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Recent Decisions

RECENT DECISIONS

CONTRACTS—EFFECT OF A RECITAL OF CONSIDERATION IN A CONTRACT UNDER SEAL.—Executors of testator's will sued on a note payable to testator. Defendant pleaded a prior contract under seal wherein plaintiff's testator agreed that the indebtedness would be cancelled at his death in consideration for payment of one dollar, receipt of which was acknowledged in the instrument. On motion for a summary judgment dismissing the complaint, *held,* motion granted. There is no triable issue over the existence of consideration in a contract under seal. This case is not one for the admission of parol evidence to contradict the receipt of consideration as provided in N. Y. CIV. PRAC. ACT (1920) § 342. *Hemlick v. Probst,* 170 Misc. 284, 9 N. Y. S. (2d) 975 (Sup. Ct. 1939).

It was the plaintiff's contention that the receipt of consideration was a question of fact which the plaintiff was entitled to rebut by parol evidence.[1] The court held, however, on the authority of *Cochran v. Taylor,*[2] that "parol evidence is inadmissable to question or contradict the recited consideration in the sealed instrument for the purpose of showing that it was void for lack of consideration, and thus to defeat it." On the principle of *stare decisis* the decision in the principal case is unquestionably correct, as the case is fundamentally on all fours with the *Cochran* case. But as to

1. N. Y. CIV. PRAC. ACT (1920) § 342 at the time provided that: "A seal upon an executory instrument is only presumptive evidence of a sufficient consideration, which may be rebutted as if the instrument was not sealed." By N. Y. Laws 1935, c. 708, this section was amended, effective as of Sept. 1, 1935, to read as follows: "A seal upon a written instrument hereafter executed shall not be received as conclusive or presumptive evidence of a sufficient consideration." For a discussion of this amendment, see LEGIS. (1936) 5 FORDHAM L. REV. 144. By N. Y. Laws 1936, c. 685, this section was again amended, as of Sept. 1, 1936, to eliminate the words "a sufficient".

2. 273 N. Y. 173, 181, 7 N. E. (2d) 89, 92 (1937). In Cochran v. Taylor, the plaintiff sued for specific performance of an option contract under seal acknowledging the receipt of the sum of one dollar as the consideration of the promise to sell. The trial court, finding that the dollar had not been paid, dismissed the complaint on the theory that there was no consideration for the promise, and hence the defendant had the right to revoke her offer. 156 Misc. 750, 282 N. Y. Supp. 530 (Sup. Ct. 1935). The Appellate Division affirmed this judgment, two justices dissenting. 248 App. Div. 669, 289 N. Y. Supp. (4th Dep't 1936) 911. The Court of Appeals unanimously reversed the Appellate Division. The rule adopted by this court was clearly stated in Fuller v. Artman, 69 Hun. 546, 549, 24 N. Y. Supp. 13, 15 (1893). The Court said: "While the mere presumption of consideration, which arises from the use of seals in the execution of the instrument, is subject to rebuttal, the expression of a consideration in such an instrument is not subject to contradiction for the purpose or with the effect of invalidating the instrument." Upholding this rule, the Court of Appeals made a distinction between consideration and a sufficient consideration. The court said: "Those statutory changes in the common law rule refer only to the question of *sufficient consideration,* and as to the sufficiency of the consideration, the seal, it is declared, shall only be presumptive evidence. . . . The question of sufficiency has always been open to inquiry, and the statute is merely declaratory of the common law rule, but the 'consideration' implied by the seal cannot be impeached for the purpose of invalidating the instrument or destroying its character as a specialty." Cochran v. Taylor, 273 N. Y. 173, 180, 7 N. E. (2d) 89, 91 (1937); McMillan v. Ames, 33 Minn. 257, 22 N. W. 612 (1885); Fuller v. Artman, 69 Hun. 546, 24 N. Y. Supp. 13 (1893).

the soundness of the *Cochran* decision, in the light of the diminishing importance of the seal, there is some doubt.

At common law a promise under seal was binding without consideration.[3] After the action of assumpsit arose, and the legal mind became impressed with the necessity of consideration, inaccurate expressions to the effect that the seal "imported" consideration or was "conclusive evidence" of consideration began to appear. So widespread did these expressions become that, when New York and Alabama decided to make promises under seal not binding unless they were supported by consideration, they were able to do so by making the seal only presumptive and not conclusive evidence of consideration.[4] However, until the enactment of such statutes, the seal, whether considered as conclusive evidence of consideration, or as a magic wafer which enforced a promise without consideration, served as an effective barrier to the proof of a want of consideration for the purpose of invalidating the instrument. But with the enactment of such statutes, that barrier logically collapsed.[5] Thus the question arises as to whether there are any other remaining reasons why a seal on an executory instrument, confessing the receipt of a specified consideration, should deafen the ears of the court to the actual facts.

It has been asserted that the admission of evidence rebutting the acknowledgment of the receipt of consideration would do violence to some elementary principles of the law of evidence bearing upon the credit and validity belonging to instruments in writing and under seal.[6] In other words, the admission of such evidence is prohibited by the parol evidence rule.[7] However, it has long been recognized that the parol evidence rule only begins to operate when a valid contract has been established, and that consequently it does not prevent the admission of parol evidence tending to show that a written instrument is no contract at all.[8] In a unilateral contract there are no mutual promises, but merely a promise by one party to do something in consideration for some act done by the other party in consequence of the promise. The promise does not become binding upon the maker until the act is performed.[9] Reducing such a contract to writing, we have nothing more than a

3. 1 WILLISTON, CONTRACTS (rev. ed. 1936) § 109.

4. See LEGIS. (1936) FORDHAM L. REV. 144, 146.

5. Morrison v. Johnson, 148 Minn. 343, 181 N. W. 945 (1921). This case overrules McMillan v. Ames, 33 Minn. 257, 22 N. W. 612 (1885), a case which was cited by the New York Court of Appeals in the Cochran case as authority for its proposition. The Morrison case points out that the McMillan case was decided when the common law rule concerning the effect of seal on consideration was still in effect. It held that a statute similar to N. Y. CIV. PRAC. ACT (1920) § 342 destroyed the conclusive effect of the seal on a contract reciting consideration. It stands directly *contra* to the Cochran case.

6. Fuller v. Artman, 69 Hun. 546, 24 N. Y. Supp. 13 (1893), cited *supra* note 2.

7. Generally speaking the parol evidence rule provides that parol evidence may not be introduced to vary or contradict the terms of a written contract in a suit between the parties to the writing. Hutchison v. Ross, 262 N. Y. 381, 398, 187 N. E. 65, 72 (1933).

8. The theory is that such evidence does not vary or contradict the terms of a contract but merely shows that no contract ever existed. "Thus fraud, illegality, want of consideration, delivery upon an unperformed condition, and the like may be shown by parol, not to contradict or vary but to destroy the written instrument." Thomas v. Scutt, 127 N. Y. 133, 137, 27 N. E. 961, 962 (1891). This is the first of the two general exceptions to the parol evidence rule. The second exception permits parol evidence to explain any ambiguity in the terms of a contract.

9. Petterson v. Pattberg, 248 N. Y. 86, 161 N. E. 428 (1928).

statement of the promise and an acknowledgment by the promisor that the act bargained for has been performed. This acknowledgment is not a term of the contract, but merely the statement of a fact. Thus to show by parol evidence that the statement is false, and that the act was never performed, is not to vary or contradict a term of the contract but is merely to show that a past event recited in the instrument did not, in fact, occur. The effect of such evidence is to show that *no contract ever existed.* Therefore the admission of such evidence does not violate the parol evidence rule.[10]

Another reason put forth to prevent the introduction of such evidence is an estoppel.[11] The difficulty with this argument is that as between the original parties, there has been no reliance on the misstatement of fact, for both parties know that the act has not been performed.[12] Moreover, if the estoppel theory were sound, there should be no distinction between sealed and unsealed contracts, since the basis for its application is the false acknowledgment. Yet the acknowledgment is rebuttable if the instrument is not under seal.[13] Thus it would seem that the estoppel theory is unsound.

In the *Cochran* case the Court of Appeals attempted to ground the rule on a distinction between consideration and sufficient consideration. They argued that only the question of the *sufficiency* of the consideration was opened to rebuttal by the original section 342 of the Civil Practice Act, and that the question of whether or not there was *any* consideration was still conclusively answered in the affirmative by the seal. And this consideration, conclusively implied by the seal as distinguished

10. "Recitals, even recitals of consideration, unless intended in themselves to embody a contractual right or obligation, may be contradicted." Hutchison v. Ross, 262 N. Y. 381, 398, 187 N. E. 65, 72 (1933). The admission of such evidence merely denies a fact admitted in the instrument. 1 WILLISTON, CONTRACTS § 115 B.

11. "The guarantor acknowledged the receipt of one dollar, and is now estopped to deny it. If she has not received it, she would now be entitled to recover it." Story, J. in Lawrence v. McCalmont, 2 How. 425, 452 (U. S. 1844).

