Fordham Law Review

Volume 19 | Issue 1 Article 5

1950

Recent Decisions

RECENT DECISIONS

ADMIRALTY—LIABILITY OF GENERAL AGENT OF THE GOVERNMENT TO SHIP'S COMPLEMENT—Plaintiff while employed as an engineer on a ship contracted poliomelitis and was permanently injured allegedly due to the negligence of the master and officers of the vessel in taking precautions and in failing to furnish proper treatment. His complaint alleged that the defendant shipping company "managed, operated and controlled" the ship under a standard form of General Agency Agreement with its owner, the United States Government, and that the negligent master and officers were "agents, servants and employees" of the defendant. The plaintiff obtained judgment in the District Court and the Court of Appeals affirmed. Upon further appeal, *held,* four Justices dissenting, judgment of the Court of Appeals reversed on the ground that the Government had retained control of the ship's complement to the exclusion of the defendant general agent and the latter was not the employer of the plaintiff. *Cosmopolitan Shipping Company, Inc. v. McAllister,* 337 U. S. 783 (1949).

In a common law action a seaman injured in the service of his ship was entitled to wages, maintenance and cure at the expense of the owner of the vessel; he was not, however, entitled to compensatory damages save in the exceptional cases of unseaworthiness or negligence in medical treatment.[1] Even in these cases, the seaman's suit for full indemnity was only obtainable in admiralty without a jury. The Jones Act[2] extended the rights of the injured seaman against his employer by authorizing a negligence action for damages at law in which more lenient rules would apply.[3] Later the Clarification Act[4] was passed which attempted to secure to seamen employed by the United States through the War Shipping Administration the same protections as were afforded seamen employed on privately owned and operated American vessels. Where the suit is against the United States, however, the seaman must proceed under the Suits in Admiralty Act,[5] but if the shipping company (here the general agent) is the employer, then the seaman can bring himself within the protection of the Jones Act and is not relegated to a suit in admiralty under the Suits in Admiralty Act. The important question, therefore is: who is the seaman's employer? To put the question another way: is a private corporation, operating a vessel as an agent of the United States Government under the Standard form of agency agreement, liable to a seaman for torts committed by the officers and crew of that vessel?

This question has been considered on several occasions by the United States Supreme Court, but the results have been varying and seemingly inconclusive. In

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1. Panama Railroad Co. v. Johnson, 264 U. S. 375 (1924). The shipowner was not responsible for injuries to a seaman occasioned by the negligence of members of the crew or the ship's officers. *Id.* at 377.

2. THE MERCHANT MARINE ACT OF 1920; 41 STAT. 1007 (1920), 46 U. S. C. § 688 (1948).

3. These rules were taken from the Federal Employers' Liability Act, 35 STAT. 65 (1908), 45 U. S. C. § 51 *et seq.* (1948), and include an abandonment of the assumption of risk and fellow servant rules and an adoption of the doctrine of comparative negligence—all of which, of course, works for the benefit of the seaman. Chesapeake and Ohio Railway Co. v. Richardson, 313 U. S. 574 (1940); Great Northern Railway v. Leonidas, 305 U. S. 1 (1938).

4. THE WAR SHIPPING ADMINISTRATION (CLARIFICATION) ACT OF 1943; 57 STAT. 45 (1943), 50 U. S. C. § 1291 (1948).

5. SUITS IN ADMIRALTY ACT BY OR AGAINST VESSELS OR CARGOES OF UNITED STATES; 41 STAT. 525 (1920), 46 U. S. C. §§ 741 to 752 (1948).

United States Shipping Board Emergency Fleet Corporation v. Lustgarten,[6] the court decided that the seaman's action lay only against the government and that he had no remedy as against the agent. However, in *Brady v. Roosevelt S.S. Co.*,[7] the plaintiff's injury occurred as a result of the agent's own negligence and not as a result of any negligence on the part of the master or crew, and, consequently, the court held the agent responsible for the injury. Although the *Brady* case involved a question quite distinct from that in the *Lustgarten* case, the Supreme Court in *Hust v. Moore-McCormack Lines*[8] considered it as overruling the latter case and as deciding that the general agent is the real employer, even though the seaman might be "technically" employed by the government. The Court in the *Hust* case also interpreted the first section of the Clarification Act as allowing seamen, injured prior to the enactment of that statute, an election between a suit against the government in admiralty and one against the agent at law. It was said that a seaman on a vessel owned by the government and operated under a general agency agreement always had, and continued to have, a right to sue the agent. Nor could *Caldarola v. Eckert & Co.*,[9] be considered to have disturbed the *Hust* decision for it was concerned solely with the agent's liability to a stevedore. There the court said: "We there [i.e., in the *Hust* case] held that under the Agency contract the Agent was the 'employer' of an injured seaman as that term is used in the Jones Act. . . . The Court did not hold that the Agency contract . . . imposed upon him, as a matter of federal law, duties of care to third persons, more particularly to a stevedore. . . ."[10]

The facts of the *Hust* case are virtually indistinguishable from those in the instant case. The only discernible difference is that the injury to *Hust* occurred before the enactment of the Clarification Act while the injury to the plaintiff here was subsequent to that Act. Neither appellate court in the instant case could find in that difference any basis for distinguishing the cases.[11] But the majority of the Supreme Court did argue that the holding of the *Hust* case was unsound on two grounds: first, in holding that the decision in the *Brady* case reversed the *Lustgarten* decision, and thereby giving to seamen the right to sue general agents under the Jones Act for torts committed by masters and crew, for the simple reason that the *Brady* case dealt only with the seaman's right to sue the agent for the agent's *own* torts; second, in holding that the Clarification Act reinforced the alleged right of the seaman to sue the agent under the Jones Act, because the Clarification Act merely extended to seamen employed by the War Shipping Administration rights then enjoyed by privately employed seamen. The Clarification Act did not give to these employees of the government rights as against anyone other than their employer. Thus the injured seaman may recover only against his employer and this right is unaffected by the Clarification Act. The decision reached by the Court in the principal case clearly required a reversal of the *Hust* decision and the Court did not hesitate to do so.

The Court announced that it would liberally construe the term "employee" so as to accomplish the beneficient purposes of the Jones Act without disregarding the plain and ordinarily accepted meaning of the relationship between employer and employee.[12] Much weight was given to the contract between the defendant and the

6. 280 U. S. 320 (1929).
7. 317 U. S. 575 (1943).
8. 328 U. S. 707 (1946).
9. 332 U. S. 155 (1947).
10. *Id.* at 159.
11. 337 U. S. 783, 787 (1949); 169 F. 2d 4, 8 (2d Cir. 1948).
12. *Id.* at 791.

United States. The court declared: "An examination of the terms of that contract demonstrates that the United States had retained for the entire voyage the possession, management, and navigation of the vessel and control of the ship's officers and crew to the exclusion of the general agent."[13] The majority concluded from this that the government, and not the agent, was the employer. This conclusion is strengthened by the fact that though the officers and men were procured by the general agent through the usual channels, they were paid by, and were subject to the orders of, the United States; that the United States, through the master of the ship, retained full control of them and the physical operation of the vessel; and that the shipping articles, including those the plaintiff in this case signed, were stamped: "You Are Being Employed By The United States." The responsibility of the general agent, on the other hand, was that of a ship's husband, including the duty to "equip, victual, supply and maintain the vessel, subject to such directions, orders . . . as the United States may from time to time prescribe."[14]

The reasoning upon which this decision is based appears to be sound and reaches a desirable result. This is so particularly in view of the fact that it seems to have been the intent of the government, in its general agency agreements, to indemnify the agent for personal injury suits against him by the crew.[15] The result of the decision is to make agents, such as the defendant, immune from suits by seamen injured during the course of a voyage due to the negligence of the master or crew. The holding is equally applicable to any other action which a seaman might bring that depends on the existence of an employer-employee relationship.[16] In all such cases, the seaman's exclusive remedy is against the United States. The general agency agreement, especially the indemnifying clause noted above, gives evidence that this was in the contemplation of both parties to the agreement. Moreover, it is important that the United States be considered as being in possession and control of the vessels operating under the War Shipping Administration because it is by virtue of this government possession that these ships are immune from many restrictions applicable to private vessels, both in foreign ports and at home, and are thus enabled to expedite their important work.[17]

How does the majority opinion in the principal case affect the rights of seamen? The court remarked that seamen would enjoy substantially the same rights whether the government or the general agent was considered to be his employer. The Clarification Act provides that the seaman's action against the government must be brought under the Suits in Admiralty Act which means a suit in admiralty without the jury which would sit in an action under the Jones Act. Moreover, the shorter statute of limitations, two years, under the Suits in Admiralty Act,[18] now replaces the three year period given to seamen under the Jones Act.[19] This may work hardship on seamen who have delayed bringing their suit in reliance on the three year limitation under the Jones Act. Another possible detriment to the seaman is that there are indications that the decision in the *Brady* case may still be the law so that seamen must now predict in doubtful cases whether the injury will be held to

13. *Id.* at 795.

