tenancy to run for the successive periodic unit. Such a tenancy is an indefinite term tenancy requiring notice to quit;[5] 2. Where there is a valid lease for a definite term but a holdover takes place and the tenant continues to occupy the premises[6] with the consent of the landlord.[7] Such a tenancy, by the New York rule, is a definite term tenancy and consequently does not require notice to quit.[8]

In contrast to the periodic tenancy from "month to month" there is the "monthly" tenancy which is a specific tenancy for one month and consequently does not require notice to quit.[9] All indefinite term tenancies except a life tenancy, a tenancy at will, or sufferance,[10] may be terminated only after notice to quit.[11] All definite term tenancies may be terminated without notice.[12] The fundamental question here raised is which one of these three tenancies did the court have in mind. The Appellate Term seems to hold it to be a definite tenancy, and that therefore a "month to

1. The terms "yearly," "monthly," and "weekly" are sometimes taken to mean from period to period. See Miller v. Lowe, 86 N. Y. Supp. 16 (Sup. Ct. 1904); Boyar v. Wallenberg, 132 Misc. 116, 117, 228 N. Y. Supp. 358, 359 (Ct. Ct. 1928); Queen Club Gardens Estates v. Bignell, L. R. [1924] 1 K. B. 117.

2. RESTATEMENT, PROPERTY (1936) § 20.

3. Hoffman v. Van Allen, 3 Misc. 99, 22 N. Y. Supp. 369 (Com. Pl. 1893).

4. Reece & Treece v. A. G. Leslie & Co., 105 Ark. 127, 150 S. W. 579 (1912).

5. J. H. Schneider & Co. v. Amendola, 113 N. Y. Supp. 517 (Sup. Ct. 1908); O'Brien v. Clement, 160 N. Y. Supp. 975, 977 (Sup. Ct. 1916); Reece & Treece v. A. G. Leslie & Co., 105 Ark. 127, 150 S. W. 579 (1912).

6. Gibbons v. Dayton, 4 Hun 451 (N. Y. 1875). In Kennedy v. City of New York, 196 N. Y. 19, 25, 89 N. E. 360, 362 (1909), the court said, "Upon principle and authority we conclude that *a tenancy from year to year* (italics supplied), created by the tenant's holding over after the expiration of his original term, is a new term for each year of such holding over, upon the terms of the original lease so far as they are applicable to the new relation."

7. But in New York City the consent of the landlord is not necessary because, by statute a monthly tenant and a tenant from month to month has the right to a thirty day notice in writing before he can be treated as a holdover tenant. N. Y. REAL PROPERTY LAW § 232a (1939).

8. See note 6 *supra.*

9. Hand v. Knaul, 116 Misc. 714, 191 N. Y. Supp. 667 (Co. Ct. 1921). 2 THOMPSON, REAL PROPERTY 785 (1924). In such a tenancy there is no need to protect one party from the arbitrary action of the other in suddenly terminating the tenancy because it is known in advance when the tenancy will expire.

10. Even in a tenancy at will or sufferance the *landlord* is by statute to give thirty days notice to the tenant. N. Y. REAL PROPERTY LAW § 228.

11. See Garner v. Hannah, 13 N. Y. Super. Ct. 262, 270 (1857); 2 THOMPSON, REAL PROPERTY (1924) § 781 *et seq.*

12. See note 9 *supra.*

month" tenancy is for a definite term.[13] Is there precedent for this proposition? In all the cases investigated the term "month to month", when not misused,[14] refers to a periodic tenancy. There is no well-analysed precedent for applying the designation "month to month" to a definite term except in the case of tenancies created by a holding over after a definite term.

Hence, if this decision is not to be considered as unprecedented, one of two conclusions must be selected. It may be concluded that this court was using the term "month to month" in the same sense as other courts have used the term "monthly". This court is not the only one that has used the terms interchangeably.[15] Such perpetuation of confusion in terms of common use is unfortunate. But, in spite of the possible misuse of the terms, there seems to be little basis for holding that there was a "monthly" tenancy because it was stated herein that there was "no lease" at all, let alone one for a definite term ending at the date the tenant vacated the premises. Again it may be concluded that the court is using the term "month to month" to indicate that there was originally a definite term and thereafter a holding over by the tenant. If such were the case then the tenant under the New York rule[16] would hold for the definite term of one month because he remained in possession beyond the original term. For this result, it must be shown that there was a stated tenancy for one month when the tenant first went into possession of the premises. This does not seem to be the fact in the instant case. The only facts given would seem to indicate that the defendant had been a "month to month" tenant, *i.e.* for an indefinite term. It is true that payment of rent in advance has sometimes been offered as proof that a tenancy is in reality for a definite term,[17] but this theory although receiving some judicial sanction has generally been discarded.[18] Therefore

13. In the last paragraph of its opinion the court distinguished "indefinite hirings." T.I.B. Corporation v. Repetto, 174 Misc. 501, 503, 20 N. Y. S. (2d) 744, 746 (Sup. Ct. 1940).

A tenant for no fixed period is as much an indefinite term tenant as the tenant who has a lease in which the term "month to month" is expressly used. WALSH, REAL PROPERTY (2d ed. 1927) 256.

14. The proper use of the term "month to month" tenancy is indicated in: J. H. Schneider & Co. v. Amendola, 113 N. Y. Supp. 517 (Sup. Ct. 1908); Witherbee, Sherman & Co. v. Wykes, 159 App. Div. 24, 143 N. Y. Supp. 1067 (3d Dep't 1913); Hand v. Knaul, 116 Misc. 714, 191 N. Y. Supp. 667, 669 (Co. Ct. 1921); Davis v. Jones, 6 N. Y. S. (2d) 963 (Ct. Ct. 1938).

15. See note 1 *supra.*

16. See note 6 *supra.*

17. See Ludington v. Garlock, 9 N. Y. Supp. 24, 25 (Sup. Ct. 1890). In Gilfoyle v. Cahill, 18 Misc. 68, 71-73, 41 N. Y. Supp. 29, 31-32 (Sup. Ct. 1896), Judge McAdam in a concurring opinion held that a definite term tenancy existed. One of the facts of the case was that rent was payable in advance. In Hand v. Knaul, note 2 *supra,* Judge Senn follows the *dictum* of Ludington v. Garlock, *supra,* and distinguished Thomson v. Chick, note 6 *supra,* and Hungerford v. Wagoner, 5 App. Div. 590, 39 N. Y. Supp. 369 (1896), from the Ludington case in that in the latter case the rent was payable in advance.

18. Mandel v. Koerner, 90 Misc. 9, 152 N. Y. Supp. 847 (Sup. Ct. 1915) (in an indefinite term lease the requirement was that rent be paid in advance); Geiger v. Braun, 6 Daly 506 (N. Y. Com. Pl. 1876) (where an oral lease was void under the statute of frauds court held that an indefinite tenancy existed despite the fact that there was an agreement to pay rent in advance); Wilson v. Taylor, 8 Daly (N. Y. Com. Pl. 1879) (the court held an

it seems that the tenant had been in occupancy of the property for an indefinite period.

The court seems to indicate[19] that it does not need to distinguish between "month to month" and "monthly" tenancy or between "year to year"[20] and "yearly" tenancy. However, all the cases cited by it deal with hold-over tenancies in which the courts have carelessly used the terms, "month to month" and "year to year" to refer to definite term tenancies.[21] If the court intended to point out that there is no distinction between an indefinite and a definite term in the matter of notice to quit it is in error. Assuming that this is, as we believe, an indefinite tenancy, the trial court seems to have been correct in requiring the tenant to give thirty days notice to quit.[22]

MUNICIPAL CORPORATIONS—EXAMINATIONS BEFORE TRIAL.—In actions against the City of Albany to recover damages for personal injuries alleged to have been sustained because of the defendant's negligence, an order was made at Special Term and affirmed in the Appellate Division, directing defendant's officers to submit to examination before trial. On appeal, *held*, a municipal corporation may not be examined before trial. Order reversed. *Kasitch v. City of Albany* and *Czyzewski v. City of Albany*, 283 N. Y. 622, 28 N. E. (2d) 30 (1940).

The Appellate Division,[1] one justice dissenting, in the principal case permitted the examination because it feared "grave injustice and grievious wrong" if the examination was denied. For authority it placed reliance on *Brand v. Butts*,[2] *Breault v. Embossing*

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indefinite term tenancy existed even though one of the important facts was that rent was payable in advance).