12. 1 WILLISTON, CONTRACTS § 115 B. The learned author also answers the argument that the promisor would be entitled to enforce payment if it had not been received. "The error in Judge Story's statement, for error it must be considered, is not that it directly denies any principles of law, but by a fictitious interpretation assumes to treat an acknowledgement that one dollar has been received by way of consideration, if not true literally, because no money was received, as amounting to a promise to give one dollar. Having thus fictitiously treated an admission of an alleged fact as a promise to make it true, the parol evidence rule becomes applicable to the case." See Komp v. Raymond, 175 N. Y. 102, 67 N. E. 113 (1903). See note 11, *supra.*

13. Presbyterian Church of Albany v. Cooper, 112 N. Y. 517, 20 N. E. 352 (1889); Komp v. Raymond, 175 N. Y. 102, 67 N. E. 113 (1903).

To say that the doctrine of estoppel by deed applies, and that the party is estopped by his deed to assert a want of consideration, when the consideration is non-contractual, is merely to restate the problem. When the seal was still conclusive evidence of consideration, it was permissable to rebut by parol evidence the recital of consideration for every purpose except to avoid one's covenant. McCrea v. Purmont, 16 Wend. 460, 473 (N. Y. 1836). The reason why at that time a person could not rebut it for the purpose of invalidating the instrument was that the common law rule as to the conclusiveness of the seal on consideration still applied. The conclusive character of the seal having been destroyed by statute, the question arises: What reason remains why such evidence should be inadmissable?

from its sufficiency, of which the seal was only presumptive evidence, could not "be impeached for the purpose of invalidating the instrument, or destroying its character as a specialty."[14] This argument seems to overlook the fact that the manifest intent underlying section 342, as originally enacted, was to require executory contracts under seal to be supported by consideration to be binding. In other words it seems that the intent was to make an executory contract under seal similar to an unsealed, written contract with respect to the question of consideration, except that the former should carry a rebuttable presumption of a sufficient consideration. Now the consideration required to support an unsealed, written contract must be a sufficient consideration. Insufficient consideration is in fact no consideration. Or, conversely, the only consideration that will support a contract is a sufficient consideration. Insufficient consideration, then, is a contradiction in terms. Thus it would seem that the distinction is not well founded or in accord with the intent of the legislature. This distinction probably will not be made under the present statute, for this statute was amended[15] so as to omit the words "a sufficient".[16]

Finally there is a very strong affirmative argument to support the proposition that it was the intention of the statute in question to admit parol proof to rebut the acknowledgment of the receipt of a named non-promissory consideration in an executory contract under seal. The statute provided that "a seal upon an executory instrument is only presumptive evidence of a sufficient consideration, which may be rebutted as if the instrument was not sealed." From this it could be inferred the statute intended that the presumption of consideration in at least some sealed instruments could be rebutted in the same way as the recited consideration in some instruments not under seal can be rebutted. For otherwise the words "as if the instrument was not sealed" would have no meaning. Now there are three classes of unsealed contractual instruments, (1) Instruments containing a promise but not reciting the consideration for which the promise was given; (2) Instruments containing a promise and reciting that it was given in consideraton for an act; and (3) Instruments containing a promise and reciting that it was given in consideration for a return promise. Now the first class carry no presumption of consideration. To be enforced, the consideration for which the promise was given must be shown by parol evidence.[17] Therefore it would seem that though the statute intended

14. See Cochran v. Taylor, 273 N. Y. 172, 180, 7 N. E. (2d) 89, 91 (1937).

15. See note 1, *supra*.

16. The Law Revision Commission recently made a thorough study of the seal and consideration. In discussing Fuller v. Artman, 69 Hun. 546, 24 N. Y. Supp. 13 (1893), they said: "It is doubtful whether the rule of this case could have been followed by the Court of Appeals even before the recent enactment amending N. Y. Civ. Prac. Act (1935) § 342, and abolishing the effect of the seal upon consideration." The amendment, although not directly covering this case, which depends upon an application of estoppel, would seem to tip the scales in favor of a rejection of the doctrine, since it has, as its apparent purpose, the entire abrogation of the effect of the seal upon the consideration." Report of the Law Revision Commission (1936) 269.

It was at their recommendation that the statute was amended in 1936 so as to omit the words *a sufficient*. See note 1, *supra*. No reason was given for the recommendation, which incidentally was made before the Cochran case was decided. Very probably it will have the effect of destroying the distinction between consideration and a sufficient consideration. See note 2, *supra*.

17. Presbyterian Church of Albany v. Cooper, 112 N. Y. 517, 20 N. E. 352 (1889).

that a seal on such an instrument would raise a presumption of consideration, which could not be rebutted, it did not intend to limit the right to rebut the presumption of consideration arising from the seal, to only this class of sealed instruments.[18] For if this was the intention, the statute could have ended with the word "rebutted". The remaining words would be superfluous and without meaning. Now the third class of unsealed contractual instruments carry a conclusive presumption of consideration due to the parol evidence rule. Hence whether sealed or unsealed, the consideration recited in this class of instrument is not subject to rebuttal. Thus the only class remaining is the second. Now although there is not a presumption that unsealed instruments in this class are supported by consideration yet in practical effect they give rise to a strong inference that they are supported by consideration. This inference may be rebutted by parol evidence.[19] Therefore it would seem that when the instrument in this class is under seal, the consideration recited in it should be subject to rebuttal by parol evidence. For it is the only kind of sealed instrument which contains a consideration which can be rebutted *in the same way* as the consideration in an instrument not under seal. Hence if meaning is to be given to every word in the statute, the consideration recited in this class of sealed instruments should be allowed to be rebutted by parol evidence.

However, there may be some justification for the rule of the *Cochran* case. Perhaps the court was mindful of the numerous business contracts under seal, which recite that they were given for a dollar paid in hand, but where as a matter of fact the dollar is never paid, being considered a mere figment of the lawyers. Or perhaps the case is one last attempt to save the fast fleeting glory of the seal. Or perhaps it was an attempt to make options under seal binding without consideration.[20] By declaring that options under seal that recite consideration are *sui generis* the Court of Appeals may in the future avoid applying the rule of the *Cochran* case to some other type of contract.[21] Whatever one may think of the case, it seems to give the seal more potential strength in New York than many thought it still had.[22] Yet by judicial construction, the Court of Appeals may hold that the deletion of the words "a sufficient" from the statute,[23] had the effect of relieving the court from the necessity of applying the *Cochran* decision to contracts entered into after Sept.

18. See note 2, *supra*.

19. See note 13, *supra*.

20. For a discussion of cases on options see Professor Whiteside, citing Fuller v. Artman, 76 Hun. 546, 24 N. Y. Supp. 13 (1893) says that: "The only executory contracts that are binding in New York solely by reason of being under seal or having a nominal consideration are options." RESTATEMENT, CONTRACTS (1932) § 366; RESTATEMENT, CONTRACTS, N. Y. ANNOT. (1933) § 366.

21. The Court of Appeals had this problem before it once before, under the form of a mortgage contract. The court below had held that parol evidence was admissable to rebut the recited non-promissory consideration for the purpose of invalidating the instrument. Baird v. Baird, 81 Hun. 300, 30 N. Y. Supp. 785 (1894). Incidentally, this case was decided by the same court that decided Fuller v. Artman, 69 Hun. 546, 24 N. Y. Supp. 13 (1893). The latter was decided in June, 1893. It was relied upon by the plaintiff in the Baird case. The decision in this case was handed down in October, 1894. It failed to mention Fuller v. Artman, *supra*. The Court of Appeals affirmed the judgment of the General Term. Baird v. Baird, 145 N. Y. 659, 40 N. E. 222 (1895).

22. See note 16, *supra*.

23. See note 1, *supra*.

1, 1936.[24] Just what rule would apply to contracts entered into between Sept. 1, 1935 and Sept. 1, 1936 is an interesting and highly speculative question.[25]

CONSTITUTIONAL LAW—MUNICIPAL ORDINANCE AFFECTING FOREIGN COMMERCE—POLICE POWER.—The defendant company was accused of violating Section 211 of the Sanitary Code of New York City prohibiting the discharge of dense smoke from a vessel within the city of New York or on the waters adjacent thereto within the jurisdiction of said city. The defendant's two ships discharged dense smoke, before sailing, for an aggregate period of twenty-four minutes, but not continuously. On appeal from conviction, *held,* three judges dissenting, that to require the defendant company, which used all modern appliances available to curb the discharge of smoke, to do away with this smoke entirely, would be so impractical as to be unreasonable, exceeding the police power delegated to the city and obstructing commerce. The court divided on the fact question as to whether the smoke was avoidable. *People v. Cunard White Star, Ltd.,* 280 N. Y. 413, 21 N. E. (2d) 489 (1939).

Smoke at common law was not a nuisance *per se.*[1] However it has been held to be a nuisance where it endangered the health of others or was of such a nature as to cause substantial discomfort or inconvenience to a person or some tangible injury to property.[2]

Smoke was established to be, in itself, a public nuisance through the enactment of restricting ordinances by legislatures. The constitutionality of such restrictions has often been questioned. Usually the first objection is that the legislature has invaded the judicial province by unreasonably declaring that to be a nuisance *per se* which was not so inherently.[3] However courts usually agreed with legislative concepts. In *State v. Tower*[4] the court declared that "it was entirely competent for the legislature to take cognizance of the fact, known to all men, that the emission and discharge of dense smoke into the atmosphere of a large and populous city is, of itself, a nuisance, a constant annoyance to the general public of such city, and one calculated to interfere with the health and comfort of the inhabitants, and to declare it a nuisance *per se.*" A second objection to such ordinances is that they constitute a type of class legislation. This criticism has been made when they have omitted to proscribe certain smoke-producing structures, while specifically naming others, and also where they have limited their scope to certain parts of a city or to cities of a certain population.[5]

24. See note 16, *supra.*

25. "Whether the intent of Chapter 708 of the Laws of 1935 (in effect September 1, 1935) was to destroy the conclusive effect of the seal on a written instrument, we are not called upon to determine." Cochran v. Taylor, 273 N. Y. 173, 180, 7 N. E. (2d) 89, 91 (1937).