14. Art. 2 of the general agency agreement.

15. 332 U. S. 155, 167 (1947).

16. 328 U. S. 707, 719 (1946).

17. 332 U. S. 155, 159 (1947).

18. See note 5, *supra.*

19. The statutory limitation for actions under the Jones Act is governed by an amendment to the Federal Employers' Liability Act, 2 STAT. 1404 (1939), 45 U. S. C. § 56 (1948).

be due to the agent's own negligence or that of the master or crew. If the former, he *may* sue the agent at law; if the latter, he *must* sue in admiralty. This difficulty has its practical solution in filing two suits as the court observed in the *Hust* case. But it is possible that this division of remedies might also result in loss of relief altogether.[20]

The rights of seamen have undergone important modification by reason of the majority holding in the instant case. Although the court in the *Hust* case observed that the rights of seamen were so settled that only the legislature could disturb them,[21] the bare majority of the Court in the principal case entertain a different view. In any event, this vacillation is clearly undesirable. Nevertheless, the inherent soundness in reasoning of the majority opinion in the *McAllister* case should compel its acceptance as finally settling the law on the liability of a general agent of the government to a ship's complement.[22]

PATENTS—REQUIREMENTS FOR PATENTABILITY—STANDARDS OF INVENTION—Plaintiff, owner of a patent on a drapery hanger, brought an action for infringement of two claims under this patent. The defenses of invalidity and non-infringement were set up by the defendant. The trial court found plaintiff's hanger was novel and useful but declared the two claims in question invalid for lack of invention on the ground of the absence of a "flash of genius". On appeal, *held,* reversed on the ground that the test for invention is a display of more ingenuity than a workman skilled in his line of work possesses. *Falkenberg v. Bernard Edward Co.,* 175 F. 2d 427 (7th Cir. 1949).

The decision in the principal case, like many others, involves the effect to be given by the courts to the "flash of creative genius" test of inventiveness announced in *Cuno Engineering Corporation v. Automatic Devices Corporation,*[1] previously discussed and critically analysed by this Review.[2]

The immediate reaction to the decision in the *Cuno* case was sharp and divided. Many courts interpreted the decision as setting a new subjective standard for invention.[3] In *Picard v. United Aircraft Corp.*[4] the court recognized a "new doctrinal trend" in the Supreme Court's "increasing disposition to raise the standard of originality necessary for a patent". In *Potts v. Coe,*[5] the "flash of genius" expression was held to indicate that more emphasis was to be placed on individual achievements rather than on the qualities of the production in determining patentability. In *Ander-*

20. 328 U. S. 707, 721 (1946). It seems that a seaman might be rebuffed at law on the ground that his suit should have been brought in admiralty, and in admiralty on the ground that his suit should have been brought at law.

21. *Id.* at 722.

22. Allen v. Boland *et al.,* 94 N.Y.S.2d 81 (Sup. Ct. 1949).

1. 314 U.S. 84, 91 (1941).

2. 13 FORD. L. REV. 84 (1944).

3. Potts v. Coe, 145 F.2d 27 (D.C. Cir. 1944); Kaufmann & Co. v. Leitman, 131 F.2d 308 (2d Cir. 1942); Picard v. United Aircraft Corp., 128 F. 2d 632 (2d Cir. 1942); Anderson Co. v. Lion Products Co., 127 F.2d 454 (1st Cir. 1942); Brown & Sharpe Mfg. Co. v. Kar Engineering Co., 59 F. Supp. 820 (Mass. 1945); Wolf Bros. v. Equitable Paper Bag Co., 55 F. Supp. 832 (E.D. N.Y. 1943).

4. 128 F. 2d 632, 636 (2d Cir. 1942).

5. 145 F.2d 27 (D.C. Cir. 1944).

son Co. v. Lion Products Co.[6] the court held that invention cannot be claimed "unless the patentee can show by his achievement that spark of ingenuity which distinguishes invention from mere improvement."

Other courts,[7] however, refused to acknowledge any change in the standard of invention established in *Hotchkiss v. Greenwood*,[8] *i.e.*, a display of "more ingenuity and skill . . . than were possessed by an ordinary mechanic acquainted with the business." In *Chicago Steel Foundry Co. v. Burnside Steel Foundry Co.*[9] the court objected to inquiry into the quality of an inventor's mind or the nature of his mental activity in determining patentability, and rejected "flash of genius" as a test "not only because it is incapable of acceptable definition but because it injects into the statute something not appearing therein." In *Brown & Sharpe Mfg. Co. v. Kar Engineering Co.*[10] the court questioned whether the phrase had added a higher test of invention and concluded that the Supreme Court opinion in the *Cuno* case was merely a restatement of the classic test. The Court of Customs and Patent Appeals in the case of *In re Shortell*[11] held that the term "flash of creative genius" was intended to mean "nothing more than that the thing patented must involve more than the skill of the art to which it relates". This court refused to recognize any new doctrinal trend as to the tests of invention, and held that it was not within the province of the courts to establish new standards for determining invention.

The later decisions of the Supreme Court, though fully aware of the conflict arising in the various Circuits and the basic problem provoked by its holding in the *Cuno* case, have not succeeded in clearing up the resulting confusion. In *Sinclair & Carroll Co. v. Interchemical Corp.*,[12] the court cited the *Cuno* decision but significantly avoided any mention of "flash of genius". In stating that the patent system was "not concerned with the quality of the inventor's mind, but with the quality of his product",[13] the court appeared to reject the subjective test for invention implicit in its earlier decision.[14] However, a more recent decision of the Supreme Court in *Jungersen v. Ostby & Barton Co.*[15] hews close to the reasoning of the *Cuno* decision,

6. 127 F.2d 454, 457 (1st Cir. 1942).

7. See Trabon Enigineering Corp. v. Dirkes *et al.*, 136 F.2d 24, 27 (6th Cir. 1943) where the court in discussing the flash of genius concept stated: "We do not interpret the observation as indicating anything more significant than that the quality of invention is 'something more' than expected mechanical skill."

8. 11 How. 248, 266 (U.S. 1850).

9. 132 F.2d 812, 818 (7th Cir. 1943).

10. 154 F.2d 48, 52 (1st Cir. 1946), *cert. denied*, 329 U.S. 822 (1946).

11. 142 F. 2d 292, 295 (C. C. P. A. 1944).

12. 325 U.S. 327 (1945).

13. "A long line of cases has held it to be an essential requirement for the validity of a patent that the subject-matter display 'invention', 'more ingenuity . . . than the work of a mechanic skilled in the art'. . . . This test is often difficult to apply; but its purpose is clear. Under this test, some substantial innovation is necessary, an innovation for which society is truly indebted to the efforts of the patentee. Whether or not those efforts are of a special kind does not concern us." Sinclair & Carroll Co. v. Interchemical Corp., 325 U.S. 327, 330 (1945).