Marcus, *Periodic Tenancies* (1938) 7 FORDHAM L. REV. 167, 174, note 40, points out that if the fact of payment of rent in advance were sufficient to indicate a definite term tenancy there would be very few indefinite term tenancies today since rent is usually paid in advance.

19. The court says, "As a yearly tenant or tenant from year to year many vacate the premises at the end of any year without prior notice, so a monthly tenant or tenant from month to month may surrender at the end of any month without noice." T.I.B. Corporation v. Repetto, 174 Misc. 501, 502, 20 N. Y. S. (2d) 744, 745.

20. A "year to year" tenancy in contradistinction to a "yearly" tenancy is an indefinite term tenancy and requires one half year's notice to quit. Jackson v. Bryan, 1 John 322 (N. Y. Sup. Ct. 1806).

21. See note 6 *supra*.

22. However the trial court was in error for requiring the notice to be in writing. Under N. Y. REAL PROPERTY LAW § 232a, the obligation to give thirty days written notice to terminate the monthly, or month to month tenancy in New York City rests solely on the landlord. Ertischek v. Blanco, 173 Misc. 153, 17 N. Y. S. (2d) 719 (1940).

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1. Kasitch v. City of Albany and Czyzewski v. City of Albany, 259 App. Div. 17, 18 N. Y. S. (2d) 140 (3d Dep't 1940).

2. 242 App. Div. 149, 273 N. Y. Supp. 181 (3d Dep't 1934), where in an action against the parents of his wife for alienation of his wife's affections, the plaintiff was permitted to examine the defendants before trial.

Co. Inc.[3] and *Weinberg v. City of Troy.*[4] In neither of the first two cases was the precise point of the principal case involved. The actions were against individual defendants and not against municipal corporations. They merely restated the rule that an examination before trial should not be denied on technical grounds when it is necessary or useful in establishing a plaintiff's cause of action or a defendant's affirmative defense. The third case, *Weinberg v. City of Troy,* had been decided only one year before by the same court. This previous decision was said to compel the ruling of the Appellate Division. However, the previous decision itself does not seem to have been in accordance with prior New York law. The doctrine of immunity of municipalities from examination before trial originated in *Uvalde v. City of New York.*[5] Prior to this case the precise question of the right to examine a municipal corporation had not been passed upon in New York and the court cited as the only precedent *Linehan v. Cambridge,* a Massachusetts case.[6] *Davidson v. City of New York*[7] and *Bush Terminal Co. v. City of New York*[8] are to the same effect. It is well to note that these cases were only memorandum decisions of the Court of Appeals. And while it is true that these prior cases might have warned the Appellate Division of the impending reversal by the Court of Appeals of their decision, their weight was, at least, open to question.[9]

Evidently not convinced themselves that the principle of *stare decisis* sustained their decision the majority of the Appellate Division sought to distinguish the instant case from the *Uvalde Co.* and *Davidson* and *Bush* cases. They stated: 1) that these cases were decided under the Code of Civil Procedure and that the instant case was covered by the Civil Practice Act[10] which is a more comprehensive statute; 2) that, whereas under the Code of Civil Procedure only "officers and directors" of a corporation could be examined, under the Civil Practice Act, examination of a corporation through any "employee" is permitted; 3) that in the *Davidson* and *Uvalde* cases the information could have been secured by the applicant in another way,[11] and in the *Bush*

3. 253 App. Div. 175, 1 N. Y. S. (2d) 595 (3d Dep't 1938). Examination of plaintiff before trial was permitted in an action for injuries sustained while repairing the wall of defendant's premises.

4. 256 App. Div. 1028, 11 N. Y. S. (2d) 670 (3d Dep't 1939); leave to appeal denied to the municipality, 257 App. Div. 1062, 14 N. Y. S. (2d) 286 (3d Dep't 1939).

5. 149 App. Div. 491, 134 N. Y. Supp. 50 (1st Dep't 1912). This case is the foundation of the later cases on the point. It held that the Code of Civil Procedure, § 870 *et seq.,* relating to examinations of a party before trial did not apply to municipal corporations. The applicant sought to inspect the records in the office of the Bronx Borough President showing permits to occupy, open or disturb the surface of a specified street.

6. 109 Mass. 212 (1872).

7. 221 N. Y. 487, 116 N. E. 1042 (1917), involving an application to review an assessment of real property. Examination of the defendant was denied.

8. 259 N. Y. 509, 182 N. E. 158 (1932) decided on the authority of the Davidson Case. The Court of Appeals reversed another decision of an Appellate Division court, this time the Second Department. See also, Cooper v. Village of Brockport, 246 App. Div. 571, 282 N. Y. Supp. 839 (4th Dep't 1935); Greenberg v. N. Y. City, 235 App. Div. 788 (1st Dep't 1935); Pardee v. Mutual Benefit Life Ins. Co., 238 App. Div. 294, 265 N. Y. Supp. 837 (4th Dep't 1933).

9. Marcus, *Affirmance Without Opinion* (1937) 6 FORDHAM L. REV. 212.

10. The sections in point are CODE CIV. PROC. § 870 *et seq.* and CIV. PRAC. ACT § 288 *et seq.*

11. The means applicable were provided for by Greater N. Y. Charter §§ 1545, 1546, New

Terminal case the plaintiff already had the information which was sought. Yet in the principal case, the information required could be obtained only by an examination of defendant before trial. These distinctions do not seem to justify the holding of the Appellate Division. It is true that the Civil Practice Act is more comprehensive than the Code of Civil Procedure but the language of the latter, referring to examination of defendant corporations is not materially different from that of the Civil Practice Act. Such language was construed to exclude municipal corporations.

Although the Court of Appeals has reemphasized the principle that a sovereign may only be sued according to the practice it prescribes, the principle does not seem sound. The object of the Appellate Division to force municipal corporations to submit to an examination before trial is a praiseworthy one but the proper method to accomplish this object is by legislative enactment. Since the plaintiffs are permitted to sue the municipal corporations in this type of case, there is no reason why they should not proceed according to the same practice that they use against other defendants who are liable to them. The mere fact that a municipal corporation has some of the attributes of a sovereign should not exempt it from usual procedures. No practical difficulty stands in the way.

By recent legislation the State of New York may now be subjected to an examination before trial.[12] Why should a municipal corporation, a subdivision of the state, be sacrosanct.[13] The fact that there are other means of obtaining information besides the examination is no ground for denying it in the ordinary case.[14] However, the information obtained under the procedure providing for the examination and inspection of documents[15] limits the party to the information contained in the documents whereas, by an examination of individuals, the party may go into all matters which are material and necessary in the prosecution or defense of the action.[16] There should be no reason for denying it where a municipal corporation is concerned. This would be more in keeping with the policy of liberality in practice, which policy was written into the law when the Civil Practice Act was adopted.[17] Courts have repeatedly

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City Charter §§ 893, 894 under which records could have been examined and copied by taxpayers. (The statute does not provide for examination of individuals). If such examination be denied a summary remedy by application to a justice was provided for by Greater N. Y. Charter § 1545.

12. COURT OF CLAIMS ACT § 17 (2), N. Y. Laws 1939, c. 860. For holdings under the new statute, see Buchalter v. State, 172 Misc. 420, 15 N. Y. S. (2d) 244 (Ct. Cl., 1939); Dunbar & Sullivan Dredging Co. v. State, 174 Misc. 743, 21 N. Y. S. (2d) 937 (Ct. Cl., 1940).

13. Prior to the COURT OF CLAIMS ACT § 17 (2), neither the state nor municipal corporations could be examined before trial. Friedman v. State, 161 Misc. 358, 292 N. Y. Supp. 90 (Ct. Cl., 1936), *aff'd* 250 App. Div. 809, 294 N. Y. Supp. 460 (3d Dep't 1937), motion for leave to appeal denied, 251 App. Div. 753, 297 N. Y. Supp. 797 (3d Dep't 1937); Langder v. State, 160 Misc. 946, 290 N. Y. Supp. 948 (Ct. Cl., 1936); Fleming v. State, 162 Misc. 340, 294 N. Y. Supp. 576 (Ct. Cl., 1937).

14. Wertheim v. Gromebecker, 229 App. Div. 16, 240 N. Y. Supp. 623 (3d Dep't 1930); Peck Coal Co. v. Fowler, 230 App. Div. 713, 243 N. Y. Supp. 247 (2d Dep't 1930); Hillack v. Edwards & Son, 143 Misc. 277, 256 N. Y. Supp. 313 (Sup. Ct., 1932).