1. See St. Louis v. Heitzeberg Packing Co., 141 Mo. 375, 378, 42 S. W. 954, 955 (1897); People v. N. Y. Edison Co., 159 App. Div. 786, 789, 144 N. Y. Supp. 707, 709 (1st Dep't 1913); JOYCE, NUISANCES (1906) § 135.

2. Cogswell v. N. Y. N. H. & H. R. R., 103 N. Y. 10, 8 N. E. 537 (1886); JOYCE, NUISANCES (1906) § 135; 2 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) § 694.

3. State v. Tower, 185 Mo. 79, 84 S. W. 10 (1904); *Ex parte* Junqua, 10 Cal. App. 602, 103 Pac. 159 (1909).

4. 185 Mo. 79, 81, 84 S. W. 10, 11 (1904).

5. Brooklyn v. Nassau Electric R. R., 44 App. Div. 462, 61 N. Y. Supp. 33 (2d Dep't 1899); State v. Tower, 185 Mo. 79, 84 S. W. 10 (1904). See Truax v. Corrigan, 257 U. S.

This objection has received scant attention from courts. As the court in *State v. Tower* pointed out, "the suppression of the nuisance (smoke) was clearly . . . within the discretion of the legislature and . . . it must be presumed that its classification was based on satisfactory evidence."[6] The courts generally have allowed the legislators full sway in the use of their discretionary powers on this point.[7]

Another line of objection, mentioned by the court in the instant case,[8] is based on the exclusive power of Congress to regulate interstate commerce. A state cannot lawfully impose a burden on interstate commerce.[9] However, the grant of control to the federal government does not expressly exclude states from regulating it also.[10] And it has been held that in matters local in character and effect, the states might legislate even though interstate commerce might be *somewhat* affected.[11] This doctrine is at present the accepted doctrine of the Supreme Court and was firmly established by *Bowman v. C. & N. Y. R. R.*,[12] which stated that in matters local in character the states can act until Congress interferes and supersedes its authority.[13]

The authority of the states to legislate with reference to commerce is part of its police power. But this police power to enact and enforce measures may only interfere with commerce when this interference is incidental and not the ultimate aim of the measure.[14] Interference with commerce is permitted only when the necessities and conveniences of the public seem to demand it and when the regulations provided are reasonable and just.[15]

312, 322 (1921) for a general discussion of the question as to whether the classification of businesses amounts to discrimination.

6. 185 Mo. 79, 84, 84 S. W. 10, 13 (1904).

7. N. W. Laundry v. Des Moines, 239 U. S. 486 (1915), noted in (1916) 4 CALIF. L. REV. 416; Bowers v. Indianapolis, 169 Ind. 105, 81 N. E. 1097 (1907); People v. Lewis, 86 Mich. 273, 49 N. W. 140 (1891).

8. See People v. Cunard White Star Ltd., 280 N. Y. 413, 419, 21 N. E. (2d) 489, 490 (1939).

9. DiSanto v. Pennsylvania, 273 U. S. 34 (1927) (a state law compelling a person who sold tickets for foreign steamships to obtain a license, for the alleged purpose of curtailing frauds, was not a proper exercise of police power, being a direct burden on foreign commerce and so contravening the commerce clause of the Federal Constitution); Shafer v. Farmers Grain Co., 268 U. S. 189 (1925) (a law requiring the return of dockage to producer is a direct interference with commerce as affecting price).

10. See Cooley v. Port Wardens, 12 How. 299, 319 (U. S. 1851).

11. *Ibid*; 2 WILLOUGHBY, CONSTITUTIONAL LAW (2d ed. 1929) § 468.

12. 125 U. S. 465, 481 (1888). See also Covington Bridge Co. v. Kentucky, 154 U. S. 204, 209 (1894) for a discussion of power of state over general subject of commerce.

13. 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 1274.

14. Hennington v. Georgia, 163 U. S. 299 (1896) (regulation of running freight trains on Sunday upheld, though it affected interstate commerce in a limited degree, and held valid until displaced by Act of Congress); 2 WILLOUGHBY, *op. cit. supra* note 9, § 598. In Henderson v. Mayor, 92 U. S. 259, 271 (1875) speaking of police power, the court wrote: "no definition of it and no urgency for its use can authorize a state to exercise it in regard to a subject matter which has been confided exclusively to the discretion of Congress by the Constitution. Nothing is gained in the argument by calling it the police power."

15. Smith v. St. Louis Ry., 181 U. S. 248 (1901) (cattle quarantine upheld); Southern R. R. v. King, 217 U. S. 524 (1910) (railroad regulation); Oregon-Washington R. R. and Navigation Co. v. Washington, 270 U. S. 87 (1926) (took away from state and gave to Federal Government the right to quarantine produce); *Ex parte* Junqua, 10 Cal. App. 602, 103 Pac. 159 (1909) (a municipality may in the protection of its citizens' health and well-being regulate the type of fuel to be used).

No distinction seems to be made as to whether the offender be a ship or a permanent structure erected on shore. *Harmon v. Chicago*[16] held that such a smoke regulation may be enacted to apply to adjacent waters and to boats despite the fact that they may affect interstate commerce indirectly, if they do not impose a burden thereon. In that case a conviction was upheld because it was shown that by use of a better grade of coal the smoke could be considerably lessened. But again, unreasonable regulation will be forbidden. The court in *McMarran v. Cleveland Cliffs Co.*,[17] a private nuisance case, refused to grant an injunction sought by the plaintiffs to terminate the issuance of all annoying smoke from defendant's boats at his dock. Smoke is an incident of navigation, the court claimed, and where there is no negligence in operation an injunction would be an undue restraint.

The instant case observes the limit to which such ordinances may go in their restrictions. Moreover, all members of the court conceded that foreign commerce, as well as local commerce, may be reasonably regulated under the police power. The one point on which the court divided, unfortunately, was on the fact question as to the avoidability of the smoke and not on any question of law involved.

DAMAGES—OPTION OF REMITTITUR OR NEW TRIAL—COMPULSORY REMITTITUR.—A jury awarded plaintiff a recovery of $12,500 for injuries sustained in an automobile collision. After reconsidering the evidence bearing on the extent of plaintiff's injuries, *held*, three judges dissenting, that any recovery in excess of $1,000 was excessive, and that judgment must be reduced to this amount and as thus modified, affirmed. *Standard Coffee Co. v. Watson*, 129 S. W. (2d) 948 (Ark. 1939).

It is well established that the discretion of the jury as to the amount of damages to be awarded, while very wide, is not arbitrary or unlimited but must be reasonably exercised in harmony with the evidence[1] and its award is subject to revision by the court in certain instances.[2]

At the time of the adoption of the United States Constitution, whenever a jury returned a verdict for damages, considered by the appellate court to be excessive, the normal procedure was to order a new trial[3] before another jury. The reason for this was that then, as well as now, trial by jury was regarded as a sacred right and any infringement upon such right was scrutinized with jealous solicitude.[4] However, in an endeavor to eliminate the delays and expenditures that must accompany fur-

16. 110 Ill. 400 (1884) (tugboats on the Chicago River).

17. 253 Mich. 65, 234 N. W. 163 (1931).

1. Sinclair Ref. Co. v. Fuller, 190 Ark. 426, 79 S. W. (2d) 736 (1935); Sloane v. So. Cal. Ry., 111 Cal. 668, 44 Pac. 320 (1896); Fox v. Oakland Consol. St. Ry., 118 Cal. 55, 50 Pac. 25 (1897); Frankfurt v. Coleman, 19 Ind. App. 368, 49 N. E. 474 (1898). SEDGWICK, LAW OF DAMAGES (2d ed. 1909) 40; 2 SUTHERLAND, DAMAGES (4th ed. 1916) § 459.

2. Toledo R. & Light Co. v. Mason, 81 Ohio St. 463, 91 N. E. 292 (1910), containing a comprehensive study of this proposition.

3. Cowperthwaite v. Jones, 2 Dall. 55 (U. S. 1790); Neal v. Lewis, 2 Bay 204, 1 Am. Dec. 640 (S. C. 1798); Vanch v. Hall, 2 Pen. 578, 4 Am. Dec. 389 (N. J. 1809); Comment (1931) 16 MINN. L. REV. 185, 193.

