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# Recent Decisions

# RECENT DECISIONS

BILLS AND NOTES—REFERENCE TO EXTRINSIC CONTRACTS.—The plaintiff sued the drawer on a trade acceptance containing a due date, August 5, 1938, and a printed stipulation beneath the signature of the drawer that "the obligation of the acceptor hereof arises out of the purchase of goods from the drawer, maturity being in conformity with the original terms of purchase." The defendant pleaded breach of contract and fraud. The plaintiff moved to strike out the defense as insufficient on the ground that the personal defenses of breach of contract and fraud were not available against a holder in due course and asked for judgment on the pleadings. *Held,* the order was unconditional and negotiable; the plaintiff is entitled to judgment on the pleadings. *State Trading Corporation v. Smaldone,* N. Y. L. J., Nov. 30, 1938, p. 1875, col. 3. (Special Term).

It is familiar learning that when a clause in a bill of exchange renders payment conditional upon the terms of an extrinsic contract, and the instrument is non-negotiable, the defenses of fraud in the treaty and breach of contract valid against the payee, are available also against his transferee. But if such reference to a collateral document does not condition the terms of the bill, the instrument remains negotiable and the stated defenses must fail as against a holder in due course.[1]

By that section of the statute which defines negotiability, a bill must contain an *unconditional order to pay* a sum certain in money.[2] A later section adds that "an unqualified order or promise to pay is unconditional . . . though coupled with . . . a statement of the transaction which gives rise to the instrument."[3] There has been a welter of conflicting decisions interpreting the scope, extent and application of these sections to bills and notes containing specific references to some extrinsic agreement or contract between the drawer and the payee. Into this confusion of authority one must plunge to determine whether in the present case the payment of the draft is made subject to or conditional upon any extrinsic agreement.

A negotiable instrument has been termed "a courier without luggage."[4] The difficulty lies in distinguishing between luggage and mere identification tags. When a reference by use of the words "subject to" makes the bill or note specifically contingent upon some extrinsic contract, the courts have been uniform in their agreement that the instrument is rendered non-negotiable.[5] The words "as per contract"

1. Abrahamson v. Steele, 176 App. Div. 865, 163 N. Y. Supp. 827 (1st Dep't 1917).

2. N. Y. NEGOTIABLE INSTRUMENTS LAW, (1897) § 20 (2).

3. N. Y. NEGOTIABLE INSTRUMENTS LAW, (1897) § 22 (2).

4. Overton v. Tyler, 3 Pa. 346 (1846).

5. Klots Throwing Co. v. Manufacturers Commercial Co., 179 Fed. 813 (C. C. A. 2d, 1910), (held non-negotiable a note "subject to terms of contract between maker and payee"); Old Colony Trust Co. v. Stumpel, 126 Misc. 375, 213 N. Y. Supp. 536 (Sup. Ct. 1926), *aff'd,* 247 N. Y. 538, 161 N. E. 173 (1928) held non-negotiable a note *subject* to the terms of a conditional sales agreement which accelerated maturity of the note at any time conditional seller deemed himself insecure. This reference to a collateral agreement not only made the note conditional but also made uncertain the maturity date. (The result reached will be the same whether the reference is placed on the front or back of the instrument). Verner v. White, 214 Ala. 550, 108 So. 369 (1926), ("*subject* to terms of contract"); WILLISTON, NEGOTIABLE INSTRUMENTS (Rev. ed. 1933) 38; BIGELOW, LAW OF BILLS, NOTES AND CHECKS (3d ed. 1928) § 98 ("The courts have shown a disposition to interpret this rule, . . . in a spirit of liberality, . . . save where the instrument indicates on its face that it is made *subject* to the conditions or contingencies growing out of the original transaction . . ."). See (1923) 23 COL. L. REV. 183 for acceptances "as per

do not *per se* affect negotiability when coupled with and following the words "value received,"[6] as payment is not construed to have been made conditional thereby. Slight variations on the other hand, such as "rent for a month . . . as per contract",[7] or "as per contract for certain apparatus,"[8] have been held sufficient to make the notes non-negotiable. The inference is fair in these cases that the mere use of such words will not necessarily destroy the negotiable character of the instrument. Rather the position of the words must be such as to indicate an intention to condition in some way the obligation to pay. This is the test we must apply to the instant case.

The clause reading "the obligation of the acceptor hereof arises out of the purchase of goods from the drawer" has already received judicial interpretation in New York. The court held that the words recited no more than a statement of the transaction which gave rise to the instrument,[9] and that the negotiable nature of the note was not affected thereby. The same words have received similar construction in other jurisdictions,[10] although at times based upon seemingly unsound methods of reasoning.[11]

However, the instant case presented in addition to the clause discussed, the added phrase "maturity being in conformity with the original terms of purchase," and thus confronted the New York court with a question of first impression. As one of the purposes behind the negotiable instrument is uniformity,[12] the court examined

contract." Orange Grove State Bank v. Williams, 277 S. W. 773, 774 (Tex. Civ. App. 1923) (the result reached will be the same whether the reference is placed on the front or back of the instrument). Gaines v. Fitzgibbons, 168 La. 260, 121 So. 763 (1929) (the notes were "*subject* to the conditions set forth in the contract of sale with which this note is identified").

6. First National Bank of Richmond, Indiana v. Badham, 86 S. C. 170, 68 S. E. 536 (1910), ("value received in one machine as per contract"); National Bank of Newbury v. Wentworth, 218 Mass. 30, 105 N. E. 626 (1914), ("value received as per contract"); The Waterbury Wallace Co. v. Ivey, 99 Misc. 260, 163 N. Y. Supp. 719 (1st Dep't 1917); Strand Amusement Co. v. Fox, 205 Ala. 183, 87 So. 332 (1921), ("value received with interest as per contract"). Tyler v. Whitney v. Central Trust & Savings Bank, 157 La. 250, 102 So. 325 (1924), ("value *to be* received . . . as per lease this date").

7. Continental Bank & Trust Co. v. Times Pub. Co., 142 La. 209, 76 So. 612 (1917).

8. Central National Bank v. Hubbel, 258 Mass. 124, 154 N. E. 551 (1927).

9. Coopersmith v. Maunz, 227 App. Div. 119, 237 N. Y. Supp. 1 (4th Dep't 1929).

10. Bartoshesky v. Houston Trading Corp., 198 Atl. 697 (Del., 1938); Arrington v. Mercantile Protective Bureau, 24 S. W. (2d) 383 (Tex. Com. App., 1930). This case, by a refusal to follow the contrary former holdings, in effect, overrules Harris v. Wuensche, 7 S. W. (2d) 595 (Tex. App., 1928); Harris v. Bucek, 8 S. W. (2d) 565 (Tex. App. 1928) which had held that the clause, "the obligation of the acceptor hereof arises out of the purchase of goods from the drawer" rendered the note non-negotiable.

11. American Exchange National Bank v. Steeley, 10 S. W. (2d) 1038 (Tex. App., 1928). The court stated that if the reference to the extrinsic contract reasonably conveyed the fact that it was an executed one, negotiability would not be affected. But, such a test of reasonability is far too hazardous when applied to negotiable instruments. Negotiability is a matter of freedom from conditions. Whether a condition is performed or not, if the order is conditioned when issued, it does not fulfill the statute. The court in Tyler v. Whitney Central Trust & Savings Bank, 157 La. 250, 102 So. 325, (1924) pointed out that "the fact that the consideration recited is executory will not change the rule (that is make the note non-negotiable), unless it appears from the rental that payment is made to depend on the performance or the execution of the consideration recited."

12. BRANNAN'S NEGOTIABLE INSTRUMENTS LAW (6th ed. 1938) 98-103.

cases in other jurisdictions. Four cases have dealt with the identical phrasing and two have held that negotiability was impaired.[13] One by dicta has indicated that negotiability is impaired[14] while one has considered the words of no effect.[15]

The two cases directly in point, proceed on the grounds that the instrument is rendered payable on a contingency,[16] and that the clause is a limitation on the due date,[17] which renders it uncertain because reference must be had to the "original terms of purchase" of another contract than the instrument itself. The court in the instant case has rejected not only this reasoning, but also the precedent for uniformity which might have carried it along with the weight of authority on this precise phraseology which stands against negotiability. Instead the court has followed the minority Minnesota ruling[18] in which the words were regarded as merely a statement of the transaction which gave rise to the instrument. The bill hence was essentially different from an instrument where the reference made another underlying contract a part of itself and so became subject to its terms.[19]

If these words in the instant case are more than a recital of the transaction which gave rise to the present agreement, can their presence be excused as being a superfluous phrase having no bearing on the contract of the parties? It must be borne in mind that doubtful and unnecessary phrases, laxly permitted on litigated negotiable

13. First National Bank v. Power Equipment Co., 211 Iowa 153, 233 N. W. 103 (1930), (construed the clause to be a limitation on the due date); Westlake Mercantile Finance Corp. v. Merritt, 204 Cal. 673, 269 Pac. 620 (1928), (construed instrument to be payable on a contingency).

14. Lane v. Crum, 291 S. W. 1084 (Tex. Com. App., 1927). The court justified its holding that the note was non-negotiable by pointing out that the obligation of the acceptor according to the terms of said clause, arose not from the instruments themselves, but from a collateral transaction. But the court would have ruled similarly had there been a use only of the first clause under discussion. Harris v. Wuensche, 7 S. W. (2d) 595 (1928). A subsequent ruling in the same jurisdiction has held that the first clause will not render a note non-negotiable. This holding renders nugatory the decision in Lane v. Crum. The case is Arrington v. Merchant Protective Bureau, 24 S. W. (2d) 383, 384 (1930). The court significantly pointed out that the clause was a mere recital, that the obligation disclosed by the instrument was one given for the purchase of goods from the drawer by the acceptor), the case of Lane v. Crum has been commented on in 37 YALE L. J. 382. The author did not indicate any opinion as to the effect the second clause might have had on the decision.

15. Heller v. Cuddy, 172 Minn. 126, 214 N. W. 924 (1927) the court distinguished the situation herein from that presented in King Cattle Co. v. Joseph, 158 Minn. 481, 199 N. W. 437 (1924) where it was found that the reference was of such a nature as to subject the paper to the terms of the extrinsic agreement and to impose terms upon it.

16. Westlake Mercantile Finance Corp. v. Merritt, 204 Cal. 673, 269 Pac. 620 (1928); the case has been discussed briefly in (1928) 15 VA. L. REV. 170. See BRANNAN'S NEGOTIABLE INSTRUMENTS LAW (6th ed. 1938) § 3. The argument is advanced that the clause renders the note non-negotiable in the Westlake Mercantile Finance Corp. v. Merritt because the instrument contains no date of maturity. This fact, however, is not apparent in the reported case. *A fortiori,* it seems to be denied by a question which the court words on p. 60, to wit, "Particularly, does the expression (clause quoted) refer to the date set up in the body of the trade acceptance, or does it refer to the underlying contract between the parties?"

17. First National Bank v. Power Equipment Co., 211 Iowa 153, 233 N. W. 103 (1930).

18. Heller v. Cuddy, 172 Minn. 126, 214 N. W. 924, 925 (1927).

19. For a brief discussion of the case, see (1927) 12 MINN. L. REV. 68.

instruments, can give rise to a dangerously uncertain condition, for the specific phraseology construed to be the surplusage of one instrument, may by a slight manipulation in position, be the weakening non-negotiating link in another. The burden of differentiation and distinction is a heavy one to thrust upon the layman. The test of the soundness of the ruling must of course be contingent upon its practicability, for the Negotiable Instrument Law deals with a practical subject. True, the courts have deemed it good public business policy to stretch points in an effort to salvage negotiability to instruments on the boundary line,[20] but the instant case seems questionable.

CONFLICT OF LAWS—TORTS.—The plaintiff, a resident of Florida, brought an action in a federal district court for New York against the defendants, husband and wife for an assault committed upon her in Florida by the wife. The defendants are citizens of New York and the husband had never been in Florida. The common law still obtains in Florida, under which a husband is liable for the torts committed by his wife. On appeal from a judgment dismissing the complaint as against the husband *held,* any liability in the husband can be created only by the law of New York, the state in which the court is sitting, not by the law of Florida. Therefore, assuming that the husband is liable in Florida, New York will not accept as a model for any tort liability which it will create, a liability imposed by another state upon an absentee non-resident who did not procure, incite, or in any other way make himself a party to the tort. Judgment affirmed. *Siegmann v. Meyer,* 100 F. (2d) 367 (C. C. A. 2d, 1938).