15. See note 11 *supra*.

16. CIV. PRAC. ACT § 288.

17. CIV. PRAC. ACT Art. I § 2 specifically provides for a liberal construction of the Act. "In order to give the Civil Practice Act the effect which its passage was intended to secure,

affirmed that the Civil Practice Act is to be liberally construed,[18] and a court's right to grant examination of adverse parties before trial is a matter of wide discretion.[19]

RES JUDICATA—AUTOMOBILES—NEGLIGENCE—CONCLUSIVENESS OF JUDGMENT.—Plaintiff, operating a truck, was injured in a collision with a truck owned by the defendant. In a suit for personal injuries plaintiff proved a judgment for property damage in his employer's favor in a prior action arising out of the same accident against the defendant, the other truck owner. On appeal from an order denying plaintiff's motion for a directed verdict on the issue of liability, *held,* a verdict should have been directed for plaintiff because the issue of negligence was *res judicata.* Order reversed. *Elder v. N. Y. Penn. Motor Express Inc.,* 259 App. Div. 380, 19 N. Y. S. (2d) 553 (1st Dep't 1940).

It is only by making an exception to the general requirements of the doctrine of *res judicata,* that it can be said that the determination of the first case by the plaintiff's employer against the defendant concludes the case of the plaintiff against the defendant. The doctrine of *res judicata,* as established substantially in all jurisdictions and promulgated in judicial decisions, is enunciated as follows: A former and existing final judgment, rendered by a court of competent jurisdiction, on the merits of a litigated cause, in the absence of fraud or collusion, is conclusive of the rights of the parties and their privies, in all subsequent actions on the points in issue, adjudicated in the prior suit.[1] Simply stated, this rule determines that once the issues of any cause have been adjudicated that decision will be binding upon the parties who were litigants or who are in privy with such litigants.

The courts will allow but one trial of the issues of an action and any party or his privy who has had his day in court will be estopped from seeking a retrial of the same issues. Basically, *res judicata* is grounded on the principle of estoppel and, of necessity, *mutual* estoppel. Prior judgment being alleged to be conclusive, unless both parties to the prior action are bound thereby, neither should be concluded.[2] For the

it must be applied in a broad and liberal spirit, and its provisions must not be restricted by a forced and narrow interpretation, based on the language of the former sections in the Code of Civil Procedure, which have been totally suspended by the later legislation", Stehli Silks Corp. v. Kleinberg, 200 App. Div. 16, 18, 192 N. Y. Supp. 284, 285 (1st Dep't 1922).

18. Sands v. Comerford, 211 App. Div. 406, 207 N. Y. Supp. 398 (4th Dep't 1925); Nat'l Fire Insurance Co. v. Shearman, 209 App. Div. 538, 204 N. Y. Supp. 673 (4th Dep't 1924).

19. Jenkins v. Putnam, 106 N. Y. 272, 276, 12 N. E. 613, 615 (1887); Public Nat'l Bank v. Nat'l City Bank, 261 N. Y. 316, 185 N. E. 395 (1933); Middleton v. Boardman, 240 N. Y. 552, 148 N. E. 701 (1925).

1. Since its formulation in England in the 18th Century the doctrine of *res judicata* has been defined and applied in numerous cases. Marginson v. Blackburn Borough Council, (1938) 2 All E. R. 539; Hegarty v. Berger, 304 Pa. 221, 155 Atl. 484 (1931); Whipple v. Fardig, 109 Conn. 460, 146 Atl. 847 (1929); Cora Belle Luce v. N. Y., Chicago & St. Louis R.R. Co., 213 App. Div. 374, 211 N. Y. Supp. 184 (4th Dep't 1925); Ward v. Foulkrod, 264 Fed. 627 (C. C. A. 3d, 1920); Akers v. Fulkerson, 153 Ky. 228, 154 S. W. 1101 (1913); Smith v. Smith, 55 S. C. 507, 33 S. E. 583 (1899); Stansteed v. Beach, (1899) Q. R. 8 Q. B. 276; Gelston v. Hoyt, 1 John Ch. 542 (N. Y. 1815). See also, ANDERSON, AN AUTOMOBILE ACCIDENT SUIT (1934) § 668 and citations; (1926) 12 CORN. L. Q. 92.

2. The rule of mutuality covers parties and their privies. Liberty Mutual Ins. Co. v.

doctrine of *res judicata* to apply, it has been held, in cases adhering to the strict rule, that there must be identity of parties and of subject matter.[3] It will be noted that privies of the original litigants will also be concluded by the prior judgment. Privies are "persons connected together, or having a mutual interest in the same action or thing (property right) by some relation other than that of actual contract between them. . . . Those who are partakers or have an interest in an action or thing in relation to another. . . ."[4] Simply stated, in the contemplation of *res judicata,* privity is used to denote a successive relationship to the same property right.[5] Clearly, there is no privity in this strict sense where recoveries in tort actions are sought by different persons for different injuries, to-wit property and personal, since neither is to share in the other's recovery, nor is damage done by the defendant to the same right. The present actions are of this divergent type. They are not in privity, strictly speaking, merely because as litigants in two different suits they happen to be interested in proving or disproving the same facts, *i.e.,* the negligence of the defendant. However, whether based on a principle of agency or otherwise, the vicarious liability of the owner of a vehicle creates sufficient privity to bring the case within the exceptions.[6]

George Colon & Co., Inc., 260 N. Y. 305, 183 N. E. 506 (1932); Syczyk v. Szczerbaniewicz, 233 App. Div. 342, 252 N. Y. Supp. 280 (4th Dep't 1931); Haverhill v. International Ry. Co., 217 App. Div. 521, 217 N. Y. Supp. 522 (4th Dep't 1926), *aff'd* 244 N. Y. 582, 155 N. E. 905 (1927) (which case defendant, in the instant case, invokes as authority). See also, Hamilton Nat. Bank v. American Loan & Trust Co., 72 Neb. 81, 100 N. W. 202 (1904); Logan v. Nebraska Moline Plow Co., 66 Neb. 67, 92 N. W. 129 (1902); Brown v. Tillman, 121 Ala. 626, 25 So. 836 (1899); Mershion v. William, 63 N. J. L. 398, 44 Atl. 211 (1899); Degelos v. Woolfolk, 21 La. Ann. 706 (1878). 2 BLACK, JUDGMENTS (2d ed. 1902) § 534.

3. James v. Bream, 263 Pa. 205, 106 Atl. 722 (1919); Fulton County Gas v. Hudson River Tel. Co., 200 N. Y. 287, 93 N. E. 1052 (1911); Monroe v. Matlox, 27 Ky. 575, 85 S. W. 748 (1905); Hamilton Nat. Bank v. American Loan & Trust Co., 72 Neb. 81, 100 N. W. 202 (1904); Reilly v. Sicilian Asphalt Co., 170 N. Y. 40, 62 N. E. 772 (1902); Schranth v. Dry Dock Savings Bank, 86 N. Y. 390 (1881).

4. Maddocks v. Gushee, 120 Me. 247, 113 Atl. 300 (1921); Dudley v. Jeffress, 178 N. C. 111, 100 S. E. 253, 254 (1919); Bailey v. Sundberg, 49 Fed. 583 (C. C. A. 2d, 1892).

5. Haverhill v. International Ry. Co., 217 App. Div. 521, 217 N. Y. Supp. 522 (4th Dep't 1926); Bigelow v. Old Dominion Copper Min. Co., 225 U. S. 111 (1912); Goddard v. Benson, 15 Abb. Pr. 191 (N. Y. 1862). This definition might be a little narrow. Lumpkin, J., in Brown v. Chaney, 1 Kelly 410, 412 (Ga. 1846), makes it much broader including all in interest with the parties.

6. Old Dominion Copper Min. Co. v. Bigelow, 203 Mass. 159, 89 N. E. 193 (1909), *aff'd* 225 U. S. 111 (1912).

Any application of *res judicata* to tort actions is an exception to the strict rule where there is a question of derivative liability; yet it has been applied. Hemstead v. Costi, 36 Mo. 437 (1865); Kingsley v. Davis, 104 Mass. 178 (1870); Spencer v. Dearth, 43 Vt. 98 (1870); Ransom v. Pierre, 101 Fed. 665 (C. C. A. 8th, 1900); Hayes v. Chicago Tel. Co., 218 Ill. 414, 75 N. E. 1003 (1905); Pangburn v. Buick Motor Co., 211 N. Y. 228, 105 N. E. 423 (1914); Cressler v. Brown, 79 Okla. 170, 192 Pac. 417 (1920). In Fleischer v. Detroit Cadillac Motor Car Co., 165 N. Y. Supp. 245 (App. Term 1st Dep't 1917), judgment was had by plaintiff for injuries to his motorcycle in a collision with defendant's car, and though the subsequent cause was for personal injuries she was allowed to set forth *res judicata.* N. Y. VEHICLE AND TRAFFIC LAW § 59 and similar laws in other jurisdictions make the owner of a car liable to any one injured by said car.