4. Beers v. Beers, 4 Conn. 535, 538 (1823), approved in Capital Traction Co. v. Hoff, 174 U. S. 128 (1899). The same principle was enunciated in Parsons v. Bedford, 3 Pet. 433 (U. S. 1830).

ther litigation when the propriety of the amount of damage is at stake, the practise of allowing *remittitur* was introduced.[5] Thus, when the court rules the verdict of the jury excessive, it is customary to allow the plaintiff the option of consenting to the deduction from the verdict of the amount of the excess, rather than to order a new trial unconditionally.[6] If he consents, judgment is entered for the balance; if he refuses, a new trial is necessary.[7] It cannot be contended that such a procedure is an encroachment upon the constitutional right to a trial by jury,[8] since the defendant is ordered to pay less rather than more than a jury had already awarded and the plaintiff is by his consent precluded from complaining.[9]

The majority of decisions do not permit *remittitur* where a verdict is excessive and where it is indicated that bias, passion, prejudice, or other influences worked upon the jury. They require a new trial.[10] Obviously the right to trial by jury implies the right to be tried by a jury acting properly.[11] Where bias is indicated,

5. See Holbrook v. J. J. Quinlan & Co., 84 Vt. 411, 80 Atl. 339, 342, 343 (1911), for a discussion of the origin and meaning of the term.

6. Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69 (1889); Gila Valley Ry. v. Hall, 13 Ariz. 270, 112 Pac. 845 (1911), *aff'd*, 232 U. S. 94 (1914); Hepner v. Libby, 114 Cal. App. 747, 300 Pac. 830 (1931); Noxon v. Remington, 78 Conn. 296, 61 Atl. 963 (1905); Schwartz v. Chatham Bank, 185 App. Div. 68, 172 N. Y. Supp. 762 (2d Dep't 1918); Duaine v. Gulf Refining Co., 285 Pa. 81, 131 Atl. 654 (1926); Placella v. Robbio, 47 R. I. 180, 131 Atl. 647 (1926).

7. Kennon v. Gilmer, 131 U. S. 22 (1889); Johnson v. Louisville & Nashville Ry., 204 Ala. 662, 87 So. 158 (1920); Sewell v. Sewell, 91 Fla. 982, 109 So. 98 (1926); Plecas v. Devich, 72 Utah 578, 272 Pac. 197 (1928); Bourne v. Moore, 77 Utah 184, 292 Pac. 1102 (1930). Restricting the new trial to the issue of damages: Vacuum Oil Co. v. Smookler, 282 Mass. 361, 185 N. E. 13 (1933); Lunblad v. Erickson, 180 Minn. 185, 230 N. W. 473 (1930); Comment (1931) 16 MINN. L. REV. 185.

8. Jury trials in civil cases are guaranteed in the Federal courts. U. S. CONST. Amend. VII. This right has been almost universally adopted by the state constitutions. See N. Y. CONST. Art. I, § 2. In Louisiana, however, such a right does not exist in civil cases. See MCCORMICK, DAMAGES (1935) 78, n. 9. In the Arkansas Valley Land & Cattle case, 130 U. S. 69 (1889), cited *supra* note 6, it was contended that this was a re-examination of facts tried by a jury in a mode unknown to the common law, and therefore a violation of U. S. CONST. Amend. VII. *Held*, no violation. See also Burdict v. Missouri Pacific R.R., 123 Mo. 221, 27 S. W. 453 (1893); (1905) HARV. L. REV. 312; and see note 6, *supra*.

For a discussion of the constitutional question involved in *additur*—the enlargement of the recovery allowed by a jury, conditioned only upon the acquiescence of the defendant and preclusive of the plaintiff's right to a new trial—see (1935) 4 FORDHAM L. REV. 344. See also Dimick v. Schiedt, 293 U. S. 474 (1935); Cesario v. Demetrio, 250 App. Div. 272, 294 N. Y. Supp. 26 (1st Dep't 1937).

9. See note 6, *supra*.

10. Minneapolis St. P. & S. Ste. M. R. Co. v. Moquin, 283 U. S. 520 (1931); Tunnel Min. & Leasing Co. v. Cooper, 50 Colo. 390, 115 Pac. 901 (1911); Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930 (1913); Burdict v. Missouri Pacific R.R., 123 Mo. 221, 27 S. W. 453 (1894); Gamble v. Keyes, 49 S. D. 39, 206 N. W. 477 (1925); Olson v. Northern Pacific Ry., 49 Wash. 626, 96 Pac. 150 (1908). The mere fact that the verdict of a jury may be excessive is not alone sufficient to show that it is the result of passion or prejudice. The power lies within the sound discretion of the court. Eleganti v. Standard Coal Co., 50 Utah 585, 168 Pac. 266 (1917).

11. Walker v. New Mexico & So. Pacific R.R., 165 U. S. 593 (1897); Lionel Barber & Co. v. Deutsche Bank [1919] A. C. 304.

the verdict is *radically* wrong and a new trial is fairer. Some courts, however, leave it to the discretion of the court to decide whether or not a new trial is necessary in such an instance.[12] Where the jury is erroneously charged and in obedience to the court's instruction includes in its assessment of damages improper elements which could not be ascertained in amount, a new trial must generally be ordered.[13] This is equally true where an excessive verdict unsupported by substantial evidence has been returned.[14] In general, however, courts are reluctant to interfere with a verdict challenged as excessive, on mere ground of size alone,[15] though it may be argued that inasmuch as the verdict returned is the only mode of expression given by that body, an improper mental attitude is inferable.[16]

Where fixed rules and principles are recognized whereby the measure of damages may be regulated and it can be determined to what extent a verdict is excessive as in some actions on contract[17] where the plaintiff has sustained loss due to the defendant's failure to transfer a commodity of recognized value and for torts to property,[18] the amount of which may be ascertained with reasonable mathematical

12. Kurpgeweit v. Kirby, 88 Neb. 72, 129 N. W. 177 (1910). But see Babbitt v. Union Pac. R.R., 78 Neb. 410, 110 N. W. 1014 (1907) where the verdict for the plaintiff was the result of passion and prejudice, but the appellate court was unable to determine from the record whether plaintiff was entitled to recover more than a nominal sum and it accordingly refused to order a *remittitur*. Accord: Alabama Great So. R. R. v. Roberts, 113 Tenn. 488, 82 S. W. 314 (1904); Brown v. Southern Pacific Co., 7 Utah 288, 26 Pac. 579 (1891); Olson v. Northern Pac. R.R., 49 Wash. 626, 96 Pac. 150 (1908); Brossard v. Morgan Co., 150 Wis. 1, 136 N. W. 181 (1912).

13. Toder v. Jayne 142 Fed. 1010 (E. D. 1906), *rev'd on other grounds*, 149 Fed. 21 (C. C. A. 3d, 1906); West Coast Cattle Co. v. Aguilar, 22 Ariz. 484, 198 Pac. 1103 (1921); Slattery v. St. Louis, 120 Mo. 183, 25 S. W. 521 (1894). And see Lisbon v. Lyman, 49 N. H. 553 (1870) wherein it was said: "It is a general principle that when an error has happened in a trial, the party prejudiced by it has a right to the correction of the error, but has not a right to a new trial if the error can be otherwise corrected; and when it can be corrected only by a new trial, it is still the correction of the error and not the new trial, to which he is entitled."

14. Texas & St. L. Ry. v. Eddy, 42 Ark. 527 (1883); Kelly v. McDonald, 39 Ark. 387 (1882), approved in Coca-Cola Bottling Co. v. Cordell, 189 Ark. 1132, 76 S. W. (2d) 307 (1934); Andrew v. Tyng, 94 N. Y. 16 (1883). But see Mo. P. R.R. v. Remel, 185 Ark. 598, 48 S. W. (2d) 548 (1932); Coca-Cola Bottling Co. v. Eudy, 193 Ark. 436, 100 S. W. (2d) 683 (1937).

15. Pullman Co. v. Walton, 152 Ark. 633, 239 S. W. 385 (1922); Tedford v. Los Angeles Elec. Co., 134 Cal. 76, 66 Pac. 76 (1901); Jeffersonville v. Rogers, 38 Ind. 116 (1871); Hulin v. Western Union, 185 N. C. 470, 117 S. E. 588 (1923).

16. Tunnel Min. & Leasing Co. v. Cooper, 50 Colo. 390, 115 Pac. 901 (1911); McLean v. Amer. Ry. Exp. Co., 243 Mich. 113, 219 N. W. 664 (1928); Coleman v. Southwick, 9 Johns. 45 (N. Y. 1812).

17. Koenigsberger v. Richmond Silver Min. Co., 158 U. S. 41 (1895); Blair Baker Horse Co. v. R. Transfer Co., 59 Ind. App. 505, 108 N. E. 246 (1915); Herrman v. Leland, 163 App. Div. 515, 148 N. Y. Supp. 643 (1st Dep't 1914), *aff'd*, 221 N. Y. 143, 116 N. E. 865 (1917).

