Fordham Law Review

Volume 7 | Issue 2 Article 7

1938

Recent Decisions

RECENT DECISIONS

BANKRUPTCY—SUMMARY JURISDICTION—BURDEN OF PROOF IN TURNOVER PROCEEDINGS.—Six months after the filing of a voluntary petition in bankruptcy by the *X* Corp., the trustee moved before the referee for a turnover order[1] directing the respondents, who were the officers and chief stockholders of the bankrupt, to surrender funds belonging to the bankrupt estate. The referee found as a fact that the respondents, preparatory to abandoning the bankrupt and forming a new company, had for three months prior to the filing of the petition looted it to the extent of quadrupling the average amount of their weekly salary withdrawals. Accordingly, some sixteen months after the filing of the trustee's petition, the referee directed the respondents to turn over the excess funds. On appeal from an order of the district court confirming the referee's report,[2] *held,* when the respondents admitted receiving the money but denied present possession, the trustee had the burden of proving that the missing funds were in their possession at the time the referee's summary order passed. Order reversed. *Danish v. Sofranski,* 93 F. (2d) 424 (C. C. A. 2d, 1937).

In view of the limited scope of the summary jurisdiction of a court of bankruptcy,[3] it must be conceded that considerable circumspection should be exercised before a turnover order is issued.[4] Failure to comply with the turnover order in all likelihood will result in commitment for contempt,[5] inasmuch as the respondent is precluded, on the contempt proceedings, from collateral attack on the findings in the summary order,[6] and what in effect amounts to imprisonment for debt is the result. The attitude of the courts, therefore, in demanding that the respondent's ability to comply with the turnover order be shown by clear and convincing evidence,[7] becomes more readily understandable. The Bankruptcy Act does not contemplate the imprisonment of a debtor who is unable to do the impossible, irrespective of his faithlessness.

But the trustee is not always faced with the difficult task of proving that the assets of the bankrupt are presently within the respondent's possession or control. If the trustee is seeking relatively valueless chattels, such as books of account, it is considered unlikely that the respondent has destroyed them, and if they can be

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1. The name commonly applied to a summary order issued by the referee at the suit of the trustee directing the respondent to turn over to the trustee assets of the bankrupt estate.

2. *In re* Sobod, Inc., Bankruptcy No. 62243 (S. D. N. Y., Aug. 3, 1937), *per* Leibell, D. J.

3. Summary jurisdiction is dependent upon possession of the *res,* actual or constructive, in the bankrupt or his agent, or in someone with no claim of a beneficial interest therein. 5 REMINGTON, BANKRUPTCY (4th ed. 1936) § 2350.

4. 5 REMINGTON, *op. cit. supra* note 3, § 2409.

5. 30 STAT. 545 (1898), 11 U. S. C. A. § 11 (16) (1927).

6. Oriel v. Russell, 278 U. S. 358 (1929).

7. Oriel v. Russell, 278 U. S. 358 (1929). Before this decision the bankruptcy courts floundered helplessly in a welter of conflicting authority on the *quantum* of proof necessary. See, *e.g.,* Boyd v. Glucklich, 116 Fed. 131, 140 (C. C. A. 8th, 1902) ("beyond a reasonable doubt"); American Trust Co. v. Wallis, 126 Fed. 464, 466 (C. C. A. 3d, 1903) (indisputable proof); *In re* Adler, 129 Fed. 502, 504 (W. D. Tenn. 1904) ("something like incontestible proof"); Kirsner v. Taliaferro, 202 Fed. 51, 60 (C. C. A. 4th, 1912); (proof "as nearly absolute as human conclusions ordinarily can be"); *In re* Dixon, 224 Fed. 624, 627 (D. Mass. 1915) ("by a fair preponderance of the testimony").

traced into his hands, he will be ordered to surrender them.[8] Or the respondent may steadfastly deny ever having received the property; in such a case it is held that the trustee need only make out a *prima facie* case of possession, and the respondent's defense is shattered; the court will draw the inference that, his original denial being discredited, he is still in possession.[9] It is unfortunate that the court in the principal case does not feel itself free to indulge in the same inference when the respondent admits having received the property. Their denial of present possession[10] should not, of itself, relieve them of the duty of explanation,[11] and for all practical purposes it is immaterial whether they admit having received the property. There is some analogy to the case of bailments, where the bailee lawfully placed in possession must nevertheless explain his failure to return the property shown by the bailor to have been delivered to him.[12] Nor can it be said that the mere lapse of time should cast the full burden on the trustee. It is true that the likelihood that the respondent continues in possession lessens as time passes, but he is still, even years later, the one best able to tell the subsequent history of property traced into his hands.

Unfortunately, future fraudulent bankrupts will doubtless avail themselves of

8. *In re* Arctic Leather Garment Co., 89 F. (2d) 871 (C. C. A. 2d, 1937). If the trustee makes out a *prima facie* case of possession, the respondent's unsupported denial will not overcome it. *In re* Ahlstrom & Enholm Co., 26 F. (2d) 268 (D. Mass. 1928).

9. Hirsch v. Schilling, 28 F. (2d) 171 (C. C. A. 3d, 1928); *In re* Steinreich Associates, Inc., 83 F. (2d) 254 (C. C. A. 2d, 1936); Moore v. Lane, 84 F (2d) 553 (C. C. A. 8th, (1936). Says Learned Hand, C. J., in the principal case: "The ground for this [rule] has never been stated, but a valid explanation is that, as the supposed excuse would contradict his denial, it may be assumed that he would not make it. . . ." 93 F. (2d) at 426.

10. It is not settled what date is to be used in determining when the respondent has the necessary possession. There is some authority which supports the view that the time of the filing of the bankruptcy petition is the correct test date. Frederick v. Silverman, 250 Fed. 75 (C. C. A. 3d, 1918). But, as is pointed out in 5 REMINGTON, *op. cit. supra* note 3, § 2418, the summary order is always dependent upon possession, and it should not issue on the tenuous theory that the respondent *ought* to be in possession because he had the property at the time of the filing of the petition. *Cf. In re* J. L. Marks & Co., 85 F. (2d) 392 (C. C. A. 7th, 1936). Of course, in the principal case the trustee's application for the turnover order was not made until six months after the bankruptcy—due for the most part to the fact that the respondents' records were devoid of clues which would have indicated the manner in which the bankrupt's assets were dissipated. In such a case it may be said that possession must be determined by the date of the turnover order; the presumption that the property was still in the respondent's possession had largely ceased. Marin v. Ellis, 15 F. (2d) 321 (C. C. A. 8th, 1926).

11. It is suggested that the burden of explanation should shift to the respondent in all situations when the trustee has made out his *prima facie* case. See 5 REMINGTON, *op. cit. supra* note 3, § 2408.50; see also 1 COLLIER, BANKRUPTCY (13th ed. 1923) 97; COLLIER, BANKRUPTCY (Gilbert's 4th ed. 1937) 86. And see Sheinman v. Chalmers, 33 F. (2d) 902, 904 (C. C. A. 3d, 1929), wherein the court, admitting the respondent's contention that the burden of proof never shifted from the trustee, said: "There it rests, at least until he has made out a *prima facie* case. Then the burden, not of proving the proponent's case but of explaining or rebutting it, shifts to the other party. This burden he may assume or ignore as he may wish, but he will suffer the consequences of not taking it up and carrying it."

12. Wintringham v. Hayes, 144 N. Y. 1, 38 N. E. 999 (1894); Kohlsaat v. Parkersburg & Marietta Sand Co., 266 Fed. 283 (C. C. A. 4th, 1920), 11 A. L. R. 690 (1921); 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2508.

the course so carefully charted for them by this decision. They need only cheerfully admit their fraud and deny present possession; the trustee, unable to prove possession, is left with the empty remedy of a plenary action. It may be argued that the desire to avoid an unjust confinement is sufficiently compelling to justify the policy inherent in the decision,[13] but it is another question whether such solicitude for the welfare of one acknowledgedly fraudulent is morally defensible. It is some comfort, therefore, to note the court's hint that on other facts it might be prepared to relax the stringency of the rule.[14]

CARRIERS—PASSENGERS—DEGREES OF CARE.—Action by a passenger against a carrier for injuries sustained in slipping upon a banana peel as the passenger arose to alight from the bus. The trial court charged the jury that the defendant owed to the plaintiff the highest degree of practicable care for her safety. On appeal, *held,* two justices dissenting, the plaintiff was entitled to have the court instruct the jury that in the inspection of the bus and in the duty of keeping it free from refuse likely to cause harm, the carrier was bound to exercise the highest degree of care practicable under the circumstances. Judgment affirmed. *Jones v. Youngstown Municipal Ry. Co.,* 12 N. E. (2d) 279 (Ohio 1937).

The liability of a common carrier for injury to a passenger is based upon negligence.[1] Negligence is generally defined as the want of due care under the circumstances.[2] As to the degree of care required of a carrier, however, there are two theories. One theory follows the general rule applicable to the ordinary relation and requires the exercise of a reasonable care or due care under the circumstances;[3] the other theory, which is the majority rule, would require the exercise of the highest degree of care.[4] The reasoning of the instant case adopts the second theory.

The concept that a carrier is bound to exercise the highest degree of care under the circumstances, for the safety of its passengers, is founded upon understandable factual considerations. Human life is submitted to the control of the carrier. The disastrous results, which would follow the abuse of that control in the transportation business, seem to be influencing the courts when they, *as a matter of law,* divide care into grades and require of a carrier of passengers the highest degree of care under the circumstances.[5]

13. It has been suggested that in such cases a short confinement is usually effective in producing the missing property promptly. See the remarks of McPherson, C. J., in *In re* Epstein, 206 Fed. 568, 569-70 (E. D. Pa. 1913), quoted at length with approval in Oriel v. Russell, 278 U. S. 358, 365-66 (1929).

14. "It is of course possible that the amount withdrawn may be so large, and the interval between the withdrawal and the order so short, that it can be said with certainty that a minimum must be left, and what it is, but the trustee must in some way way establish the point." 93 F. (2d) at 426-27.

1. The law does not impose upon a carrier of passengers the liability of an insurer. IV HALSBURY, LAWS OF ENGLAND (1908) § 74; Crozier v. Hawkeye Stages, 209 Iowa 313, 228 N. W. 320 (1929); O'Brien v. New York Rys. Co., 185 App. Div. 867, 174 N. Y. Supp. 116 (1st Dep't 1919); Bines v. United Electric Rys. Co., 50 R. I. 438, 148 Atl. 417 (1930).

2. THROCKMORTON, COOLEY ON TORTS (Students ed. 1930) § 313.

3. Union Traction Co. v. Berry, 188 Ind. 514, 121 N. E. 655 (1919).

4. See authorities collected in Note (1924) 32 A. L. R. 1190. In describing this high degree of care there is little uniformity. See Note (1932) 18 VA. L. REV. 686.