The American courts, in explanation of the fact that they sometimes decide cases according to the rules of law established by some state other than the forum, have pronounced three theories of conflict of laws.[1] The earliest of these, which was advanced by Judge Story,[2] declares that when the forum enforces a right in the plaintiff arising from a transaction which took place in a foreign jurisdiction it does so as a matter of "comity", or "courtesy".[3] This explanation was discovered to be inadequate by later writers,[4] and was succeeded by the "vested rights" theory,[5] which

20. OGDEN, NEGOTIABLE INSTRUMENTS (3d ed. 1931) § 70; Musser v. Fehr, 102 Pa. Sup. 273, 156 Atl. 740 (1931).

1. The provisions of the Federal Constitution do not obviate a conflict of the laws among the states, nor, as interpreted by the Supreme Court, with some exceptions, impose a duty upon the states to conform their decisions on conflict of laws to what the Supreme Court regards as correct principles. DODD, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws,* (1926) 39 HARV. L. REV. 533.

2. STORY, CONFLICT OF LAWS (8th ed. 1883) § 38; STUMBERG, CONFLICT OF LAWS (1937) 6.

3. STORY, *loc. cit. supra,* note 2.

4. DICEY, CONFLICT OF LAWS (Keith, 4th ed. 1927) 9; DODD, *op. cit. supra,* note 1, at 536; Beach, *Uniform Enforcement of Vested Rights* (1918) 27 YALE L. J. 656. The editors of Story have abandoned the theory. See STORY, CONFLICT OF LAWS (8th ed. 1883) § 36. Criticism of the theory is threefold. First, the application of foreign law is not a matter of caprice or option as it would seem to be under the comity theory. Second, it throws no light, except negatively, on the question of when foreign law is adopted. Third, it has led some courts to follow a policy of reciprocity, that is, to refuse to entertain suit arising from transactions which take place in other states or countries on the sole ground that the latter had refused to enforce a similar action brought by one of its own citizens.

has been adopted by many courts.[6] Its proponents declare that a right is created at the time, the place, and by the laws of the state where the wrong was committed.[7] The right vests in the plaintiff,[8] while the act complained of gives rise "to an obligation, an *obligatio,* which like other obligations, follows the person (of the defendant), and may be enforced wherever the person may be found."[9] Accordingly, when suit is brought in a state other than the one where the transaction occurred, the courts of the forum give effect, not the foreign law as such, but to the right created by that law.[10] Thus, in the application of this theory, the forum seeks an appropriate jurisdiction by the laws of which it shall determine the existence of a right in the plaintiff, rather than an appropriate rule of substantive law.[11]

Critics of the theory allege that it does not fit the facts and offer a third explanation. They contend that both the right and the remedy are created by the laws of the forum.[12] Besides the questionable theoretical defect of the vested rights theory, they also point out that there are practical factors which render its application in any particular case difficult. First, it presupposes an entire legal system defining the facts which give the state in which the right arises jurisdiction[13] to create such right enforceable in other states. Actually, the method of determining jurisdiction varies with the right sought to be enforced and the state allegedly creating the right.[14] Secondly, the proponents of the vested rights' theory maintain that a right in the plaintiff should not be defeated by procedural bars extant in the state in which the putative right arises. However, separating the procedural elements from the substantive often becomes a matter of considerable difficulty.[15] Finally, there is a large field of exception, since according to the theory the forum is not required to enforce rights vested in a plaintiff where to do so would violate its settled public policy.[16]

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Hilton v. Guyot, 159 U. S. 113 (1895); Union Securities Co. v. Adams, 33 Wyo. 55, 236 Pac. 513 (1925).

5. BEALE, CONFLICT OF LAWS (1916) § 73.

6. Slater v. Mexican Nat. Ry., 194 U. S. 120 (1904); Western Union Tel. Co. v. Brown, 234 U. S. 542 (1914); Loucks v. Standard Oil Co., 224 N. Y. 99, 120 N. E. 198 (1918).

7. BEALE, CONFLICT OF LAWS (1916) § 73; 2 BEALE, CONFLICT OF LAWS (1935) § 378.2; RESTATEMENT, CONFLICT OF LAWS (1934) §§ 378-379.

8. BEALE, CONFLICT OF LAWS (1916) 107.

9. Slater v. Mexican Nat. Ry., 194 U. S. 121, 126 (1904).

10. BEALE, CONFLICT OF LAWS (1916) 107; STUMBERG, CONFLICT OF LAWS (1937) 8.

11. Cavers, *A Critique of the Choice-of-Law Problem* (1933) 47 HARV. L. REV. 173, 178.

12. Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE L. J. 457, and *Tort Liability and the Conflict of Laws* (1935) 35 COL. L. REV. 202; Lorenzen, *Territoriality, Public Policy and the Conflict of Laws* (1924) 33 YALE L. J. 736, and *Tort Liability and the Conflict of Laws* (1931) 47 LAW QUARTERLY REV. 483.

13. "'Jurisdiction' means the power of a state to create interests which under the principles of the common law will be recognized as valid in other states." RESTATEMENT, CONFLICT OF LAWS (1934) § 42.

14. Stumberg, *Foreign Created Rights* (1930) 8 TEXAS L. REV. 173, 191; STUMBERG, CONFLICT OF LAWS (1937) 9.

15. Cavers, *op. cit. supra,* note 11, at 185; Comment (1935) 4 FORDHAM L. REV. 89, 91; (1935) 44 YALE L. J. 1233, 1234.

16. Hudson v. von Hamm, 85 Cal. App. 323, 259 Pac. 374 (1927); GOODRICH, CONFLICT OF LAWS (2nd ed. 1938) § 8; 3 BEALE, CONFLICT OF LAWS (1935) § 612.1. However, it is contended that such an execption should not be permitted. Beach, *Uniform Interstate Enforcement of Vested Rights* (1918) 27 YALE L. J. 656.

In the instant case, as part of the *ratio decidendi,* Judge Learned Hand reiterates the third theory of conflict of laws, which we may call the "local law" theory,[17] saying: " . . . the liability enforced (by the forum) is the creature of its own will; its law of conflict of laws alone determines when it will fashion a liability after the foreign liability."[18] As expanded by writers on the subject,[19] this probably means that the forum enforces its substantive law only. When the transaction leading to the suit presently before it, contains foreign elements the court will take into consideration the law of the foreign state as one of the operative facts upon which the rights created by their own law depend.[20] Thus, in contrast to the vested rights theory, according to which law is local and rights are transitory, by this new theory rights are local and law is spatially unlimited.[21]

It is evident that upon any theory the same decision would follow from the facts of this case. Under the vested rights theory, in order that a right be created by the laws of Florida, that state must have had jurisdiction[22] in order to obtain power to create such right. This it did not have.[23] And similarly, under the comity theory the forum would be under no duty of "courtesy" to enforce a right created by the

17. This name was first applied to the theory by Dodd, *Supreme Court and the Conflict of Laws* (1926) 39 HARV. L. REV. 533.

18. Siegmann v. Meyer, 100 F. (2d) 367 (C. C. A. 2d, 1938).

19. See note 12, *supra.*

20. *Ibid.*; STUMBERG, CONFLICT OF LAWS (1937) 13.

21. deSloovère, *The Local Law Theory and Its Implications in the Conflict of Laws* (1928) 41 HARV. L. REV. 421, 450.

22. See note 13, *supra.*

23. RESTATEMENT, CONFLICT OF LAWS (1934) § 47. The lack of jurisdiction to impose a liability upon this defendant would seem to follow inevitably from the basic principles of the vested rights theory. The existence of liability for a tort is, it is true, governed by the laws of the state in which the tort is committed [Dorr Cattle Co. v. Des Moines Bank, 127 Iowa 153, 161, 98 N. W. 918, 922 (1904); Ryan v. Scanlon, 117 Conn. 428, 168 Atl. 17 (1933)]. But the right which arises there in the plaintiff imposes a concurrent liability only in the tort-feasor,—in this case, the wife. Consequently, in order that the absentee non-resident defendant (in this case, the husband) may be made subject to the *lex loci delicti,* it is necessary that he have submitted himself in some way to the authority of the State [Scheer v. Rockne Motors Corp., 68 F. (2d) 942 (C. C. A. 2d, 1934); RESTATEMENT, CONFLICTS § 387, Comment a]. This most frequently arises under a master-servant relationship. [Laughlin v. Mich. Motor Lines, 276 Mich. 545, 268 N. W. 887 (1936); RESTATEMENT, CONFLICTS § 387, Comment b]. However, in recent years, the doctrine of vicarious liability has been extended in two cases to persons who loaned their automobiles to others, to be used in a foreign state, which foreign state by statute imposed liability upon the *owner* of an automobile involved in an accident [Young v. Masci, 289 U. S. 253 (1933); Scheer v. Rockne Motors, 68 F. (2d) 942 (C. C. A. 2d, 1934)]. The present case, however, is easily distinguishable from those: (1) because the Young and Scheer decisions were obviously motivated by the growing atmosphere of interstate cooperation in the control of motor vehicles, there being no similar cooperation in the field of domestic relations, and (2) because the automobile decisions are predicated on the fact that the defendants permitted others to use their own cars and authorized those others to take the cars into the foreign state. In this case, by the law of New York, the wife was free and independent of control by her husband. He could not authorize her to go to a foreign state, since she already had that authority by law. Hence, it is clear that the decision in this case is compatible, indeed, even necessary, under the vested rights theory.

laws of Florida when the latter state did not have jurisdiction to create such right.[24] Further, it would appear to be against the public policy of New York to enforce such a liability, which under either theory would be sufficient to sustain the decision of this case.[25]

The theoretical basis of the law of conflict of laws is in serious dispute and there is no agreement among the writers as to the fundamental concepts involved.[26] It is, therefore, unfortunate that Judge Hand sought fit to express the *dictum* herein contained. It was not required to justify the decision. It lays down among the cases a third theory of conflict of laws for which he cites no judicial precedent[27] and the merits of which do not in theoretical demonstration overcome its defects.[28] The only result of the dictum is to obfuscate an already difficult and involve subject.

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24. Since comity is based on the general principle that the laws of a state have no extra-territorial power, but can operate only upon those who are within the state's jurisdiction [See STORY, *loc. cit. supra,* note 2; Hilton v. Guyot, 159 U. S. 113 (1895)]. Therefore, in this case, the doctrine of comity could not give precedence to Florida's law, when the defendant had never entered Florida's jurisdiction.

25. N. Y. DOM. REL. LAW § 57; Mertz v. Mertz, 271 N. Y. 466, 3 N. E. (2d) 597 (1936). The Judge of the District Court in granting the defendant's motion for summary judgment based his opinion wholly on the ground that it would violate the public policy of New York to enforce such a liability as is involved here. Siegmann v. Meyer, Circuit Court Clerk's file no. 16117, Transcript of Record 21-22.

26. See Cook's criticisms of the vested rights theory, (1924) 33 YALE L. J. 457; (1935) 35 COL. L. REV. 202, and de Sloovère's criticism of the local law theory, (1921) 41 HARV. L. REV. 421. The most recent law review writer on the subject, Stimson, *Which Law Should Govern?* (1938) 24 VA. L. REV. 748, advances a fourth theory. The writer contends that the existence of an effective remedy is a condition precedent to the creation of a right, and therefore "the applicable law is the law to which the person alleged to be under a duty was subject at the time of his conduct the legal effect of which is in question." He rejects the idea that the forum enforces a foreign-created right (vested rights theory), but imposes strict limitations upon the exercise of discretion by the forum, in its choice of law, which contravenes an essential hypothesis of the local law theory.

27. The only possible judicial support for the proposition is contained in dicta of two other cases, both decided by Judge Hand. Guiness v. Miller, 291 Fed. 769, 770 (S. D. N. Y. 1923); The James McGee, 300 Fed. 93, 96 (S. D. N. Y. 1924).

28. The local law theory is so broad that in effect there is no restraint upon the power of the courts of the forum to reach any desired result. The court is not constrained to apply the rules of substantive law of the forum because the case before it involves a foreign element and therefore does not fit within the precise set of facts necessary to bind the court under the doctrine of stare decisis, as it would be bound if the case before it involved a purely domestic transaction. The court is not constrained to apply the rules of law of the foreign state, although it recognizes its persuasive power and influence, because by hypothesis the court applies the substantive law of the state in which it sits. This latitude given the court in arriving at its decision, first, enables a reconciliation of cases which under any other theory would be irreconcilable, and secondly, permits the court to be guided in its decision by considerations of expediency and social justice.