14. In Brown & Sharpe Mfg. Co. v. Kar Engineering Co., 154 F.2d 48, 52 (1st Cir. 1946) the court considered that the opinion in the *Sinclair* case "establishes conclusively that the Supreme Court has wrought no change in the classic test for invention—that there is no need to find a 'flash of creative genius' on the part of a patentee to sustain his patent. . . ."

15. 335 U.S. 560, 566 (1949).

and, citing that decision, holds a patent invalid where there "was not an exemplification of inventive genius such as is necessary to render the patent valid". In *Graver Tank & Mfg. Co. v. Linde Air Products Co.*,[16] the Supreme Court indicates that patentable discovery is to be measured "by the standards announced by this court in *Cuno Engineering Corp. v. Automatic Devices Corp.*"

The present wide divergence in interpretation of the *Cuno* standard, more than eight years after the decision, is best illustrated by a comparison of the opinion of the Seventh Circuit Court of Appeals in the instant case with the recent opinion of the Eighth Circuit Court of Appeals in *Alemite Co. v. Jiffy Lubricator Co.*[17] In the instant case the court stated that "the trial court . . . erred in construing the phrase, 'flash of genius', as adding a test for invention of a higher degree or superior to that which would have produced patentable invention under the law as it existed prior to the date of the *Cuno* decision."[18] In the *Alemite* case the court held that its statements in a 1936 case[19] "must be considered in the light of more recent decisions of the Supreme Court raising the standards of originality necessary to sustain a patent",[20] and the *Cuno, Jungersen,* and *Mandel Bros. v. Wallace*[21] cases were cited as exemplifying the new attitude toward patentability. Other recent decisions point up this continuing conflict in the courts between adherence to the traditional standards of invention on one hand,[22] and recognition of higher, more subjective, standards on the other.[23]

Whether higher standards of invention are desirable in the American patent system today is an actively debated subject.[24] It is argued by many that the classic test is sufficiently flexible to be still applicable in the present state of technological advancement.[25] There is legislation pending in Congress which if enacted would settle the

16. 336 U.S. 271, 281 (1949).

17. 176 F.2d 444 (8th Cir. 1949).

18. Falkenberg v. Bernard Edward Co., 175 F.2d 427, 428 (7th Cir. 1949).

19. Stewart-Warner Corp. v. Jiffy Lubricator Co., 81 F. 2d 786 (8th Cir. 1936).

20. 176 F.2d 444, 448 (8th Cir. 1949).

21. 335 U.S. 291 (1948).

22. In Robertson Rock Bit Co. v. Hughes Tool Co., 176 F.2d 783, 790 (5th Cir. 1949), the court presents the traditional view, stating, "It is true that the combination must represent something more than the ordinary skill of the average mechanic, but, speaking prosaically rather than poetically, it is not true, as is sometimes claimed, that patents to be valid must be the result of, must embody, flashes of genius. . . . The 'any person who has invented or discovered' etc. of Revised Statute, Sec. 4886, . . . is intended to mean something more than the mere display 'by an ordinary mechanic' of mechanical aptitude. It means no more, though, than that when confronted with a combination producing a materially different or more advantageous result, one must examine the particular change made in the light of the art at the time the device was developed to determine whether inventive skill produced the change or whether only mechanical aptitude was responsible." See also Smith v. Kingsland, 82 U. S. P. Q. 353, 355 (D. C. Cir. 1949).

23. In Miller v. Tilley, 178 F.2d 526, 528 (8th Cir. 1949) the court expressly recognizes higher standards, stating, "The standards of originality necessary to sustain a patent have in recent years been raised." See also Gomez v. Granat Bros., 177 F.2d 266, 268 (9th Cir. 1949); Koochook Co. v. Barrett, 158 F.2d 463 (8th Cir. 1946); Reynolds v. Emaus, 83 U.S.P.Q. 510 (D. Mich. 1949).

24. See Cooper, *Challenging the Court's View of "Invention"*, 35 A.B.A.J. 306 (1949) and Kenyon, *Why Challenge the Court's View of "Invention"?*, 35 A.B.A.J. 480 (1949).

25. In Brown & Sharpe Mfg. Co. v. Kar Engineering Co., 154 F.2d 48, 52 (1st Cir. 1946) the court states: "To us this [the increase in patents held invalid by Supreme Court in

controversy in favor of the traditional test.[26] Also, a codification of the traditional standard of invention, with express provision that the test shall be objective rather than subjective, is contained in the preliminary draft of the proposed revision of the patent laws, drawn by the Committee on the Judiciary of the House of Representatives.[27]

It is submitted that even in the absence of such clarifying statutes, the courts are justified in applying the traditional standards as the appellate court did in the instant case. Those courts ruling patents invalid, with modifying statements, "Under the state of the law as it formerly existed, these elements would probably combine to produce patentable invention",[28] or "If it were not for *Cuno* . . . and the line of authority which it has engendered . . . I should . . . have concluded that B. had made a patentable invention",[29] are overestimating the powers of the judiciary. Whatever the underlying intent of the court in the *Cuno, Jungersen,* and *Mandel Bros.* decisions may have been, the opinions should be read merely as a restatement of the traditional test.[30] The Supreme Court, having well settled the interpretation of the 1874 statute as to standards of invention over a long period of years, cannot now elevate these standards by reinterpretation. If the threshold requirements of patentability are to be raised, or indeed changed at all, it should be solely the function of Congress to so change.

REAL PROPERTY—ESTATE TERMINABLE BY MUTUAL AGREEMENT—LIFE ESTATE OR TENANCY AT WILL.—Husband and wife were married in 1922 and in August they entered into a separation agreement, the terms of which were made a part of a decree of divorce granted to the wife in October 1944. The pertinent paragraph of the separation agreement read: "The second party agrees to release all of her right, titles and interest in and to the house and lot owned by the parties hereto, jointly . . . but the party of the second part . . . [is] to have the right and privilege of occupying said premises without paying any rent until it is otherwise mutually agreed by the parties hereto." The husband died testate in 1946 leaving his entire estate to his

recent years] indicates no change in doctrine but instead points to recognition of the fact that the classic test for invention, like the classic test for due care to which it is closely analogous, must, like any standard for human conduct be applied in the environment of today, not yesterday, and that today, due to the tremendous advance in technological knowledge and the wide dissemination of education, the general level of the capacity of those skilled in the various arts is far higher than it used to be."

26. H. R. REP. No. 4798, 81st Cong., 1st Sess. (1949).

27. PROPOSED REVISION OF THE PATENT LAWS, Title 35, Sect. 31: "A patent may not be obtained though the invention is not identically disclosed or described in the material specified in section 22 of this title, if the differences between the subject matter sought to be patented and said material are such that the subject matter as a whole would be obvious to an ordinary person skilled in the art. Patentability as to this condition shall be determined by the nature of the contribution to the advancement of the art, and not by the nature of the mental processes by which such contribution may have been accomplished."

28. Falkenberg v. Bernard Edward Co., 79 F. Supp. 417 (N. D. Ill. 1948), *rev'd,* 175 F. 2d 427 (7th Cir. 1949).

29. Brown & Sharpe Mfg. Co. v. Kar Engineering Co., 59 F. Supp. 820, 825 (Mass. 1945), *rev'd,* 154 F. 2d 48 (1st Cir. 1946).

30. In Brown & Sharpe Mfg. Co. v. Kar Engineering Co., 154 F. 2d 48, 52 (1st Cir. 1946) the court noted that "later decisions of the Supreme Court indicate, we think unmistakably, that all that was intended in the Cuno case was a restatement of the classic test."

mother, except for legacies to each of his daughters. This action was brought by his former wife to enforce against his estate her right to the property in question. Plaintiff was awarded life use of the premises and the defendant, testator of the husband, appealed from that part of the judgment awarding plaintiff life use of the realty and ordering defendant to set aside funds for payment of taxes on the premises. *Held,* judgment reversed on the ground that the agreement created a tenancy at will which is personal in its nature, and terminates at the death of either party. *Lepsch v. Lepsch,* 275 App. Div. 412, 90 N. Y. S. 2d 157 (4th Dep't 1949).