5. Control would seem to be the dominating consideration. The common carrier of goods, with certain exceptions, is an insurer; one reason being that he has *complete*

The criticism of the instant case is that while applying the above rule it ignores its logic. Here is a case where the plaintiff was injured as a result of a comparatively trifling danger; one which is not peculiar to conveyance by a carrier or the business of transportation; one not within the control of the carrier.[6] The risk would be the same in an apartment house or a department store. It seems better to hold that where an injury results to a passenger through the carelessness of another, not in the employ of the carrier, and for whose negligence it is admitted the carrier is only bound after notice,[7] the general rule of ordinary care should be applied even by a court which sanctions the division of care into degrees.[8] Under these circumstances the carrier should be liable only if, in the exercise of due care, it should have discovered and removed the danger.[9] Nor should the fact that the carrier knows about the danger require as a matter of law a greater degree of care in removing it. Such a distinction leads to a mode of reasoning too fine to serve any practical purpose.[10]

It would seem, however, that the court is persisting, in this decision, in an outworn and useless division when it assumed that under *any* facts, even in connection with a risk which is peculiar to transportation, the court should charge the grades of care as a matter of law and that a carrier is bound to exercise the highest degree of care. The division of care into degrees is condemned by modern authorities.[11] There is only one *standard* of care—due care under all the circumstances.[12] What *amount* of care is necessary to be exercised in order to constitute due care is variable depending upon the circumstances. What that amount of care should be is a question which should properly be left with the jury.[13] It is unnecessary[14] and more-

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dominion over the goods he is transporting. The law imposes a lesser liability upon a carrier of passengers, not because human life is less valuable, but because the carrier cannot in the nature of things exercise the same degree of control over intelligent beings as over inert matter. See MOORE ON CARRIERS (1906) 541. *Cf.* Note (1926) 74 U. PA. L. REV. 841.

6. This is the argument of the dissent in the instant case at p. 283.

7. If the rules applicable to the ordinary relation were applied, the bus driver would be liable if he knew, or in the exercise of due care ought to have known, of the dangerous condition of the floor. In the instant case the majority required the bus driver to exercise the highest degree of care in discovering the danger.

8. Bassell v. Hines, 269 Fed. 231 (C. C. A. 6th, 1920); Pittsburgh, C. C. & St. L. Ry. Co. v. Rose, 40 Ind. App. 240, 79 N. E. 1094 (1907); Thoreson v. N. Y. State Rys., 98 Misc. 37, 162 N. Y. Supp. 397 (Sup. Ct. 1916).

9. Long v. Atlantic Coast Line R. Co., 238 Fed. 919 (C. C. A. 4th, 1916); Burns v. Pennsylvania R. Co., 223 Pa. 304, 82 Atl. 246 (1912); Stimson v. Milwaukee, L. S. J. W. Ry. Co., 75 Wis. 381, 44 N. W. 748 (1890).

10. This distinction is, however, sometimes made. Anderson v. South Carolina & G. R. Co., 77 S. C. 434, 58 S. E. 149 (1907); Forbes v. Pullman Co., 137 S. C. 433, 135 S. E. 563 (1926). Morally, however, the knowledge of the danger and the duty to discover the danger should each be governed by the same rule.

11. HARPER, TORTS (1933) § 74; (1921) 34 HARV. L. REV. 789; (1922) 31 YALE L. J. 555. *Cf.* Note (1928) 14 VA. L. REV. 200.

12. *Ibid.*

13. Union Traction Co. v. Berry, 188 Ind. 514, 121 N. E. 655 (1919); Pittsburgh, C. C. & St. L. Ry. Co. v. Stephens, 86 Ind. App. 251, 157 N. E. 58 (1927).

14. Whittacker v. Brooklyn, Q. C. & S. R. Co., 110 App. Div. 767, 768, 97 N. Y. Supp. 414, 415 (2d Dep't 1906). Gaynor, J. says, "There is, indeed, only one rule of care; *i.e.*, that of ordinary care, . . . The courts of this state have determined as a matter of law that the care required of carriers of passengers in respect of the construction and care of their road beds, machinery and cars is the highest degree of care which human

over often harmful for the court to instruct the jury on degrees of care in that it confuses the jury.[15] A charge that the carrier is bound to use the highest degree of care places false emphasis upon the relation of carrier and passenger. It is not the relation of carrier and passenger which gives rise to an obligation to use a greater *amount* of care; it is the probable dangerous circumstances in each particular case which affix the amount of care required to measure up to reasonable care. Finally the division of care into degrees is perplexing to the court itself.[16] They grudgingly charge the grades.[17] Some courts repudiating the division of negligence into degrees affirm the division of care into degrees.[18] Some courts while holding that the carrier is bound to exercise the highest degree of care to guard against accident arising out of the condition of its cars, road-beds, machinery and appliances yet apply the rule of ordinary care to the operation of those means of transportation.[19] Such decisions merely indicate how hard it is to properly comprehend a rule which would necessitate the division of care into degrees.

As a summary of the foregoing, it seems that when a court in a carrier-passenger case charges as a matter of law that the carrier is bound to exercise a very high degree of care only one of two things can be true. Either the circumstances in fact demand great care or else they do not. If the circumstances do require great care the charge is as above indicated not only futile but harmful. If the circumstances do not require great care the court is disregarding the realities of the case and is misled by a maxim. In neither case is the court putting itself in an enviable position.

CONFLICT OF LAWS—FOREIGN DIVORCE—RECOGNITION IN NEW YORK.—In an action by a wife for a separation the alleged husband interposed as a defense a decree of divorce previously granted in his favor by a Nevada court, pursuant to proceedings instituted by him after he had left New York and established a domicile in Nevada. The parties had been domiciled in the State of New York prior and subsequent to their marriage and after obtaining the Nevada divorce the husband had returned to New York. The wife while remaining domiciled in New York had voluntarily appeared in the divorce action by attorney. On appeal, from a judgment affirming a judgment for the defendant, *held,* the Nevada decree was a valid defense to plaintiff's action. Judgment affirmed. *Glaser v. Glaser,* 276 N. Y. 296, 12 N. E. (2d) 305 (1938).

The difficulties which attend the problem of jurisdiction in divorce proceedings spring from the fact that the dissolution of the marriage bond concerns not only the

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prudence and foresight can suggest (Stierle v. Union Railway Co., 156 N. Y. 70, 50 N. E. 419), but it was quite unnecessary, for juries knew it all along, namely, that ordinary care in such cases required just that."

15. (1919) 19 COL. L. REV. 166.

16. See O'Brien v. New York Rys. Co., 185 App. Div. 867, 873, 174 N. Y. Supp. 116, 120 (1st Dep't 1919). This case indicates how perplexing a problem the division of care into degrees has become. The court struggles to propound a wise rule of law. The case points out the futility of trying to fashion a rule of law to fit unending factual situations. It would seem that a jury is more capable of handling such a problem than the court.

17. In the related field of bailor-bailee there is also dissatisfaction with the division of care into degrees. See Dalton v. Hamilton Hotel Operating Co., Inc., 242 N. Y. 481, 487, 152 N. E. 268, 270 (1926).

18. Magrane v. St. Louis S. Ry. Co., 183 Mo. 119, 81 S. W. 1158 (1904). *Cf.* Union Traction Co v. Berry, 188 Ind. 514, 121 N. E. 655 (1919).

19. Stierle v. Union Railway Co., 156 N. Y. 70, 50 N. E. 416 (1898); Taddeo v. Tilton, 248 App. Div. 290, 289 N. Y. Supp. 427 (4th Dep't 1936). For a criticism of such a distinction see Note (1932) 18 VA. L. REV. 686, 688.

husband and wife who are parties to the action but also the state.[1] Because of this tripartite relationship, the action for divorce in an appreciable degree centers around the question of domicile. When both parties are domiciled in the state where the divorce is granted, its extra-territorial effect is not open to question; but if the husband and wife have acquired domiciles in different states, complications arise.

When not bound by the full faith and credit clause of the Federal Constitution, the New York Courts have declared that the operation of a foreign divorce decree in the State is a matter of public policy, and that this policy seeks to maintain the permanence of the marriage bond.[2] An examination of the cases shows that where recognition of foreign decrees is involved, the following matters have been deemed material: (1) The *bona fides* of the libellant's domicile; (2) The location of the matrimonial domicile; (3) The nature of the libellee's participation in the divorce proceedings; and, possibly, (4) The character of the marital conduct of the libellee.[3]

When the respondent in a foreign proceeding has been served only by publication, the Court of Appeals has scrutinized the domicile of the libellant with great diligence.[4] Even when this domicile has been established as *bona fide*, recognition may be withheld[5] expect in instances where the divorce was obtained at the matrimonial domicile.[6]

However, not only has the Court of Appeals intimated, in opinions holding foreign *ex parte* divorces invalid, that an appearance by the libellee would have entitled such decrees to recognition,[7] but it has squarely ruled in a number of decisions that a foreign decree issued against a respondent who appeared voluntarily in the divorce proceedings was valid in this state.[8] Indeed, it would appear from the cases that if the

1. Maynard v. Hill, 125 U. S. 190 (1887).

2. See Hubbard v. Hubbard, 228 N. Y. 81, 85, 126 N. E. 503, 509 (1920). The latter conclusion is supported by the fact that adultery is the sole ground for divorce in New York. N. Y. CIV. PRAC. ACT (1921) § 1147. (An annulment may be obtained where a spouse has been absent or incurably insane for five years. N. Y. DOM. REL. LAW (1937) §§ 7 (5) and 7-a.)

3. See RESTATEMENT, CONFLICT OF LAWS (N. Y. Annotation 1935) § 113; Greene, *The Enforcement of a Foreign Divorce Decree in New York* (1926) 11 CORN. L. Q. 141, 154-159.

4. Lefferts v. Lefferts, 263 N. Y. 131, 188 N. E. 279 (1933); Fischer v. Fischer, 254 N. Y. 463, 173 N. E. 680 (1930).

5. Haddock v. Haddock, 178 N. Y. 557, 70 N. E. 1099 (1904), *aff'd*, 201 U. S. 562 (1906); People v. Baker, 76 N. Y. 78 (1879). This doctrine has been relaxed where parties whose marital domicile was in another state have been involved. Hubbard v. Hubbard, 228 N. Y. 81, 126 N. E. 508 (1920). In such cases the rule of the state of the respondent's domicile is applied. Dean v. Dean, 2 N. Y. 240, 149 N. E. 844 (1925); Ball v. Cross, 231 N. Y. 329, 132 N. E. 106 (1921). The novel case of Gould v. Gould, 235 N. Y. 14, 138 N. E. 490 (1923) recognized a French divorce although the parties appeared to have been domiciled in New York at the time when the decree was entered but this case was limited by the court itself to its precise facts.

6. Atherton v. Atherton, 181 U. S. 155 (1900); Schenker v. Schenker, 181 App. Div. 621, 169 N. Y. Supp. 35 (1st Dep't 1918), *aff'd*, 228 N. Y. 600, 127 N. E. 921 (1920); Greene, *The Enforcement of a Foreign Divorce Decree in New York* (1926) 11 CORN. L. Q. 141. While many interpretations of the term "matrimonial domicile" may be found, it is here limited to the meaning in which it is used in the Atherton case, *supra*, namely, the state where the parties last resided together as husband and wife.

7. See Lefferts v. Lefferts, 263 N. Y. 130, 131, 188 N. E. 279 (1933); Starbuck v. Starbuck, 173 N. Y. 503, 508, 66 N. E. 193, 194 (1903); O'Dea v. O'Dea, 101 N. Y. 23, 29, 4 N. E. 110, 111 (1885); People v. Baker, 76 N. Y. 78, 83 (1879); Borden v. Fitch, 15 Johns. 121, 143 (N. Y. 1818).