There is no identity of subject matter either if by subject matter is meant "the thing demanded and the cause of demand," as some cases argue.[7] The causes of action are different, to-wit, one for personal injuries and one for property damage. But if the character of the defendant's conduct is the subject matter of the case the subject matter in both actions is the same. It is well settled in automobile cases where the owner and driver are joint tortfeasors, that a plaintiff being unsuccessful in proving negligence against one will not be allowed to proceed against the other.[8] By making *res judicata* a bar in such case, the courts seem to indicate that the subject matter of both cases is the same where the issues determining the liability are identical, *i.e.*, negligence of the parties immediately involved in the accident.

In *Good Health Dairy Products v. Emery*,[9] is found authority for the present holding. There the driver of a pleasure car recovered for personal injuries due to a collision with a truck. The truck owner then sued the owner of the pleasure car. But the court considered the first judgment against the truck owner in favor of the driver would be a bar to his action against the owner of the pleasure car. The court seems to consider the subject matter of actions to be the same when the conduct of the parties and its wrongful character presents the same issues in each case.[10]

Looking at the instant case there is manifestly no identity of parties and subject matter, as demanded under the strict doctrine. But the court does not attempt to satisfy the strict rule. It declares that every party is entitled to one opportunity to litigate the issues of any action as a party in control thereof. Otherwise courts would be unable to complete their business.[11] Once having been afforded the opportunity he is bound by the determination of the court, and is foreclosed whether or not he has availed himself thereof.[12] This reasoning is in keeping with the spirit of the doctrine of *res judicata* and the underlying theory which caused its adoption. It must be realized, however, that the doctrine should not be too broadly extended. Only where there is vicarious liability and identity of issues should the doctrine control.

If a defendant neglects to defend an action because the damages demanded are too small and judgment is entered against him it is no injustice that he be concluded by that judgment as *res judicata* in a subsequent action. By this neglect he admits his own fault and should be required to make complete reparation. He certainly cannot plead this neglect to get relief from its consequences.[13]

7. Haverhill v. International Ry. Co., 217 App. Div. 521, 525, 217 N. Y. Supp. 522, 526 (4th Dep't 1926).

8. Wolf v. Kenyon, 242 App. Div. 116, 273 N. Y. Supp. 170 (3d Dep't 1934); Anderson v. West Chicago St. R.R., 200 Ill. 329, 63 N. E. 717 (1902); Hart Steel Co. v. Railroad Supply Co., 244 U. S. 294 (1916).

9. 275 N. Y. 14, 9 N. E. (2d) 758 (1937).

10. Haverhill v. International Ry. Co., 217 App. Div. 521, 217 N. Y. Supp. 522 (4th Dep't 1926) is *contra* to the decision in the instant case. It does not admit of an exception and adheres to the strict rule.

11. Jenkins v. Atlantic Coastline Ry. Co., 89 S. C. 408, 71 S. E. 1010 (1911).

12. When a party has had an opportunity to litigate the issues of a cause as a party in control thereof it matters not whether he avails himself of the opportunity or fails so to do. Last Chance Mining Co. v. Tyler Mining Co., 157 U. S. 683 (1895); Garner v. Second National Bank, 89 Fed. 636 (C. C. R. I. 1898); Minor v. Walter, 17 Mass. 237 (1821); Thatcher v. Gammon, 12 Mass. 267, 268 (1815); Newton v. Hook, 48 N. Y. 676 (1872); Jarvis v. Briggs, 69 N. Y. 143 (1877); Brown v. Mayor of the City of New York, 66 N. Y. 85 (1876); Barker v. Miller, 32 App. Div. 364, 53 N. Y. Supp. 283 (2d Dep't 1898).

13. N. Y. MUN. CT. CODE § 186, relating to cases tried in the Small Claims Part, provides:

The doctrine of *res judicata* should bind all the parties who have had their day in court if the issues of liabilities are identical as between the parties of the prior and subsequent actions, and if the interests of the parties are so interdependent by virtue of a relationship between them that the result should be identical in both cases. The satisfaction of these requirements is evident in the instant case and it therefore appears sound on principle.[14]

TORTS—RIGHT OF PRIVACY—BIOGRAPHICAL SKETCH OF FORMER CHILD PRODIGY AS A MATTER OF PUBLIC CONCERN.—Plaintiff at eleven years of age was a child prodigy well-known to the reading public. After graduation from college he avoided publicity. He became an obscure clerk. The defendant without his consent published a magazine article describing plaintiff's early accomplishments and his subsequent humble position, adding many details of the plaintiff's intimate personal life such as his curious appearance and characteristics and his shabby quarters. Plaintiff sued *inter alia*[1] for infringement of his rights under Sections 50 and 51 of the New York Civil Rights Law.[2] On appeal from dismissal, *held,* plaintiff cannot recover because the magazine article was not written for advertising or trade purposes since it imparted factual information to the public and was in no way fictionalized. *Sidis v. F. R. Publishing Corp.*, 113 F. (2d) 806 (C. C. A. 2d 1940).†

At common law a right of privacy was not recognized in New York. That state originally rejected the doctrine in *Robertson v. Rochester Folding Box Co.*[3] although a famous article by Warren and Brandeis[4] had called for the recognition of a right

"A judgment under this title may be pleaded as res judicata only as to the amount involved in the particular action and shall not otherwise be deemed an adjudication of any facts at issue or found therein in any other action or court." Had the judgment in the prior action been given by the Small Claims Part of the Municipal Court of the City of New York, this statute would prevent its being pleaded as *res judicata* in the subsequent action.

14. The doctrine set down in the instant case and its authority, the Good Health case, note 9 *supra,* have been criticized as pregnant with the possibility of injustice. Note (1938) 8 BROOKLYN L. REV. 224, 234-235.

1. Plaintiff's other causes of action were: (1) Violation of the right of privacy, as that right is recognized in California, Georgia, Kansas, Kentucky and Missouri. (2) Malicious libel, under the laws of Delaware, Florida, Illinois, Maine, Massachusetts, Nebraska, New Hampshire, Pennsylvania, and Rhode Island. There was no recovery under these causes of action. This comment is limited to a discussion of the second cause of action which was brought under the New York statute.

2. N. Y. Laws 1909 c. 14, amended by the N. Y. Laws 1911 c. 226 and the N. Y. Laws 1921 c. 501.

† Petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. N. Y. L. J., December 17, 1940, p. 2080.

3. 171 N. Y. 538, 64 N. E. 442 (1902). The court said that there was no place in the law for a "right of privacy", and was unwilling to make a place for any such "right", because it might do harm to principles of law already well settled. Yet, it was suggested by the court that it was within the power of the legislature to create such a right; and although this case denied relief to a woman whose picture was used to advertise the defendant's product, it was quite probably as a result of this suggestion that the statute in New York was passed.

4. *The Right to Privacy* (1890) 4 HARV. L. REV. 193.

of privacy because of the increasing distress caused by magazines, newspapers and motion pictures turning the spotlight of publicity on private lives. Later New York by statute recognized a qualified right of privacy.[5] The Civil Rights Law, Section 50 provides: "A person, firm or corporation that uses for advertising purposes or for the purposes of trade, the name, portrait or picture of any living person without first having obtained the written consent of such person, or if a minor of his parent or guardian, is guilty of a misdemeanor." Section 51 provides for the recovery of damages.