A tenancy at will is an interest in property which is terminable at the will of the grantor and of the grantee and which has no other designated period of duration.[1] It is an estate of uncertain duration but differs from freehold interests in that it is defeasible at the uncontrolled will of its creator.[2]

Estates which by their terms are to last only so long as both parties agree have been classified as estates at will. In *Say v. Stoddard*[3] the property in question was let "for so long as the parties shall mutually agree to continue the renting under this agreement."[4] The estate would determine the moment either party so decided, and

1. N. Y. REAL PROP. LAW § 228 reads in part: "A tenancy at will or by sufferance, however created, may be terminated by a written notice of not less than thirty days given in behalf of the landlord, to the tenant, requiring him to remove from the premises. . . . " In 1 TIFFANY, REAL PROPERTY § 155 (3d ed. 1939) the author defines a tenancy at will as "a tenancy which is terminable at the volition of either the landlord or the tenant."

2. 2 BL. COMM. *145; Burns v. Bryant, 31 N. Y. 453, 454 (1865); Post v. Post, 14 Barb. 253, 258 (N. Y. 1852). Some conflict seems to have arisen as a result of Lord Coke's statement that when a lease is made at the will of the lessee, the tenancy must also be at the will of the lessor. Co. LITT. *68. The case of Western Transportation Co. v. Lansing, 49 N. Y. 499 (1872) appears to follow the English authorities on this point but has been distinguished and its application limited in later New York cases. Kolasky v. Michels, 120 N. Y. 635, 24 N. E. 278 (1890); Hoff v. Royal Metal Furniture Co., 117 App. Div. 884, 103 N. Y. Supp. 371 (2d Dep't 1907), *aff'd,* 189 N. Y. 555, 82 N. E. 1128 (1907). In Effinger v. Lewis, 32 Pa. 367, 370 (1859) the court stated that "an estate at the will of the grantee, his heirs and assigns, is equivalent to a fee simple, and such an estate could not, by the old customs, be conveyed without livery of seisin. By the same customs, *there could be no livery of seisin under a lease, but a mere taking of possession.* Land granted by livery of seisin, without defining the quantity of the estate, was treated as a life estate. Where there was *merely a delivery of possession,* without defining the term, there arose only a *tenancy at will.* For want of livery of seisin, and the form of conveyance proper to that ceremony, it was necessary to treat an estate at the will of the grantee, as being also at the will of the grantor, else a fee simple might be granted in a form that pertained to the lowest order of estates; and this the customs of that day did not allow." (italics supplied). The fact that old authorities turned upon the question of whether livery of seisin had been made is occasionally overlooked. With livery of seisin no longer required, a lease at the will of the lessee is a life tenancy, terminable at the option of the lessee. Lindlay v. Raydure, 239 Fed. 928, 942 (D. C. Ky. 1917); Gunnison v. Evans, 136 Kan. 791, 18 P.2d 191 (1933); Ely v. Randall, 68 Minn. 177, 70 N.W. 980 (1897).

3. 27 Ohio St. 478 (1875).

4. *Id.* at 483. A further provision provided that "either party may put an end to this renting by giving the other party *four days'* notice, in *writing.* . . . " (italics in lease). In holding that the agreement created a tenancy at will, the court stated that "the character of the tenancy is not affected by the fact that four days' notice of its determination, is provided for in the contract; for in a general tenancy at will, reasonable notice must be

the tenant therefore was holding at the will of the lessor. Such an estate comes within the strict definition of an estate at will and the court so held. A similar limitation appeared in the case of *Richardson v. Langridge*.[5] In that case the owner agreed to let the premises "so long as both parties like." Holding that such an agreement created a tenancy at will, the court said: "But if two parties agree that the one shall let, and the other shall hold, so long as both please, that is a holding at will."[6] The instant case was held to be an estate at will on analogy to the *Richardson* case. The court said: "Taking the words in their usual sense, it appears that the words 'until it is otherwise mutually agreed by the parties hereto' would mean substantially the same as an agreement that the property was to be held 'as long as both parties please', which was construed to create a tenancy at will. . . ."[7]

A fine line of distinction is often all that separates these estates at will from an estate for life.[8] While an estate for life may be expressly described as to duration in terms of the life of one or more specified persons, the use of the term "life estate" is not necessary[9] and the intention to create a life estate may be expressed in any equivalent and appropriate language.[10] Such an estate will result whenever an interest is granted for an uncertain period, which is not inheritable, *nor terminable at the will of the grantor,* and may last for a lifetime.[11] So long as such an estate continues it is governed by all the rules and principles of life estates and the uncertainty of the duration of the estate or the probability of its being determined in a limited number of years is immaterial so long as it is capable of enduring for the term of a life.[12]

An estate which is terminable at the will of the grantee but not at the will of the grantor has been held to be a life estate. In *Sweetser v. McKenney*,[13] the court construed an agreement to let the premises in question "for five years and as much longer as he desires" as creating a life tenancy. The court held that the right of the lessee, independent of the will of the lessor, to renew the lease indefinitely gave to him a right of occupancy[14] which is not to be defeated at the option of the lessor. This in-

given by the party whose will determines it, to the other party; and the contract here fixes the length of that notice."

5. 4 Taunt. 128, 128 Eng. Rep. 277 (Com. Pl. 1811).

6. *Id.* at 131, 128 Eng. Rep. at 278.

7. 275 App. Div. 412, 414, 90 N.Y.S.2d 157, 160 (4th Dep't 1949).

8. Life estates are classified, according to the manner in which they are created, into "conventional" life estates and "legal" life estates. 1 REEVES, REAL PROPERTY § 440 (1909). Legal life estates are those created by operation of law. Knapp v. Knapp, 303 Ill. 535, 135 N. E. 732 (1922). Conventional life estates are those created by contract or convention of the parties. 1 TIFFANY, REAL PROPERTY § 49 (3d ed. 1939).

9. Cross v. Hock, 149 Mo. 325, 50 S. W. 786 (1899).

10. Greenleaf v. Greenleaf, 332 Mo. 402, 58 S. W. 2d 448 (1933).

11. 1 TIFFANY, REAL PROPERTY § 49 (3d ed. 1939); Ely v. Randall, 68 Minn. 177, 70 N. W. 980 (1897); Disley v. Disley, 30 R. I. 366, 75 Atl. 481 (1910).

12. In Ely v. Randall, 68 Minn. 177, 70 N. W. 980 (1897), the lessee occupied the premises under a lease which provided that the lessee should hold for a term of five years, with a privilege of renewal indefinitely. The lessee covenanted to keep a post office and a store on the premises, and if at any time he should cease to do so, the lease was to terminate. The court held that it was a lease for life subject to the performance of the specified conditions.

13. 65 Me. 225 (1875).

14. It has been said that the giving of a "right to occupy" creates only an incumbrance

terest is of such an uncertain duration that it may last a lifetime and therefore was held to be a life tenancy.

Substantially the same facts as in the principal case were presented in *Disley v. Disley*.[15] There the agreement stipulated that the plaintiff was to live on the premises and make it a home for her sister, without becoming a tenant, "until further agreement between said parties".[16] In holding that the agreement created a life estate the court said: "The expression 'life estate' is to be thought of as comprising a well-defined class of interests, some of which may not continue during any specified life or lives, but all of which are freehold estates not of inheritance. Any estate that may last for a life or lives, that is not inheritable and that is not at will, nor for any fixed period of time, is placed in this category."[17] The court reasoned that the agreement could be terminated only by the happening of the specified event, *i.e.*, a further agreement between the parties. It did not depend upon the uncontrolled will of the grantor.