8. Hess v. Hess, 276 N. Y. 16, 12 N. E. (2d) 170 (1937); Ansorge v. Armour, 267 N. Y.

libellee has appeared voluntarily in the action, that the extra-territorial effect of the divorce is governed by the full faith and credit clause of the Federal Constitution.[9]

In the principal case, after having declared that there was evidence to support the findings made by the Special Term that the husband had established a *bona fide* domicile in Nevada and that the wife's appearance had not been procured through fraud,[10] the court confined its attention solely to the remaining question raised by the plaintiff's appeal, namely, whether it was contrary to the public policy of the State of New York to recognize a foreign divorce, obtained by a husband whose main purpose in leaving New York had been to procure the dissolution of his marriage.[11] It would seem that the policy of the State in this connection has never been expressly defined.[12] No reported case is to be found in New York prior to the instant decision wherein the libellant's motive in leaving the state has been questioned, once the fact of his domicil in the foreign state has been established.[13] Apparently it has been taken for granted that once the question of domicile has been settled, a party's motive in leaving the state is no longer of any importance. In several cases where the facts clearly indicate that the libellant had left the state to institute such an action the foreign decree was nevertheless recognized.[14]

Although the conclusion of the court in the principal case is correct, it would seem that public policy is not the only basis upon which the Nevada decree should have been recognized.[15] It has been shown heretofore that where a respondent has ap-

492, 196 N. E. 546 (1935); Borenstein v. Borenstein, 272 N. Y. 497, 3 N. E. (2d) 844 (1936); Pearson v. Pearson, 230 N. Y. 141, 129 N. E. 886 (1920); Tiedemann v. Tiedemann, 225 N. Y. 709, 122 N. E. 892 (1919); Jones v. Jones, 108 N. Y. 415, 15 N. E. 707 (1888); Kinnier v. Kinnier, 45 N. Y. 535 (1871).

9. Cheever v. Wilson, 9 Wall. 108 (1869); Ansorge v. Armour, 267 N. Y. 492, 196 N. E. 546 (1935). See Haddock v. Haddock, 201 U. S. 562, 570 (1900); RESTATEMENT, CONFLICT OF LAWS (1934) § 113 (a) (iii) comment d.; *id.* (N. Y. Annotation 1935) § 113 (a) (iii).

10. See Glaser v. Glaser, 276 N. Y. 296, 298, 12 N. E. (2d) 305 (1938). Moreover, it would seem that the New York courts do not question a libellant's domicile when the libellee has appeared in the proceedings. Tiedemann v. Tiedemann, 225 N. Y. 709, 122 N. E. 892 (1919). See RESTATEMENT, CONFLICT OF LAWS (N. Y. Annotation 1935) § 111.

11. See Glaser v. Glaser, 276 N. Y. 296, 299, 12 N. E. (2d) 305, 306 (1938). While the instant opinion does not mention the possibility, it would seem that the wife might be barred from contesting the validity of a divorce proceeding in which she appeared voluntarily. Borenstein v. Borenstein, 158 Misc. 160, 270 N. Y. Supp. 688 (Sup. Ct. 1934), *aff'd*, 272 N. Y. 407, 3 N. E. (2d) 844 (1934). *Cf.* Hynes v. Title Guarantee & Trust Co., 273 N. Y. 612, 7 N. E. (2d) 719 (1937); Starbuck v. Starbuck, 173 N. Y. 503, 66 N. E. 193 (1903). But *cf.*, Stevens v. Stevens, 273 N. Y. 157, 7 N. E. (2d) 26 (1937) in which it was stated that the rule of "estoppel" is only applied when a party is seeking to promote some selfish, private end and not where the court is asked to pass judgment directly upon the marital status.

12. Glaser v. Glaser, 276 N. Y. 296, 12 N. E. (2d) 305 (1938).

13. RESTATEMENT, CONFLICT OF LAWS (N. Y. Annotation 1935) § 113 (a) (iii). While motive may be important evidence in determining the intent to establish domicile, it is not conclusive. Matter of Newcomb, 192 N. Y. 238, 84 N. E. 950 (1908); RESTATEMENT, CONFLICT OF LAWS (1934) § 22.

14. Ansorge v. Armour, 267 N. Y. 242, 196 N. E. 546 (1935); Pearson v. Pearson, 230 N. Y. 141, 129 N. E. 886 (1920); Kinnier v Kinnier, 45 N. Y. 535 (1871).

15. The court's argument was apparently based upon public policy. "None of these cases, [referring to decisions in U. S. Supreme Court cited by appellant] however, decide when and under what conditions a State may recognize a foreign decree, although it is not bound to do so under the Federal Constitution. These are matters of State policy over which the United States Court has no jurisdiction." Glaser v. Glaser, 276 N. Y. 296, 301, 12 N. E. (2d) 305, 306 (1938).

peared voluntarily before a court in the state of the libellant's domicil, the ensuing decree is entitled to full faith and credit.[16] Once the matter of the libellant's domicile has been settled, it would seem clear that the motive behind his departure from the state cannot nullify the validity of the foreign decree and transform the question of recognition into a problem of local state policy.[17]

Thus it appears that despite the husband's motive in departing from New York, the divorce questioned in the principal case is not offensive to the public policy of the State of New York and is also entitled to full faith and credit under the Constitution of the United States.

CONSTITUTIONAL LAW—ADMISSIBILITY OF WIRE-TAPPED EVIDENCE.—Defendant-petitioners were convicted of the smuggling, possession, and concealment of alcohol. Evidence procured by Federal agents by tapping defendant's telephone wires was admitted at the trial. On appeal from the judgment of conviction, *held,* two judges dissenting, that such evidence was inadmissible in court under the Federal Communications Act of 1934.[1] Judgment reversed. *Nardone v. United States,* 58 Sup. Ct. 275 (1937).

One of the most curious anomalies in the law of evidence is the refusal of courts to take judicial notice of the criminal acts of policemen when they are engaged in procuring evidence to prove the criminal acts of wrong-doers.[2] Thus, law enforcement agencies may use in evidence articles seized beyond the scope of a search warrant,[3] and in some jurisdictions, they may use such articles illegally seized, merely upon reasonable suspicion of crime, without a search warrant.[4] Not that this condition of the law can be criticized too severely, for it must be conceded that without some such allowances, the government agencies would be handicapped in their pursuit of criminals.[5]

It is with reference to the number and extent of the allowances made to police officers that the courts of various jurisdictions are in conflict. The Federal courts were at first inclined toward accepting *in toto* the English rule; that the court in a criminal trial cannot take notice of how the evidence offered was acquired.[6] But as the Fourth Amendment provides protection to the citizens of the United States

16. See note 9, *supra.*

17. See Haddock v. Haddock, 201 U. S. 562, 570, 583 (1906); Andrews v. Andrews, 188 U. S. 14, 29-30, 31 (1903). But see Lister v. Lister, 86 N. J. Eq. 30, 46, 97 Atl. 170, 177 (1915).

1. 48 STAT. 1064, 1103, c. 652, 47 U. S. C. A. § 605 (1936). ". . . no person not being authorized by the sender shall intercept any [interstate or foreign] communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . . ."

2. Adams v. New York, 192 U. S. 585 (1904); State v. Kelley, 125 Kan. 805, 265 Pac. 1109 (1928); People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926); Bishop Atterbury's Trial, 16 How. St. Tr. 495 (1723); 1 GREENLEAF, EVIDENCE (16th ed 1899) § 254a; Comment (1904) 4 COL. L. REV. 60. *Cf.* Weeks v. United States, 232 U. S. 383 (1914); State v. Sheridan, 121 Iowa 164, 96 N. W. 730 (1903).

3. Commonwealth v. Tibbetts, 157 Mass. 519, 32 N. E. 910 (1893).

4. People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926).

5. See People v. Defore, 242 N. Y. 13, 23, 150 N. E. 585, 588 (1926). But see the dissenting opinion of Justice Brandeis in Olmstead v. United States, 277 U. S. 438, 484 (1928).

6. See also Bacon v. United States, 97 Fed. 35, 40 (C. C. A. 8th, 1899); Adams v. New York, 192 U. S. 585 (1904).

against illegal searches and seizures of property,[7] it soon became evident that if it was to have any effect, it would be necessary to outlaw any evidence acquired in violation of the constitutional provisions.[8] Since the case of *Weeks v. United States*,[9] the Federal rule has been certain; the court in Federal criminal trials, will not take notice of the means by which the evidence brought before it was procured, unless it has been gathered in violation of a constitutional guaranty.[10] The blow which this doctrine dealt to the efficiency of the Federal crime bureaus by preventing the introduction of evidence gathered in violation of the Constitution was offset to some degree, however, when the Supreme Court decided, four judges dissenting, in *Olmstead v. United States*,[11] that evidence procured by the tapping of defendant's telephone wires was not a violation of the Fourth Amendment, because such tapping of wires did not constitute a physical entry into the defendant's house. Hence such evidence was admissible in Federal criminal trials, even though procured in violation of a state statute.[12]

The majority of state courts adhere to the early common law rule on the question of admissibility of illegally acquired evidence, and accept it without taking notice of the means by which it is gathered.[13] New York courts, in particular, have had few qualms of conscience in this respect. They have universally admitted evidence, no matter how acquired.[14] Although the Fourth Amendment to the United States Constitution does not apply to the states,[15] Section 8 of the Civil Rights Law of

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7. *Ex parte* Jackson, 96 U. S. 727 (1877); Boyd v. United States, 116 U. S. 616 (1886).

8. Actually the evidence is outlawed by the Fifth Amendment, which provides that no person "shall be compelled in any criminal case to be a witness against himself." It is well settled that the Fifth Amendment protects a defendant from incrimination by the use of evidence seized in violation of his rights under the Fourth Amendment. Weeks v. United States, 232 U. S. 383 (1914); Burdeau v. McDowell, 256 U. S. 465 (1921); Agnello v. United States, 269 U. S. 20 (1925). See also: Fraenkel, *Concerning Searches and Seizures* (1921) 34 HARV. L. REV. 361, 367.

9. 232 U. S. 383 (1914).

10. Silverthorne Lumber Co. v. United States, 251 U. S. 385 (1920); Gouled v. United States, 255 U. S. 298 (1921); Agnello v. United States, 269 U. S. 20 (1925). There are two exceptions to this rule: (1) If the evidence is seized by others than Federal agents, it may be used by Federal agents in the trial. Burdeau v. McDowell, 256 U. S. 465 (1921). But when state and Federal officers cooperate in a joint enterprise in obtaining evidence by illegal seizure, such evidence is inadmissible. Byars v. United States, 273 U. S. 28 (1927). (2) If no objection is made by the defendant to the introduction of such evidence at the trial, he cannot subsequently use the introduction of that evidence as grounds for appeal, but is assumed to have consented to the seizure of such evidence. United States v. Napela, 28 F. (2d) 898 (N. D. N. Y. 1928); Cogen v. United States, 278 U. S. 221 (1929).

11. 277 U. S. 438 (1928).

12. The Court in Olmstead v. United States, 277 U. S. 438 (1928) negatived the plea of defendants that their rights under the Fifth Amendment had been violated by the fact that the wire-tapped evidence was, in a sense, self-incriminating evidence. "There was no evidence of compulsion to induce the defendants to talk over their many telephones." Olmstead v. United States, *supra* at 462.

13. For a comprehensive collection of state cases on both sides of this question, see Note (1923) 24 A. L. R. 1408.

14. People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926); Gumperz v. Hoffmann, 245 App. Div. 622, 283 N. Y. Supp. 823 (1st Dep't 1925); *In re* Davis, 252 App. Div. 591 (1st Dep't 1937).