The court in the instant case thought that the statute was not violated because the information given in the article was factual and not fictionalized or dramatized. It assumed that such a distinction had been drawn in New York cases particularly in *Sarat Lahiri v. The Daily Mirror Inc.*[6] However an examination of the *Sarat Lahiri* case reveals that the distinction between fact and fiction is not the point of the decision. The court was distinguishing between trade purposes and other purposes and argued that dispensing "news" to the public or "educating" the public is not a trade purpose. The court seemed to recognize that fiction might well be used for an "educational" purpose without violation of the statute.[7] There are cases supporting the proposition that the use of a name or picture in connection with publications of "news"[8] or which "educate" the public[9] and give them information are

5. Some states recognized a right of privacy at common law. In Pavesich v. New England Life Ins. Co., 122 Ga. 190, 191, 50 S. E. 68, 69 (1904), the plaintiff recovered for the publication of his picture in connection with an advertisement of an insurance company. The court said, "The right of privacy has its foundation in the instincts of nature."; and the court concluded that the ultimate source of such a right was in the natural law. See also, Foster-Millburn Co. v. Chinn, 134 Ky. 424, 120 S. W. 364 (1909), which cites with approval the Pavesich case, *supra,* and see Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911), in which the court reasoned that the right of privacy was a property right and on that theory granted relief to the plaintiff for the publication of his picture, without his consent, in connection with an advertisement of the defendant's business. Recovery was also allowed in Edison v. Edison Polyform Mfg. Co., 13 N. J. Eq. 136, 67 Atl. 392 (1907).

6. 162 Misc. 776, 295 N. Y. Supp. 382 (Sup. Ct. 1937). A professional picture of the plaintiff who was a Hindu musician, appeared once in a newspaper article about Hindu mystics. The court denied him relief since the picture had a legitimate connection with an article of an educational character.

7. See Sarat Lahiri v. Daily Mirror, 162 Misc. 776, 782, 295 N. Y. Supp. 382, 389 (Sup. Ct. 1937).

8. Humiston v. Universal Film Co., 189 App. Div. 467, 178 N. Y. Supp. 752 (1st Dep't 1919). The plaintiff was a lawyer in the city of New York. She helped in the solution of a murder by finding the body for which the police had been searching. The defendant made motion pictures of the plaintiff while she was actually so engaged and displayed them in various theaters. The court dismissed the action, holding that the matter exhibited was of current news interest. In Sweenek v. Pathe News Inc., 16 F. Supp. 746, 747 (E. D. N. Y. 1936), it was said: "The publication of matter of public interest in newspapers . . . is not a trade purpose within the meaning and purview of this statute." And in Martin v. New Metropolitan Fiction Inc., 139 Misc. 290, 248 N. Y. Supp. 259 (Sup. Ct. 1931), *aff'd* without opinion 234 App. Div. 904, 254 N. Y. Supp. 1015 (3d Dep't 1931), Judge Staley said: "Apparently legitimate use of names and pictures in commercial enterprises

not trade uses.[10] The distinction between fact and fiction is not clearly supported by prior cases.

However, it might be argued that the instant decision involved the use of the plaintiff's name only in an educational endeavor. The article was a study in abnormal psychology designed to inform the public concerning this field. Such an argument while having some merit seems to be weak. Such justification assumes a public interest in or a public right to educational information. No one denies this in general, but we wonder if the public has a right to education on every subject? Useful articles on health, household arts, husbandry, *etc.* no doubt may be defended on the ground that the public has a legitimate interest in their publication. The basis of this is that these articles are necessary for the improvement of the culture of the people. An article on *normal* psychology which interests the mass of people because they are normal might well be in the public interests; but can it be demonstrated that an article on *abnormal* psychology is necessary or even helpful in the development of the culture of a people? Such an article in a medical magazine might be justified. Is it justified in a public magazine? Is it of any practical or intellectual advantage to its readers or is it designed merely to satisfy morbid curiosity?

Assuming that it is proper information, could not the information have been imparted without harshly exposing the personal habits of a sensitive man?[11] Would it not be proper for the court to consider the method as well as the educational purpose of the article? It might have been enough to point out the fact that a child prodigy made no contribution to the intellectual life of the country and was apparently content in a humble position. When the court says that the *mores* of the times justifies such publication, is it not abdicating from its duty to improve the *mores* of

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depends upon the purpose from the standpoint of the reactions of the public rather than from the standpoint of the person who uses them. . . . The distinction is well illustrated by the motion picture cases. Such pictures are regarded by the public as primarily educational rather than commercial, while mere dramatization of the same events would be considered essentially commercial." *Id.* at 292.

9. Jeffries v. New York Evening Journal Publishing Co., 57 Misc. 570, 124 N. Y. Supp. 780 (Sup. Ct. 1910). An injunction was refused to James J. Jeffries, a well-known prize fighter, when he sought to enjoin a newspaper from publishing his picture in connection with a series of biographical articles about himself.

10. *But,* in Blumenthal v. Picture Classics Inc., 235 App. Div. 570, 257 N. Y. Supp. 800 (1st Dep't 1932), plaintiff recovered for the exhibition of her picture showing her while she was engaged in her regular trade of selling bread on one of the streets in the city of New York. The motion picture in which she appeared was entitled: "Sight Seeing in New York with Nick and Tony", and beside the plaintiff two professional actors were employed in making the picture. The exhibition might have been justfied on the ground that it was educational, or on the other hand, the court might have reasoned that the employment of the professional actors gave to the picture that degree of fictualization or dramatization which would make it an exhibition "for the purposes of trade" in the sense of the statute.

11. "The article closes with an account of an interview with Sidis at his present lodgings, 'a hall bedroom of Boston's shabby south end', the untidiness of his room, his curious laugh, his manner of speech and other personal habits are commented upon at length, . . . The article was merciless in its dissection of intimate details of its subject's personal life, . . . " Sidis v. F. R. Publishing Corp., 113 F. (2d) 806, 807 (C. C. A. 2d 1940).

the times as far as it can by barring the expression of that which caters to and develops the less elevated tendencies of men?

It would seem that there is no justification in the letter of the statute for making any distinctions. Yet, if we concede that the purpose of every newspaper and magazine is the dispensing of news and other information, then newspapers might be precluded even from the mention of a person's name.[12] Quite probably it was for the purpose of avoiding such an unfortunate result that the court in the instant case had to resort to the arbitrary distinction between "fact" and "fiction". It will be interesting to see what will happen when this sort of litigation will be increased by invasions of the privacy right by radio and television. Perhaps it would be wise to recommend some change in the wording of the statute in order to take the burden of making "forced" interpretations off the courts.[13]

TRESPASS—LIABILITY OF TRESPASSER ON LAND TO POSSESSOR THEREOF AND TO MEMBERS OF HIS HOUSEHOLD.—The defendant's employee, attempting to deliver a package addressed indefinitely, entered the home of plaintiff's father, walking across an enclosed porch to another room. The plaintiff, a five and one-half year old child, went to the door left open by the delivery man and tumbled down five steps to the driveway, suffering severe injuries. On appeal from a judgment in favor of the defendant, *held,* the delivery man was a trespasser and his employer is liable to members of the household of the possessor of the land for injuries caused by his trespass. The injury to the child was caused by the trespasser's act. *Keesecker v. G. M. McKelvey Co.,* 64 Ohio App. 29, 27 N. E. (2d) 787 (1940).

There are two points involved in this case: 1) Was the defendant a trespasser? 2) May the plaintiff recover for this trespass?

With regard to the first point the court stated that the jury should have been instructed as a matter of law that the employee of the defendant, when he opened the door of the sunroom and proceeded across such room was a trespasser. The court bases its holding concerning the trespass on Section 158 of the *Restatement of the Law of Torts.*[1] It is not open to question whether the employee's act was intentional or not. All will agree that it was intentional but before this section is applicable it must be shown that the intrusion was "without a consensual or other privilege". There is a very definite possibility that the defendant's agent, the delivery man, might have been a "business invitee" or "licensee". The *Restatement of the Law of Torts* cited by the presiding justice as authoritative, maintains in another section[2] that: "Thus a delivery man of a provision store while delivering goods to

12. *Cf.* Note (1919) 33 HARV. L. REV. 711.

13. "As long as they (the courts) will continue to interpret this law not according to *what it provides,* but according to *what they think it ought to provide,* they will always run into contradiction, discrepancies and absurdities, and the public will be left without protection against the scurrilous, tabloid journalism and other similar parasites." Kacedan, *The Right of Privacy* (1932) 12 B. U. L. REV. 600, 645.

1. RESTATEMENT, TORTS (1934) § 158: "One who intentionally and without a consensual or other privilege enters land in possession of another or any part thereof or causes a thing or a third person so to do . . . is liable as a trespasser to the other irrespective of whether harm is thereby caused to any of his legally protected interests."

2. RESTATEMENT, TORTS (1934) § 332.

a residence is a business visitor of the possessor thereof." A business visitor is not liable as a trespasser for entrance on the customer's land.[3]

The court argues that even if the package was properly addressed to the plaintiff's father, the result would be the same. This is difficult to reconcile with the fact that the defendant, in committing the alleged trespass, had to open the outer door of a sunparlor and cross the floor in order to ring the entrance bell. The absence of a bell on the outer door would seem to be an authorization, by the plaintiff's father to all those concerned with the occupants of the house, to open the sunparlor door, cross the floor and ring the bell, the usual medium for attracting the attention of persons within the house.