It seems clear that the words of duration in the instant case, "until it is otherwise mutually agreed by the parties" is equivalent, not to "so long as the parties shall mutually agree", as appeared in the *Richardson* case, but to the phrase "until further agreement between said parties" as existed in the *Disley* case. A fair reading of the agreement in the principal case leads to the conclusion that termination and not continuance of the interest of the wife was dependent upon mutual agreement; that, in fact, the husband had no right to destroy that interest without the concurrence of the wife. Yet an interest having such characteristics is, as noted before, a life estate and not an estate at will.[18]

This view of the interest of the wife is given further support if we look to the probable intent of the parties at the time of execution of the instrument creating the estate. The court in its opinion stated but one of the characteristics of the estate

and not an estate for life. Matter of Reid, 165 Misc. 132, 300 N.Y. Supp. 124 (Surr. Ct. 1937); RESTATEMENT, PROPERTY, App. Chap. A ¶ 24. But an examination of the cases so holding shows that such a result was reached only because the grantor so intended. For example, where an estate was granted to one person conditioned upon his permitting a second person also to occupy the premises granted, the court found that the grantor did not express an intention to grant to the second person an estate—only an incumbrance. Matter of Reid, *supra*; Sayres v. Johannes, 116 Misc. 497, 190 N.Y. Supp. 247 (Sup. Ct. 1921); Franklin v. Minertzhagen, 39 App. Div. 555, 57 N.Y. Supp. 401 (1st Dep't 1899). It was held to be an incumbrance because the grantor so intended and not because the words "right and privilege of occupancy" were incompatible with the creation of a life estate. In the instant case the provision granting "a right and privilege of occupancy until mutually agreed otherwise" is the only provision of grant in the instrument and there is nothing to indicate an intention to create a charge only.

15. 30 R.I. 366, 75 Atl. 481 (1910).

16. The court construed the words "without becoming a tenant" as having been used in a broad and colloquial sense; as having had particular reference to the payment of rent; and that it was the intent of the parties to create a tenancy of some kind.

17. 30 R.I. 366, 370, 75 Atl. 481, 483 (1910).

18. It is evident that the trial court's order directing the defendant to set aside funds for the payment of taxes is directly contrary to Matter of Albertson, 113 N. Y. 434, 439, 21 N. E. 117, 118 (1889) which stated the general rule that a tenant for life, since he enjoys the rents and profits of the land, must pay the taxes and make ordinary, reasonable and necessary repairs required to preserve the property and prevent its going to decay or waste, unless the instrument creating his tenancy expressly provides otherwise.

at will, *i.e.*, that it terminates with the death of the grantor.[19] The more important incident of an estate at will is that which has been stressed above, *i.e.*, that it is terminable at the will of the grantor at any time. In view of the fact that in the same paragraph of the instrument which created her interest in the property, the wife agreed to execute in favor of the husband a deed releasing her joint interest in the property, it is reasonable to believe that the parties did not intend to create an interest in the wife which the husband could destroy as soon as the agreement was signed, by giving the statutory notice.

TORTS—RIGHT OF REPRESENTATIVE OF UNBORN CHILD TO RECOVER FOR PRENATAL INJURIES INCURRED WHILE THE FOETUS WAS VIABLE.—Plaintiff, as administrator of the estate of an unborn child, brought an action against defendant doctor and maternity hospital for the wrongful death of the unborn child. The complaint alleged that the child would have been born alive if reasonable and prudent care had been exercised by the defendants. On appeal from an order sustaining a demurrer to the complaint, *held,* order reversed on the ground that the plaintiff has a right, under the wrongful death statute, to recover for prenatal injuries incurred by a viable foetus as a result of defendants' negligence notwithstanding the fact that the foetus did not survive and was born dead. *Verkennes v. Corneia* et al., 38 N. W. 2d 838 (Minn. 1949).

Specifically the question in the instant case is whether or not the now scientifically proven fact that at some time late in pregnancy the foetus is capable of an extra-uterine existence destroys the effect of an almost unwavering line of cases which denied to anyone a cause of action for injuries to a child before birth on the ground that, for the purpose of such a suit, the child at the time of the injury was still a part of its mother and not cognizable in the law as a potential plaintiff. The origin of this line of cases is *Dietrich v. Inhabitants of Northampton.*[1] In an opinion by Justice Holmes the Massachusetts court announced that the representative of a child born during the fourth or fifth month of pregnancy, due to its mother's falling down a coal-hole, had no cause of action for the child's death because the child was not a legal person capable of suing at the time of the injury. Furthermore the court was reluctant to recognize a right without precedent. Until recently American courts have

19. The court seems to take the position that the fact that the wife was given only the "right and privilege" of occupancy without paying rent negates the possibility of the creation of a life estate. Yet in the *Disley* case the agreement merely provided that the plaintiff was to continue to live on the premises, without becoming a tenant, until further agreement between the parties. The court there had no difficulty in finding a life tenancy. There are no words of art necessary to the creation of a life estate and the intention to create such an estate may be expressed in any appropriate language. N. Y. REAL PROP. LAW § 240 provides that: "Every instrument creating, transferring, assigning or surrendering an estate or interest in real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law." A conveyance which is of doubtful meaning will be construed in favor of the grantee and against the grantor. Reed v. Lewis, 74 Ind. 433 (1881); Blackman v. Striker, 142 N. Y. 555, 560, 37 N. E. 484, 485 (1894); 1 TIFFANY, REAL PROPERTY § 158 (3d ed. 1939).

1. 138 Mass. 14 (1884).

generally followed this rule without regard to whether or not the foetus was viable at the time of the injury or whether the child survived birth.[2]

Other fields of the law have long since recognized that definite legal and equitable rights inhere in the unborn infant. For example, the slaying of an unborn child that has quickened in its mother's womb is manslaughter in New York;[3] in the law of property, the unborn child is considered *in esse* for the purpose of taking a remainder or an interest which is to its benefit[4] or of assuring a valid limitation of future estates.[5] The child may bring an action for the wrongful death of its parent occurring prior to birth;[6] it can be named an executor before it is born[7] and, before birth, it may obtain an injunction to stay waste.[8] Precisely because this recognition of the unborn child is considered a "legal fiction" designed principally, in the interests of justice, to benefit the child and conform its status to firmly rooted concepts in property and criminal law, courts have not been willing to extend the fiction to tort liability for prenatal injuries when such an extension could in no way have blended with any of the traditional principles of tort liability but, on the contrary, would have clashed harshly with established concepts in the law of negligence.

Today however, concrete information regarding the viability of the foetus (*i.e.*, the capability of extra-uterine existence[9]) affords scientific support to the legal idealist who would enlarge tort liability so as to include responsibility for prenatal injuries and allow recovery to the child or its representative. The court in the principal case

2. The cases which have followed the *Dietrich* case and regarded it as precedent can generally be placed in three categories: *First,* suits instituted by the administrator of the child: Stanford v. St. Louis-San Francisco Ry., 214 Ala. 611, 108 So. 566 (1926); Newman v. Detroit, 281 Mich. 60, 274 N.W. 710 (1937); Buel v. United Ry., 248 Mo. 126, 154 S.W. 71 (1913); Gorman v. Budlong, 23 R.I. 169, 49 Atl. 704 (1901); Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935). *Second,* suits where the infant was a viable foetus at the time of the injury but where recovery was denied on the basis of the *Dietrich* case: Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900); Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921); Berlin v. Penney *et al.,* 339 Pa. 547, 16 A.2d 28 (1940). *Third,* suits brought by the surviving infant to recover for pre-natal injuries incurred before viability: Stemmer *et al.,* v. Kline, 128 N. J. L. 455, 26 A. 2d 489 (1942); Lipps v. Milwaukee Ry., 164 Wis. 272, 159 N. W. 916 (1916). In all these cases, Justice Holmes' pronouncement was considered at least worthy of attention though the facts in the *Dietrich* case demonstrate that the infant there was not viable at the time it received its fatal injury.