15. Adams v. New York, 192 U. S. 585 (1904).

New York embodies the same provision as does that amendment; but even a violation of that section does not render evidence inadmissible at the trial of a criminal.[16] The introduction of evidence acquired by the tapping of a defendant's telephone wires, then, offered no problem to the courts of this state.[17] The mere fact that there is a state statute which makes wire-tapping a crime[18] cannot exclude evidence acquired by that means[19] from the trial.[20]

As a result of the principal case, however, the Federal rule is now changed, and the federal law-enforcement agencies have encountered another obstacle in their prosecution of the breaches of the laws of the United States. This is especially true of Internal Revenue Bureau's activities.[21] It would seem that the decision places an unnecessarily harsh burden on all the investigative branches of the government. Indeed, on first glance, it appears that the case overrides an intimation in the *Olmstead* case, that nothing but a procedural statute expressly forbidding the introduction of wire-tapped evidence in court would suffice to change the rule;[22] a mere criminal statute would not be effective in excluding such evidence. But the statute upon which the ruling in this case is based is merely a criminal statute. However, a closer study of the statute reveals that its wording precludes the necessity of a procedural regulation to the same effect. For it commands that no person "shall intercept any communication (telephone) and divulge . . . such . . . communication". A crime is being committed in court when the witness divulges information acquired in the forbidden manner.[23] Clearly the rule of admissibility of illegal evidence could not be strained so far as to embrace a situation where the illegal act is being performed before the eyes of the court. The argument of the dissenting opinion, that government agents are to be exempted from persons included in the statute is of little, if any, force. The plain mandate of the statute includes all persons.[24]

16. People v. Adams, 176 N. Y. 351, 68 N. E. 636 (1903); People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926).

17. People v. McDonald, 177 App. Div. 806, 165 N. Y. Supp. 41 (2d Dep't 1917); *In re* Davis, 252 App. Div. 591 (1st Dep't 1937).

18. N. Y. PENAL LAW (1909) § 1423 (6).

19. New York courts would seem to have approached the limits of liberality in the question of wire-tapped evidence. In a recent case, *In re* Davis, 252 App. Div. 591 (1st Dep't 1937), such evidence was allowed in a proceeding for the disbarment of an attorney, nominally, at least, a non-criminal trial. And it was intimated in People v. Hebberd, 96 Misc. 617, 620, 162 N. Y. Supp. 80, 84 (Sup. Ct. 1916), that a Police Commissioner is exempt from criminal liability for wire-tapping, if it is carried on in line of duty.

20. At the recently ended session of the New York Legislature a bill was introduced (Nos. 525, 2540. Int. 605 by Mr. McNaboe) and passed by both houses, which would amend § 1423 of the N. Y. PENAL LAW to conform in great measure with the Federal Statute which is the basis of the principal decision. It would necessarily, then, overturn the New York rule on the admissibility of wire-tapped evidence. However, the bill was vetoed by Governor Lehman. N. Y. Times, Apr. 5, 1938, p. 4, col. 4.

21. N. Y. Times, Dec. 22, 1937, p. 4, col. 2.

22. Olmstead v. United States, 277 U. S. 438, 465 (1928).

23. Although the situation has not yet arisen, it would appear that the statute would prevent State agents who have tapped interstate wires from introducing evidence procured thereby in a State court. This would be true even in States, like New York, which follow the common law rule of admissibility of illegally gathered evidence, for while the court may refuse to take notice of the illegal means whereby the evidence was acquired, it certainly cannot ignore the fact that a witness is violating a Federal Criminal Statute in the court's presence, when he "divulges" interstate, wire-tapped communications.

24. There are only two classes of cases in which government agents are impliedly

Inasmuch as the statute applies only to the tapping of interstate wires it would seem that intra-state communications may still be received in evidence, although acquired by wire-tapping.[25]

The court in the instant case mentions the contention of government counsel that Congress had no intention, when it passed the Federal Communications Act, of overthrowing the rule of the *Olmstead* case.[26] If this contention is true, it is up to Congress to correct the statute. But until it does so, the right of privacy has gained an important victory over the practical convenience of governmental administration.

CONTRACTS—CONSIDERATION—CHARITABLE SUBSCRIPTIONS.—The defendant executed and delivered to the Beth Israel Hospital Association the following statement: "To aid and assist the Beth Israel Hospital Association in its humanitarian work, and in consideration of the promises of others contributing for the same purposes, the undersigned does hereby promise to pay to the order of the Beth Israel Hospital Association . . . $5,000 payable in 4-year installments, $1,250 each. The undersigned further requests each and every other contributor to make his contribution in reliance upon the contribution of the undersigned herewith made." The Hospital Association assigned its rights under the agreement to the plaintiff. The complaint alleged that in reliance on the defendant's promise the plaintiff's assignor had incurred liabilities, spent money, and obtained other like subscriptions. Defendant moved to dismiss the complaint on the ground that it did not allege a valid consideration. On appeal from a reversal of an order granting the motion, *held,* one judge dissenting, that the complaint states a cause of action. Judgment affirmed. *I. & I. Holding Corp. v. Gainsburg,* 276 N. Y. 427, 12 N. E. (2d) 532 (1938).

Considerations of public policy have led courts to enforce subscriptions to charities even in situations where it appeared that the subscriber's promise was no more than an offer to make a gift in the future.[1] The task of finding that such engage-

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exempted from the general effect of a statute. The first class is where the statute would deprive the government of an established right or title. United States v. Stevenson, 215 U. S. 190, 197 (1909). The second class is where inclusion of such officers under the statute would work an obvious absurdity. State v. Gorham, 110 Wash. 330, 188 Pac. 457 (1920). Neither class fits this case.

25. It was recently held in United States v. Bonanzi, 94 F. (2d) 570 (C. C. A. 2d, 1938), that the government agents must prove that the wire-tapped evidence introduced against a criminal was acquired by the tapping of intra-state wires, and the court disallowed the introduction of such wire-tapped evidence on the ground that the government had not proved that the tapping was of intra-state, rather than inter-state, wires. The question of admissibility of intra-state communications was not presented to the court.

26. "Several . . . bills were introduced to prohibit the practice [wire-tapping by federal agents] all of which failed to pass." Nardone v. United States, 58 Sup. Ct. 275, 276 (1937).

1. The New York Court of Appeals has declared that the sound public policy of enforcing liability on charitable subscriptions would not be abandoned "to save the symmetry of a concept [consideration] which itself came into our law, not so much from any reasoned conviction of its justice, as from historical accidents of practice and procedure." Allegheny College v. National Chautauqua County Bank, 246 N. Y. 369, 375, 159 N. E. 173, 175 (1927); First Methodist Episcopal Church v. Howard's Estate, 133 Misc. 723, 726, 233 N. Y. Supp. 451, 455 (Surr. Ct. 1929) (liability enforced in interest of fair dealing); Eastern States Agricultural and Ind. League v. Vail's Estate, 97 Vt. 495, 500, 124 Atl. 568, 571 (1924).

ments were supported by a valid consideration has quite exhausted the ingenuity of bench and bar. Nor is it surprising that difficulty should arise, since very often it seems that the real intention is to make a gift and not to contract.[2]

Many courts have argued that an offer to make a contribution finds its consideration in the express or implied promise of the charitable organization to use the money in furtherance of its charitable enterprises.[3] Thereby a bilateral contract arises, binding the offeror to give the money, and theoretically obligating the offeree to continue the eleemosynary work. However, in the ordinary case, it may be said that although the subscriber intends that his money shall be returned if the project is abandoned, it is difficult to see that he had any intention to obligate the recipient of the contribution to continue its work.[4]

Other courts have taken the view that each contributor expressly or impliedly requests other contributors to make similar commitments, and that their promises, operating as acceptances of each other, are binding bilaterally upon the subscribers.[5] Thus, each obligor has a cause of action against those who default. However, since in the ordinary case the donee, which is not one of the contracting parties, brings suit to enforce liability, the objection may be maintained that the action must fail unless the case is brought within the narrow rules permitting donee beneficiaries to recover on contracts. In some instances there have been expressions favoring the doctrine of promissory estoppel as a substitute for consideration.[6] Under that

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2. See 1 WILLISTON, CONTRACTS (rev. ed. 1936) § 116. Professor Williston points out that the term "charitable subscription" indicates that in the ordinary case there is no contractual intention. See also Billig, *The Problem of Consideration in Charitable Subscriptions* (1927) 12 CORN. L. Q. 467, 472.

3. Central Maine General Hospital v. Carter, 125 Me. 191, 132 Atl. 417 (1926) (court found implied promise by donee to devote hospital to particular purposes); *In re* Griswold's Estate, 113 Neb. 256, 202 N. W. 609 (1925) (bilateral contract arising out of promise to give money and promise to use same as endowment fund for university); see Barnett v. Franklin College, 10 Ind. App. 103, 110, 37 N. E. 427, 429 (1894). *Contra:* Bridgewater Academy v. Gilbert, 2 Pick. 579 (Mass. 1824) (express stipulation as to purpose insufficient to create obligation); Trustees of Hamilton College v. Stewart, 1 N. Y. 581 (1848).

4. In some cases, however, the great benefit moving to the contributor indicated that he did intend to make a binding contract. New Jersey Orthopaedic Hospital & Dispensary v. Wright, 95 N. J. L. 462, 113 Atl. 114 (1921) (donee agreed to name operating room after person designated by donor); Allegheny College v. National Chautauqua County Bank, 246 N. Y. 369, 159 N. E. 173 (1927) (donee to name scholarship fund in honor of donor); Tioga County General Hospital v. Tidd, 164 Misc. 273, 298 N. Y. Supp. 460 (Sup. Ct. 1937).

5. University of Southern California v. Bryson, 103 Cal. App. 39, 283 Pac. 949 (1929) (subscription note delivered upon express condition that others would execute like instruments); Jackson v. Forward Atlanta Commission, Inc., 39 Ga. App. 647, 148 S. E. 356 (1929); Young Men's Christian Ass'n v. Caward, 213 Iowa 403, 239 N. W. 41 (1931) (no failure of consideration if others subscribed even though donee used funds for purpose other than that set out in subscription blank); see Commissioner of Internal Revenue v. Bryn Mawr Trust Co., 87 F. (2d) 607, 609 (C. C. A. 3d, 1936). *Contra:* Presbyterian Church of Albany v. Cooper, 112 N. Y. 517, 20 N. E. 352 (1889); Cutwright v. Preachers' Aid Society, 271 Ill. App. 168 (1933).

6. In the following cases the rules of orthodox estoppel appear to have been applied: Miller v. Western College of Toledo, 177 Ill. 280, 52 N. E. 432 (1898) (liability enforced even though giving of promissory note was not regarded as executed gift and consideration was lacking); Gans v. Reimensnyder, 110 Pa. 17, 2 Atl. 425 (1885) (no lia-

theory a promisee, having incurred detriment in justified reliance upon a promise, may hold the promisor estopped to claim that the undertaking was intended as a mere gratuity.[7] Decisions are to be found wherein the courts, giving up entirely the search for a *quid pro quo*, have denied the validity of these promises.[8]

In the rare instance where the offer plainly asks for the doing of a particular act, there is little trouble in supporting the conclusion that when the act has been performed a contract exists.[9] More often, however, it is only by implication that the promisee may be said to have requested action in exchange for his contribution.[10] The great extent to which courts will go in finding an implied request is illustrated by the instant case. Here the court argued that since the contribution was made to aid the promisee in its humanitarian work, there was a request that the institution continue to function as a hospital. The difficulty with accepting this argument is that the language from which the request was implied appears to be nothing more than a declaration of the defendant's motive. Money was to be contributed "To aid and assist . . ." the hospital in caring for the sick. It would appear that only a somewhat forced construction will sustain the conclusion that by these words the defendant requested the plaintiff to do anything in consideration for, or as a condition precedent to, receiving the money.