The defendant would not be a trespasser if there were proof of a custom permitting him to enter upon the plaintiff's property. The custom of coming upon the walks or driveways of property owners of the vicinity was pleaded, but, in the opinion of the court, this did not justify the defendant's opening the door of the house. It might be argued that the defendant by custom was permitted to enter upon the walk or driveway of the plaintiff for the purpose of pushing the bell button to attract her attention. This would allow the defendant to reach the bell and, if necessary to reach the bell, to cross the porch. Possibly this argument was not advanced by the defense and, therefore, since no custom was proved, the defendant was a trespasser.

Another argument which substantiate's the court's position that the defendant's employee was a trespasser, but which was not put forward, is that suburban homes of this type usually have a tradesman's entrance. In such a case, a delivery man going to the front entrance of the house would not be protected by the custom under discussion.

Since the court found no custom existing which might have excused the delivery man, and since the intrusion was intentonal, then, his act is correctly characterized by Section 158 of the *Restatement of the Law of Torts*[4] as a trespass.

With regard to the second point mentioned above, *viz.*, may the plaintiff recover for the employee's trespass, it is to be noted that the court cites the *Restatement of the Law of Torts,* Section 380[5] in deciding that she could recover. This section of the *Restatement* enlarges the liability of a trespasser on real property. Not only the possessor but members of his household may recover for injuries caused by the trespasser. Originally the action of trespass protected only the possessor of the land.[6] It will now protect all members of the household of the possessor, irrespective of whether the party injured is in possession or not.

Another jurisdiction had reached this result before the *Restatement* in the case of *Watson v. Dilts.*[7] There the action was brought by the wife of the owner of

3. Statkunis v. Promboim, 274 Mass. 515, 174 N. E. 919 (1931); Johnson v. Glasier, 40 S. D. 13, 166 N. W. 154 (1918).

4. See note 1 *supra.*

5. This section reads as follows: "A trespasser on land is subject to liability for bodily harm caused to the possessor thereof or to members of his household by any act done, activity carried on or condition created by the trespasser while upon the land irrespective of whether the trespasser's conduct is such as would subject him to liability were he not a trespasser."

6. "The interest protected . . . is the interest of one in possession of land to enjoy the exclusive possession thereof, free from the interferences by physical intrusions of persons or things controlled or set in motion by others. . . ." HARPER, LAW OF TORTS (1933) § 33. Roper Lumber Co. v. Elizabeth City Lumber Co., 135 N. C. 744, 47 S. E. 757 (1904).

7. 116 Iowa 249, 89 N. W. 1068 (1902).

premises for injuries from fright caused by the defendant's trespass. The court said that it did not matter that the trespass was committed on property belonging to the husband. The plaintiff, it was held, had a right to live there with her husband; her right to its peaceful and quiet enjoyment day or night was equal to that of her husband. An unlawful trespass which produced physical injury to her was a wrong for which she ought to recover. The *Watson* case was cited with approval in two similar cases in the states of Minnesota and Alabama.[8] Possibly this trend of thought[9] exerted some influence in the framing of Section 380 of the *Restatement of the Law of Torts,* and we may now look to the *Restatement* to influence future court action.

In considering whether the plaintiff may recover for injuries resulting from the trespass by defendant's employee it is necessary to show the *nexus* between the trespasser's act and the injury. The question of proximate cause is usually one for the jury upon all the facts.[10] Proximate cause in ordinary cases is said to be a mixed question of law and fact which must be submitted to the jury under proper instructions.[11] But where the facts are undisputed and the inferences to be drawn from them are plain and not open to doubt by reasonable men, it is the duty of the court to determine the question as a matter of law.[12]

There are two problems involved in determining tort liability.[13] In the instant case they are: 1) Was the plaintiff's interest within the protection of the rule invoked, *i.e.,* the obligation upon the defendant not to trespass on the land of plaintiff's father? and, 2) should the defendant have reasonably foreseen injury to the plaintiff's interest as a probable consequence of his conduct? Usually the first question is for the court and the second for the jury. The court in finding the delivery man a trespasser and then approving Section 380 of the *Restatement of the Law of Torts* answered the first problem affirmatively. With regard to the second problem, the trial court found the injuries should have been foreseen as a probable result of the act of defendant's employee.

The objection that the injury was caused by the independent act of another, if urged, would be met by pointing out that the intervening act was that of a very young child. In situations where the harm is immediately caused by the acts of children incapable of legal negligence by reason of their tender years, courts are eager to hold that the act of such a child is foreseeable.[14]

8. Lesch v. Great Northern Ry. Co., 97 Minn. 503, 106 N. W. 955 (1906); Engle v. Simmons, 148 Ala. 92, 41 So. 1023 (1906).

9. Although not in point, the case of Domenicis v. Fleisher, 195 Mass. 281, 81 N. E. 191 (1907), is another example of the above reasoning. It dealt with an action by the daughter of a tenant against the landlord for a negligent keeping of the premises. The court held that the fact that the plaintiff was not the tenant, but his daughter, made no difference. A number of cases where the tenant's family has been allowed to recover for the negligent act of the landlord are: Tooney v. McLean, 129 Mass. 33 (1880); Shute v. Bills, 191 Mass. 433, 78 N. E. 96 (1906); Andrews v. Williamson, 193 Mass. 92, 78 N. E. 737 (1906).

10. Ehrgott v. Mayor of City of New York, 96 N. Y. 264, 48 Am. Rep. 622 (1884).

11. Meyer v. Butterbrodt, 146 Ill. 131, 34 N. E. 152 (1893).

12. Goodlander Mill Co. v. Standard Oil Co., 63 Fed. 400 (C. C. A. 7th, 1894).

13. GREEN, RATIONALE OF PROXIMATE CAUSE (1927) 80.

14. Gimmstead v. Rose Bros. Co., 194 Minn. 531, 261 N. W. 194 (1935); Langevin v. Twin State Gas Co., 81 N. H. 446, 128 Atl. 681 (1925); United Zinc & Chemical Co. v. Britt, 258 U. S. 268 (1922).

The important feature of the case, that it enlarges the liability of the trespasser, may at first have seemed revolutionary but it has existed for some time and rightly so. The prominence given it by inclusion in the *Restatement* should rouse it from its dormant state.

WORKMEN'S COMPENSATION—HAZARDOUS OCCUPATION—"WORKMEN OR OPERATIVES."—The defendant was an insurance company employing sixteen men as claim adjusters, seven or eight of whom regularly operated their own cars in their work. The decedent, William Gilmore, an attorney, employed as one of these claim adjusters, was struck by a bicycle as he was about to enter a subway station and received injuries of which he died nine days later. Gilmore did not drive a car in connection with his work but depended on subway transportation which was optional with the employees, the company paying traveling expenses in any case. On appeal from an order of the Appellate Division affirming an award of compensation, *held,* one judge dissenting, the claimant was not engaged in a hazardous occupation under the Workmen's Compensation Law. *Matter of Gilmore v. Preferred Accident Insurance Co.,* 283 N. Y. 92, 27 N. E. (2d) 515 (1940).

The question raised by the case is, was the decedent engaged in a hazardous occupation as defined in the New York Workmen's Compensation Law, Article 1, Section 3, Subdivision 1, Group 18?[1] Except in certain situations not pertinent to this case, the statute classifies as hazardous all employments in which there are regularly employed four or more "workmen or operatives".[2] May these claim adjusters be considered workmen or operatives so as to bring the employment of Gilmore within the provisions of the law?[3] The State Industrial Board and the Appellate Division[4] with but a single dissent allowed the claim of the decedent's

1. Formerly Group 45, added by N. Y. Laws 1918, ch. 634; renumbered Group 18 by N. Y. Laws 1922, ch. 625; am'd by N. Y. Laws 1928, ch. 755; N. Y. Laws 1929, chs. 304, 702; am'd N. Y. Laws 1931, chs. 385, 510; the two groups of 1931 merged by N. Y. Laws 1932, ch. 200; am'd by N. Y. Laws 1936, ch. 217; N. Y. Laws 1937, ch. 251.

2. N. Y. WORKMEN'S COMPENSATION LAW § 3, Application: "(1) Hazardous employments. Compensation shall be payable for injuries or death incurred by employees in the following employments: Group 18: 'All other employments . . . in which there are engaged or employed four or more workmen or operatives regularly, in the same business or in or about the same establishment either upon the premises or at the plant or away from the plant of the employer, under any contract of hire, expressed or implied, oral or written. . . .'"