On the other hand, the local law theory precludes the attainment of either certainty or uniformity in conflict of laws. It gives an impetus to the individualization of cases and tends to oppose *stare decisis.* It opposes deductive methods in the conflict of laws, and thereby precludes any fair probability of predicting the outcome of any given case. Thus, when presented with a transaction involving foreign elements an attorney would be at a

CONSTITUTIONAL LAW—EQUAL PROTECTION—REFUSAL TO ADMIT NEGRO TO STATE LAW SCHOOL.—The School of Law of the State University of Missouri refused to admit the petitioner, a negro citizen of the State, otherwise qualified, upon the sole ground of his race. The policy of the State of Missouri in undergraduate education provides for the segregation of white and colored students. The continuance of this policy in graduate and professional studies was provided for by the legislature through a statute arranging for the payment of negroes' tuition in the universities of adjacent States for any courses not offered to negroes within the State.[1] In an action of mandamus to compel the curators of the University to admit him, the petitioner's alternative writ was quashed and a peremptory writ was denied by the trial court. The State Supreme Court affirmed the decision. On appeal to the Supreme Court of the United States, *held,* two justices dissenting, that under the Fourteenth Amendment[2] to the Constitution, the equal protection of the laws demands that the State provide negro students with opportunities for higher education *within* the State substantially equal to those afforded white students. *State of Missouri* ex rel. *Gaines v. Canada,* 305 U. S. 337 (1938).

Although the safeguards of the Fourteenth Amendment[3] have been invoked mor often in behalf of corporate enterprises than in the protection of the rights of the negro race, yet it must be borne in mind that this latter function was the motivating force behind its adoption.[4] The instant decision falls into that relatively smaller number of cases concerned with this difficult problem. The socio-political relationship of the white and colored races has been through all history an intricate one. Contrary to a popular misconception prevalent in northern states, there is no constitutional provision demanding that the two races be commingled for all purposes. In fact, an opposite viewpoint[5] has become the settled law, permitting segregation in several fields, with a decided accent on the field of public education. The establishment of separate school systems furnishing elementary, secondary and collegiate instruction has been held constitutional within the equal protection clause of the Fourteenth Amendment[6] where substantially equal advantages are offered to each race.[7] But the problem has grown more complex when negroes have sought

loss to advise his client. Finally, it is unjust that selection of the forum should determine the result of the litigation, since that empowers the party having control over the choice to select the forum most favorable to him.

1. "Pending the full development of the Lincoln University (for negroes), the board of curators shall have the authority to arrange for the attendance of negro residents of the State of Missouri at the university of any adjacant State to take any course or to study any subjects provided for at the State University of Missouri, and which are not taught at the Lincoln University and to pay the reasonable tuition fees for such attendance; *provided* that whenever the board of curators deem it advisable they shall have the power to open any necessary school or department." 2 MO. REV. STAT. (1929) § 9622.

2. U. S. CONST. AMEND. XIV.

3. *Ibid.*

4. See Slaughter House Cases, 16 Wall. 36, 71 (U. S. 1873); Holden v. Hardy, 169 U. S. 366, 382 (1898); Maxwell v. Dow, 176 U. S. 581, 591 (1900). See Boudin, *Truth and Fiction About the Fourteenth Amendment,* (1938) 16 N. Y. U. L. Q. REV. 19, 27.

5. Even prior to the adoption of the Fourteenth Amendment the doctrine of segregation of white and colored children in primary schools was set forth in Roberts v. City of Boston, 5 Cush. 198 (Mass. 1850).

6. U. S. CONST. AMEND. XIV.

7. "In the circumstances that the races are separated in the public schools, there is

admission to graduate and professional schools in states where the establishment of such separate institutions has been deemed impractical because of the small number of applicants.[8] Thus, the nice question arose whether a state afforded or denied the equal protection of its laws when it provided opportunities to one group of its citizens *within* its borders and provided another group with substantially the same opportunities *outside* its borders.

The Court of Appeals of Maryland left this precise question open when it treated a similar fact situation in *University of Maryland v. Murray*.[9] There the Court expressly refrained from supplying the answer inasmuch as the case could have been decided in favor of the negro on the ground of the inadequacy in number of the extra-state scholarships offered to the negroes of that State. But the courts in the principle case were afforded no such *deus ex machina*. The lower court placed great stress on the adequacy and substantial equality of the advantages offered to negroes under the statute.[10] It distinguished the case before it from the Maryland case by showing that while the state of Maryland had expressed no intention to provide within its borders for the legal education of negroes, the Missouri legislature had declared such an intention and was merely providing temporary extra-state accommodations pending the establishment of a law school at Lincoln University whenever such action was deemed necessary or practical.[11]

The majority of the highest court refused to consider the adequacy of the substituted arrangements and squarely faced what it considered the basic constitutional question involved. It flatly declared that no state could discharge its duty of providing higher education for negroes equal to that afforded the white race by setting up a fund for study, however adequate, *outside* the State. In arriving at its conclusion the majority carefully considered the acts of the legislature[12] but showed that the curators of the negro university would not have been forced to provide the petitioner with a legal education if he sought it at that institution, but in the exercise of their discretion they could have elected to pay his way through some law school in an adjacent state. This discretionary power, despite the convenience of the facilities extended elsewhere,[13] is not sufficient to validate such discrimination.[14] It

certainly to be found no violation of the constitutional rights of the one race more than of the other, and we see none of either, for each, though separated from the other, is to be educated upon equal terms with that other, and both at the common public expense." Ward v. Flood, 48 Cal. 36, 51, 17 Am. Rep. 405, 414 (1874) cited with approval in Pearson v. Murray, 169 Md. 478, 182 Atl. 590 (1936). *Cf.* Gong Lum v. Rice, 275 U. S. 78 (1927); People v. Gallagher, 93 N. Y. 438 (1883).

8. (1936) 45 YALE L. J. 1296, note 7.

9. 169 Md. 478, 182 Atl. 590 (1936).

10. State *ex rel.* Gaines v. Canada, 113 S. W. (2d) 783 (Mo. 1937).

11. *Id.* at 791.

12. "The board of curators of the Lincoln University (*for negroes*) shall be authorized and required to reorganize said institution so that it shall afford to the negro people of the state opportunity for training up to the standard furnished at the state university of Missouri whenever necessary and practicable in their opinion." 2 MO. REV. STAT. (1929) § 9618.

13. Convenience does not seem to be a controlling factor in such cases. For in Lehew v. Brummel, 103 Mo. 546, 15 S. W. 765 (1891) the fact that petitioner's children were forced to travel three and one-half miles to reach a colored school, although no white child had to go farther than two miles, was held to furnish no substantial ground of complaint. "Equality and not identity of privileges and rights is what is guaranteed to the citizen." People v. Gallagher, 93 N. Y. 438, 455 (1883). But see Williams v. Board

was to guarantee that no person or class of persons should be denied the protection of state laws enjoyed by other persons of the same state that the Fourteenth Amendment was enacted.[15]

While equality was always the basic foundation of American democracy, its citizens were never given constitutional insurance against unjust discrimination until the advent of this Amendment.[16] Hitherto in its application to the negro problem the courts have uniformly avoided treating it as a social panacea and have merely held that where a state offered advantages to its white citizens it must also offer similar opportunities to its colored citizens,[17] despite the fact that the negro demand for such opportunities might be negligible.[18] This decision and others similar to it seem to indicate a trend in the Supreme Court away from its former attitude of leaving to the discretion of the states the regulation of provisions affecting the rights of its colored citizens.[19]

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of Education, 79 Kan. 202, 99 Pac. 216 (1908) wherein a failure to provide equal protection was held because the school authorities ordered a change in school sites forcing negro children to travel one and one-half miles crossing sixteen railroad tracks.

14. Yick Wo v. Hopkins, 118 U. S. 356 (1886).

15. U. S. CONST. AMEND. XIV. Moore v. Missouri, 159 U. S. 673 (1895). *Cf.* Missouri v. Lewis, 101 U. S. 22 (1879).

16. "The toleration of slavery undoubtedly prevented the insertion (in the Federal Constitution) of any reference to equality or liberty." GUTHRIE, THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 106 (1898). However it is to be borne in mind that this guarantee as interpreted by the Courts applies only as a limitation in the powers of the States, not upon the National Government. BURDICK, THE LAW OF THE AMERICAN CONSTITUTION (1922) 190.

17. Gong Lum v. Rice, 275 U. S. 78 (1927). "Shortly stated, the requirement is not that all persons shall be treated exactly alike, but that where a distinction is made there shall be a reasonable ground therefore . . . one based on administrative or political necessity, or convenience, or on economic needs. 2 WILLOUGHBY, CONSTITUTIONAL LAW (1910) § 480.

18. McCabe v. Santa Fe R. R., 235 U. S. 151 (1914). Here the court in considering the problem of providing sleeping accommodations for negroes on railroad cars held that the limited demand for such facilities afforded no grounds for objection since the constitutional right not to be discriminated against is a personal one and does not depend on the number of persons who may be discriminated against. This language was adopted in the case of *In re* Oregon Tunnel, 120 Ore. 594, 253 Pac. 1 (1927). However in Mitchell v. Chicago, R. I. & P. Ry., 229 I. C. C. 703 (1938) the Commission refused to follow the *McCabe* case in construing the application of an Arkansas segregation statute to a similar sleeping car situation. "In any event, we are not considering a constitutional question, but rather questions of the Act. Volume of traffic is an important consideration in determining whether certain services demanded are warranted and whether a difference in treatment is justified." *Id.* at 703. This decision seems to be directly contra to the Commission's earlier holding on the same question in Edwards v. Nashville, C. & St. L. Ry. Co., 12 I. C. C. 247 (1907). At that time the fundamental governing principle was "that carriers must serve *equally well* all passengers, whether white or colored, paying the same fare. Failure to do this is discrimination and subjects the passenger to 'undue and unreasonable prejudice and disadvantage.'" *Id.* at 249. (Italics inserted.)

19. Louisiana v. Pierre, 83 L. Ed. 540 (1939). For a discussion of this decision and other cases illustrating this recent ascendancy of negro rights see COMMENT (1939) 52 HARV. L. REV. 823.

The dissenting justices, finding no clear and unmistakeable disregard of constitutional rights sufficient to justify Federal intervention, thought the state's right of selecting its own method of providing for public education should not be interfered with too readily.[20] And this position seems a fair one. While it may be true that the accommodations offered to the negro petitioner are not exactly the same as those given white students within the State of Missouri,[21] yet it might easily be that the Legislature has adopted the most suitable means of solving a difficult problem.[22] It is submitted that the majority of the court in the instant case has treated the problem as though it had arisen in the Colonial era rather than in modern times. Their decision is rooted deeply in a view of the Union as a collection of strange countries. It seems concerned with some mythical impregnability of state borders. In these days of facility of locomotion no valid objection lies against distances to be traveled merely because a state border line must be crossed. For the past century, many a white student has elected to leave the state of his residence and seek legal education in another state. If he must travel to get to school what substantial difference could the *direction* of his travel make to any negro seeking a legal education in good faith? If the opportunity for an education outside the state is made possible by the state, why is its duty not performed?

COPYRIGHT INFRINGEMENT—AWARD OF DAMAGES AND PROFITS.—In a previous proceeding in the instant case, it was decided that defendants' motion picture "Letty Lynton" plagiarized the plaintiffs' play "Dishonored Lady".[1] The present hearing is on exceptions to the referee's report which awarded to the plaintiffs all the profits earned by defendants' motion picture. It is argued by defendants that the play alone did not earn all the profits made by the picture but that much of the profits were due to the earnings of the actors; and that, therefore, plaintiffs should recover only part of those profits. *Held,* in a case of this type, no apportionment can be made

20. See Gong Lum v. Rice, 275 U. S. 78, 85 (1927). A realistic view of a similar situation was taken by the court in Cummings v. Board of Education, 175 U. S. 528 (1899) when it refused to hold a denial of equal protection where a county board, while maintaining a high school for white children, did not maintain one also for colored children because the available funds were insufficient. The court refused to grant the negro petitioner's request to close the white high school as it failed to see how the colored children could be benefited in their education by depriving others of educational opportunity.

21. The decision of the Missouri court gives a more detailed account of the substantially identical nature of the courses offered in the four schools nearest to the petitioner and elicits the interesting fact that the white residents in some parts of Missouri travel further to reach Missouri's own law school than the petitioner would have to travel from his home to a university in either of four adjacent states. State v. Canada, 113 S. W. (2d) 783, 789 (1937). See also note 12, *supra.*

22. "In the nature of things there must be many social distinctions and privileges remaining unregulated by law and left within the control of the individual citizens, as being beyond the reach of the legislative functions of government to organize and control. The attempt to enforce social intimacy and intercourse between the races, by legal enactments, would probably tend only to embitter the prejudices, if any such there are, which exist between them, and produce an evil instead of a good result." People v. Gallagher, 93 N. Y. 438, 448 (1883); *cf.* Roberts v. City of Boston, 5 Cush. 198 (Mass. 1850).

1. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F. (2d) 49 (C. C. A. 2d, 1936).

and plaintiffs are entitled to recover all the profits of the production. *Sheldon v. Metro-Goldwyn Pictures Corp.*, — F. Supp. — (S. D. N. Y., 1938).

The statutory right of a composer, author or artist to protection of his published[2] works has existed since the Middle Ages.[3] The purpose of the copyright is to assure to its owner the benefits of original[4] creative work, by prohibiting the infringement thereof. Congress has passed copyright laws from time to time by virtue of its power to "promote the progress of . . . the useful arts, by securing for limited times to authors . . . the exclusive right to their respective writings. . . ."[5] These acts effect their purpose by providing two remedies against infringement: (1) injunction; (2) the recovery of damages and profits earned by the infringer.[6]

Thus, the owner of a copyright whose work has been infringed upon is entitled to recover any damages he may have suffered, and *all the profits* earned by the infringer by the use of the copyrighted material.[7] The rule works out justly enough where the profits are *all* directly traceable to infringement of the copyright. There are cases like the instant case, however, where it is obvious that the infringement contributed only *in part* to the profits realized. Then it becomes unfair to apply the settled rule[8] that although plaintiff's work contributed only in part to the profits earned, the owner of the copyright is entitled to all the profits where the amount cannot be apportioned.

In the instant case, the defendants introduced evidence of experts to show that much of the profits were realized because the stars (Joan Crawford and Robert Montgomery) were important box office attractions. Perhaps this might be considered evidence upon which the court might have based an apportionment of profits; but in a prior case involving the infringement of a story by the production of a play, an apportionment between what was contributed by the play and what was supplied by the actors, producer, etc., was declared impossible as a matter of law.[9] The present court while expressing disapproval of that rule, was bound thereby to refuse an apportionment in the instant case.

The recovery of all the profits in the instant case is considered unjust by the

2. At common law, a copyright exists, but is limited to unpublished works. Upon publication, the author's exclusive right is terminated. See, Caliga v. Interocean Newspaper Co., 215 U. S. 182, 188 (1909).

3. 2 KENT COMM. *374 N. One of the earliest instances of a copyright is that issued by the Venetian Senate in 1469.

4. There can be no copyright of that which is in the public domain, *e.g.* copyright of matter of which the copyright has expired. 17 U. S. C. A. § 7 (1909).

5. U. S. CONST. art. I § 8, cl. 8.

6. 37 STAT. 489, 17 U. S. C. A. § 25 (1909).

7. 37 STAT. 489 (1912), 17 U. S. C. A. § 25(b). In this respect copyrights differ from patents where the patentee must elect between a suit for damages and an accounting for the profits. Sebring Pottery Co. v. Steubenville Pottery, 9 F. Supp. 384 (N. D. Ohio 1934).

8. Callaghan v. Myers, 128 U. S. 617 (1888) (law reports infringing on headnotes); Belford v. Scribner, 144 U. S. 488 (1892) (infringement of cook-book recipes). The theory of these cases is derived from the law of the confusion of goods, that where one has caused property to be mixed so that its identity is lost, he must lose all his own property as well. *Cf.* Harold Lloyd Corp. v. Witwer, 65 F. (2d) 1, 18 (1933) where the court expressed disapproval of this rule. See also, the dissent of Judge McCormick, in the same case at p. 45, where he argues that the wording of the present law would allow equity courts to exercise discretion in awarding damages and profits.

9. Dam v. Kirk La Shelle, 175 Fed. 902 (C. C. A. 2d, 1910). For a discussion of this point, see (1939) 52 HARV. L. REV. 688.

court.[10] Prior to the infringement, the author had contracted for a sale of the play at $30,000, in negotiations which failed because the Hays office disapproved the play. While it is true that the value put upon such a right in incompleted negotiations is immaterial,[11] that sum is an indication of the disproportionate nature of the amount awarded. But the theory of the present copyright law is that plaintiff should be allowed what the infringer earned; not what the copyright owner would have earned if he had exploited the copyright himself.[12] If a means of apportionment is impossible, the outcome must be as the present court decided it under the existing law.

It was urged in this case that the court apply another provision of § 25 that the plaintiff recover "in lieu of actual damages and profits, such damages as to the court shall appear to be just . . . " (within limits of $250 and $5000).[13] To accede to this request would have raised two difficulties, however. The first arises from the prior holding of the courts that the clause can be applied only where no actual damages or profits can be shown.[14] This rule was formulated because of a desire to help the complainant who cannot show that he has suffered any damages or that there has been any profit by allowing him to recover a statutory amount.[15] Another aim of the rule is to prevent a complainant, who could show damages and profits, from getting more than the infringer earned from the wrong.[16] There is a second difficulty: If the court does exercise the discretion granted by § 25b, its award is limited to the provided statutory damages and may not go beyond them.[17] Thus, the highest award possible is $5000. It is obvious that the application of the rule would not fit this case where a just apportionment of the profits would necessitate a higher award.

That some principle must be evolved to meet a situation like that present in the instant case is obvious. The theory of the new copyright law does not seem to be

10. *Cf.* Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307 (1850), stating the doctrine that a wrongdoer who enhances the value of goods loses to the rightful owner what he (the wrongdoer) has contributed.

It may be noted that the parties negotiated with reference to the play in suit in 1930 at the time when the case of Nicholls v. Universal Pictures Corp., 45 F. (2d) 119 (C. C. A. 2d, 1930), was handed down and which held that the play, Abie's Irish Rose, was not plagiarized by the motion picture, The Cohens and The Kelleys, on the ground that their similarity was merely in ideas which are not subject to copyright. It may be argued that such a decision might be interpreted, by companies having difficulties in negotiations for stories and plays, as a liberal rule which would allow them to copy with safety. The most effective way of putting a stop to such practices would be a judgment of the type awarded here.

11. Doll v. Libin, 17 F. Supp. 546 (Montana, 1936).

12. Scribner v. Clark, 50 Fed. 473, 475 (N. D. Ill. 1888). See (1934) 9 TEMPLE L. Q. 78, 85 and cases cited.

13. 37 STAT. 489 (1912), 17 U. S. C. A. § 25(b). See note 21 *infra*.

14. Douglas v. Cunningham, 294 U. S. 207 (1935); Davilla v. Brunswick-Balke Collender Co., 94 F. (2d) 567 (C. C. A. 2d, 1938).

15. See Douglas v. Cunningham, 294 U. S. 207, 209 (1935) ". . . The phraseology [of § 25(b)] was adopted to avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copyright some recompense for the injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits. In this respect the old law was unsatisfactory."

16. Davilla v. Brunswick-Balke Collender Co., 94 F. (2d) 567, 568 (C. C. A. 2d, 1938).

17. Westerman Co. v. Dispatch Printing Co., 249 U. S. 100 (1919).

the imposition of a penalty on the defendant,[18] but to give plaintiff reimbursement for the loss he suffered by reason of the interference with his exclusive right to his work. It is difficult to see, however, how an award which is out of proportion to what would reasonably be plaintiff's loss, can be considered anything less than a penalty.

The court, in this case, outlines its suggestions for a modification of the rule in its application to cases where the copyright contributed to only a part of the profits realized by the production which infringed upon it. One of these suggestions is an application of the method used in patent cases where evidence is allowed upon which the court can base an award of reasonable royalty.[19] If the law as it stands, despite the analogy between patent and copyright infringement cases, is too rigid to allow of any distinction, then legislation should be enacted to give the courts discretion such as they have been granted by statute in patent infringement cases.[20] Certainly a rule which leaves judges no alternative[21] but to come to a decision against conscience is hardly worthy of survival.

INFANTS—TORTS BETWEEN MINORS IN DOMESTIC RELATIONS.—The plaintiff, an unemancipated minor, was seriously injured through the negligence of his sister, also an unemancipated minor. Action was brought against the sister by the plaintiff's guardian. On appeal from judgment for plaintiff, *held,* judgment affirmed. An unemancipated minor may maintain an action against his unemancipated minor sister

18. Brady v. Daly, 175 U. S. 148, 154 (1899); Bolles v. Outing Co., 175 U. S. 262 (1899). These cases were decided prior to the enactment of the present Copyright Act; but they made a clear distinction between actions for damages and actions for statutory penalties. The present act, repealing the old provisions for penalties, makes no such provisions except for the penalties included in the "in lieu" clause [37 STAT. 489 (1912)], 17 U. S. C. A. § 25(b). In regard to this clause, the law expressly states that these damages "shall not be regarded as a penalty." See also Davilla v. Brunswick-Balke Collender Co., 94 F. (2d) 567, 570 (C. C. A. 2d, 1938).

It may also be noted that there is criminal liability for willful infringement for profit (35 STAT. 1082, 17 U. S. C. A. § 28 (1909)) and intent is a necessary element of the misdemeanor. Liability for damages, however, is not affected by the innocence of intent. Fisher v. Dillingham, 298 Fed. 145 (S. D. N. Y. 1924).

19. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641 (1915).

20. 42 STAT. 392, 35 U. S. C. A. § 70 (1922).

21. It is difficult to agree with the note appearing in (1939) 52 HARV. L REV. 688, which seems to indicate that the judge in the instant case might have come to a different conclusion within permitted techniques. The contention is made that the court could have made an apportionment of the profits on the evidence before it and again that the decisions on which this case is based were decided prior to the enactment of the present Copyright Act.

This district court nowhere indicated that it was bound by the case of Callaghan v. Myers, 128 U. S. 617 (1888) except for the proposition that the report of the Special Master is to be treated as presumptively correct. The district court, however, did base its decision on the case of Dam v. Kirk La Shelle, 175 Fed. 903 (C. C. A. 2d, 1910) which declared an apportionment impossible as a matter of law in a situation almost precisely the same as that in the instant case, and the court here is bound by that decision.

It has been indicated that the existing interpretation of § 25(b) would not allow the assumption of judicial discretion in the apportionment of profits.

for personal injuries. Rozell v. Rozell, 256 App. Div. 61, 8 N. Y. S. (2d) 901 (3rd Dep't 1939).

The instant case is without precedent in this jurisdiction.[1] However, the court decided that, on principle and analogy, the action was maintainable. The opinion stated that there was no rule of sound public policy in this state which would prohibit the maintenance of this suit.[2] In fact, said the court, "not only is the maintenance of such a suit not expressly or impliedly forbidden, but its prosecution is not contrary to a well defined legislative policy."[3] The legislation referred to here was the amended § 57 of the Domestic Relations Law, which gave to the husband or the wife a right of action against the other for wrongful or tortious acts resulting in any injury to the person.[4] The tribunal, in the instant case, construed that statute as declarative of a policy likewise applicable to the brother-sister relationship.

The court evidently thought that the common law's aversion to actions which tended to disintegrate the domestic unit was being broken down. Since actions between spouses for injuries resulting from tortious conduct were no longer denied, why may not brother sue brother or sister?

It was reasoned at common law that a marriage created a legal unit as far as husband and wife were concerned.[5] Therefore, the maintenance of any action between the spouses would be inconsistent with the integration, by the law, of these parties as a unit.[6] The belief also prevailed that if such suits were not prohibited, discord rather than peace would pervade the home.[7] At present, the conception of unity, and the fears of a disruption of domestic tranquillity, if such suits were allowed, seem to have abated. The change in the trend of the law is a striking one.

The instant case also presents the same question. However, it is well to remember

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1. Rozell v. Rozell, 256 App. Div. 61, 63, 8 N. Y. S. (2d) 901, 904 (3d Dep't 1939).

2. *Ibid.* "The courts have generally approved the statement that public policy is that principle of the law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good." Cahill v. Gilman, 84 Misc. 372, 377, 146 N. Y. Supp. 224, 227 (Sup. Ct. 1914); Spead v. Tomlinson, 73 N. H. 46, 59 Atl. 376 (1904).

3. Rozell v. Rozell, 256 App. Div. 61, 63, 8 N. Y. S. (2d) 901, 904 (3d Dep't 1939).

4. N. Y. Laws 1937, c. 669, § 1, amendment to N. Y. Dom. Rel. Law (1909) § 57, providing for reciprocal rights of action for personal injuries to one spouse, caused by the tortious conduct of the other. See (1937) 6 Fordham L. Rev. 493; *cf.* Note (1935) 4 Fordham L. Rev. 475, 484 (suggesting statutory abolition of the concept of the unity of the spouses, so as to authorize suits between husband and wife for personal injuries).

5. 1 Bl. Comm. *444; Schouler, Domestic Relations (5th ed. 1895) § 51; Phillips v. Barnet [1876] 1 Q. B. 436; Rex v. Harrison, 1 Leach 47, 168 Eng. Reprints 126 (1756); McCurdy, *Torts Between Persons in Domestic Relations* (1930) 43 Harv. L. Rev. 1030, 1035.