Since the offer in the instant case contemplated a unilateral contract, the bothersome question also arises as to whether the law permits revocation by the offeror after the offeree has performed in part. In strict theory the offeror may revoke under such circumstances, for the acceptance, which is the completed act and nothing less, has not been given.[11] However, the injustice of permitting one to go free after he has induced another to incur a detriment in reliance on a promise has caused the majority of jurisdictions to accept the rule that the offeror is bound after an act of part performance by the offeree, but that his obligations are con-

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bility on subscription because elements of estoppel found lacking); see Simpson Centenary College v. Tuttle, 71 Iowa, 596, 33 N. W. 74, 76 (1887). Though there are no cases which squarely adopt promissory estoppel, it has been mentioned in dicta. See Allegheny College v. National Chautauqua County Bank, 246 N. Y. 369, 374, 159 N. E. 173, 175 (1927); First Methodist Episcopal Church v. Howard's Estate, 133 Misc. 723, 727, 233 N. Y. Supp. 451, 456 (Surr. Ct. 1929). That the precise elements of a promissory estoppel are not always clearly understood was indicated in Matter of Tummonds, 160 Misc. 137, 139, 290 N. Y. Supp. 40, 43 (Surr. Ct. 1936), where the court said "It is perhaps, somewhat difficult from a casual reading of the Allegheny College Case to understand just what is meant by a promissory estoppel." See (1937) 6 FORDHAM L. REV. 123.

7. A complete discussion of promissory estoppel is given in 1 WILLISTON, CONTRACTS (rev. ed. 1936) § 139.

8. Dalhousie College v. Boutilier [1934] S. C. R. 642 (Can.), 95 A. L. R. 1305 (1935).

9. Roberts v. Cobb, 103 N. Y. 600, 9 N. E. 500 (1886) (express request that promisee obtain like subscriptions up to stipulated amount); Washington Heights Methodist Episcopal Church v. Comfort, 138 Misc. 236, 246 N. Y. Supp. 450 (Mun. Ct. 1930) (promisor requested promisee to secure like subscription from a certain third party).

10 Presbyterian Society v. Beach, 74 N. Y. 72 (1878) (request implied from donor's silent acquiescence in making of preparations); Keuka College v. Ray, 167 N. Y. 96, 60 N. E. 325 (1901); Trustees of Univ. of Pennsylvania v. Cadwalader, 277 Pa. 512, 121 Atl. 314 (1923); Rouff v. Washington & Lee University, 48 S. W. (2d) 483 (Tex. Civ. App. 1932).

11. Wormser, *The True Conception of Unilateral Contracts* (1916) 26 YALE L. J. 136. Professor Wormser explains that since the offeree is in no event bound to commence or continue the act of acceptance it would be unjust to prohibit a revocation while the performance is in progress.

ditional upon the completion of the requested act.[12] Whether New York follows the majority view or the strict, technical rule is a matter of doubt. Most writers on the law of contracts cite *Petterson v. Pattberg*[13] as authority for the proposition that in this state the offeror may revoke at any time before there has been full performance. In that case the act requested was the payment of a sum of money. The offeree informed the offeror that he had come for the purpose of paying, whereupon the latter revoked. His right to do so was upheld by the New York Court of Appeals. However, it has been pointed out that the court regarded this case as one in which the performance of the act of payment had not been commenced before the revocation.[14]

Because there is no case which definitely determines the New York law with regard to the right of revocation,[15] the instant decision is of the utmost importance.[16] Here both the court and the dissenting judge set forth with apparent approval that section of the Restatement of the Law of Contracts which sets forth the majority rule.[17] The great number of cases which hold that a contributor is bound after the promisee has obligated itself in reliance on the promise are hardly sustainable unless that view is applied. If the defendants in these situations have bargained for anything, it is the attainment of an end, and not the incurring of liability as a step toward that end. Viewed in this light, the quotation from the Restatement in the instant decision indicates that the court is inclined at least in charitable subscription cases, to deny the right of revocation after a part of the act called for has been done. It is regrettable that we are not told whether the court regarded the plaintiff's performance as incomplete, and squarely adopted the prevailing view as the law of this state; or whether, on the other hand, the intention was merely to indicate, by way of dictum, a line of reasoning upon which the defendant might have been held liable even though there had been only part performance. Necessary clarification on the question of the offeror's right of revocation must await the decisions that are to follow.

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12. Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 Pac. 1086 (1902) (offeror denied right to revoke offer after offeree, pursuant thereto, had substantially constructed car line); Ham v. Miss C. E. Mason's School, The Castle, Inc., 249 Ky. 478, 61 S. W. (2d) 7 (1933); see Ballantine, *Acceptance of Offers for Unilateral Contracts* (1921) 5 Minn. L. Rev. 94. The question of which of these views is preferable has been the subject of much debate. Compare 1 Williston, Contracts (1920) § 60A, where the author apparently favored the strict view, with the same section in the revised edition, where a different point of view is taken. See also Restatement, Contracts (1932) § 45.

13. 248 N. Y. 86, 161 N. E. 428 (1928), discussed in 1 Williston, Contracts (rev. ed. 1936) § 60A, n. 1.

14. Bacon, Book Review (1936) 5 Fordham L. Rev. 526, 529.

15. The following cases do not decide whether the offeror may revoke after part performance, because the offers were revoked before performance had been begun: White v. Kingston Motor Car Co., 69 Misc. 627, 126 N. Y. Supp. 150 (Sup. Ct. 1910); Butchers' Advocate Co. v. Berkof, 94 Misc. 299, 158 N. Y. Supp. 160 (App. Term 1916). The question did not arise in Rague v. New York Evening Journal Pub. Co., 164 App. Div. 126, 149 N. Y. Supp. 668 (2d Dep't 1914), for the requested act had been completed before the attempted revocation.

16. See Charles E. Quincy & Co. Arbitrage Corp. v. Cities Service Co., 156 Misc. 83, 282 N. Y. Supp. 294, 302 (Sup. Ct. 1935), where the court in dictum said that only complete performance would cut off the right to revoke the offer. The court also stated that the majority view was not the law in New York.

17. Restatement, Contracts (1932) § 45.

INSURANCE—WHAT CONSTITUTES CONTRACTS.—The plaintiff corporation is engaged in manufacturing and selling watches. It agreed with each purchaser of a watch to replace it, if lost through burglary or robbery. No additional consideration was received for this promise. On an agreed statement of facts presenting the question whether the plaintiff was carrying on an insurance business in violation of the statute prohibiting the transaction of insurance without a certificate of authority from the superintendent of insurance,[1] *held,* two justices dissenting, that the contract was not one of insurance. *Ollendorff Watch Co. v. Pink,* 253 App. Div. 73, 300 N. Y. Supp. 1176 (3d Dep't 1937).

The widening scope of so-called guarantees employed by merchants in an effort to increase sales has presented the problem of whether or not they are contracts of insurance. In most instances, the question arises when the state seeks to compel compliance with rigid insurance regulations[2] imposed for the benefit of the public.[3]

Whether a contract[4] is one of insurance is to be determined from the nature and effect of the agreement and not merely from its terminology.[5] It is well settled that the essential requisites of such a contract are: (1) consideration, (2) risk, and (3) indemnity. The consideration is the premium paid for the insurer's undertaking; the risk is the peril or contingent event against which the assured is protected; and the indemnity is the sum to be paid, or the act of value to be performed by the insurer in case of loss or damage caused by the specified hazard. Measuring the certificates in question by these standards, the court in the case at bar concludes that the elements of consideration and indemnity are both lacking, and that they are, therefore, not contracts of insurance.

An examination of the authorities reveals the fact that exclusive of a few cases, which defy classification,[6] the decisions divide these so-called guarantees into four general groups: (1) contracts of fidelity and surety, (2) installment contracts for the loan of money or the sale of property contingent upon the death of the debtor,

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1. N. Y. INSURANCE LAW (1909) § 9.

2. The instant case is not based on any statute since the New York Insurance Law does not contain a statutory definition of a contract of insurance. But see MASS. GEN. LAWS (1932) c. 175, § 2; MONT. REV. CODE ANN. (Choate, 1921) § 8060; WASH. REV. STAT. ANN. (Remington, 1932) § 7032.

Some common law definitions include the element of a plan to distribute the losses among persons subject to similar risks. VANCE, HANDBOOK OF THE LAW OF INSURANCE (2d ed. 1930) 2; Comment (1936) 36 COL. L. REV. 456, 458.

3. The Supreme Court has held that the business of insurance may be regulated by the state because it is affected with a public purpose. German Alliance Ins. Co. v. Lewis, 233 U. S. 389 (1913).

4. A policy of insurance must also fulfill all the requirements of an ordinary contract. VANCE, HANDBOOK OF THE LAW OF INSURANCE (1st ed. 1904) 72.

5. Physicians' Defense Co. v. Cooper, 199 Fed. 576 (C. C. A. 9th, 1912); Trustees of First Baptist Church in B'klyn v. B'klyn Fire Ins. Co., 28 N. Y. 153 (1863); Am. Nat. Ins. Co. v. Brawner, 93 S. W. (2d) 450 (Tex. 1936); 1 COOLEY, BRIEFS ON INSURANCE (2d ed. 1927) 6; VANCE, HANDBOOK OF THE LAW OF INSURANCE (2d ed. 1930) 57; 1 JOYCE, INSURANCE (1897) 55. See Comment (1936) 36 COL. L. REV. 456 for a discussion of the contract of insurance.

6. State v. Towle, 80 Me. 287, 14 Atl. 195 (1888) (a contract agreeing not to marry but providing that if any member of the association married within 2 years, his wife would receive a certain sum. This was not a contract of insurance); Commonwealth *ex rel.* Hensel v. Philadelphia Inquirer, 15 Pa. Co. Ct. 463 (1893) (an offer to pay a certain sum to heirs of any person who died with a copy of a newspaper upon him; held to be insurance).

(3) contracts of warranty, (4) contracts for services dependent on specified contingencies.

Contracts of the first and second classes have been uniformly held to be contracts of insurance. They have included agreements to indemnify for losses incurred because of uncollectible debts,[7] contracts guaranteeing faithful performance by lessee, employee or surety,[8] and installment contracts for loan of money[9] or sale of property,[10] providing for the cancellation of the debt on the death of the debtor, if it occurs during the term of the agreement. These latter agreements have been regarded with suspicion by the courts, and have been determined to be contracts of insurance, primarily because such provision is entirely foreign to a contract for the sale of realty. But it has been pointed out that the existence of an insurance device incidental to the main agreement should not of itself make the contract one of insurance.[11] It has also been urged in the installment cases, that the contract need not be subjected to state supervision because there is no necessity to protect the assured against the possible inability of the insurer to pay.[12]

Contracts of the third type, on the other hand, which warrant indemnity against loss or damage caused by a defect in the article sold, are generally construed as

7. Claflin v. U. S. Credit System Co., 165 Mass. 501, 43 N. E. 293 (1896) (contract made to purchase accounts against insolvent debtors); Shakman v. U. S. Credit System Co., 92 Wis. 366, 66 N. W. 528 (1896) (contract guaranteed the debts of customers of a clothing manufacturer); *cf.* State *ex rel.* Clapp v. Fed. Investment Co., 48 Minn. 110, 50 N. W. 1028 (1892); People *ex rel.* Daily Credit Service Corp. v. May, 162 App. Div. 215, 147 N. Y. Supp. 487 (3rd Dep't 1914) (contract to supply merchants with financial reports regarding business responsibilities of their customers).