18. Carlisle v. Callahan, 78 Ga. 320, 2 S. E. 751 (1887); McGuigan v. Jacobson, 106 Kan. 744, 189 Pac. 962 (1920); Hodges v. Hodges, 5 Metc. 205 (Mass. 1842); Gen. Acc. F. & L. Ins. Corp. v. Bundren, 283 S. W. 491 (Tex. Comm. App. 1926).

definiteness, a *remittitur* of the excess may be awarded without option of a new trial, when such motion is made on ground of excessive damages. The justification for such a principle lies in the theory that such an error does not permeate the entire verdict and may be separated from it without further expense and delay,[19] and that even later verdicts of new juries would have to come to the same sum or be patently improper. Of course this is even more evident in cases of mere mathematical miscalculation.[20]

Few courts have followed the rule in the principal case[21] with regard to unliquidated damages, and the majority of courts have been unanimous in declaring such a practise to be a violation of the constitutional guaranty of trial by jury.[22] It is conceded that the findings of a jury, when substantiated by the evidence, is conclusive,[23] and when not, a new jury trial must be offered the plaintiff. Consequently, to reduce a judgment under such circumstances to such an amount as the court thinks reasonable is to substitute the opinion of the judge for the verdict of the jury and to arrive, at best, at a bald assessment of damage.[24] It is an encroachment upon the jury whose province it is to determine from the evidence what the award shall be.[25] Particularly is this true in actions for personal injury, especially where a recovery for mental suffering is sought. The plaintiff seeks compensation in such cases and as exact compensation is impossible and different individuals will differ as to what is a just amount, the plaintiff has a right to ask a jury to assess it.

19. Blair Baker Horse Co. v. R.R. Transfer Co., 59 Ind. App. 505, 108 N. E. 246 (1915), cited *supra* note 17.

20. Avery v. Thomason, 10 Ga. App. 11, 72 S. E. 525 (1911); Hasbrouck v. Marks, 58 App. Div. 33, 68 N. Y. Supp. 510 (1st Dep't 1901), *aff'd*, 170 N. Y. 594, 63 N. E. 1117 (1902); Rogers v. Emillio, 114 N. Y. Supp. 111 (Sup. Ct. 1909).

21. For a discussion of this problem see Alabama Gt. So. R. Co. v. Roberts, 113 Tenn. 488, 82 S. W. 314 (1904); in Watt v. Watt [1905] A. C. 115, the Court of Appeal ordered a new trial on ground of excessiveness, unless plaintiff should consent to a verdict. The House of Lords reversed this order and ordered a new trial without option of *remittitur*, and this seems to be the rule in England generally.

22. The Supreme Court has held such a decree in a tort action violates the constitutional guaranty of trial by jury in the federal courts. Kennon v. Gilmer, 131 U. S. 22 (1889). "The plaintiff was entitled to the finding of the jury, and until she waived that right the court had no power to determine the question or to change the verdict to her prejudice." Barber v. Maden, 126 Iowa 402, 403, 102 N. W. 120 (1905). See also Coca Cola Bottling Co. v. Cordell, 189 Ark. 1132, 76 S. W. (2d) 307 (1934); Duke v. Fargo, 172 App. Div. 746, 158 N. Y. Supp. 1009 (2d Dep't 1916); Chester Park Co. v. Schulte, 120 Ohio St. 273, 166 N. E. 186 (1929); (1922) HARV. L. REV. 616; (1922) 70 U. OF PA. L. REV. 330; MCCORMICK, DAMAGES (1935) 78.

23. See Manhattan Const. Co. v. Atkisson, 191 Ark. 920, 925, 88 S. W. (2d) 819, 821 (1926).

24. Werne v. Bryden, 84 Cal. App. 472, 258 Pac. 138 (1927).

25. "They saw the witnesses; heard them testify; were able to observe their demeanor on the witness stand, and also had an opportunity to see the appellee himself, and they are therefore, better judges of the extent of the injury and the amount necessary to compensate appellee than this court is, and for that reason the jury is the judge of the credibility of the witnesses and the weight to be given to their testimony." Coca Cola Bottling Co. v. Cordell, 189 Ark. 1132, 1135, 76 S. W. (2d) 307, 309 (1934).

DESCENT AND DISTRIBUTION—RIGHT OF GRANDNEPHEWS AND GRANDNIECES TO TAKE BY REPRESENTATION.—The intestate left surviving her, her husband, one nephew, two nieces, one grandnephew and three grandnieces. The administrator contends that the grandnephew and grandnieces are not distributees under the statute, providing as follows: "4. If the deceased leaves a surviving spouse, and no descendant, parent, brother or sister, nephew or niece, the surviving spouse shall be entitled to the whole thereof; but if there be a brother or sister, nephew or niece, and no descendant or parent, the surviving spouse shall take ten thousand dollars and one half of the residue, and the balance shall descend and be distributed to the brothers and sisters and *their representatives*."[1] On motion to require the administrator to file an amended petition, *held*, that grandnephews and grandnieces are representatives of brothers and sisters and are distributees under the statute. *Matter of Martin*, 170 Misc. 813, 12 N. Y. S. (2d) 316 (Surr. Ct. 1939).

Since the passage of Section 83(4) of the Decedent Estate Law by the New York Legislature,[2] the instant case is the first one involving its peculiar fact situation. In the light of the present decision the statute presents an anomaly. If the decedent be survived by his or her spouse and no parent, descendant, brother or sister, nephew or niece, it is clear that the children of the deceased nephews and nieces are excluded from taking by representation.[3] If a brother or sister, nephew or niece, survive the decedent, however, then the grandnephews and grandnieces are admitted to representation. If the surviving spouse is to be preferred to the exclusion of grandnephews and grandnieces in one situation, there seems to be no reason why a circumstance outside the control of the surviving spouse and the grandnephews and grandnieces, namely the fact that the deceased left surviving him or her brothers or sisters, nephews or nieces, should alter their rights. If consistency and logical symmetry are desirable in the law, then the New York law upon this point is unsatisfactory.

In the quest for a more suitable rule, a glance at the past might be enlightening. In England the right to take personal property by representation among collaterals was limited to the children of brothers and sisters of the intestate by the Statute of Distribution.[4] Nor is there any dearth of early English decisions based on the statute and applying its rule.[5] The antiquity of the Statute of Distribution (1671) and the abundant English case law on the point, prior to 1776, justify reference to the rule as the common law rule, at least in consideration of the general conception of what constituted the common law of the various United States at the time of the Revolution.[6] Moreover, the tenor of the early American cases,[7] many of them

1. N. Y. DEC. EST. LAW § 83(4) (Italics inserted).

2. N. Y. Laws 1929, c. 229.

3. Matter of Marshall, 146 Misc. 601, 262 N. Y. Supp. 523 (Surr. Ct. 1933), *aff'd without opinion*, 239 App. Div. 768, 263 N. Y. Supp. 936 (1st Dep't 1933).

4. 22 & 23 CAR. II, c. 10, § 7 (1671). "VII. Provided, that there be no representatives admitted among collaterals after brothers' and sisters' children; . . . "

5. Carter v. Crowley, 1 Freem. 299, 89 Eng. Reprints 216 (K. B. 1680); Caldicot v. Smith, 2 Show. 286, 89 Eng. Reprints 943 (K. B. 1683); Welch v. Welch, 2 Freem. Ch. 189, 22 Eng. Reprints 1153 (1692); Rex v. Raines, 1 Ld. Raym. 571, 91 Eng. Reprints 1281 (K. B. 1700); Stanley v. Stanley, 1 Atk. 455, 26 Eng. Reprints 289 (K. B. 1739). See also 2 BL. COMM. *515.

6. Namely, the common law of England and such English statutes "as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances." DECLARATION OF RIGHTS OF THE

decided under statutes similar to the Statute of Distribution, is much the same as that of the English cases. Some cases,[8] under similar but not identical statutes, show a tendency to relax the rule to the extent of admitting grandnephews and grandnieces to representation, although sometimes expressly limiting it to them.[9]

The Statute of Distribution became law in New York in 1774 by express re-enactment by the General Assembly of the Colony,[10] although it was probably law in the colony before then.[11] The Revised Statutes of 1830 made no substantial change in its provisions.[12] In 1893 the provision of the law limiting the right to take personal property by representation among collaterals to brothers' and sisters' children was re-enacted as Section 2732 of the Code of Civil Procedure;[13] it was essentially still the rule of the Statute of Distribution. After this rule had been law, by statute, for one hundred and twenty-four years, Section 2732 was amended so as to provide: "Representation shall be admitted among collaterals in the same manner as allowed by law in reference to real estate."[14] Thus the rule governing the descent of real property was applied to real and personal property equally. Under the amended Section 2732 the New York courts held that grandnephews and grandnieces were entitled to take by representation.[15] This is in accordance with

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CONTINENTAL CONGRESS (1774). See interesting discussion of this point by Chief Justice Shaw in Commonwealth v. Chapman, 13 Metc. 68 (Mass. 1848). See also POUND, THE FORMATIVE ERA OF AMERICAN LAW (1938) 8 and 32, n. 9.

7. In re Curry's Estate, 39 Cal. 529 (1870); Quinby v. Higgins, 14 Me. 309 (1837); Davis v. Stinson, 53 Me. 493 (1866); Duvall v. Harwood's Adm'rs, 1 Harr. & Gill 474 (Md. 1827); McComas v. Amos, 29 Md. 120 (1868); *id.* 29 Md. 132 (1868); Bigelow v. Morong, 103 Mass. 287 (1869); Van Cleve v. Van Fossen, 73 Mich. 342, 41 N. W. 258 (1889); In re Chapoton's Estate, 104 Mich. 11, 61 N. W. 892 (1895); Douglas v. Cameron, 47 Neb. 358, 66 N. W. 430 (1896); Doughty v. Stillwell, 1 Bradf. 300 (N. Y. 1850); Poaug v. Gadsden, 2 Bay 293 (S. C. 1801); North v. Valk, Dud. Eq. 212 (S. C. 1838); Penniman v. Francisco, 48 Tenn. 511 (1870); Hatch v. Hatch, 21 Vt. 450 (1849). See also 2 KENT COMM. *424. "Children" in the descending collateral line has been held not to include grandchildren, but only descendants one degree removed. In re Curry's Estate, *supra*; In re Chapoton's Estate, *supra*.