6. "The reason why the wife cannot sue the husband for beating her *must* be because they are one and the same person, and the same reason exists in criminal law, where a woman cannot be convicted of larceny though she has in fact carried away her husband's goods. . . . The reason is not the technical one of parties, but because, being *one* person, one cannot sue the other." Phillips v. Barnet, [1876] 1 Q. B. 436, 439.

7. "It is contrary to the policy of the law and destructive of that conjugal union and tranquility, which it has always been the object of the law to guard and protect." Such actions "might involve the husband and wife in perpetual controversies and litigation . . . and sow the seeds of perpetual domestic discord." Longendyke v. Longendyke, 44 Barb. 366, 368, 369 (N. Y. 1863); Freethy v. Freethy, 42 Barb. 641 (N. Y. 1865).

that it required an express enactment of the legislature[8] for spouses to maintain tortious actions against each other. The Married Women's Acts[9] uniformly gave to women the right to own property, contract, and sue and be sued, as if unmarried. Under these statutes, it was argued that the spouses could sue each other in tort. But though the decisions were in conflict, the majority of the jurisdictions adhered strictly to the common law rule, and steadfastly refused to sanction tort actions between the spouses, unless some express legislative provision were enacted.[10] Therefore, it seems in point to question the soundness of the instant decision on that issue. If it required a definite legislative enactment to provide for such suits, why should not the courts likewise deny suits between minors in the same household, until the state deems it a wise and sound policy to sanction their maintenance?

It is true that, historically, the prohibition of action never applied to brothers and sisters in the same way in which, at early common law, it was applied to the spouses. No vows are taken by the issue of any marriage that they are one until death parts them. However, the policy of the courts at common law has ever been to protect the domestic unit as a unit; not regarding it as separable into distinct groups, such as the husband-wife, or parent-child, or brother-sister relationship, with different principles applicable to each. Therefore, when considering the different members of the domestic relation, perhaps it is possible that the same principle must have been intended to apply to each. True, the legislature has taken much of the sting out of the public policy argument by providing for suits between husbands and wives, but it will be noted that, as concerns the parent-child relationship, no one has yet suggested that suits, for tortious conduct may be maintained between parent and unemancipated child.[11]

In further support of its position, the court points out that the owner of the vehicle in which both the plaintiff and defendant were riding carried liability insurance. This, said the court, was a practical guaranty that the domestic tranquillity would not be threatened by such suits.[12] The same point was made in *Dunlap v. Dunlap*,[13] wherein a minor child was suing his father for negligent operation of his automobile. The parent carried liability insurance. The court allowed a recovery in that case, drawing a distinction between cases in which the parent was insured and those in which he was uninsured. The court ably argued that since the recovery truly was against the insurance company, there was no fear of the home being broken up. Speaking of the parent, the court said, " . . . he is not found to take the

8. See note 4, *supra*.

9. For complete discussion see McCurdy, *Torts Between Persons in Domestic Relations*, (1930) 43 HARV. L. REV. 1030, 1036.

10. Thompson v. Thompson, 218 U. S. 611 (1910); Peters v. Peters, 156 Cal. 32, 103 Pac. 219 (1909); Furstenburg v. Furstenburg, 152 Md. 247, 136 Atl. 534 (1927); Schultz v. Schultz, 89 N. Y. 644 (1882); Pearlman v. Bklyn. City Ry., 117 Misc. 353, 191 N. Y. Supp. 891 (Sup. Ct. 1921); (1913) 22 YALE L. J. 250. *Contra:* Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1914); Gilman v. Gilman, 78 N. H. 4, 95 Atl. 657 (1915).

11. Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891); Sorrentino v. Sorrentino, 248 N. Y. 626, 162 N. E. 551 (1928); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905) (holding father not civilly liable for ravishing his daughter). See Dunlap v. Dunlap, 84 N. H. 352, 150 Atl. 905 (1930) (where recovery allowed child, suing father covered by liability insurance) and Notes (1930) 10 B. U. L. REV. 584; (1930) 44 HARV. L. REV. 135.

However, a parent was allowed an action against an unemancipated child in tort. Crosby v. Crosby, 230 App. Div. 651, 246 N. Y. Supp. 384 (3d Dep't 1930).

12. Rozell v. Rozell, 256 App. Div. 61, 63, 8 N. Y. S. (2d) 901, 904 (1939).

13. 84 N. H. 352, 364, 150 Atl. 905, 912 (1930).

situation seriously. . . . It is more likely to be viewed as something to be welcomed, as adding to the family assets."[14]

Herein lies a danger of which the legislature has taken cognizance. It was notorious that insurance carriers had been defrauded in too many instances. The legislature was well aware of the existing situation. It was the fear of affording further devices for collusion that hindered the passage of the amendment to § 57 of the Domestic Relations Law. When § 57 was passed, the legislature threw a protective cloak about the shoulders of the insurance carriers, by also amending the Insurance Law[15] and the Vehicle and Traffic Act.[16] But, the court in the instant case, while leaning heavily for support on the amended § 57 of the Domestic Relations Law, as tending to show the legislative policy, fails to consider the protective additions to the Insurance and the Vehicle and Traffic Laws which formed a part of the original session law.[17] It does not mention the possibilities of collusion between brother and sister, and that such possibilities might be as great as exist between husband and wife, and parent and child. It fails to note that special legislative enactments were deemed necessary to protect the insurers against these frauds. Therefore, until the necessary legislative steps are taken, the soundness of the courts' position may well be questioned; for, admitting that such suits are not disruptive of the family unit, since it is the insurer who pays, is it not equally against public policy to foster the possibility of additional frauds, by permitting the maintenance of such suits?

However, with the enactment of specific legislation on the subject, affording ample protection against frauds, it will be found that the result in the instant case would not be repugnant to good morals or natural justice. Everyone has a right to have his person protected from injury. Having established this valuable right, and having proved an injury to this right, with consequent damages, the legislature should provide some mode of redress, which, though not contravening the policy of the state, will make complete reparation.

JUDGMENTS—STATUTE OF LIMITATIONS ON INTEREST.—Appellant's intestate was awarded $58,152 for land taken in an assessment proceeding. With benefits deducted, the net judgment entered in February, 1926, amounted to $54,554. This amount was paid in October, 1926. In December, 1934, an action was brought to recover interest upon the judgment entered. The trial court entered judgment for the amount of the interest, which was reversed in a higher court. Upon appeal it was *held,* two judges dissenting, that interest upon the sum of a judgment is authorized by statute alone. It is not such a part of the judgment as to come within the scope of the statute of limitations applicable to judgments, but is rather within the scope of the statute limiting, generally, actions not otherwise specifically pro-

14. See *id.* at 365, 150 Atl., at 913; *cf.* Mesite v. Kirchstein, 109 Conn. 77, 145 Atl. 753 (1929).

15. N. Y. Laws of 1937, c. 669 § 2, adding subdivision 3a to § 109 of the N. Y. INSURANCE LAW, providing that policies issued before and after the amendment to § 57 N. Y. DOM. REL. LAW, should not be deemed to insure against any liability of the insured for injuries to his or her spouse unless express provision is made for such coverage in the policy.

16. N. Y. Laws of 1937, c. 669 § 2, amending § 59 N. Y. VEHICLE AND TRAFFIC LAW. Thus, it appears that the legislature was not willing to extend the tort liability to the husband-wife relation without curbing the danger of collusion.

17. N. Y. Laws of 1937, c. 669, §§ 2, 3.

vided for. Judgment affirmed. *Blakeslee's Storage Warehouses, Inc. v. City of Chicago*, 369 Ill. 480, 17 N. E. (2d) 1 (1938).

In situations arising out of the non-payment of interest on judgments such as the present case, an historical viewpoint is not without profit, in seeking an explanation of the confusion which so often characterizes the courts' attitude towards this question. In medieval society, predominantly agricultural as it was, most loans were non-productive and the taking of interest upon any sort of debt was regarded as usury—a sin in the eyes of the Church and a crime in those of the early common law courts.[1] With the growth of commerce in England in the sixteenth and seventeenth centuries, however, the common law courts began to adopt in large measure the body of the Law Merchant and to relax the strict medieval laws regarding usury.[2] However, the process was gradual and in the early American decisions we find that the various state courts were not in accord as to whether interest was recoverable upon a judgment at common law.[3] Today most, if not all, common law jurisdictions provide for interest on judgments by statute.[4]

In numerous, more modern, decisions, the courts have defined interest as damages for the detention of money due and consideration paid for the use of money.[5] The rationale of these cases is that, since the creditor is deprived of the productive use of his money, the debtor must compensate him for that loss. In actions brought upon a prior judgment, the judgment itself is the obligation which bears the interest and not any transaction which gave rise to the judgment.[6] In the light of this the court

1. LEET JURISDICTION OF NORWICH (Vol. V, Selden Society, 1891) pp. 35, 38.

2. See 8 HOLDSWORTH'S HISTORY OF THE ENGLISH LAW 100, for a discussion of the effect of the Law Merchant on the English usury laws.

3. For cases holding that interest was recoverable at common law see: Crawford v. Simonton's Ex'rs., 7 Port. 110 (Ala. 1838); Guthrie v. Wickliffe, 7 Ky. 541, 7 Am. Dec. 746 (1817); Fitzgerald v. Caldwell's Ex'rs., 4 Dall. 251 (Pa. 1802). For the contrary proposition see: Thompson v. Monrow, 2 Cal. 99, 56 Am. Dec. 318 (1852); Frazer v. Boss, 66 Ind. 1 (1879); Williamson v. Broughton, 4 McCord 212 (S. C. 1827).

On this question even the text writers are in conflict. "At common law, judgments did not bear interest, and in an action on a judgment interest was recoverable (if at all) only by way of damages." 2 BLACK, JUDGMENTS (2d ed. 1902) 1439, § 981. Another authority holds that at common law interest could be collected on execution, but that the debtor could satisfy the original judgment at any time by paying the amount thereof without interest. If an action were brought upon the original judgment, damages were allowed which some cases characterized as interest, others as damages. 2 FREEMAN, JUDGMENTS (5th ed. 1925) 2262.

4. United States, 5 STAT. 518, 28 U. S. C. A. § 811 (1842); with regard to claims against the United States, 43 STAT. 940, 28 U. S. C. A. § 765 (1925); and 43 STAT. 939, 31 U. S. C. A. § 226 (1925); Connecticut, CONN. GEN. STAT. (1918) § 5781; California, CAL. GEN. STAT. tit. 276 § 1 (1931); New York, N. Y. CIV. PRAC. ACT (1920) § 481; Pennsylvania, PA. STAT. ANN. (Purdon, 1936) tit. 12 §§ 781, 782; Texas, TEX. REV. CIV. STAT. (Vernon, 1936) Art. 5072; England, JUDGMENTS ACT (1838), 1 & 2 Vict. c. 110.

5. Maryland Casualty Co. v. Omaha Electric Light & Power Co., 157 Fed. 514 (C. C. A 8th, 1907); Hagan v. Commissioner's Court, 160 Ala. 544, 49 So. 417 (1909); Arizona Eastern R. R. v. Head, 26 Ariz. 259, 224 Pac. 1057 (1924); Sayles v. Commissioner, 286 Mass. 102, 189 N. E. 579 (1934); Marion v. City of Detroit, 284 Mich. 476, 280 N. W. 26 (1938); Town of Hartland v. Damon's Estate, 103 Vt. 519, 156 Atl. 518 (1931).

6. Watson v. McManus, 223 Pa. 583, 72 Atl. 1066 (1909). The example of a judgment recovered in tort bearing interest illustrates this. Klock v. Robinson, 22 Wend. 157 (N. Y. 1839).

in the present case, in distinguishing between the action for the principal sum of the judgment and that for the interest thereon, seems to be exhibiting the reluctance of an earlier day to extend the scope of recovery of interest. Although the amount of the judgment had been paid and the present action was brought to recover the interest alone, still the argument of the present decision, if carried to its logical conclusion, would apply with equal force to actions brought to recover both principal and interest accrued on a prior judgment. In such a case the anomalous situation would be presented of allowing a plaintiff recovery within the Statute of Limitations for the principal sum of the judgment and barring interest as an integral part of his damages.