8. First Nat. Bank of E. Islip v. Nat. Surety Co., 228 N. Y. 469, 127 N. E. 479 (1920) (contract guaranteed honesty of an employee). But a single contract of guaranty does not put the contracting parties in the insurance business. James Eva Estate v. Mecca Co., 40 Cal. App. 515, 181 Pac. 415 (1919) (lessee); Stern v. Rosenthal, 71 Misc. 422, 128 N. Y. Supp. 711 (Sup. Ct. 1911) (employee).

9. Missouri, K. & T. Trust Co. v. Krumseig, 77 Fed. 32 (C. C. A. 8th, 1896) (agreement provided that if the debtor should die within a 10 yr. period, the mortgage was to be cancelled. Note that a question of usury was also involved in this case); State v. Beardsley, 88 Minn. 20, 92 N. W. 472 (1902) (loan was made in order to finance a home; if debtor died, there was to be cancellation of the debt, but lender had to pay sum still due); *Cf.* Equity Service Corp. v. Agull, 250 App. Div. 96, 293 N. Y. Supp. 872 (1st Dep't 1937) (loan was secured by debtor's automobile; agreement provided that debtor could satisfy loan by surrendering auto even though it might have been damaged by a fire, accident, etc., *held,* not to be insurance); Philbrick v. Puritan Corp., 178 Okla. 489, 63 P. (2d) 38 (1936) (promissory note secured by a life insurance policy held not to be insurance contract).

10. Attorney General v. C. E. Osgood Co., 249 Mass. 473, 144 N. E. 371 (1924) (household goods were sold on installment plan; contract providing for cancellation on death of debtor held to be insurance); Barna v. Clifford Country Estates, Inc., 143 Misc. 813, 258 N. Y. Supp. 671 (City Ct. 1932) (similar contract applying to sale of realty); *cf.* Saltzman v. Fairbanks Realty Corp., 145 Misc. 478, 260 N. Y. Supp. 334 (Sup. Ct. 1932) (contract was held not to be insurance because buyer's representatives had an option to continue payments or rescind the contract).

11. Stern v. Rosenthal, 71 Misc. 422, 128 N. Y. Supp. 711 (Sup. Ct. 1911); *cf.* Colaizzi v. Penn. R. R., 208 N. Y. 275, 101 N. E. 859 (1913) (maintenance of relief department for the benefit of employees held not to be insurance).

12. Comment (1936) 36 COL. L. REV. 456, 464; Comment (1937) 36 MICH. L. REV 311, 314.

guarantees and not as contracts of insurance.[13] These decisions have emphasized the fact that a defect in an article is not a contingent peril or hazard of the type contemplated by an insurance contract.

As to the final class of contracts, the authorities are divided. Although seemingly fulfilling all the requirements for contracts of insurance, they have been held by the majority of jurisdictions to be contracts for an indeterminate amount of service.[14] These decisions have been justified by narrowing the accepted requirements, as for example, by claiming that the indemnity was not made in a fixed or ascertainable sum of money,[15] or that the consideration was not graduated or adequate according to the risk involved.[16] Some courts stress the risk-distributing element of a contract of insurance and point out that this is absent in the case where the promisor only operates within a limited area.[17] Contrary results have been sometimes reached in those situations where the promisor must procure performance by another.[18] But wherever there exists a possibility of fraud,[19] or an attempt to evade the insurance laws,[20] the courts do not hesitate to abandon their differences and to subject such contracts to the regulation of their insurance statutes.

It would seem that the court's reasoning in the instant case had been influenced by the tendency of many jurisdictions to refrain if possible from interfering with these ventures of the modern business man. By adopting the viewpoint of the strict constructionists, it reaches the conclusion that the certificates are not contracts of insurance because consideration is not present and the indemnity is not to be made in money. Conceding that the agreed statement of facts[21] admitted that no addi-

13. Evans & Tate v. Premier Refining Co., 31 Ga. App. 303, 120 S. E. 553 (1923) (a contract by a seller of an auto lubricant to replace auto gears of purchasers); Cole Bros. & Hart v. Haven, 7 N. W. 383 (Iowa 1880) (dealer in lightning-rods agreed to indemnify purchasers against damages caused by lightning).

14. Vredenburgh v. Physicians' Defense Co.. 126 Ill. App. 509 (1906); Moresh v. O'Regan, 187 Atl. 619 (N. J. 1936) (agreement to repair and replace broken glass); Physicians' Defense Co. v. Laylin, 73 Ohio St. 90, 76 N. E. 567 (1905) (contract agreed to defend physicians against actions for malpractice); Commonwealth v. Provident Bicycle Ass'n., 178 Pa. 636, 36 Atl. 197 (1897) (contract agreed to repair and replace bicycles). *Contra*: Physicians' Defense Co. v. Cooper, 199 Fed. 576 (C. C. A. 9th, 1912); Allin v. Motorist's Alliance of America, 234 Ky. 714, 29 S. W. (2d) 19 (1930) (contract agreed to furnish legal services to owners of automobiles); Physicians' Defense Co. v. O'Brien, 100 Minn. 490, 111 N. W. 396 (1907); State v. Bean, 193 Minn. 113, 258 N. W. 18 (1934); People v. Standard Plate Glass & Salvage Inc., 174 App. Div. 501, 156 N. Y. Supp. 1012 (3rd Dep't 1916).

15. Commonwealth v. Provident Bicycle Ass'n., 178 Pa. 636, 36 Atl. 197 (1897). See the dissenting opinion in Physicians' Defense Co. v. O'Brien, 100 Minn. 490, 111 N W. 396 (1907).

16. Commonwealth v. Provident Bicycle Ass'n., 178 Pa. 636, 36 Atl. 197 (1897).

17. Moresh v. O'Regan, 187 Atl. 619 (N. J. 1936), noted (1937) 36 MICH. L. REV. 311.

18. Physicians' Defense Co. v. Cooper, 199 Fed. 576 (C. C. A. 9th, 1912); Allin v Motorist's Alliance of America, 234 Ky. 714, 29 S. W. (2d) 19 (1930).

19. South Georgia Funeral Homes, Inc. v. Harrison, 184 S. E. 875 (Ga. 1936); State v. Willett, 171 Ind. 296, 86 N. E. 68 (1908); State *ex rel.* Attorney General v. Wichita Mut. Burial Ass'n., 73 Kan. 179, 84 Pac. 757 (1906); Renschler v. Hogan, 90 Ohio St. 363, 107 N. E. 758 (1914); State v. Glove Casket & Undertaking Co., 82 Wash. 124, 143 Pac. 878 (1914).

20. People v. Roschli, 275 N. Y. 26 (1937) (criminal proceedings against secretary of an association which agreed to replace broken glass only if fund had sufficient money).

21. Brief for appellant, p. 5.

tional charge was added to the sales price as consideration for the promise, could not the court have found consideration for the watch company's undertaking in the actual purchase price of the watch?[22] It is likewise worthy of note that in passing on the question of indemnity, the court apparently chooses to disregard the fact that the insurer's promise of indemnity may include an act of value[23] equivalent to the payment of money.[24] Finally, the court appears to be swayed by the plaintiff's contention that there is no attempt on his part to engage in a new business.[25] But the question of intention is immaterial, if in fact an insurance business is being conducted.[26] It is submitted that the court should not indulge in artificialities and technicalities, and thereby indirectly aid in the circumvention of insurance laws enacted for the benefit of the people.

LIBEL—CONSTRUCTION OF DEFAMATORY ARTICLE.—The plaintiff, former son-in-law of the President of the United States, sued upon a news article,[1] alleged to be libelous in that it charged the plaintiff with having committed suicide. The defendant contended that the reference to the suicide of the plaintiff was part of an article reporting the suicide of the son-in-law of the Premier of France; that it was used merely by way of illustration and analogy; that its falsity and the purpose for which it was used were so apparent as to make the article when read as a whole non-libelous. The jury returned a verdict for the defendant which, on the plaintiff's motion, was set aside as contrary to the weight of evidence. On appeal, *held*, that the article was libelous *per se*, it being immaterial that the context later showed the narrative to be fictitious, so long as its result was to expose the plaintiff to public shame or ridicule, or to injure him in his reputation, trade or profession. Order affirmed. Dall v. Time, Inc., 252 App. Div. 636, 300 N. Y. Supp. 680. (1st Dep't 1937).

22. One consideration may support several promises. 1 WILLISTON, CONTRACTS (Rev. ed. 1937) § 137a.

23. Commonwealth v. Wetherbee, 105 Mass. 149 (1879); Attorney General v. Osgood, 249 Mass. 473, 144 N. E. 371 (1934). It is to be noted that the words "or some act of value" are included in some statutory definitions of a contract of insurance.

24. Would the court have reached the same result if, in an action by the purchaser against the watch company, the defendant had pleaded no consideration for the promise to replace the watch?

25. Brief for appellant, p. 22.

26. State v. Beardsley, 88 Minn. 20, 92 N. W. 472 (1902); People v. Roschli, 275 N. Y. 26 (1937).

1. The article complained of read as follows:

"FOREIGN NEWS

"FRANCE

"Son-in-Law

" 'Yesterday Curtis B. Dall, son-in-law of President Roosevelt, shot himself in the White House in the presence of his estranged wife and Mrs. Roosevelt. He died later in the day.'

"If such an event were so briefly reported in the U. S. Press, neither readers nor publishers would be satisfied. Yet almost an exact parallel of that tragedy occurred in the Hotel Continental apartment of Premier Gaston Doumergue last week. Mention was limited to a few slender paragraphs in New York newspapers and a close-mouthed silence on the part of French officialdom."

The third and final paragraph of the article reported the suicide of Enzo de Bonze, estranged husband of the stepdaughter of the French Premier, after a vain attempt at reconciliation, and the subsequent suppression of the incident.

The definition of libel stated in the instant case[2] does not lack support in the decisions of this state,[3] and in other jurisdictions.[4] Not mentioned by the court here, but of an importance secondary only to that of the definition itself, is the rule that an allegedly defamatory article must be read as a whole[5] and the libel, if such there be, gathered from the writing read as an entirety, including the headlines.[6] It would seem to follow that where the context of an article indicates that the objectionable portion is fictitious and false, the article (unless there be malice or bad faith on the part of the writer or publisher) would be non-libelous. This follows from the rule that an alleged libel is to be read and construed as a reader of average intelligence would understand it.[7] It seems inconsistent with the latter principle to assert that a plaintiff has been exposed to the contemptuous[8] ridicule of reasonable men, or that his reputation among them has been injured, by an article, the very reading of which by a person of average intelligence demonstrates to him its falsity.[9] Yet, such a rule[10]

2. "Any written or printed article published of and concerning a person without lawful justification or excuse and tending to expose him to public contempt, scorn, obloquy, ridicule, shame or disgrace, or tending to induce an evil opinion of him in the minds of right thinking persons, or injure him in his profession, occupation, or trade, is libelous and actionable, whatever the intention of the writer may have been." Dall v. Time, Inc., 252 App. Div. 636, 639, 300 N. Y. Supp. 680, 683 (1st Dep't 1937).

3. Morey v. Morning Journal Ass'n, 123 N. Y. 207, 25 N. E. 161 (1890); Bennet v. Commercial Advertiser Ass'n, 230 N. Y. 125, 129 N. E. 343 (1920); Sydney v. MacFadden Newspaper Publishing Corp., 242 N. Y. 208, 151 N. E. 209 (1926).