8. Doane v. Freeman, 45 Me. 113 (1858); In re Reynolds, 57 Me. 350 (1869); Copenhaven v. Copenhaven, 78 Mo. 55 (1883); Appeal of Lane, 28 Pa. 487 (1857); Daboll v. Field, 9 R. I. 266 (1869); Gaines v. Strong's Estate, 40 Vt. 354 (1866). For an earlier case holding to the same effect as those cited *supra*, see Rodman's Heirs v. Smith, 2 N. J. L. 3 (1806).

9. Stetson v. Eastman, 84 Me. 366, 24 Atl. 868 (1892).

10. LAWS OF THE COLONY OF NEW YORK, 14 & 15 GEO. III, c. 9 (1774).

11. See note 6, *supra*.

12. 2 N. Y. REV. STAT. (1830) 96, § 75.

13. N. Y. Laws 1893, c. 696, § 2732(12).

14. N. Y. Laws 1898, c. 319, § 2732(12).

15. Matter of Samson, 257 N. Y. 358, 178 N. E. 557 (1931); Matter of Ebbets, 43 Misc. 575, 89 N. Y. Supp. 544 (Surr. Ct. 1904), *aff'd*, Matter of De Voe, 107 App. Div. 245, 94 N. Y. Supp. 1129 (2d Dep't 1905), *aff'd without opinion*, 185 N. Y. 536, 77 N. E. 1185 (1906); Matter of Prote, 54 Misc. 495, 104 N. Y. Supp. 581 (Surr. Ct. 1907), *aff'd*, 133 App. Div. 928, 118 N. Y. Supp. 1136 (2d Dep't 1909); Matter of Fleming, 48 Misc. 589, 98 N. Y. Supp. 306 (Surr. Ct. 1905); Matter of Farmer's Loan Co., 68 Misc. 279, 125 N. Y. Supp. 78 (Surr. Ct. 1910).

the well-established rule governing the descent of real property.[16] This rule was incorporated in the Decedent Estate Law at its passage in 1909.[17] In 1929 the new Section 81 of the Decedent Estate Law[18] abolished "all existing modes, rules and canons of descent." Thus the rule of the Statute of Distribution and the real property rule, after having each in their turn been law in New York, were abolished at one stroke by the Legislature. Nothing but the provisions of the Decedent Estate Law is to govern descent and distribution.[19]

The leading case in New York under the rule of the Statute of Distribution was *Doughty v. Stillwell*,[20] identical in its essential facts to the instant case. However, the statute[21] governing that case has not been law in New York since 1898[22] and the court in the instant case distinguishes *Doughty v. Stillwell*[23] upon that ground. In *Matter of Marshall*[24] the court discussed the situation which arose in the instant case and came to the same conclusion as the present decision. Although that conclusion was merely dicta, the question not then being before the court, still it has persuasive authority. The court in that case recognized the inconsistency presented by the statute.[25]

The two rules which prevailed in New York prior to 1929, *i.e.*, the rule of the Statute of Distribution and the real property rule were both better rules than the present rule. Under the rule of the Statute of Distribution which excluded grandnephews and grandnieces from representation, the surviving spouse would take to the exclusion of the grandnephews and grandnieces, whether there were surviving brothers or sisters, nephews or nieces, or not.[26] Under the rule governing the descent of real property, the grandnephews and grandnieces would take as representatives in either case.[27] Neither rule presented the inconsistency of the present one, which permits the grandnephews and grandnieces to take by representation when the decedent is survived by brothers or sisters, nephews or nieces, as in the instant case, or excludes them when no brothers or sisters, nephews or nieces survive the decedent.

16. Pond v. Bergh, 10 Paige 140 (N. Y. 1843); Beebe v. Griffing, 14 N. Y. 235 (1856). See also 4 KENT COMM. *440.

17. N. Y. Laws 1909, c. 18.

18. N. Y. Laws 1929, c. 229.

19. N. Y. DEC. EST. LAW (1929) § 81.

20. 1 Bradf. 300 (N. Y. 1850).

21. 2 N. Y. REV. STAT. 96, § 75.

22. See note 14, *supra*.

23. 1 Bradf. 300 (N. Y. 1850).

24. 146 Misc. 601, 262 N. Y. Supp. 528 (Surr. Ct. 1933), *aff'd without opinion*, 239 App. Div. 768, 263 N. Y. Supp. 936 (1st Dep't 1933).

25. See Matter of Marshall, 146 Misc. 601, 603, 262 N. Y. Supp. 528, 529 (Surr. Ct. 1933).

26. Doughty v. Stillwell, 1 Bradf. 300 (N. Y. 1850).

27. Pond v. Bergh, 10 Paige 140 (N. Y. 1843); Beebe v. Griffing, 14 N. Y. 235 (1856); Matter of Samson, 257 N. Y. 358, 178 N. E. 557 (1931); Matter of Ebbets, 43 Misc. 575, 89 N. Y. Supp. 544 (Surr. Ct. 1904), *aff'd*, Matter of De Voe, 107 App. Div. 245, 94 N. Y. Supp. 1129 (2d Dep't 1905), *aff'd without opinion*, 185 N. Y. 536, 77 N. E. 1185 (1906); Matter of Prote, 54 Misc. 495, 104 N. Y. Supp. 581 (Surr. Ct. 1907), *aff'd*, 133 App. Div. 928, 118 N. Y. Supp. 1136 (2d Dep't 1909); Matter of Fleming, 48 Misc. 589, 98 N. Y. Supp. 306 (Surr. Ct. 1905); Matter of Farmers' Loan Co., 68 Misc. 279, 125 N. Y. Supp. 78 (Surr. Ct. 1910).

The instant case may be criticized by suggesting that the legislative intent to exclude grandnephews and grandnieces from taking by representation in all cases is clear from the first part of subdivision 4 of Section 83 which permits the surviving spouse to take all when the grandnephews and grandnieces are the sole living collaterals. However, the language of the second part of the subdivision is clear. As is intimated in the instant case and in *Matter of Marshall*,[28] the inconsistency is chargeable to the legislature and not to the courts. When the language of the statute is clear the courts can do no more than heed the legislative behest. The correction of this inconsistency is a matter calling for legislative, not judicial, action.

EQUITY—INJUNCTION—RESTRAINING ACTION IN FOREIGN JURISDICTION.—Plaintiff, a domestic corporation with its principal place of business in New York, instituted an action for a permanent injunction restraining the defendant, a citizen of New York, from prosecuting an action for breach of contract instituted by him in an English court. The writ of the English court was delivered to an officer of the plaintiff within the City of New York. Plaintiff made an application for an injunction *pendente lite*. The Supreme Court granted the injunction. Defendant appealed. *Held*, two justices dissenting, that in the absence of fraud, bad faith, or attempt to evade the law or public policy of the state, the court will not exercise its discretionary power to issue an injunction restraining the prosecution of an action in a foreign jurisdiction. The appropriate forum in which to test the effect of the alleged service of the process herein is the English court. Injunction denied. *Paramount Pictures, Inc. v. Blumenthal*, 256 App. Div. 756, 11 N. Y. S. (2d) 768 (1st Dep't 1939).

The following question was certified by the Appellate Division to the Court of Appeals: "Upon the record was the defendant, Ben Blumenthal, as a matter of law, entitled to an order reversing the order of the Special Term?" *Held*, appeal dismissed with costs. Question certified was not answered. The certified question is not decisive of the issue, which is one of fact. It is not a question of power but of discretion. All concur. *Paramount Pictures, Inc. v. Blumenthal*, N. Y. L. J., Oct. 11, 1939, p. 1078, col. 3.

In view of the Court of Appeals' memorandum, it may be worthwhile to analyze the decision rendered by the Appellate Division in the exercise of its discretionary powers.

In an early Chancery case it was held that an injunction would not lie to restrain an action in a foreign court.[1] Subsequently, it was uniformly held that although the Chancery Court could not act directly upon the foreign court to enjoin a suit improperly instituted in another country, it may stop the prosecution of such suit indirectly by granting an injunction which will operate directly upon the person who so attempts to prosecute it.[2]

A court has the power to compel its own citizens to respect its laws, even beyond

28. See 146 Misc. 601, 603, 262 N. Y. Supp. 528, 529 (Surr. Ct. 1933).

1. Lowe v. Baker, 2 Freem. Ch. 125, 22 Eng. Reprints 1101 (Ch. 1665), *overruled*, Portarlington v. Soulby, 3 Myl. & K. 107, 40 Eng. Reprints 41 (Ch. 1834).