This court's distinction also seems to disregard the true nature of interest. Interest, of its nature, cannot exist alone; it is incident to the principal sum. An action brought to recover any sum bearing interest is usually conceived of as being a single, inseparable action.[7] It is, in cases like the present, where the principal sum has already been satisfied, that a separate action for the interest is brought.[8] While it is true that some courts regard interest upon judgments as damages for the nonpayment of the sum of the judgment,[9] still interest has been held, in well considered opinions, to be part of the judgment and incident to it.[10] Interest has been held to be as distinctly a substantive part of the judgment debt, as if the obligation to pay it were founded on a contract therefor.[11] In the famous case of *Foakes v. Beer*[12] an agreement to release the judgment debtor from his obligation to pay interest on the judgment was held invalid because of failure of consideration, since the debtor was already under obligation to pay the interest as an integral part of the original judgment debt. The payment of the principal sum has been held not to be a satisfaction of the judgment debt in subsequent actions brought to recover the interest due upon the judgment.[13] If the interest is an inseparable part of the

7. "Where the terms of an obligation comprehend interest, it is inaccurate to say interest is added by way of damages, for it is a substantive part of the debt as much as the principal is." Hummel v. Brown, 24 Pa. 310 (1855). It has been held that interest is a legal incident of every judgment when a statute provides that judgment shall bear interest. Cochran v. Cummings, 4 Dall. 250 (Pa. 1802); Commonwealth v. Vanderslice, 8 S. & R. 452 (Pa. 1822). That interest is as much part of the judgment lien as the principal sum recovered when a statute provides for its collection on execution has been held in Mower v. Kip, 2 Edw. Ch. 165 (N. Y. 1834) and Sims v. Campbell, 1 McCord Eq. 53, 16 Am. Dec. 595 (S. C. 1826). See also 2 FREEMAN, JUDGMENTS (5th ed. 1925) 1954.

8. As where the principal sum due on a negotiable instrument was paid, and an action to recover the interest due upon the instrument was allowed. Florence v. Jenings, 2 C. B. N. S. 454 (1857).

9. See cases cited in note 5, *supra*.

10. National Bank v. Mechanic's Bank, 94 U. S. 437 (1876). The opinion in this case discusses the history of interest. It is cited with approval in Ticonic Nat. Bank v. Sprague, 303 U. S. 406 (1938). See also Cochran v. Cummings, 4 Dall. 250 (Pa. 1802), and Commonwealth v. Vanderslice, 8 S. & R. 452 (Pa. 1822).

11. Watson v. McManus, 223 Pa. 583, 72 Atl. 1066 (1909), and Hummel v. Brown, 24 Pa. 310 (1855).

12. 9 A. C. 605 (1884).

13. Except where a valid release is given, or there is a lawful agreement otherwise providing, a judgment may be satisfied or discharged only by payment in full with accrued interest and costs. Persons v. Gardner, 122 App. Div. 167, 106 N. Y. Supp. 616 (4th Dep't 1907). See also 2 FREEMAN, JUDGMENTS (5th ed. 1925) 2329.

judgment debt—and the authorities already cited conceive of it as such—then it follows that the recovery of interest is limited in all respects by the limitations imposed upon actions upon judgments and those limitations only.

The instant decision holds that when judgment was entered no interest was due and consequently interest was no part of the judgment. It is obvious that at the time judgment is entered it is not within the court's knowledge as to when the judgment will be satisfied. It is this impossibility of computing what interest will have accrued that prevents the entering of the interest in the original judgment and not any rule of substantive law.[14]

In its opinion the court makes the statement, "How the interest could afterward modify the judgment by increasing it in amount is not suggested. . . . A judgment stands in amount as it is entered, and the only way in which it may be modified is by a direct proceeding for that purpose. . . . The conclusion is inescapable that interest on a judgment is not part of it."[15] In this argument the court fails to see that if the interest is part of the judgment then its addition cannot modify it.[16] To support its argument the court assumes the conclusion of it, namely that interest is not part of the judgment, as a basic premise. The accruing of interest upon the sum of a judgment is rather a legal effect provided for by statute.

The court seems to have adopted the distinction of an early case,[17] that interest is allowed not as interest, but as damages for the detention of money. This is a distinction which should make no difference in the result.[18] Interest is admittedly recoverable as damages, but it is an element of damage inseparable from the judgment. If the judgment creditor is entitled to recover the sum of his judgment within the time specified by the legislature, surely he is entitled to recover the damage which is a legal incident of the judgment. If his action is not barred, certainly his damages should not be.[19]

Considering the contemporary view of interest taken, not only by laymen gener-

14. When the amount of costs, to give an analogy, are subsequently inserted in a blank in the judgment and docket entry left for that purpose, it is covered by the judgment lien, provided of course this practice is permitted by statute. Matthewson v. Fredrich, 19 S. D. 423, 103 N. W. 656 (1905). Costs of appeal have been held to be in contemplation of law a part of the original judgment appealed from. McClung v. Beirne, 10 Leigh 394, 34 Am. Dec. 739 (Va. 1839).

15. See Blakeslee's Storage Warehouses, Inc. v. City of Chicago, 369 Ill. 480, 484, 17 N. E. (2d) 1, 3.

16. In proceedings to modify judgments the basis for modification is generally mistake —clerical errors in entering the judgment or mathematical errors in computing the sum of judgment.

17. Young's Adm'r v. Lancaster, 21 Ky. 381 (1827).

18. See 2 FREEMAN, JUDGMENTS (5th ed. 1925) 2262. Although some courts allowed interest to be recovered as interest and others as damages distinguished from interest in most cases both computed it by the interest allowed in actions of debt.

19. In a New York case, Matter of Sanford, 95 Misc. 3, 160 N. Y. Supp. 209 (Surr. Ct. 1916), a judgment creditor was allowed to recover in an action brought upon a prior judgment three years after the statutory period of limitation on actions on judgments had elapsed, because of an agreement to forbear from the collection of the judgment until the death of a certain person. Interest for the entire period was allowed by the court. It is obvious that the court looked upon the interest as an incident to the judgment and as compensation to the creditor for the loss suffered by him in forbearing to collect his judgment.

ally, but even by the courts, the decision in the present case has the appearance of an anachronism, the scope of which it is hoped will be narrowed rather than extended.

MARRIAGE—INSANITY—ADJUDICATION.—This action was brought in 1936 to annul a marriage between plaintiff's incompetent son and the defendant. The incompetent was adjudicated a lunatic in 1922, and the plaintiff, his mother, was appointed and continued to act as committee of his person and estate. While on parole from the State Hospital, in 1926, the incompetent and the defendant were married. At the trial, the defendant introduced evidence as to the sanity of her husband at the time of the marriage ceremony and the court found that he understood the nature and quality of his acts. On appeal from a judgment dismissing complaint, *held*, a judicially declared lunatic is not incapable of contracting marriage; the marriage was not absolutely void and the finding of sanity was warranted by the evidence. *Weinberg v. Weinberg*, 255 App. Div. 366, 8 N. Y. S. (2d) 341 (4th Dept., 1938).

The ancient doctrine, that a man shall not be allowed to stultify himself by alleging mental incapacity in avoidance of his contracts, is no longer accepted in the law of England or of this country.[1] According to the view now commonly held, the contracts of a lunatic made before his incompetency has been judicially declared, are voidable.[2] Where, however, a person is adjudicated insane and a committee appointed for him, all contracts made by him concerning his estate during the life of the inquisition are absolutely void;[3] and this is so notwithstanding the fact that the contract was made in a lucid interval.[4] Although this rule is followed in a majority of jurisdictions,[5] there is conflict as to the basis for it. Some take the view that the mere adjudication renders the acts of the incompetent void, regardless of the appointment of a guardian.[6] Such a holding would give to the decree of the

1. 2 BL. COMM. *291 (Cooley 4th ed. 1899).

2. Smith v. Ryan, 191 N. Y. 452, 84 N. E. 402 (1908); Blinn v. Schwartz, 177 N. Y. 252, 69 N. E. 402 (1904); Williams v. Sapieha, 94 Tex. 430, 61 S. W. 115 (1901); 1 WILLISTON, CONTRACTS (Rev. ed. 1936) § 251.

3. Carter v. Beckwith, 128 N. Y. 312, 28 N. E. 582 (1891); L'Amoreaux v. Crosby, 2 Paige 422 (N. Y. 1831); Leonard v. Leonard, 31 Mass. 280 (1833); See Thorpe v. Hanscom, 64 Minn. 201, 66 N. W. 1 (1896).

At common law, it was the custom to permit the jury to determine how long the lunacy had existed and, as to contracts made during the *retrospective* period, the finding of insanity was prima facie evidence of incapacity. Hughes v. Jones, 116 N. Y. 67, 22 N. E. 446 (1889). Banker v. Banker, 63 N. Y. 409 (1875); Portsmouth v. Portsmouth, 1 Hagg. Eccl. 355, 162 Eng. Reprints 611 (1828). Under the present statute in New York, N. Y. CIV. PRAC. ACT (1920) § 1371, the inquiry is limited and confined to the fact of lunacy at the time of the inquiry. Boschen v. Stockwell, 224 N. Y. 356, 120 N. E. 728 (1918).

4. Acacia Mut. Life Ins. Co. v. Jago, 280 Mich. 360, 273 N. W. 599 (1937); Rannells v. Gerner, 80 Mo. 474, (1883). The court will not inquire whether in fact the lunacy continued and existed at the time the contract was made. Carter v. Beckwith, 128 N. Y. 312, 28 N. E. 582 (1891).

5. The minority rule is that the adjudication and guardianship are not conclusive of incapacity to dispose of property, but merely evidence thereof. Chase v. Spence, 150 Mich. 99, 113 N. W. 578 (1907); Field v. Lucas, 21 Ga. 447 (1857); Arrington v. Short, 10 N. C. 71 (1824).

6. "The adjudication of lunacy renders contracts thereafter entered into by the lunatic

court a conclusive presumption of continued insanity and seems unreasonable.[7] The better view, however, is that the appointment of the guardian works a change in the legal power of the lunatic to act for himself.[8] The committee is vested with the control over the property of the incompetent and the latter, although not divested of the title, can no longer buy, sell or enter into any contract binding himself or his estate.[9] To hold otherwise would be to defeat the very purpose of the guardianship.[10]

Marriage, although primarily a status or relation, is entered into through the doors of a contract not entirely dissimilar to other contracts.[11] Since there can be no marriage without the mutual consent of both parties, there can be none where one of the parties is mentally incapable of giving the matrimonial consent. Hence courts, when unfettered by statute, generally follow the common law rule that the marriage of a lunatic is void, on principles of ordinary contracts.[12] By statute, however, a majority of jurisdictions, including New York, now holds such a marriage voidable only.[13]

The instant case raises the question as to the effect of an adjudication and guardianship upon this contract. England, by statute, holds such a marriage absolutely void.[14] Other jurisdictions have held that the general effect of the finding of insanity does not apply in the case of matrimony and that the presumption of incapacity is rebuttable.[15] Such a conclusion has been reached despite statutes declaring *all* con-

invalid regardless of the fact whether he has a guardian or not." Kiehne v. Wessell, 53 Mo. App. 667, 671 (1893); Redden v. Baker, 86 Ind. 191, 194 (1882).

7. This would be contrary to the rule of law that the presumption of continuance arising from a condition, once shown to exist, may be overcome by evidence to the contrary. 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2530. Mutual Life Ins. Co. v. Wiswell, 56 Kan. 765, 44 Pac. 996 (1896). The fact that a petition for adjudication of insanity is denied does not render the presumption of sanity conclusive. Gibson v. Soper, 6 Gray 279, 285 (Mass. 1856).

8. 1 WILLISTON, CONTRACTS (Rev. ed. 1936) § 257. "And then the party becomes incapable of contracting, not merely from the state of his mind, but because the power of present control over his property is taken from him." Gibson v. Soper, 6 Gray 279, 286 (Mass. 1856); Southern Tier Masonic Relief Ass'n v. Laudenbach, 5 N. Y. Supp. 901 (Sup. Ct. 1889).

9. See Viets v. Union Nat'l Bank of Troy, 101 N. Y. 563, 569, 5 N. E. 457, 459 (1886); People *ex rel.* Smith v. Commissioners, 100 N. Y. 215, 218, 3 N. E. 85, 87 (1885); Wadsworth v. Sharpsteen, et ano., 8 N. Y. 388 (1853).

10. Jordan v. Dickson, 19 Weekly L. B. 64 (Ohio 1887).

11. BISHOP, MARRIAGE, DIVORCE AND SEPARATIONS (1891) § 296; N. Y. DOM. REL. LAW (1909) § 10.

12. Wightman v. Wightman, 4 Johns. Ch. 343 (N. Y. 1820); Powell v. Powell, 18 Kan. 371 (1877); Rawdon v. Rawdon, 28 Ala. 565 (1856); Although no decree of nullity is necessary, yet as well for the sake of the good order of society, as for the peace of mind of all persons concerned, it is expedient that the nullity of the marriage should be ascertained and declared by a court of competent jurisdiction. 2 KENT COMM. *76.