3. N.Y. PENAL LAW § 1050.

4. Stedfast v. Nicoll, 3 Johns. 18 (N. Y. 1802).

5. Long v. Blackall, 7 Durn. & E. 100 (K.B. 1812).

6. Quinlen v. Welch, 69 Hun. 584 (N.Y. 1893), *aff'd,* 141 N.Y. 158, 36 N.E. 12 (1894).

7. *Ibid.* See also Marsellis v. Thalhimer *et al.,* 2 Paige 35 (N.Y. 1830).

8. *Ibid.* See also Jenkins v. Freyer, 4 Paige 47 (N.Y. 1833).

9. 2 WITTHOUS AND BECKER, MEDICAL JURISPRUDENCE 522 (1940). A foetus is considered viable at the time when, if delivery were necessary, it could survive birth. "While it is a fact that there is a close dependence by the unborn child on the organism of its mother, it is not disputed today that the mother and the child are two separate and distinct entities; that the unborn child has its own system of circulation of the blood separate and apart from the mother; that there is no connection between the two circulation systems; that the heartbeat of the child is not in tune with that of the mother, but is more rapid; that there is no dependence by the child on the mother except for sustenance." Stemmer *et al.* v. Kline, 128 N.J.L. 455, 466, 26 A.2d 489, 687 (1942) (dissent per Brogan, C. J.).

could not have been unaware that legal precedent, no matter how solidified by tradition, has not always prevailed over compelling extra-legal concepts hostile to the past; the *usque ad coelum* theory was forced to comprehend the airplane[10] and the "oneness" of the husband and wife did not survive post-Victorian sociology and the emancipation of womanhood.[11]

In the instant case, it is significant that the court's departure from the past was not, itself, without precedent. As early as 1916, a Wisconsin court in *Lipps v. Milwaukee Ry.*,[12] indicated that the fact of viability would have influenced a decision which dismissed a suit brought on the grounds that the child was in fact not viable at the time of the alleged negligence and did not survive the injury. And in 1946, a Federal court in *Bonbrest v. Kotz* et al.,[13] permitted an action by the child for prenatal injury caused by an alleged careless removal of the viable foetus from the mother's womb on the theory that there was a legally cognizable distinction between an embryo and a viable foetus. It is true that in the *Bonbrest* case there was an actual touching of the foetus by the defendant but the importance of that fact is dimmed, if not extinguished, by the court's recognition of the fact that viability alone conferred on the child a right to sue for his injury incurred while viable. The *Bonbrest* case was a large step away from the *Dietrich* case's rule, but there was a "more poignant question"[14] which it suggested, *i.e.*, will its new rule be extended to include a case where it is the mother who is directly injured and where, as a consequence, the foetus is also harmed. The answer was given recently in *Williams v. Marion Rapid Transit Co.*[15] where the Ohio Supreme Court, basing its decision in part on its interpretation of the word "person" in the state constitution as including the viable foetus,[16] declared that as such the infant was a legal entity who had a right after birth to maintain an action for the accident which allegedly caused the horrible deformities which she must carry through life.

Thus, before the decision in the instant case, the *Lipps, Bonbrest* and *Williams* cases constituted a steady progression, however scattered, of American judicial opinion away from the securely grounded lack of legal personality concept first enunciated in the *Dietrich* case. It seems clear that the scientific determinability of viability was the impetus for this deliberate departure from tradition. The decision in the principal case takes a step even beyond the *Williams* case. Here, as a result of the defendants' non-feasance, both the mother and the child died. The Minnesota court allowed the administrator of the infant to maintain a cause of action for the latter's wrongful death even though the foetus did not survive birth. The court thus removed any possibility that it considered the child's survival, as in the *Williams* case, to be a requisite to the maintenance of the action.

In these unborn child cases the problem is basically uncomplicated and the reasoning behind the decisions naturally does not contemplate certain practical difficulties which grow out of the resolution of the initial and purely legal problem of whether or not

10. See, for example, Hinman v. Pacific Air Transport, 84 F. 2d 755 (9th Cir. 1936).

11. See, for example, Oppenheim v. Kridel, 236 N. Y. 156, 140 N. E. 227 (1923).

12. 164 Wis. 272, 159 N. W. 916 (1916).

13. 65 F. Supp. 138 (D. D. C. 1946).

14. "The perhaps more poignant question remained whether recovery should be permitted where there is proof of a negligent blow to the person of the pregnant mother of such character and location as to cause injury to the viable unborn infant. . . ." 95 U. OF PA. L. REV. 96 (1946).

15. 152 Ohio St. 114, 87 N. E. 2d 334 (1949).

16. *Id.* at 117, 87 N. E. 2d at 335. OHIO CONST. § 16, Art. I.

the plaintiff had a cause of action. Nevertheless, because these difficulties are the inevitable result of the holding in the *Williams* and principal cases and because their consequent perplexities have often dissuaded legal minds from conferring a cause of action for prenatal injuries to the unborn, yet viable child, it is wise to anticipate some of them and briefly discuss their relation to the new cause of action.

First of all, it has been suggested that, if a right to sue is to be given the unborn child, the instant of viability is an arbitrary and unsound point during pregnancy at which to confer the right. These commentators contend that once the law admits the right to sue before birth, it should go all the way and permit a suit for injuries incurred at any time before birth.[17] It is submitted, however, that to deny the right to sue for injuries occurring before viability and to permit the cause of action for injuries occurring afterward, is a logical distinction. Before viability the foetus has no separate existence apart from its mother and an injury to it is actually an injury to the mother. The impetus behind the decisions of the courts in Ohio and Minnesota was a scientific fact, not the legal fiction which spurs the law's recognition of certain rights in the unborn child in criminal and property law.[18] The suggested enlargement of the right to sue would find no support in the extra-legal basis of the decision in the instant case and could hardly be grounded in the legal personality which is conferred on the unborn child by other fields of the law and which, as admitted fiction, lacks the stability to combat the realities of negligence law.

It is obvious that the acceptance by the courts that the plaintiff, while still *in utero,* is nevertheless a separate person does not necessarily mean that recovery will always follow an injury allegedly caused by the negligent behavior of the defendant. The infant still must prove that the defendant was chargeable with legal foresight of him and it is entirely conceivable that in many cases this burden is unbearable. Nevertheless, in certain situations, *e.g.,* where the defendant is a doctor as in the instant case; where the act of the defendant is inherently dangerous without regard to specific persons; where the mother is known to be in the last stage of pregnancy, this burden can be successfully carried. Generally, however, the issue as to whether the unborn child is encompassed by the circuit of foresight chargeable to the defendant is a matter to be decided only on the facts of each case.

Another difficulty which has occasionally been the principal deterrent to the viable child's right of action is the problem of proof.[19] It may be stated generally that the novelty of medical testimony necessary to prove viability and injury to the viable child does not make the matters to be so proved any more difficult in presentation or comprehension than other problems of causation which depend for their proof on

17. "The difficulty would seem to lie with that [viability] theory itself, which is too broad in that it allows recovery in the Verkennes situation and too narrow in that it would not aid a surviving child injured before viability. . . . It would seem wiser to avoid all medico-metaphysical controversies as to when personality is to be accorded a foetus . . . and to admit frankly that, regardless of theory and analogies, the fundamental reason for allowing a surviving child a right of action for prenatal injuries is the injustice of denying it." 63 HARV. L. REV. 173, 174 (1949). "But if the reasons given above for investing the unborn child with a legal personality are valid, this [viability] distinction is unsound, for it should make no difference at what stage of embryonic development the foetus is when injured." Comment, *Legal Status of Infant En Ventre Sa Mere,* 17 CHI. L. REV. 395, 397 (1950).

18. See notes 3-8 inclusive *supra,* and accompanying text.

19. An example of the cases where this difficulty had seemed insurmountable by the court is Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935).

competent and complicated medical testimony. The confusion of unfamiliar data and the fear of embarrassing professional conflict in evidence have not dissuaded courts in the past from entertaining suits which portend such problems. The suit for prenatal injuries by the child is hardly the place to succumb to such suasion.