2. Venning v. Lloyd, 1 De G. F. & J. 193, 45 Eng. Reprints 332 (Ch. 1859). See Cole v. Cunningham, 133 U. S. 107, 121 (1890); 2 STORY, EQUITY JURISPRUDENCE (13th ed. 1886) §§ 899, 900.

its own territorial limits.[3] The power of the courts to restrain one citizen from prosecuting in the courts of a foreign state an action against another, which will result in a fraud, gross wrong, or oppression, is undoubted.[4] It is the province of a court of equity to prevent one party from taking an unconscionable advantage of another, and when that may be attempted, to interpose and restrain the attempt by means of an injunction.[5] However, it should be carefully noted that courts of equity, from motives of comity and public policy, have very properly refused, except in special cases, to restrain by injunction parties residing within its jurisdiction from proceeding in actions commenced in the courts of a sister or foreign state.[6] However, no rule of comity or public policy forbids or precludes the issuance of an injunction to prevent oppression or fraud.[7]

Generally speaking, a suit may not be maintained in a foreign state where the maintenance and defense of such suit would be unjust, inequitable, or would impose an unconscionable and unreasonable burden on the defending party.[8]

3. Royal League v. Kavanagh, 233 Ill. 175, 84 N. E. 178 (1903); Thorndike v. Thorndike, 142 Ill. 450, 32 N. E. 510 (1892). It may be noted that there are cases which would lead the reader to believe that injunctive relief is limited to citizens of the state in which such relief is sought. Kern v. Cleveland, 204 Ind. 595, 185 N. E. 446 (1933). The instant case is also in this category. However, there are many cases which state that a court of equity will act against all persons within its jurisdiction, irrespective of their citizenship. In these cases it would seem that effective service of process will be sufficient to give the court jurisdiction over the parties. Dehon v. Foster, 4 Allen 545 (Mass. 1862); Portarlington v. Soulby, 3 Myl. & K. 107, 40 Eng. Reprints 41 (Ch. 1834); The Salvore, 36 F. (2d) 712 (C. C. A. 2d, 1929). See also Wabash Ry v. Peterson, 187 Iowa 1331, 1339, 175 N. W. 523, 527 (1919); RESTATEMENT, CONFLICT OF LAWS (1934) §§ 94, 96.

On the same question of jurisdiction it would appear that there is an apparent distinction between matrimonial actions and commercial actions. Courts of equity will entertain suits in commercial cases regardless of domicile, whereas in matrimonial actions, it would seem that equity will only act when defendant's domicile is within the confines of the state. Note also that in matrimonial cases, the plaintiff's domicile is usually within the state. See notes 13, 14, *infra*. Also see Dublin v. Dublin, 150 Misc. 694, 695, 270 N. Y. Supp. 22, 23, 24 (Sup. Ct. 1934). RESTATEMENT, CONFLICT OF LAWS (1934) § 96; RESTATEMENT, CONFLICT OF LAWS, N. Y. ANNOT. (1935) § 96.

4. Guggenheim v. Wahl, 203 N. Y. 390, 96 N. E. 726 (1911), Ann. Cas. 1913 B. 201. See 1 BEALE, CONFLICT OF LAWS (1935) § 96 (1). For comments on the power of a court of equity to order or forbid an act outside the forum, see RESTATEMENT, CONFLICT OF LAWS (1934) §§ 94, 96; RESTATEMENT, CONFLICT OF LAWS, N. Y. ANNOT. (1935) §§ 94, 96. *Cf.* Kempson v. Kempson, 58 N. J. Eq. 94, 43 Atl. 97 (1899).

5. Claflin v. Hamlin, 62 How. Prac. 284 (N. Y. 1881).

6. Weaver v. Railway, 200 Ala. 432, 76 So. 364 (1917); Jones v. Hughes, 156 Iowa 684, 137 N. W. 1023 (1912); Wabash Ry v. Peterson, 187 Iowa 1331, 175 N. W. 523 (1919); Mason v. Harlow, 84 Kan. 277, 114 Pac. 218 (1911); Mead v. Merritt, 2 Paige 402 (N. Y. 1831); Schuyler v. Pelissier, 3 Edw. Ch. 191 (N. Y. 1838); Williams v. Agrault, 31 Barb. 364 (N. Y. 1860); Vail & Robinson v. Knapp, 49 Barb. 299 (N. Y. 1867).

7. Vail & Robinson v. Knapp, 49 Barb. 299 (N. Y. 1867).

8. Kern v. Cleveland, 204 Ind. 595, 185 N. E. 446 (1933); Kempson v. Kempson, 58 N. J. Eq. 94, 43 Atl. 97 (1899); Guggenheim v. Wahl, 203 N. Y. 390, 96 N. E. 726 (1911).

When an action is already pending in the court of the domicile and defendant threatens an action upon the same controversy in a foreign court, an injunction may be granted to prevent the prosecution of such action. Field v. Holbrook, 3 Abb. Prac. 377 (N. Y. 1867).

Ordinarily, a court of equity has considerable discretion in determining whether or not to grant an injunction under the facts and circumstances of a given case; unless there has been a flagrant abuse of that discretion, the trial court's decision should not be interfered with on appeal.[9] The weight of authority, however, is that a court of equity should enjoin an oppressive and vexatious action since it would subject defendant to great hardship, inconvenience, and expense in defending such action.[10]

In the instant case, the Appellate Division reversed the order of the lower court in granting the injunction, without expressly holding that the trial court had been guilty of an abuse of discretion. Instead, the majority court analyzes and classifies two typical situations in which a court of equity will grant relief, (1) to prevent embarrassment, oppression, or fraud,[11] (2) to prevent evasion of the laws of the domicile of the parties.[12] The court cites as an illustration of the first category the case of *Greenberg v. Greenberg*.[13]

An analysis of the *Greenberg* case reveals that the important factors were (a) lack of jurisdiction of the Mexican court over the plaintiff, (b) the inconvenience and burdensome expense of transporting witnesses to and maintaining them in Mexico, (c) the annoyance caused to the plaintiff by any necessity for defending the action, and (d) the customary interest of the state in matrimonial cases and the natural desire to protect its residents against an upheaval in the matrimonial status, no matter how invalid the foreign divorce may be.

Of these factors, all but the last one are present in the instant case. We are therefore confronted with the question as to whether the doctrine of the *Greenberg* case is equally applicable to commercial cases where a resident of New York seeks

9. Spicer v. Hoop, 51 Ind. 365 (1875); People's Gas Co. v. Tynes, 131 Ind. 277, 31 N. E. 59 (1892).

10. Kern v. Cleveland, 204 Ind. 595, 185 N. E. 446 (1933).

11. Kempson v. Kempson, 58 N. J. Eq. 94, 43 Atl. 97 (1899). See 1 BEALE, CONFLICT OF LAWS (1935) § 96 (1).

12. Cole v. Cunningham, 133 U. S. 107 (1890). The U. S. Supreme Court also held in this case that the issuance of an injunction against prosecution of an action in the court of another state is not unconstitutional. See also Stevens v. C. N. Bank, 144 N. Y. 50, 59, 39 N. E. 68, 71 (1894).

In Dehon v. Foster, 4 Allen 545 (Mass. 1862), the Supreme Court of Massachusetts enjoined a citizen of that state from prosecuting a debtor by attachment in Pennsylvania because the effect of allowing the attachment suit to go to judgment would be to give the attaching creditor a preference over the other creditors and so defeat the operation of the Massachusetts Insolvency Law.

In Indiana an injunction issued where an attempt was made to enforce a claim in a foreign jurisdiction in such a manner as to deprive the debtor of his exemption under the laws of Indiana. Wilson v. Josephs, 107 Ind. 490, 8 N. E. 616 (1886). The same doctrine was held in Snook v. Snetzer, 25 Ohio St. 516 (1874), and in Griggs v. Doctor, 89 Wis. 161, 46 Am. St. Rep. 824 (1895).

13. Greenberg v. Greenberg, 218 App. Div. 104, 218 N. Y. Supp. 87 (1st Dep't 1926). The court reversed the order of Special Term and granted plaintiff's action for a temporary injunction. It appeared that plaintiff, a resident of the State of New York, sought to restrain the defendant, likewise a New York resident, from prosecuting an action for divorce against the plaintiff in Mexico. The complaint alleged that the plaintiff would be required to bring witnesses from New York and maintain them in Mexico, to undergo the expenses of employing counsel in Mexico and, further, that the Mexican court had acquired no jurisdiction over the plaintiff.

relief against the possibility of a foreign judgment which can have no validity here because of the court's lack of jurisdiction.[14]

Several of the matrimonial cases seem to base their holdings not upon the question of public policy, but rather upon the ground that the foreign court did not obtain jurisdiction over the person or the property of the defendant.[15]

But even if the element of public policy were an essential prerequisite for the application of the *Greenberg* doctrine, is not that element of public policy present in the instant case? In these times, when the lot of a defendant in far off jurisdictions may not be as fortunate as the plaintiff's, should a New York court permit one of its residents to sue another in a "remote corner of the world",[16] although jurisdiction over the latter has not been legally obtained? Assuming that the English judgment would not be enforceable in New York, it does not follow that the grounds for equitable intervention prior to such judgment are removed. The needless expense of defending the English suit, or if it is not defended, the necessity of defeating the English judgment in New York argues for injunctive relief.