13. N. Y. DOM. REL. LAW (1909) § 7; Dunphy v. Dunphy, 161 Cal. 87, 118 Pac. 445 (1911); Henderson v. Ressor, 265 Mo. 718, 178 S. W. 175 (1915) (construing Arkansas Statute). In New York, at common law, the sane spouse could not annul the marriage. Hoadley v. Hoadley, 244 N. Y. 424, 155 N. E. 728 (1927). By recent amendment, however, this disability has been removed. N. Y. CIV. PRAC. ACT (1932) § 1137.

14. 15 GEO. II, c. 30; 19 HALSBURY'S LAWS OF ENGLAND 822.

15. Castor v. Davis, 120 Ind. 231, 22 N. E. 110 (1889); McClearly v. Barcalow, 3 Ohio C. C. 481 (1891). 2 BISHOP, MARRIAGE, DIVORCE AND SEPARATION (1891) § 1243.

tracts of adjudicated lunatics void.[16] This rule seems quite a proper departure from the rule holding the ordinary contract of the incompetent to be an absolute nullity. The latter rule is practical and efficient, since the lunatic has someone to act for him.[17] However, inasmuch as marriage involves a personal relation of love and affection, it is readily seen that the guardian cannot act for the one who is supposed to experience that emotion and make a decision in his stead on a helpmate. He cannot become an alter ego, even by judicial appointment. The courts of New York, prior to the instant case, have not passed on this point, although the propriety of the foreign decisions has been recognized.[18] The result in the principal case follows the general trend of this and other jurisdictions, in refusing to give effect to the conclusive presumption of incapacity of a lunatic under guardianship, as to acts which are purely personal and which the guardian cannot perform.

This trend is apparent in analogous situations. In Wormington v. Wormington,[19] a Missouri Court held that a reconciliation, after separation, between a husband and wife, the former having been previously adjudicated insane and placed under guardianship, was binding, provided the husband understood the nature of his act. The court stated that if there had been a divorce and subsequent remarriage, the sanity at the time of the ceremony would be a question of fact and further that the guardian could no more condone or forgive the past than he could marry or make a will for his ward. A will made by an adjudicated lunatic under guardianship is valid if executed in a lucid interval.[20] Although a will is not a contract, the courts reason on the theory that the act is one which the guardian cannot perform. An adjudicated lunatic is a competent juror provided it can be shown that he was sane at the trial.[21]

However much the decision may be in accord with legal trends it yet may be asked if its policy is sound. We should be eager to apply every legitimate presumption in favor of the validity of a marriage. But might we not doubt whether a person found to be insane and incapable of managing his property would be able to assume the duties coincident with marriage. The dependence of children renders it necessary

16. Payne v. Burdette, 84 Mo. App. 332 (1900); Roether v. Roether, 180 Wis. 24, 191 N. W. 576 (1923); Ross v. Ross, 175 Okla. 633, 54 P. (2d) 611 (1936); *Contra:* Sims v. Sims, 121 N. C. 297, 28 S. E. 407 (1897).

17. Without this rule it would be difficult, if not impossible, for the guardian to execute his trust, since in every action concerning the property of his ward he might be obliged to go before a jury upon the question of the ward's insanity. Thorpe v. Hanscom, 64 Minn. 201, 205, 66 N. W. 1, 2 (1896).

18. See Martello v. Cagliastro, 122 Misc. 306, 308, 202 N. Y. Supp. 703, 705 (Sup. Ct. 1924). *Contra:* O'Reilly v. Sweeney, 54 Misc. 408, 105 N. Y. Supp. 1033 (Sup. Ct. 1907), wherein the court held, in an action for damages for breach of promise of an adjudicated lunatic to marry, that the contract was absolutely void. It should be noted that this case primarily involved the property of the estate.

Where a widow is given by a will an election to demand dower or to accept provisions of the will, the committee has no power to exercise such election in her behalf. Camardella v. Schwartz, 126 App. Div. 334, 110 N. Y. Supp. 611 (2d Dept. 1908). See Matter of Rasmussen, 147 Misc. 564, 264 N. Y. Supp. 600 (Surr. Ct. 1933).

19. 226 Mo. App. 195, 47 S. W. (2d) 172 (1931), wherein the plaintiff wife sought to share in the estate of her deceased husband despite the fact that she had by separation agreement released all claim against it.

20. Breed v. Pratt, 18 Pick 115 (Mass. 1836); 1 JARMAN, WILLS (5th ed. 1898) 49. See also Lewis v. Jones, 50 Barb. 645 (N. Y. 1868). In such cases the person assenting the validity of the will has the burden of proving sanity at the time of execution.

21. State v. Bucy, 104 Mont. 416, 66 P. (2d) 1049 (1937).

that they be maintained[22] and advised as their characters develop. By nature this duty devolves upon the parent as the most fit and proper person.[23] For the duty of educating and advising a child, an adjudicated lunatic whose lucid intervals are irregular would hardly be a fit and proper person. However, bearing in mind that this action is to *annul* an executed marriage and not merely to separate the parties or secure proper guardianship for the children *we* think it proper to conclude that the decision is sound. A valid marriage exists when the intent to enter a marriage contract is present in the parties' minds. That intent in this situation will probably not be realized as far as the education of offspring is concerned. This is true of the present situation as well as the case where a person affected with a serious ailment that will probably cause death within a few months marries. But the remedy is not to invalidate the contract, it is to protect the children and the wife by guardianship or separation.

PLEADING AND PRACTICE—COUNTERCLAIM—STOCKHOLDER'S DERIVATIVE ACTION.—The plaintiff corporation sued defendant, a stockholder and officer for moneys claimed to be due it because of excess withdrawals in anticipation of extra salary, profits and credits. The defendant counterclaims against the plaintiff and its directors alleging mismanagement of corporate affairs and asking an accounting, the restitution of moneys improperly received by said directors, and the payment to defendant of his share of the corporate income misappropriated. The lower court struck out the counterclaim, holding it unavailable to the defendant on the ground that the proceeds to be realized as a result thereof belonged to the corporation and not to the defendant stockholder. On appeal to the Appellate Division, *held*, the counterclaim was proper under Section 266 of the Civil Practice Act. Order reversed. *Geer Jr. & Co. v. Fagin*, 255 App. Div. 253 (3d Dep't 1938).

The recent trend toward the liberalization of procedure[1] is particularly illustrated in the pleading of counterclaims.[2] Prior to 1936, the counterclaim had to meet certain prescribed requisites in order to be available.[3] It had to tend to defeat or diminish the plaintiff's recovery.[4] Contract could be pleaded against contract,[5] but

22. The committee may provide for the support of the family of the lunatic, N. Y. CIV. PRAC. ACT (1920) § 1357.

23. 2 KENT. COMM. *189; 1 BL. COMM. *447.

1. For a review of the recent modifications in pleading, see Saxe, *The Renascence of Civil Practice in New York*, (1938) 7 FORDHAM L. REV. 45.

2. N. Y. Laws 1936, c. 324, amending N. Y. CIV. PRAC. ACT, §§ 245 (a), 267, 278, adding new § 266.

3. The former § 266 read as follows: "A counterclaim except as otherwise provided by statute, must tend to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff or the plaintiff and another person or person alleged to be liable a separate judgment may be had in the action:

"1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action;

"2. In an action on contract, any other cause of action on contract existing at the commencement of the action."

4. Lipman v. Jackson, 128 N. Y. 58, 27 N. E. 975 (1891). This requirement has been adopted by many states even in the absence of express statutory provisions. Bannerot v.

not tort against tort, nor contract against tort unless they arose out of the same transaction or were connected with the same subject of action.[6] Finally, the counterclaim had to be in favor of the defendant, or one or more defendants between whom and the plaintiff, or the plaintiff and another person or persons alleged to be liable,[7] a separate judgment could be had in the action.[8] Vague and indefinite as were these requirements to start with, subsequent judicial interpretations created subtle and arbitrary distinctions.[9] The frequency with which the courts rejected causes of action conveniently counterclaimed,[10] accomplished the restoration of rigid common law pleading. The judicial defeat of the primary purpose of a counterclaim,[11] rendered its statutory revision urgent.

The new statute of 1936 was broad in its scope. It requires a counterclaim to be "any cause of action in favor of the defendants or some of them against the plaintiffs

McClure, 39 Colo. 473, 90 Pac. 70 (1907); Dietrich v. Koch, 35 Wis. 618 (1874). Clark and Surbeck, *Pleading of Counterclaims,* (1928) 37 YALE L. J. 300, 310.

5. Provided the counterclaim exists at the commencement of the action. § 266 (2), note 3, *supra.* Hull v. Hull, 225 N. Y. 342, 122 N. E. 252 (1919).

6. The terms "connected with the same subject of action" and "arising out of the same transaction" proved exceedingly burdensome. The former clause has been defined as follows: "A 'subject' is that on which any operation, either mental or material, is performed; as, a subject for contemplation or controversy. The subject of an action is either property (as illustrated by a real action) or a violated right." Glen & Hall Mfg. Co. v. Hall, 61 N. Y. 226, 236 (1874). Instances of the confusion arising out of the latter are seen in the following cases. In Goelet v. Goldstein, 229 App. Div. 456, 242 N. Y. Supp. 586 (1st Dep't 1930), an action for rent, a counterclaim alleging damage to the defendant resulting from plaintiff's negligence in maintaining the building was sustained. But in Zysman v. One Hundred Forty Seven-One Hundred Forty Nine West 57th Street Corp., 221 App. Div. 84, 223 N. Y. Supp. 62 (1st Dep't 1927), an action by tenant to recover damages for unlawful eviction, the landlord could not plead a counterclaim based on a breach of lease by the plaintiff. See also Hopkins v. Lane, 87 N. Y. 501 (1882); Burns v. Lopez, 256 N. Y. 123, 175 N. E. 537 (1931); Ludlow v. McCarthy, 5 App. Div. 517, 38 N. Y. Supp. 1075 (2d Dep't 1896); Bernheimer v. Hartmayer, 50 App. Div. 316, 63 N. Y. Supp. 978 (1st Dep't 1900); Hunter v. Booth, 84 App. Div. 585, 82 N. Y. Supp. 1000 (2d Dep't 1903); Fleming v. Jackson, 222 App. Div. 296, 226 N. Y. Supp. 281 (1st Dep't 1928).

7. N. Y. CIVIL PRACTICE ACT (1936) § 271 permitted the summoning of new parties set up in the counterclaim. See Williams v. Tompkins, 208 App. Div. 574, 204 N. Y. Supp. 168 (1st Dep't 1924).

8. Counterclaims under the contract clause were permitted only where the demand affected the same rights between the parties as existed in the original action, *i.e.* between the same parties in the same capacity. Hopkins v. Lane, 87 N. Y. 501 (1882); Hunter v. Booth, 84 App. Div. 585, 82 N. Y. Supp. 1000 (2d Dep't 1903). As to possible exceptions in "equitable set-offs", see Ecorse Trans. Co. v. Earhart, 96 Fed. 975 (C. C. D. Minn. 1899); Alpaugh v. Battles, 235 App. Div. 321, 257 N. Y. Supp. 126 (1st Dep't 1932).

9. See notes 6 and 8, *supra.*

10. Stafford v. Kremer, 258 N. Y. 1, 179 N. E. 82 (1931). Where the relief sought by the plaintiff is not affected by the defendant's counterclaim, the counterclaim will be rejected. See 3 CARMODY'S NEW YORK PRACTICE (2d ed. 1930) 2103. Also Snyder v. Magnolia Metal Co., 58 App. Div. 236, 68 N. Y. Supp. 809 (1st Dep't 1901).

11. 2 JUDICIAL COUNCIL REP. (1936) 123 states: "The counterclaim has the dual purpose of (a) the satisfaction of cross-demands, and (b) the avoidance of multiplicity of suits."

or some of them, a person whom the plaintiff represents, or a plaintiff and another person or persons alleged to be liable."[12] Also, judicial discretion has replaced the former statutory limitations, its sole confines being convenience and justice.[13] In a recent case, the court pointed out that the legislature intended to permit parties to an action to litigate, between themselves, any and all claims which they may possess or acquire against each other up to the time of the trial.[14] Under this liberal interpretation, a cause of action acquired by the defendant after the commencement of the action[15] solely for the purpose of pleading it as a counterclaim, was permitted to be used as such. In an action for an accounting of a law partnership, counterclaims by the defendant arising out of a partnership between the plaintiff and the defendant outside of the scope of the law partnership were sustained.[16] The litigious terms, "arising out of the same transaction" and "connected with the same subject of action" no longer perplex the practitioner.[17] And, although the issue has not as yet experienced exhaustive judicial discussion, the set-off of debts accruing in different rights appears permissible.[18] However, the court may, whenever it deems proper in the interest of justice, strike out the counterclaim.[19]

How this new liberality will affect the pleading of counterclaims in stockholder's representative actions, such as arises in the instant case, is an interesting inquiry. In *Security Trust Co. of Rochester v. Pritchard,*[20] a stockholder brought suit against a director, and joined the corporation as a necessary party defendant. The director counterclaimed with a derivative suit in his own name against the original plaintiff. The counterclaim was disallowed on the ground that it did not "tend to diminish or defeat the plaintiff's recovery" as required by statute.[21] In its decision the court stressed the fact that both suits were really instigated for the purpose of restoring corporate assets.