4. White v. Birmingham Post Co., 233 Ala. 547, 172 So. 649 (1937); Taylor v. Hearst, 107 Cal. 262, 40 Pac. 392 (1895); Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933); Trebby v. Transcript Pub. Co., 74 Minn. 84, 76 N. W. 961 (1898). See also NEWELL, SLANDER AND LIBEL (4th ed. 1924) 2, and cases there cited.

5. Washington Post Co. v. Chaloner, 250 U. S. 290 (1919); Gustin v. Evening Press Co., 172 Mich. 311, 137 N. W. 674 (1912); Tawney v. Simonson, Whitcomb & Hurley Company, 109 Minn. 341, 124 N. W. 229 (1909); Cooper v. Greeley, 1 Denio 347 (N. Y. 1845); Darby v. Ouseley, 1 H. & N. 1, 156 Eng. Reprints 1093 (Ex. 1856). SEELMAN, LIBEL AND SLANDER (1933) § 160 and cases there cited; ODGERS, LIBEL AND SLANDER (6th ed. 1929) 22.

6. Washington Post Co. v. Chaloner, 250 U. S. 290 (1919); Gustin v. Evening Press Co., 172 Mich. 311, 137 N. W. 260 (1913); Harvey v. French, 1 Cromp. & M. 11, 149 Eng. Reprints 293 (Ex. 1832). *Cf.* Shubert v. Variety, 128 Misc. 428, 219 N. Y. Supp. 233 (Sup. Ct. 1926), *aff'd*, 221 App. Div. 856, 224 N. Y. Supp. 913 (1st Dep't 1927).

7. More v. Bennett, 48 N. Y. 472 (1872); Morrison v. Smith, 177 N. Y. 366, 69 N. E. 725 (1904); ODGERS, LIBEL AND SLANDER (6th ed. 1929) 93; BUTTON, LIBEL AND SLANDER (1935) 4.

8. Contempt is a necessary element of the ridicule contemplated by the definition. Lamberti v. Sun Printing & Pub. Ass'n, 111 App. Div. 437, 97 N. Y. Supp. 694 (2d Dep't 1906). *Cf.* Kimmerle v. New York Evening Journal Ass'n, 262 N. Y. 99, 186 N. E. 217 (1933), holding that mere embarrassment or personal discomfort to the plaintiff is not actionable.

9. See Burton v. Crowell Pub. Co., 82 F. (2d) 154, 155 (C. C. A. 2d, 1936) where the court, per Learned Hand, J. said, by way of dictum, in discussing the actionability of a photographic illustration: " . . . [it] carries its correction on its face as much as though it were a verbal utterance which expressly declared that it was false. It would be hard for words so guarded to carry any sting. . . ." See also ODGERS, LIBEL AND SLANDER (6th ed. 1929) 22. ("A word at the end may alter the whole meaning.")

10. "Charging a named person with degrading, infamous, or criminal acts in what the context later shows to be a fictitious narrative may, nevertheless, be libelous, and actionable if the result is to expose such person to public shame or ridicule or injure him in his

was laid down in the instant case, apparently bringing the court into conflict with the foregoing principles.

Closer examination of the rule of the principal case discloses that the full scope of the doctrine there espoused is that there may be an actionable libel even though no defamatory charge[11] be made against the plaintiff.[12] In enunciating the rule[13] the court admits, at least by implication, that the article when read as a whole could be understood by readers of average intelligence to indicate that the first paragraph is a fiction. Nevertheless, says the court, the first paragraph attributes the act of suicide to the plaintiff and is therefore libelous *per se*. But if the article be upon its face a fiction how can it be argued that it *asserts facts* derogatory to the plaintiff?[14] Lacking the answer to this question, the decision here would appear to lack justification except, perhaps, as such justification may be found in a group of cases the tendency of which has been progressively to relax the doctrine that a defamatory charge is of the essence of a libel. These decisions allowed recovery where no charge was made against the plaintiff but where the necessary result of the defendant's publication was to expose the plaintiff to ridicule and contempt.[15] As is to be expected, the inevitable result of this theory has been to weaken the principle that the gist of a libel is injury to reputation.[16]

That so broad a rule is salutary insofar as it discourages an unruly and undignified press, and thus serves the public interest, is undeniable. But can it be denied that the public interest is likewise served by the existence of a press, free to disseminate and explain the news, unhampered by judicially imposed fetters which may, on occasion, become gags in the hands of those who would suppress its publication? The right to the use of an interesting or unusual editorial style has been judicially recognized[17] and so it should be, when employed within proper bounds.

Between the two desirable extremes lies a broad expanse of legitimate reportorial terrain upon which the instant decision, by the breadth and scope of the doctrine enunciated, appears to encroach.

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reputation, trade, or profession." Dall v. Time, Inc., 252 App. Div. 636, 640, 300 N. Y. Supp. 680, 685 (1st Dep't 1937).

11. It is to be noted that this instance of an article alleged by defendant to be non-libelous because obviously false is apparently unprecedented in the courts of New York. See Burton v. Crowell Pub. Co., 82 F. (2d) 154, 156 (C. C. A. 2d, 1936). No case on all fours with the instant case in this respect has been found. *Cf.* Zbyszko v. New York American, Inc., 228 App. Div. 277, 239 N. Y. Supp. 411 (1st Dep't 1930). See (1936) 49 HARV. L. REV. 840.

12. That a charge or accusation is a necessary element of a libel, see SEELMAN, LIBEL AND SLANDER (1933) § 18 in which the learned author so states in enunciating a "composite definition" of the tort, drawn by him from the New York cases.

13. See note 10, *supra*.

14. In deference to the court it should be mentioned that it repeatedly referred to the "charge" contained in the article. But having tacitly admitted that the article might be understood to be, as to the objectionable part, a fiction, and therefore no charge at all, it is difficult to see how any weight can be given to the mere use of the term.

15. Burton v. Crowell Publishing Co., 82 F. (2d) 154 (C. C. A. 2d, 1936); Zbyszko v. New York American, Inc., 228 App. Div. 277, 239 N. Y. Supp. 411 (1st Dep't 1930). See ODGERS, LIBEL AND SLANDER (6th ed. 1929) 16. *Cf.* Kimmerle v. New York Evening Journal Ass'n, 262 N. Y. 99, 186 N. E. 217 (1933); Lamberti v. Sun Printing and Publishing Ass'n, 111 App. Div. 437, 97 N. Y. Supp. 694 (2d Dep't 1906); but see SEELMAN, LIBEL AND SLANDER (1933) § 18.

16. See Burton v. Crowell Publishing Co., 83 F. (2d) 154, 155 (C. C. A. 2d, 1936).

17. Lamberti v. Sun Printing and Publishing Ass'n, 111 App. Div. 437, 442, 97 N. Y. Supp. 694, 696 (2d Dep't 1906).

RAPE—AGE OF CONSENT STATUTE—CIVIL LIABILITY.—The plaintiff brought an action to recover damages for injuries from an attempted rape. She was under the age of sixteen.[1] The trial court refused to grant the defendant's request to instruct the jury that if the plaintiff had consented to the acts of the defendant, there was no assault. On appeal from a judgment on a verdict for the plaintiff, *held,* the plaintiff was incapable of consenting as a matter of law. The penal statute setting the age below which a girl cannot consent to the crime of rape[2] is applicable to the tort of rape. Exception overruled. *Glover v. Callahan,* 12 N. E. (2d) 194 (Mass. 1937).

Generally the essence of an action for rape whether criminal[3] or civil[4] is that an assault was perpetrated upon the plaintiff against her will. Stated conversely, the rule is that if the female consents no rape is committed.[5] An exception to this general principle has been established by legislative decree making it a crime for anyone to have intercourse with a female under a certain age.[6] This crime has been commonly designated statutory rape and the defense that the girl consented is unavailable.[7]

The authorities are divided on[8] whether these statutes, essentially criminal in their

1. She was actually eight years old, so that even at common law she could not consent to rape. A child under ten was incapable of consent at common law. See Bishop v. Liston, 112 Neb. 559, 564, 199 N. W. 825, 827 (1924).

2. "Whoever unlawfully and carnally knows and abuses a female child under sixteen shall be punished by imprisonment. . . ." MASS. ANN. LAWS (1933) c. 265 § 23. In New York the age is eighteen. N. Y. PENAL LAW (1910) § 2010 (5). In Tennessee the limit is set at the extreme age of twenty-one years. (1935) 25 J. CRIM. L. 777.

3. 1 WHARTON, CRIMINAL LAW (12th ed. 1932) § 682; People v. Degnen, 70 Cal. App. 567, 234 Pac. 129 (1925); State v. Flaherty, 128 Me. 141, 146 Atl. 7 (1929); People v. Connor, 126 N. Y. 278, 27 N. E. 252 (1891). Accord: People v. Doyle, 158 App. Div. 37, 142 N. Y. Supp. 884 (3d Dep't 1913) (Conviction of a higher degree of the crime may be obtained where a girl is under eighteen and actual force can be shown).

4. HARPER, LAW OF TORTS (1933) §§ 10, 43; Koenig v. Nott, 8 Abb. Pr. 384 (N. Y. 1859); Dean v. Raplee, 145 N. Y. 319, 39 N. E. 952 (1895). The civil right of action is not merged in the felony. N. Y. CIV. PRAC. ACT (1920) § 9; Gordon v. Hostetter, 37 N. Y. 99 (1867).

5. Frey v. McManus, 54 Minn. 175, 191 N. W. 392 (1923); Champagne v. Hamey, 189 Mo. 709, 88 S. W. 92 (1905); Wright v. Starr, 42 Nev. 441, 179 Pac. 877 (1919); Young v. Johnson, 123 N. Y. 226, 25 N. E. 363 (1890).

6. See note 2, *supra.* From time to time the age limit has been changed. Virginia is a typical example. It was raised from ten in 1792, to twelve in 1849, to fourteen in 1895, to fifteen in 1916, and finally to sixteen in 1924. Note (1924) 11 VA. L. REV. 81.

7. 1 WHARTON, *op. cit. supra,* note 3, §§ 710-721. *Cf.* People v. Sheffield, 9 Cal. App. 130, 98 Pac. 67 (1908) (in prosecution for rape upon a child under age of consent, it is immaterial that she was married to another), with Elkens v. State, 167 Tenn. 546, 72 S. W. (2d) 550 (1934) (Court hesitated to apply the statute because the prosecutrix was married); State v. Burns, 82 Conn. 213, 72 Atl. 1083 (1909) (act committed in house of ill-fame, no defense); *cf.* People v. Marks, 146 App. Div. 11, 130 N. Y. Supp. 524 (1st Dep't 1911) (ignorance or mistake as to her age, no defense); see Baxter v. State, 80 Neb. 840, 843, 115 N. W. 534, 535 (1908) (the only difference between common law rape on a child and statutory rape is the increase of the age of consent from the common law age of ten).