Considering the background to the problem and prescinding from the consequent difficulties herein noted, the really startling feature of the decision in the instant case is the sixty five years which were consumed to arrive at it.

WILLS—DOCTRINE OF DEPENDENT RELATIVE REVOCATION.—Testator executed a will with due formality in July, 1910. When the will was found after testator's death, large diagonal lines appeared over the written text extending through more than half of it, and written diagonally through the text and also in the left margin were the words "See codicil". With the will was found an instrument, also in testator's handwriting, dated in October, 1946, entitled "Codicil to my will", signed by testator and making other dispositions of his property. The codicil was not executed with the formality required by law. On appeal from an order granting judgment on the pleadings and decreeing the admission of the will to probate, *held,* order affirmed on the ground that by virtue of the application of either the doctrine of dependent relative revocation or Section 34 of the Decedents Estate Law providing for revocation of wills the conditional nature of the cancellation negatives an intent to revoke. *Matter of Macomber,* 274 App. Div. 724, 87 N. Y. S. 2d 308 (3d Dep't 1949).

The methods by which a testator may revoke his will in New York are prescribed by statute,[1] and an attempted revocation which fails to meet the statutory requirements is ineffective.[2] The statute has been interpreted as permitting partial revocation of a will only by another writing which meets the requirements of the statute governing the execution of wills.[3] If the revocation is by a physical act of the testator, it will be ineffective unless it operates as a revocation of the entire will.[4]

The principal ingredient of a revocation by physical act of the testator is the intention to revoke.[5] It has been held that actual words of revocation written across the face of the instrument and signed by the testator are sufficient to constitute a valid revocation under the statute.[6] The courts have also held that, where a will is known

1. N. Y. DEC. EST. LAW § 34: "No will in writing . . . *nor any part thereof,* shall be revoked, or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless *such will* be burnt, torn, canceled, obliterated or destroyed, *with the intent and for the purpose of revoking the same.* . . . " (Italics supplied).

2. Matter of Tremain, 282 N. Y. 485, 27 N. E. 2d 19 (1940); *In re* Berman's Will, 185 Misc. 1037, 58 N. Y. S. 2d 512 (Surr. Ct. 1945); *In re* Semler's Will, 176 Misc. 687, 28 N. Y. S. 2d 390 (Surr. Ct. 1941).

3. *In re* Griffith's Will, 167 Misc. 366, 3 N. Y. S. 2d 925 (Surr. Ct. 1938); Matter of Hildenbrand, 87 Misc. 471, 150 N. Y. Supp. 1067 (Surr. Ct. 1914).

4. Revocation of a will "must be 'all or nothing' except by codicil." *In re* Lyons' Will, 75 N. Y. S. 2d 237, 243 (Surr. Ct. 1947).

5. Matter of Lloyd, 166 App. Div. 1, 151 N. Y. Supp. 459 (1st Dep't 1915); Matter of Crawford, 80 Misc. 615, 142 N. Y. Supp. 1032 (Surr. Ct. 1913).

6. Matter of Parsons, 204 App. Div. 879, 197 N. Y. Supp. 935 (2d Dep't 1922), *aff'd mem.,* 236 N. Y. 580, 142 N. E. 291 (1923).

to have been in testator's possession and cannot be found after his death, there is a presumption that the will was destroyed with an intention to revoke and that this presumption will prevail unless rebutted by proof to the contrary.[7] Thus, in order to prove a revocation by a physical act of the testator, either the intention to revoke must be expressed by the testator, either the intention to revoke must be expressed by the testator or it must appear that the act of destruction must have been done with such an intention.

The principal case again raises the question of the applicability in New York of the doctrine of dependent relative revocation that is valid on its face when the testator's intention to revoke is conditioned upon an intention to leave another will. This doctrine which originated in England[8] and which has been adopted in a number of jurisdictions in the United States,[9] is said to have been first expressed in 1788 when it was defined as follows: "This principle, that the effect of the obliteration, cancelling, etc., depends upon the mind with which it is done, having been pursued in all its consequences, has introduced another distinction not yet taken notice of; namely, that of dependent relative revocations, in which the act of cancelling, etc., being done with reference to another act meant to be an effectual disposition, will be a revocation or not, according as the relative act is efficacious or not."[10]

There are four factual situations in which the courts have invoked the doctrine: (1) Testator destroys his will in the belief that he thereby revives a prior will.[11] The attempted revival fails to meet the statutory requirements governing the revival of a prior will by revocation of a later will but the courts, in jurisdictions where the doctrine is recognized, have held that the revocation depends for its validity upon the effectiveness of the attempt to revive the prior will and that, since the revival is ineffective, the revocation is also inoperative. The application of the doctrine will not be warranted by showing merely that, in addition to the intention to revoke, the testator also intended to revive a prior will. It must also appear that, if he had known that the revival was ineffective, he would have preferred his estate to pass by the later will.[12] If it appears that, regardless of the effect of the attempted revival, the testator intended to revoke the later will, then the doctrine will not be applied and the revocation will be permitted to stand. (2) Testator revokes his will with the intention of making another will but dies before accomplishing this or the new document is ineffective for lack of due execution or other cause.[13] The doctrine has no application where the sole "revocation" of the will is by another instrument in writing which is ineffective for want of due execution. In the majority of jurisdictions an instrument in writing, in order to be effective as a revocation, must be executed with all the formalities with which the will itself was required to be executed. If, then, the revoking instrument is not duly executed it is totally inoperative as a revocation and the question of testator's intention does not arise. The doctrine has been applied, however, where the revoking instrument is

7. Matter of Staiger, 243 N. Y. 468, 154 N. E. 312 (1926); *In re* Schmidt's Estate, 63 N. Y. S. 2d 809 (Surr. Ct. 1946); *In re* Beckerle's Will, 46 N. Y. S. 2d 271 (Surr. Ct. 1943).

8. Onions v. Tyrer, 1 P. Wms. 343, 24 Eng. Rep. 418 (1716); Powell v. Powell, L. R. 1 P & D 209 (1866).

9. "It is so generally adopted that it is recognized as a part of our law without further discussion." Sanderson v. Norcross, 242 Mass. 43, 45, 136 N. E. 170, 171 (1922).

10. POWELL, DEVISES 637 (1st ed. 1788).

11. Powell v. Powell, L. R. 1 P. & D. 209 (1866).

12. *In re* Callahan's Estate, 251 Wis. 247, 29 N. W. 2d 352 (1945).

13. Dixon v. Treasury Solicitor, (1905) P.D. 42.

ineffective, not because of a defect in execution but by reason of a circumstance *dehors* the will,[14] as, for example, the inability of the legatee to take under the will. (3) Testator deletes portions of his will and interlines new matter which is of no effect since it is unsigned or unwitnessed.[15] The doctrine would not apply to this situation in New York since, under the statute, there can be no partial revocation by obliteration. (4) Testator is induced to revoke his will by a mistaken belief as to a fact or a point of law.[16] In some cases, the courts have denied effect to the revocation on the ground that the intention to revoke is conditioned on the truth of the belief which induces the testator to revoke his will.[17] Other authorities hold that the intent to revoke in such a case is absolute but that relief, if it is to be granted at all, should be granted on the ground of mistake.[18] The latter would seem to be the sounder view since, in such cases, the testator revokes his will not *on the condition that* his belief is true but *because* he believes it to be true.