3. Other states having Workmen's Compensation Laws are almost evenly split between: 1. listing the hazardous occupations and 2. covering all employments in which three to ten persons are regularly employed. The only states which have statutes similar to the New York law are Arizona and Ohio which extend compensation benefits to employments of three or more "workmen or operatives." OHIO GEN. CODE ANN. § 1465-61; ARIZ. REV. CODE ANN. § 1419. However the difficulty of distinguishing the terms "workman", "operative" and "employee" is obviated in these states by defining all the same way in the statute itself as any person under a contract of hire express or implied (as distinguished from a casual employee).

4. 258 App. Div. 832; 15 N. Y. S. (2d) 625 (3d Dep't 1939). Alsup v. Murfreesboro Bread & Ice Cream Co., 165 Tenn. 591, 56 S. W. (2d) 746 (1933). Held: employee

wife on the theory that the seven or eight claim adjusters who used automobiles were workmen or operatives and this brought Gilmore's employment within the provisions of the law. The Court of Appeals now reverses this holding and the question is answered in the negative.

The majority held that the claim adjusters were not workmen or operatives, that these terms generally applied to manual laborers[5] not to professional men who drove cars incidentally to their work. The dissenting judge argued that the employment included whatever the employer suffered them to do and while these men drove their cars they were workmen or operatives.

Prior statements, in this state, seem to support the majority. In this connection, the court in *Europe v. Addison Amusements*,[6] said: "A workman is a man employed in manual labor, whether skilled or unskilled; an artificer, mechanic or artisan and an operative is a factory hand, one who operates machinery." In that case, the decedent, Lieutenant Europe, who was the leader of a famous colored band was stabbed to death by his drummer during a concert tour arranged by the defendant employer. Although the work of the leader was obviously non-hazardous, the band's personnel included four men who did manual labor, consisting of moving scenery, arranging the stage, handling baggage and pressing clothes. Since these four men were clearly workmen in that they did manual tasks, the estate of Europe was allowed compensation. In the *Gilmore* case the court pointed out that in the *Europe* case the four men were employed to do "manual labor", *i.e.*, as "laborers" while in the *Gilmore* case, the adjusters were employed as professional men with car driving only incidental to their employment.

In *Westbay v. Curtis & Sanger*[7] the claimant's intestate was killed in an explosion while at his occupation as messenger or runner for a Wall Street firm. Although twelve or fourteen runners carried securities between various banks and brokerage houses, ran errands and sent out mail in connection with their employment the court held that no workmen were employed by Curtis & Sanger within the meaning of the Workmen's Compensation Law. It said that employees in factories would not recognize "one of these employees as a laboring man" and that it was not unreasonable to have class distinctions made in the law if they were made in ordinary

means one employed to serve another, as distinguished from "workman" or one who labors for another. *But see* Anderson v. State Industrial Accident Commission, 107 Ore. 304, 215 Pac. 582 (1923) where it was held that "workman" is synonymous with "employee".

5. Rhodes v. Matthews, 67 Ind. 131, 139 (1879) defines "operative" as synonymous with "workman". A closer definition would be "a workman who performs manual labor in and about machinery." Cocking v. Ward, 48 S. W. 287, 289 (Tenn. Ch. App. 1898). Boston & A. R. Co. v. Mercantile Trust & Deposit Co., 82 Md. 535, 34 Atl. 778 (1896) held, that under a statute reading "clerks, servants or employees," the duties of an adjuster of insurance being of a higher character than clerk, such an officer, while in a general sense an employee, cannot by any fair rule of construction, be considered an employee in the limited and restricted meaning of that term, as used in the statute. *See* Ray v. Union News Co., 198 App. Div. 149, 189 N. Y. Supp. 486 (3d Dep't 1921); Turman v. Hebrew Nat. Sausage Factory, 198 App. Div. 456, 191 N. Y. Supp. 339 (3d Dep't 1921). *Cf.* 7 FORDHAM L. REV. 225, 226 for a discussion of the application of the term "labor" to work not manual in character.

6. 231 N. Y. 105, 131 N. E. 750 (1921).

7. 198 App. Div. 25, 189 N. Y. Supp. 539 (3d Dep't 1921) *aff'd* 232 N. Y. 555, 134 N. E. 569 (1921).

life. The same result was reached in the case of a clerk in an Army and Navy Store who in his work had to lift and open boxes.[8] It seems reasonable that the lawyers employed as claim adjusters are even less like manual laborers than Wall Street runners or clerks in stores.

The dissenting contention that while the lawyers drove they were workmen or operatives seems without authority. Its assertion that had the driver of one of the cars been killed while the car was being operated, he doubtlessly would have deserved compensation, may be true but the claim would have been allowed, not under Group 18, but under Groups 7 and 12 applying to chauffeurs.[9] Yet, however correct the majority might be technically, the absurd conclusion pointed out by the dissent certainly follows as the law now stands. Had the defendant in the *Gilmore* case hired four chauffeurs to drive the claim adjusters on their duly appointed rounds, the employment of the four workmen would entitle the lawyers including Gilmore to compensation, because driving is not *incidental* to chauffeurs' employment. How the employment becomes any more hazardous in such a case than it is on the facts of the case before the court is difficult to see.[10]

ZONING—DUE PROCESS—SUIT BY NON-CONFORMER TO ENJOIN VIOLATION OF ZONING ORDINANCE.—Plaintiffs bring suit to restrain defendant from violating an ordinance prohibiting the business of parking cars in a business district. Plaintiffs themselves own and operate a garage in the same district under a variance granted on the ground that unnecessary hardship would ensue if the ordinance were enforced against them. Defendant has been refused a similar variance because of the proximity of their parking lot to a public school. On appeal from a judgment for plaintiffs, *held*, one judge dissenting, the defendant's use and improvement are not grounds for denying the enforcement of the ordinance but it was never intended that the zoning ordinance be used by one non-conforming property owner against another to stifle business competition. Judgment reversed and complaint dismissed. *Bazinsky v. Kesbec, Inc.*, 259 App. Div. 467, 19 N. Y. S. (2d) 716 (1st Dep't 1940).

The case raises the question whether the zoning law[1] amendment of 1935 can constitutionally be applied so as to prohibit the continuance of a lawfully established use not in itself a nuisance, where a substantial investment has been made in adapting the premises to such use. Defendant expended large sums of money in *permanently* improving and altering the premises for their business in 1926. Their contention that this has given them a vested right which protects them from such ordinances is amply

8. Cohen v. Rosalsky, 230 App. Div. 604, 246 N. Y. Supp. 299 (3d Dep't 1930) *aff'd* 256 N. Y. 649, 177 N. E. 177 (1931).

9. The words "all other employments not hereinbefore enumerated" with which Group 18 begins restricts its coverage to employments not covered by the preceding 17 groups; for example it does not cover employment by the State of New York or its political subdivisions because such employments are covered by Groups 15 & 17 preceding. *See* Stoerzer v. City of New York, 267 N. Y. 339, 196 N. E. 281 (1935) *rev'g* 243 App. Div. 644, 277 N. Y. Supp. 318 (3d Dep't 1935). A coal dealer may be covered in general by Group 18 while the drivers of his vehicles are covered in particular by Groups 7 and 12. *See* Mulford v. Pettit & Sons, 220 N. Y. 540, 116 N. E. 344 (1917) *aff'g* 175 App. Div. 958, 162 N. Y. Supp. 1132 (3d Dep't 1916).

10. The United States Supreme Court upheld the constitutionality of this type of statute. Ward and Gow v. Krimsky, 259 U. S. 503 (1922) *aff'g* 231 N. Y. 525, 132 N. E. 873 (1921).