8. HARPER, LAW OF TORTS (1933) p. 83 n. 33, 34. In New York two appellate courts of equal jurisdiction have come to opposite conclusions. Compare Boyles v. Blankenhorn, 168 App. Div. 388, 153 N. Y. Supp 466 (3d Dep't 1915), *aff'd on other grounds,* 220 N. Y. 624, 115 N. E. 443 (1917), where it was said that the theory of the statute is that a girl under eighteen is incapable of consenting to the act, with Barton v. Bee Line, Inc., 238 App. Div. 501, 265 N. Y. Supp. 284 (2d Dep't 1933) where the court understands that the object of the statute would be frustrated to allow her to use it to recompense herself for willing participation in that against which the law sought to protect her.

nature, have any effect on the civil liability of the male to the female. The weight of authority[9] conclusively approves of making girls under a stated age incapable of consenting to a sexual act as a matter of law, even in the realm of civil liability. But few of the courts standing with the majority offer the support of any principle or well-reasoned precedent for their position. They appear to have accepted modern and contemporaneous authority as settling the question for them.[10] Those few courts which did attempt to justify their conclusions failed invariably to distinguish between civil and criminal actions.[11] It is clear, however, that the safest premise of these decisions is that the intent of the legislature was to change the civil law[12] even though the medium used was a criminal statute. It was felt that the public policy of the state was to protect girls of tender age who lack the ability to comprehend fully the nature of the act committed.[13] This protection was to be accomplished by means of the double-barrelled threat of civil and penal liability to the men whom the courts have described as designing and unscrupulous.[14]

It is undebatable that a public policy which seeks to discourage extra-marital intercourse is laudable, but it is questionable that this rule of law is an effective means. Undoubtedly these courts feel that penal liability is not a sufficient deterrent and so they impose additional pressure on the male. But sight is lost of the fact that although the criminal law says she is unable to consent, the female may in fact be a very active participant by soliciting the man. The right to bring a suit for damages might conceivably be an incentive to her active solicitation or voluntary acquiescence and might also develop into a very fertile field of "legal extortion."[15]

9. RESTATEMENT, TORTS (1934) § 61; HARPER, *op. cit. supra* note 4, § 44; Boyles v. Blankenhorn, 168 App. Div. 388, 153 N. Y. Supp. 466 (3d Dep't 1915), *aff'd on other grounds*, 220 N. Y. 624, 115 N. E. 443 (1917); Colly v. Thomas, 99 Misc. 158, 163 N. Y. Supp. 432 (Sup. Ct. 1917); Hough v. Iderhoff, 69 Ore. 568, 139 Pac. 931 (1914); *cf.* Braun v. Heidrich, 62 N. D. 85, 241 N. W. 599 (1932) (where the court agrees with the majority but is compelled to follow the minority because of the peculiar wording of another local statute).

10. Note (1934) 20 VA. L. REV. 592.

11. Parsons v. Parker, 160 Va. 810, 170 S. E. 1 (1933) cites as authority for its holding the criminal case of Buzzard v. Commonwealth, 134 Va. 641, 114 S. E. 664 (1922). The dissent per Dunn, J. in Watson v. Taylor, 35 Okla. 768, 774, 131 Pac. 922, 926 (1913) concludes by stating that the defendant ought not be *convicted* on the uncorroborated testimony of *prosecutrix*.

Where the distinction has been overlooked, the decision ought not be followed. Goldnamer v. O'Brien, 98 Ky. 569, 33 S. W. 831 (1896).

12. See Dean v. Raplee, 145 N. Y. 319, 326, 39 N. E. 952, 954 (1895).

13. Brunet v. Deshotels, 160 La. 285, 107 So. 111 (1926); Bishop v. Liston, 112 Neb. 559, 199 N. W. 825 (1924); People v. Marks, 146 App. Div. 11, 130 N. Y. Supp. 524 (1st Dep't 1911). Although the woman cannot consent in law, the courts have taken the anomalous position of recognizing that she can consent in fact. Such a circumstance is permitted to mitigate damages. Gaither v. Meacham, 214 Ala. 343, 108 So. 2 (1926); Parsons v. Parker, 160 Va. 810, 170 S. E. 1 (1933).

14. See Colly v. Thomas, 99 Misc. 158, 160, 163 N. Y. Supp. 432, 433 (Sup. Ct. 1917).

15. See Smith v. Richards, 29 Conn. 232, 240 (1860) (power is given female sex to become seducers in their turn and to enable them to prefer false claims for a pretended violation of their chastity); Note (1934) 20 VA. L. REV. 592 (girl would consent and then bring a vexatious suit for at least nominal damages. The majority rule seems to be conducive to this practise); *cf.* Note (1925) 11 VA. L. REV. 81; N. Y. CIV. PRAC. ACT (1935) §§ 61 a-i. The legislature therein recognized that breach of promise, alienation of affections, criminal conversation, and seduction were "legal extortion" and "blackmail" and so abolished these suits. Kane, *Heart Balm and Public Policy* (1936) 5 FORDHAM L. REV. 63; Morgan v. Yarborough, 5 La. Ann. 316 (1850).

It is further difficult to understand this transfer of the standard of age of consent from the criminal to the civil law when there are decisions which definitely declare that this penal statute does not apply in other civil situations. Thus, it was decided that the age of consent to marry[16] had not been raised from the former age of sixteen to eighteen years merely because the age of statutory rape was raised from sixteen to eighteen years.

At common law whether or not the female consented was a question of fact[17] and was not arbitrarily determined by the question of age. This statute, therefore, is clearly in derogation of the common law. Legislation falling into such a category should be strictly construed.[18] There is also the other well-known formula that penal statutes must be strictly construed.[19] Yet none of the courts are overcome by the obstacle that the statute is penal and so technically cannot create[20] a civil liability that did not formerly exist. If it had been the intention of the legislature to create a cause of action not yet in existence, it is not unreasonable that specific provision[21] for it should have been made.

There is a final objection indicated by *Barton v. Bee Line, Inc.*,[22] the single standard bearer of the minority view. The transfer of the penal rule to the civil side is dangerous, because in civil law the defendant is not surrounded by the protection given him at the criminal bar. If his defense of consent is taken away then the plaintiff merely by a preponderance of the evidence[23] rather than evidence convincing

16. Fisher v. Bernard, 65 Vt. 663, 27 Atl. 316 (1893); *Ex parte* Hollopeter, 52 Wash. 41, 100 Pac. 159 (1909). A similar refusal to transfer the age standard of the rape statute to another part of the penal law was made in a prosecution for seduction where the court ruled that the prosecutrix could have consented to the act even though she was under the age of sixteen. People v. Nelson, 153 N. Y. 90, 46 N. E. 1040 (1897).

17. Bowman v. State, 93 Ark. 168, 129 S. W. 80 (1909) (where she was only 11 years old there was a presumption that she was incapable of consenting in the absence of proof to the contrary); Pounds v. State, 95 Ga. 475, 20 S. E. 247 (1894) (jury should determine whether she was a child in stature, constitution, and physical and mental development); McCombs v. State, 148 Ga. 304, 96 S. E. 385 (1918) (burden on the state to prove she was incapable of consenting).

18. Burnside v. Whitney, 21 N. Y. 148 (1860) (construing the statute prescribing certain forms for submission to arbitrators); People v. Schaller, 224 App. Div. 3, 229 N. Y. Supp. 492 (1st Dep't 1928) (the common law is no further abrogated than the language of the statute clearly imports).

19. Willet v. Schiff, 208 App. Div. 616, 203 N. Y. Supp. 900 (1st Dep't 1924) (construing N. Y. PENAL LAW (1910) § 1826); People *ex rel.* Troare v. McClelland, 146 Misc. 545, 263 N. Y. Supp. 403 (Sup. Ct. 1933) (construing N. Y. PENAL LAW (1910) § 1294).

20. Ware-Kramer Tobacco Co. v. Am. Tobacco, 180 Fed. 160 (E. D. N. C. 1910); Mairs v. B. & O. R. R., 73 App. Div. 265, 76 N. Y. Supp. 838 (1st Dep't 1902), *aff'd* 175 N. Y. 409, 67 N. E. 901 (1902) (a statute which makes a given act a felony and attaches a punishment to it, furnishes the exclusive remedy and an offense against its provisions cannot be made the basis of a civil action).

21. People *ex rel.* Troare v. McClelland, 146 Misc. 545, 263 N. Y. Supp. 403 (Sup. Ct. 1933) (A wife can't be guilty of larceny of her husband's property. She could not do so at common law because of the unity of husband and wife. The courts are bound by the common law unless that rule has been abrogated by a subsequent statute. The Married Women's Acts have not changed the common law doctrine). Note (1926) 10 MINN. L. REV. 631.

22. 238 App. Div. 501, 265 N. Y. Supp. 284 (2d Dep't 1933).

23. Miller v. Steele, 153 Fed. 714 (C. C. A. 6th, 1907); Spicer v Dashiells, 28 Del. 493, 94 Atl. 901 (1915); see dissent per Howard, J. in Boyles v. Blankenhorn, 168 App. Div. 388, 390, 153 N. Y. Supp. 466, 467 (3d Dep't 1915), *aff'd on other grounds*, 220 N. Y. 624, 115 N. E. 443 (1917).

beyond a reasonable doubt[24] establishes his liability. Nor is corroborative evidence required as at criminal law.[25] This safeguard has evolved because[26] these charges are very easy to manufacture and very difficult to disprove.

It is submitted that rather than confuse the civil law with the criminal law, it would be more advantageous[27] to retain the common law rule of consent in actions such as these. Let the jury decide whether the girl was capable of consenting or not by considering her age, appearance, mental and physical development, and demeanor at the trial.[28] If in fact she was able to consent and did consent, it is desirable to retain the rule[29] that an illegal or immoral transaction cannot be the basis of an action for damages by one who has been a party thereto. Society is adequately protected by the criminal statute.[30]

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24. 2 WHARTON, CRIMINAL EVIDENCE (11th ed. 1935) § 889; People v. Lee, 237 Ill. 272, 86 N. E. 573 (1908) (Each juror must be satisfied beyond a reasonable doubt before he can convict.); Commonwealth v. Kimball, 24 Pick. 366 (Mass. 1837); *cf.* State v. Guilfoyle, 109 Conn. 124, 145 Atl. 761 (1929) (need not be beyond possible doubt).

25. N. Y. PENAL LAW (1910) § 2013. In civil cases it is not necessary that the plaintiff be corroborated even in jurisdictions where this is required by statute in a criminal prosecution. Starnes v. Stevenson, 122 Iowa 556, 98 N. W. 312 (1904); Jensen v. Lawrence, 94 Wash. 148, 162 Pac. 40 (1916).

26. People v. Friedman, 139 App. Div. 795, 796, 124 N. Y. Supp. 521, 522 (2d Dep't 1910). But the requisite corroboration is sometimes easily satisfied. Corroboration has been held to be sufficient where the defendant asked to marry the girl when he was accused of the crime. People v. Elston, 186 App. Div. 224, 174 N. Y. Supp. 1 (2d Dep't 1919).

27. Iron-clad rules and fixed standards result in harshness, inequality and injustice. Leave the question of her capacity to consent where the legislature has left it,—with the judgment of the jury guided by the evidence. People v. Nelson, 153 N. Y. 90, 97, 46 N. E. 1040, 1042 (1897).

28. See note 17, *supra*; Note (1934) 20 VA. L. REV. 592.

29. Note (1925) 11 VA. L. REV. 241; see note 5, *supra*. Cases like the instant case should be distinguished from those affecting breaches of the peace where in spite of mutual assent both parties are allowed to recover against each other for injuries. Note (1926) 74 U. PA. L. REV. 853. See Bohlen, *Consent as Affecting Civil Liability for Breaches of the Peace* (1924) 24 COL. L. REV. 819, 834; *cf.* the dissent per O'Neill, C. J. in Brunet v. Deshotels, 160 La. 285, 288, 107 So. 111, 112 (1926) (suggests doctrine of contributory negligence).

30. See Barton v. Bee Line, Inc., 238 App. Div. 501, 265 N. Y. Supp. 284, 285 (2d Dep't 1933).