A study of the cases in which the doctrine has been invoked would seem to show that the primary requisite to its application is a valid and effective revocation. If the attempted revocation does not meet the statutory requirements, it is totally ineffective and there is no need to consider whether or not the revocatory intent was conditional. If, by applying the statute, it is determined that there is an effective revocation, the courts in jurisdictions in which the doctrine is recognized then decide what the wishes of the testator would have been if he had known that the will, which he attempted to substitute in place of the revoked will, was ineffective. If it appears that a declaration of intestacy would be more likely to effectuate the testator's intention, then the doctrine is not applied and the revocation is permitted to stand.[19] But if, from the circumstances and from the statements of the testator, it appears that he would have preferred his estate to pass by the first will rather than by intestacy, the doctrine is applied, the revocation is denied effect and the revoked will is admitted to probate.[20]

The ultimate test, then, of the application of the doctrine is the intention of the testator. It is not sufficient that, along with the intention to revoke, the testator have an intention to make another will at some indefinite future date.[21] The revocation must be performed with a present intention to set up another testamentary disposition, with the revocation dependent upon the validity of the subsequent disposition, *i.e.*, it must appear that, if the testator had known that the new will was ineffective, he

14. *In re* Kaufman's Estate, 25 Cal. 2d 854, 155 P. 2d 831 (1945); Blackford v. Anderson, 226 Iowa 1138, 286 N. W. 735 (1939).

15. Schneider v. Harrington, 320 Mass. 723, 71 N. E. 2d 242 (1947). Testatrix obliterated a bequest contained in her will. The Massachusetts statute permits partial revocation by obliteration but the court, applying the doctrine of dependent relative revocation, denied effect to the revocation and admitted the will to probate in its original form.

16. Adams v. Southerden, (1925) P.D. 177; Doe d. Evans v. Evans, 10 Ad. & E. 228, 113 Eng. Rep. 88 (1839).

17. *Ibid.*

18. Warren, *Dependent Relative Revocation,* 33 HARV. L. REV. 337, 350 (1920).

19. In the Estate of Zimmer, 40 T. L. R. 502 (1924); *In re* Houghton's Estate, 310 Mich. 613, 17 N. W. 2d 774 (1945).

20. Stewart v. Johnson, 142 Fla. 425, 194 So. 869 (1940); Charleston Library Society *et al.* v. Citizens & Southern Nat. Bank *et al.*, 200 S. C. 96, 20 S. E. 2d 623 (1942); Dixon v. Treasury Solicitor, (1905) P.D. 42.

21. McIntyre v. McIntyre, 120 Ga. 67, 47 S. E. 501 (1904); *In re* Bonkowski's Estate, 266 Mich. 112, 253 N. W. 235 (1934).

would have preferred that his estate pass by the old will.[22]

In the principal case, the court came to the conclusion that "the facts here fit well within the classic pattern of the rule in its most reliable aspect, and it ought to be applied to the facts of this case."[23] This interpretation of the facts is questionable. As stated above, a revocation of a will by cancellation is effective only if it operates to revoke the entire will. It has been held that the canceling of testator's signature is of itself sufficient to constitute a valid revocation.[24] It has also been held that express words of revocation written across the face of the instrument and signed by the testator will have the same effect.[25] In the principal case, however, the marks of cancellation covered only half of the written text and the only words written across the face of the instrument were "See codicil". Rather than showing an intention to revoke the will in its entirety, these words would seem to evince an intention merely to alter the will. If this is the true construction, the attempted revocation would not meet with the requirements of Section 34 of the Decedent's Estate Law and the will would be admitted to probate in its original form without reference to the doctrine of dependent relative revocation. If, on the other hand, the acts by which testator attempted to revoke his will were sufficient to meet the statutory requirements, the doctrine could be applied on the ground that the revocation was conditioned on the setting up of another testamentary disposition and that, since the attempted substitution was ineffective, the revocation was also inoperative.[26]

Assuming that testator's acts were sufficient to meet the statutory requirements for revocation, the court's application of the doctrine in the principal case is in conflict with the conclusion arrived at by Surrogate Foley in *Matter of McCaffrey*.[27] In that case, the testator obliterated the entire second page of his will including his signature and those of the witnesses. There was unquestionably an intention to revoke and under the facts as so far stated there was a valid revocation under Section 34 of the Decedent's Estate Law. However, at the foot of the page, there was a notation signed by the testator and admittedly in his handwriting to the effect that his intention in cancelling the will was to restore a prior will to full force and effect. The Surrogate held that, in spite of this notation, the testator's act was a complete revocation under the statutory procedure and that it effectively destroyed the will. He also concluded that, since "the history of our statutes, the decisions and our public policy exclude the existence of the doctrine of dependent relative revocation as a rule of law in this state"[28] the doctrine could not be invoked in order to deny effect to a revocation which met with all the statutory requirements. This view was adopted in *Matter of Field*[29] in which the Surrogate refused to apply the doctrine on the basis of the statement in the *McCaffrey* case.

22. *In re* Houghton's Estate, 310 Mich. 613, 17 N. W. 2d 774 (1945); In the Estate of Zimmer, 40 T. L. R. 502 (1924).

23. Matter of Macomber, 274 App. Div. 724, 728, 87 N. Y. S. 2d 308, 312 (3d Dep't 1949).

24. Matter of McCaffrey, 174 Misc. 162, 20 N. Y. S. 2d 178 (Surr. Ct. 1940).

25. Matter of Parsons, 204 App. Div. 879, 197 N. Y. Supp. 935 (2d Dep't 1922), *aff'd mem.*, 236 N. Y. 580, 142 N. E. 291 (1923).

26. Under this construction of the facts, the principal case would fall within the second of the four categories set forth above into which the cases applying the doctrine have been divided.

27. 174 Misc. 162, 20 N. Y. S. 2d 178 (Surr. Ct. 1940).

28. *Id.* at 173, 20 N. Y. S. 2d at 189.

29. 194 Misc. 47, 84 N. Y. S. 2d 886 (Surr. Ct. 1948).

It is submitted, however, that the history of the decisions in New York prior to the *McCaffrey* case does not exclude the existence of the doctrine. On the contrary, in those cases in which the doctrine was considered, it received only favorable mention.[30]

The statute presents no bar to the application of the doctrine because, where the revocation is by physical act of the testator, the statute requires that the act be performed "with an intention to revoke". No mention is made as to whether an absolute intention is essential or whether a conditional intention will fulfill the requirement. In the principal case, the court said that "the conditional nature of the cancellation here negatives an intent to revoke. . . . "[31] If these words are taken at their face value, the conclusion is inevitable that the attempted revocation was totally ineffective and there would be no need to invoke the doctrine. If, however, they may be interpreted as holding that the revocatory intent is conditional, then the court would seem to be interpreting the statute as requiring an *absolute* intention to revoke. Under this interpretation, it would seem that the court is attempting to incorporate the doctrine into the statute and deny effect to a revocation when it appears that it was done for the purpose of making another testamentary disposition.

Since the doctrine calls for an interpretation of the intention of a dead person, it should be applied with caution.[32] It is submitted, however, that a recognition of the fact that the intention with which a testator revokes his will is not always absolute would give greater effect to the wishes of testators than does the strict interpretation of the statute which is recommended in *Matter of McCaffrey*.

30. See Ely v. Megie, 219 N. Y. 112, 113 N. E. 800 (1916). Testator, by a codicil, made proponent, a charitable institution, a residuary legatee. By a later codicil, revoking the residuary clause, proponent was given a specific bequest. This bequest was invalid because of a statutory provision that a will containing a bequest to a charitable corporation must be executed within a certain period prior to testator's death. The court held that since "the gift . . . failed not by reason of any defect in the instrument, but solely in consequence of matter *dehors* the instrument," the doctrine could not be applied to revive the earlier bequest. *Id.* at 139, 113 N. E. at 807. See also Matter of Raisbeck, 52 Misc. 279, 102 N. Y. Supp. 967 (Surr. Ct. 1906): A holographic will written in ink was found after testator's death with a number of interlineations and obliterations in pencil thereon. The court said that "the circumstances would seem to justify the application of the rule of dependent relative revocation established by the English authorities," and the will was admitted to probate in its original form. *Id.* at 283, 102 N. Y. Supp. at 970.

31. Matter of Macomber, 274 App. Div. 724, 728, 87 N. Y. S. 2d 308, 312 (3d Dep't 1949).

32. Sanderson v. Norcross, 242 Mass. 43, 136 N. E. 170 (1922).