1. New York City Amended Building Code Resolution (1925) Art. II § 4 (15). This was amended in 1935 to prohibit parking of cars as a business. The prior statute was New York City Zoning Resolution (1916) Art. II § 4 (15).

supported.[2] To deprive them of their business without compensation seems an unreasonable "taking" and a violation of the Constitution,[3] even if justification is attempted under the broad ground of police power.[4] It is not denied that the police power is superior to the claims of individuals once the situation shows itself to be proper for such exercise.[5] But interference with an established user where expenditures were made in reliance on its continuance is usually held to be an unreasonable action on the part of the municipality.[6]

It would be different if defendant's business constituted a nuisance in the district. But no claim to that effect has been established. Insofar as they effect abatement of nuisances, zoning ordinances have been held valid even though operating retroactively.[7] Such legislation appears often to be intended as a supplement to nuisance legislation.[8] The theory of zoning does not require that existing users be changed; rather it effects a crystallization of present conditions and a constructive control of future developments.[9]

2. Jones v. Los Angeles, 211 Cal. 304, 320, 295 Pac. 14, 22 (1931); Forbes v. Hubbard, 348 Ill. 166, 180 N. E. 767 (1932); Adams v. Kalamazoo Ice Co., 245 Mich. 261, 222 N. W. 86 (1928); Pelham View Apt's v. Switzer, 130 Misc. 545, 224 N. Y. Supp. 56 (Sup. Ct. 1927); State v. MacDuff, 161 Wash. 600, 297 Pac. 733 (1931); Nectow v. Cambridge, 277 U. S. 183 (1928). *Contra*: New Orleans v. Murat, 119 La. 1093, 44 So. 898 (1907); Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929), *cert. denied*, 280 U. S. 556 (1929). For a criticism of the Louisiana decisions, see Comment (1937) 35 MICH. L. REV. 642, 644.

3. See U. S. CONST. AMEND. XIV, § 1; N. Y. CONST. Art. I, § 6. See the cases cited in note 2 *supra* and Bettman, *The Constitutionality of Zoning* (1924) 37 HARV. L. REV. 834; (1927) 40 HARV. L. REV. 644.

4. ". . . the validity of a police regulation . . . must depend upon the circumstances of each case. . . . " Chicago, Burlington & Quincy Ry. Co. v. Illinois, 200 U. S. 561, 592 (1906). Courts have frequently refused to define the limits of the police power. See Sligh v. Kirkwood, 237 U. S. 52 (1914); Cusack v. Chicago, 242 U. S. 526, 530 (1916).

5. See Comment (1925) 34 YALE L. J. 303, 304.

6. "If defendant had entered into construction of his building and incurred liabilities for work and material prior to the adoption of the ordinance, he could not be restrained." Rice v. Van Vranken, 225 App. Div. 179, 180, 232 N. Y. Supp. 506, 507 (3d Dep't 1929), *aff'd* 255 N. Y. 541, 175 N. E. 304 (1930). Also, Brett v. Building Comm'r, 250 Mass. 73, 145 N. E. 269 (1924); State v. Christopher, 317 Mo. 1179, 298 S. W. 720 (1927), upholding retroactivity where not enough was done to give a vested right. *Cf.* Hadacheck v. Sebastian, 239 U. S. 394 (1915). See also METZENBAUM, THE LAW OF ZONING (1930) Chap. V § 1.

7. *Ex parte* Quong, 161 Cal. 220, 118 Pac. 714 (1911) (laundry); Syracuse v. Snow, 123 Misc. 568, 205 N. Y. Supp. 785 (Sup. Ct. 1924) (fraternity house not a nuisance); Reinman v. Little Rock, 237 U. S. 171 (1915) (livery stable); (1934) 82 U. OF P. L. REV. 536. Also Young, *City Planning and Restrictions* (1925) 9 MINN. L. REV. 593, 612; (1940) 9 FORDHAM L. REV. 437.

8. In Whitridge v. Park, 100 Misc. 367, 165 N. Y. Supp. 640 (Sup. Ct. 1917), it was held that equity would not restrain a defendant from violating such an ordinance unless a nuisance *per se* had first been shown to exist. See also, Comment (1923) 32 YALE L. J. 833.

9. "The ordinance was enacted with the purpose of directing the present and future development of the city and no attempt was made to remold its past development." Zahn v. Los Angeles Board of Public Works, 195 Cal. 497, 512, 234 Pac. 388, 395 (1925). But courts have eliminated existing non-conforming structures by the device of statutes prohibiting repairs, changes, or any form of alteration. Obviously, an unrepaired structure will not long survive. Earle v. Shackleford, 117 Ark. 291, 6 S. W. (2d) 294 (1928); State v. Hillman, 110 Conn. 92, 147 Atl. 294 (1929). KAN. GEN. STAT. ANN. (Corrick, 1935) c. 12, § 709; MASS. ANN. LAWS (1940) c. 40, § 29; OHIO GEN. CODE ANN. (Page, 1937) § 4366-9.

A question is also raised whether the court's view is sound when it states that as plaintiffs are excepted from the operation of the statute, they may not enforce it as effectively as another who "conforms" to the law.[10] This in effect places one who has obtained a permissive use by reason of a variance in a class precluded from relief. It is conceded that a variance renders what otherwise might be unlawful, lawful.[11] And it might be asked if plaintiffs are acting lawfully, why, as residents of the neighborhood, are they not in the class meant to be protected?[12] It is true, however, that plaintiffs' concern with defendant's violation of the zoning ordinance is open to grave doubts. Examination reveals that the district in question contains many garages and similar uses.[13] The court regretfully seems to have felt that plaintiffs were merely anxious to eliminate a nearby competitor and they were not otherwise damaged. Zoning laws are designed to promote public health and safety, as well as the maintenance of property values and suitability of particular districts for particular uses.[14] Relief is aimed primarily towards enforcement of the plan and purpose of zoning.[15] The restriction imposed by the court in the instant case limiting relief to members of the "conforming" class[16] does not further such enforcement. However it does not make it impossible. Other residents suffering special damages[17] may still bring suit to enforce the ordinance.

10. Ordinarily enforcement in New York City is the duty of the Commissioner of Buildings and the Corporation Counsel. N. Y. Building Zone Resolution (1916) § 23.

11. The power to vary provisions of zoning ordinances given to various boards of appeal was attacked in Welch v. Swasey, 193 Mass. 364, 79 N. E. 745 (1907), upheld in 214 U. S. 91 (1909), *held,* it was merely a delegation of administrative duties and not legislative. Also, People *ex rel.* Sheldon v. Board of Appeals, 234 N. Y. 484, 138 N. E. 416 (1923); Sundeen v. Rogers, 83 N. H. 253, 141 Atl. 142 (1928); Park Ridge Fuel Co. v. City of Park Ridge, 335 Ill. 509, 167 N. E. 119 (1929); METZENBAUM, THE LAW OF ZONING (1930) Chap. IX.

12. On similar facts plaintiffs were granted relief: Seidman v. Tilrose, 153 Misc. 510, 274 N. Y. Supp. 606 (Sup. Ct. 1932); Puget Sound Traction Co. v. Grossman, 102 Wash. 482, 173 Pac. 504 (1918).

13. The existence of other non-conforming uses in a neighborhood has been held to relax the terms of a zoning ordinance. See Comment (1932) 31 MICH. L. REV. 106, 109.

14. People *ex rel.* Sheldon v. Board of Appeals, 234 N. Y. 484, 493, 138 N. E. 416, 419 (1923). See Comment (1936) 11 WIS. L. REV. 543.

15. Nectow v. Cambridge, 277 U. S. 183 (1928).

16. The court depended for this on these cases: Lang v. New York Cent. Ry. Co., 227 N. Y. 507, 125 N. E. 681 (1920); Di Caprio v. New York Cent. Ry. Co., 231 N. Y. 94, 131 N. E. 746 (1921); Schmidt v. Merchants Dispatch Co., 270 N. Y. 287, 305, 200 N. E. 824, 829 (1936). These cases, however, are not in point. They concern statutory actions based on negligence. Little significance can be predicated on them as regards a suit brought under a zoning ordinance.

17. A plaintiff must be specially damaged to enforce such laws by injunction. Fitzgerald v. Merard Holding Co., 106 Conn. 475, 138 Atl. 483 (1927); Joseph v. Wieland Dairy Co., 297 Ill. 574, 131 N. E. 94 (1921); Rice v. Van Vranken, 225 App. Div. 179, 232 N. Y. Supp. 506 (3d Dep't 1929), *aff'd* 255 N. Y. 541, 175 N. E. 304 (1930); Holzbauer v. Ritter, 184 Wis. 35, 198 N. W. 852 (1924).

Merely because the ordinance has been violated does not give a cause of action unless special damage is suffered. Joseph v. Wieland Dairy Co., 297 Ill. 574, 131 N. E. 94 (1921); King v. Hammill, 97 Md. 103, 54 Atl. 625 (1903); Hagerty v. McGovern, 187 Mass. 479, 73 N. E. 536 (1905); Coley v. Campbell, 126 Misc. 869, 215 N. Y. Supp. 679 (Sup. Ct. 1926).