It might be argued that the result of this case should have been reached in the principal case, even though the new Section 266 is apparently much more liberal. It could be emphasized that the stockholder who brings a derivative action is not the true plaintiff. He is permitted to sue in this manner simply to set in motion the judicial machinery of the court. The right of action belongs to the corporate body and not to the plaintiff individually nor to the stockholders collectively.[22]

12. The new § 266 apparently has been modeled after the English statute governing counterclaims, which has been held to allow many counterclaims beyond the scope of those provided for in the American Codes. See THE ANNUAL PRACTICE (1939) Order 19, rule 3; see Clark and Surbeck, *op. cit. supra,* note 4, at 302.

13. § 262 as amended by the Laws of 1936 permits the court, in its discretion, whenever the interests of justice require, to order a severance of the action or separate trials, or strike out the counterclaim. A similar statute also exists under the English Code. See THE ANNUAL PRACTICE (1939) Order 21, rule 15.

14. Bricken Construction Corporation v. Cushman, 163 Misc. 371, 297 N. Y. Supp. 194 (Sup. Ct. 1937).

15. See note 5, *supra.*

16. Kugel v. Telsey, 250 App. Div. 638, 295 N. Y. Supp. 148 (2d Dep't 1937).

17. See note 6, *supra.*

18. See note 8, *supra.*

19. In Ritter v. Mountain Camp Holding Corp., 252 App. Div. 602, 299 N. Y. Supp. 876 (1st Dep't 1937), the counterclaim was disallowed on equitable grounds.

20. 122 Misc. 760, 204 N. Y. Supp. 31 (Sup. Ct. 1924).

21. Former § 266. See note 4, *supra.*

22. Brock v. Poor, 216 N. Y. 387, 111 N. E. 329 (1915); Stein v. Fruend, 215 App. Div. 149, 213 N. Y. Supp. 9 (1st Dep't 1925); Potter v. Walker, 252 App. Div. 244, 293

Here, a shareholder being sued by a corporation has been permitted to counterclaim a cause of action which the corporation possesses as against the directors. It might be said that it raises no issues as between the plaintiffs and the defendants,[23] and that it is not a counterclaim as defined in Section 266 of the Civil Practice Act. On the other hand, a stockholder is the owner of a chose in action which has great value or small value in proportion as the corporate assets are large or small. He has a potential property right in any sums which may be returned to the corporation in the event that the directors make restitution. Thus, much is to be said on both sides of the question and we must await a decision of the Court of Appeals before we shall know definitely whether liberality of counterclaim shall continue permissible to the nth degree.

STATUTORY NEGLIGENCE—OWNER OF TRAILER.—A semitrailer owned by the Niagara Freight Lines Inc. was being hauled by a truck owned by one Walker and operated by his employee. Through the negligence of this driver a collision with an automobile owned by William Hennessy occurred. On appeal from a judgment in favor of the plaintiff against the owners of the truck and the semitrailer, *held*, two judges dissenting, the owner of a semitrailer attached to a separately owned tractor is not liable as a matter of law for the negligent operation of the tractor under the N. Y. Vehicle and Traffic Law (1934) Sec. 59. A new trial must be had to discover whether Walker, the owner of the truck, was an independent contractor. *Hennessy v. Walker*, 279 N. Y. 94, 17 N. E. (2d) 782 (1938).

At common law, the owner of an automobile was not liable for the negligence of the driver when the driver was using the car on his own business and was only a bailee of the car.[1] However, this common law rule was altered by statute[2] so that today in many states the owner of a motor vehicle is made liable for injuries result-

N. Y. Supp. 161 (1st Dep't 1937); Gerith Realty Corp. v. Normandie Nat. Sec. Corp., 154 Misc. 615, 276 N. Y. Supp. 655 (Sup. Ct. 1935).

23. Mortgage Commission v. Hill, 166 Misc. 794, 2 N. Y. S. (2d) 543 (Sup. Ct. 1938).

1. Potts v. Pardee, 220 N. Y. 431, 116 N. E. 78 (1917); Van Blaricon v. Dodgson, 220 N. Y. 111, 115 N. E. 443 (1917); Fallon v. Swackhammer, 226 N. Y. 444, 123 N. E. 737 (1919). In contrast with these cases compare the Family-Car doctrine, which holds that the owner of a car is liable for damages while a member of the family is driving it on his own business. See Lattin, *Vicarious Liability and the Family Automobile*, (1928) 26 MICH. L. REV. 846. For a good brief discussion of this doctrine, see HARPER, TORTS (1933) 620, 621.

The common law even asserted that the negligence of the driver was not imputable to the owner so as to preclude him from bringing an action against the negligent driver for injuries to the car. See U-Drive-It-Car Co. Inc. v. Texas Pipe Line Co., 14 La. App. 524, 129 So. 565 (1930); Robinson v. Warren, 129 Me. 172, 151 Atl. 10 (1930); Fisher v. International Ry., 112 Misc. 212, 182 N. Y. Supp. 313 (Sup. Ct. 1920).

2. N. Y. VEHICLE AND TRAFFIC LAW (1929) § 59 provides in part: "Every owner of a motor vehicle or motor cycle operated upon a public highway shall be liable and responsible for death or injuries to a person or property resulting from the negligence in the operation of such motor vehicle . . . in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner." For similar statutes in other states see CAL. CIV. CODE (Deering, 1935) § 1714¼; IOWA CODE (1935) § 5026; R. I. PUB. LAWS (1927) c. 1040 § 3.

ing from negligence in the operation of the motor vehicle by any one using it with the owner's permission.[3]

In the principal case the question arises as to whether it was the intention of the N. Y. legislature when it passed its own statute[4] of this type to include a semitrailer hauled by a truck in the class of "motor vehicle," and make its owner liable as a matter of law for the negligence of the driver.

In the passage of such a statute, making so radical a change in a common law rule of liability it is presumed that a legislature will make its intent and purposes clear[5] and go no further than the mischief to be remedied requires.[6] Hence, it might seem that unless semitrailers are clearly covered they ought not to be included by construction in the classification of the statute. When the New York act was first passed in 1924, transporting goods by means of trailer and truck could be said, for practical purposes, to be in its infancy and quite unimportant.[7] It is at least questionable whether it was the intention of the legislature to include trailers when they passed the act.

Trailers[8] and semitrailers[9] are defined and classified as vehicles[10] separate and

3. Tigue Sales Co. v. Reliance Motor Co., 207 Iowa 567, 221 N. W. 514 (1928). The statute has been construed by the New York Court of Appeals to make the driver the servant or agent of the owner. In this regard, see Psota v. Long Island R. R., 246 N. Y. 388, 159 N. E. 180 (1927). It has also been held in New York on the principle of agency that when the driver exceeds the scope of his authority the owner is not liable. Chaika v. Vandenburg, 252 N. Y. 101, 169 N. E. 103 (1929); Psota v. Long Island R. R., *supra*.

4. N. Y. VEHICLE AND TRAFFIC LAW (1929) § 59. Judge Tompkins, in Plaumbo v. Ryan, 213 App. Div. 517, 210 N. Y. Supp. 225 (2d Dep't 1925), said: "The legislature by enactment of this law abrogated the rule asserted by the Court of Appeals in the case of Rolfe v. Hewitt, 227 N. Y. 486, 125 N. E. 804 (1920) and made the owners of automobiles liable for the negligence of any person operating the car with the permission of the owner whether the automobile was being used in the business of the owner or otherwise. The intent of the legislature was to make the owner liable for the negligence of any person to whom he might give permission to operate the car and thereby prevent an owner from escaping liability by saying that his car was being used without his authority and not in his business." See also, Fluegel v. Coudert, 244 N. Y. 393, 155 N. E. 683 (1927); Jackson v. Brown & Kleinhenz, Inc., 273 N. Y. 365, 7 N. E. (2d) 265 (1937); Cohen v. Neustadter, 247 N. Y. 207, 160 N. E. 12 (1928).

5. See Seligman v. Friedlander, 199 N. Y. 373, 376, 92 N. E. 1047, 1049 (1910).

6. Psota v. Long Island R. R., 246 N. Y. 388, 159 N. E. 180 (1927).

7. HIGHWAY LAW (1924) § 282e. One must also take into consideration the fact that § 2 (27) of the N. Y. VEHICLE AND TRAFFIC LAW which defines trailers was not added until 1932, L. 1932, c. 338, § 1; § 2 (28) of the N. Y. act which defines semitrailers was not added until 1934, L. 1934, c. 471, § 1.

8. N. Y. VEHICLE AND TRAFFIC LAW (1929) § 2 (27) which reads, "Trailer shall include any vehicle not propelled by its own power drawn on the public highways by a motor vehicle operated thereon except vehicles being towed by a non-rigid support and vehicles designed and primarily used for other purposes and only occasionally drawn by a motor vehicle."

9. N. Y. VEHICLE AND TRAFFIC LAW (1930) § 2 (28) reads: "Semitrailer shall include any trailer which is so designed that when operated the forward end of its body or chassis rests upon the body or chassis of the towing vehicle."

10. N. Y. VEHICLE AND TRAFFIC LAW (1930) § 2 (7) of the act reads: "Vehicle shall include any device in, upon or by which any person or property is or may be transported

distinct from motor vehicles[11] under the New York law. But since they have no motive power of their own and cannot be moved except by some outside force, they are not motor vehicles.[12] Now while section 59 of the Vehicle and Traffic Law has been amended since the time that these definitions became part of the law, no attempt was made to enlarge the meaning of motor vehicles so as to include trailer and semitrailer. Section 59 expressly covers only motor vehicles or motorcycles.

With reference to the claim that the trailer when it becomes attached to the truck becomes part and parcel of the truck so that the trailer and truck may be considered as one motor vehicle, it may be asked if the mere fact that a trailer is hitched to and drawn by a motor vehicle changes its character as a separate and distinct vehicle? It seems not. Perhaps the reason why the minority strains its logic in favor of considering the truck and trailer one vehicle is because it seems unjust and unfair to allow the owner of a trailer to avoid liability by hiring an independent contractor to haul its goods. Large corporations can carry on an extensive trucking business over the highway and escape all responsibility for negligence even though it employed a financially irresponsible person as an independent contractor. The remedy, however, is not strained logic or circuitous action by courts[13] but direct action by legislators. In New York, the state legislature has entertained a bill which would now make the operator of the tractor also the agent of the owner of the trailer.[14]

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or drawn upon a public highway, except a baby carriage and devices used exclusively on stationary rails or tracks."

11. N. Y. VEHICLE AND TRAFFIC LAW (1930) § 2 (8) which in full reads: "A motor vehicle shall include all vehicles propelled by any power other than muscular power, except motor cycles, tractor engines, road rollers, fire and police vehicles, tractors used exclusively for agricultural purposes, tractor cranes, power shovels, road building machines, snow plows, road sweepers, sand spreaders, well drillers, electric trucks with small wheels used in factories, warehouses, and railroad stations and operated principally on private property, and such vehicles as run only upon rails or tracks."

12. The exact status of the trailer when used for transportation of persons or as a residence is beginning to trouble the courts. The trailer when detached has been held to be a house. Opinion of Federal Judge R. J. McMillan, San Antonio, Texas, appearing in the N. Y. Times, March 8, 1939, p. 16 col. 5. See (1937) 6 FORDHAM L. REV. 332.

13. The highest court of Ohio in construing a Michigan statute similar to § 59 N. Y. Vehicle and Traffic Law said that when a trailer was attached to a tractor, it did not become a motor vehicle. However the Ohio court said that the duties of a common carrier are undelegable, and it is answerable for the negligence of persons to whom it entrusts performance of part of its duties, if the acts are done in performance of such duties while acting in the scope of the agreement for carriage. Liberty Highway Co. v. Callahan, 24 Ohio App. 374, 157 N. E. 708 (1926).

The Court of Appeals of Missouri held that a trailer attached to a semitrailer was a motor vehicle within a statute prohibiting operation on highways of motor vehicles having an excessive gross weight. State v. Schwartzman Service Inc., 225 Mo. App. 577, 40 S. W. (2d) 479 (1931); Eddleman v. City of Brazil, 201 Ind. 84, 166 N. E. 1 (1929).

14. A. Int. 494, Pr. 506, Ehrlich, cited in N. Y. S. B. A. (cir. 46) 131.