But there are other considerations which militate against the conclusion that the principle of the *Greenberg* case applies only to matrimonial cases. It has already been stated, and the majority court in the instant case agreed, that a foreign suit will be enjoined to prevent embarrassment, oppression, or fraud. Under this doctrine many courts in this country have even in commercial cases granted injunctions restraining the prosecution of an action in a foreign jurisdiction, because such actions imposed a harsh and unreasonable burden upon defendant and subjected defendant to unjustifiable harassment and inconvenience.[17] In these cases the courts held the foreign suit to be vexatious and oppressive despite the fact that the foreign tribunal had obtained jurisdiction over the defendant.

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14. Although the majority refused to pass on the question of jurisdiction on the ground that it was properly determinable in the English court, it seems that any such judgment rendered in the English court would be invalid and unenforceable in New York. Bischoff v. Wethered, 76 U. S. 812 (1869); Pennoyer v. Neff, 95 U. S. 714 (1877); Hess v. Pawloski, 274 U. S. 352 (1927); Gilbert v. Burnstine, 255 N. Y. 348, 174 N. E. 706 (1931); Skandinaviska Granit Aktiebolaget v. Weiss, 226 App. Div. 56, 234 N. Y. Supp. 202 (2nd Dep't 1929); Kerr v. Tagliavia, 101 Misc. 614, 168 N. Y. Supp. 697 (Sup. Ct. 1917), *aff'd*, 186 App. Div. 893, 172 N. Y. Supp. 901 (1st Dep't 1918), *appeal dismissed*, 229 N. Y. 542, 129 N. E. 907 (1920), *cert. denied*, 254 U. S. 645 (1920).

15. See Gwathmey v. Gwathmey, 116 Misc. 85, 88, 190 N. Y. Supp. 199, 200, 201 (Sup. Ct. 1921), *aff'd without opinion*, 201 App. Div. 843, 193 N. Y. Supp. 935 (1st Dep't 1922). See also Kempson v. Kempson, 58 N. J. Eq. 94, 95, 43 Atl. 97, 98 (1899), cited with approval by the majority court in the instant case.

16. Untermeyer, J., dissenting in Paramount Pictures, Inc. v. Blumenthal, 256 App. Div. 756, 761, 11 N. Y. S. (2d) 768, 773 (1st Dep't 1939).

17. *Ex parte* Crandall, 52 F. (2d) 650 (S. D. Ind. 1931), *aff'd*, 53 F. (2d) 969 (C. C. A. 7th 1931), *cert. denied*, 285 U. S. 540 (1931); O'Haire v. Burns, 45 Col. 432, 101 Pac. 755 (1909); Kern v. Cleveland, 204 Ind. 595, 185 N. E. 446 (1933); Wabash Ry v. Peterson, 187 Iowa 1331, 175 N. W. 523 (1919); Bankers' Life Co. v. Loring, 217 Iowa 534, 250 N. W. 8 (1933); Northern Pacific Ry v. Richey & Gilbert Co., 132 Wash. 526, 232 Pac. 355 (1925). Upon analysis, it would appear that the matrimonial and commercial cases are interrelated. In Greenberg v. Greenberg, 218 App. Div. 104, 109, 218 N. Y. Supp. 87, 92 (1st Dep't 1926), the court quoted from Cole v. Cunningham, 133 U. S. 107 (1890). The cases there relied upon were not matrimonial actions, showing clearly that the granting

Since similar circumstances are present in this case, added to the important fact that the foreign court lacks jurisdiction over the defendant, thus rendering any judgment void and ineffectual, it would appear that under the foregoing authorities an injunction should have been granted in this case. It would seem logical to conclude that if the judgment to be rendered by the English court would be declared void by the courts of this state, injunctive relief should be afforded in advance. A resident ought not be subjected to the detriment and injury of a worthless judgment in a foreign court before our courts declare its worthlessness.

The majority, however, held that for an injunction to be granted in the principal case, there must be present the element of malice or bad faith.[18] None of the foregoing cases granting an injunction to prevent embarrassment, oppression, or fraud imposed such a prerequisite. Indeed, one case specifically eliminated this element from consideration in concluding that the action was vexatious and oppressive.[19]

Therefore, faced with the contention that the English court had no jurisdiction to render an effective judgment, even in the absence of bad faith it would seem that the court of the parties' domicile should decide the question of jurisdiction. A finding that the English court has no jurisdiction should result in the granting of an injunction to restrain the prosecution of a foreign suit.

EVIDENCE—PRIVILEGED COMMUNICATIONS—ADMISSIBILITY OF LAWYER'S TESTIMONY RE PREPARATION OF WILL UNDER § 354 C.P.A.—The testator had consulted a lawyer about making a will. The lawyer never drew the will, but shortly after the consultation, testator drew up his own will on a printed form, with the aid of a third person. On probate of the will, proponents introduced the lawyer as a witness over contestant's objection that communications between testator and the lawyer were privileged under § 353 C.P.A. The Surrogate admitted the testimony. On appeal, two judges dissenting, *held,* the testimony was admissible under the exception contained in Section 354 of the New York Civil Practice Act[1] since the lawyer had participated in "the preparation of the will", by virtue of the advice given in the

of such relief is not peculiar to divorce proceedings. See Von Bernuth v. Von Bernuth, 76 N. J. Eq. 177, 183, 73 Atl. 1049, 1051 (1909).

18. The majority court cites as authority for its holding, the case of Calvo v. Bartolotta, 112 Conn. 396, 152 Atl. 311 (1930). An examination of the Calvo case, however, discloses that it did not involve an action for an injunction restraining the prosecution of a foreign suit. There was no question of the propriety of the forum. The court held, merely, that an action could lie for malicious abuse of process only when the plaintiff had previously been subjected to a vexatious suit maliciously instituted by the defendant.

19. Wabash Ry v. Peterson, 187 Iowa 1331, 175 N. W. 523 (1919).

1. " . . . But nothing contained in this section or in § 353 shall be construed to disqualify an attorney, or his employees, in the probate of a will heretofore executed or offered for probate or hereafter to be executed or offered for probate or in any proceeding whatsoever involving the validity or construction of such a will, from becoming a witness as to the preparation and execution of the will so offered for probate or required to be construed or of any prior will, or of any indenture, deed of trust or instrument affecting such construction, whether such attorney is or is not one of the subscribing or attesting witnesses thereto. But such attorney or his employees, upon a trial or examination, shall not be permitted to disclose any confidential communications which would tend to disgrace the memory of the decedent."

consultation with testator. Decree affirmed. *Matter of Matheson*, 12 N. Y. S. (2d) 629 (2d Dep't 1939).

The common law rule, governing the admissibility in evidence of communications between attorney and client, applicable in most jurisdictions, holds in its most general aspect that the communications between an attorney and his client are privileged, so that the attorney can neither be permitted nor compelled to reveal them without express permission of the client.[2] However, with reference to the communications between a testator and his attorney, most common law jurisdictions apply the privilege only during the life of the testator;[3] after his death, the privilege is removed and the attorney may reveal the communications.[4] This was the rule with its above-stated attendant exception that prevailed in New York until 1876,[5] when the New York Legislature codified the rule and abrogated the exception by passing Sections 835 and 836[6] of the Code of Civil Procedure, now, in greatly altered form, Sections 353 and 354 of the Civil Practice Act.[7] The statutory changes enacted in 1876 made all professional communications between client and attorney absolutely privileged, unless expressly waived by the client. No exception was made to allow for will-preparing consultations, the common law exception was dead. The decision in this case, however, marks the complete return to the common law exception which the N. Y. courts and legislature have been gradually effecting since its repudiation in 1876.

Whether the original statute of 1876 was intended to kill the exception, or whether it was merely an inadvertent omission of the exception, is not clear.[8] But the first break in the statutory dike occurred in 1888 through judicial infiltration, when the Court of Appeals in *Matter of Coleman*[9] stated that the testator's appointment of his lawyer as a witness to the execution of the will was an express waiver of the privilege and allowed the lawyer to testify to the preparation and execution of the will. But this was a case of a satisfactory result achieved by unsatisfactory reasoning: the waiver, if waiver it was, achieved by appointing the attorney witness to the execution was certainly not an "express waiver" and moreover it could not logically go beyond matter related to the execution, as distinguished from the preparation, of the will. By amendment to Section 836 of the Code of Civil Procedure

2. Alexander v. United States, 138 U. S. 353 (1891); Bobo v. Bryson, 21 Ark. 387 (1860); Brown v. Butler, 71 Conn. 576, 42 Atl. 654 (1899); Wade v. Ridley, 87 Me. 368, 32 Atl. 975 (1895); see Britton v. Lorenz, 45 N. Y. 51, 57 (1871); 3 FORD, EVIDENCE (1935) § 290; 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2292.

3. Doherty v. O'Callaghan, 157 Mass. 90, 31 N. E. 726 (1892); Pierce v. Farrar, 60 Tex. Civ. App. 12, 126 S. W. 932 (1910); Russell v. Jackson, 9 Hare 387, 68 Eng. Reprints 558 (Ch. 1851); see Note 64 A. L. R. 184, 185.

4. Glover v. Pattern, 165 U. S. 394 (1897); Bonta v. Sevier, 202 Ky. 334, 259 S. W. 703 (1924); *In re* Healy, 94 Vt. 128, 109 Atl. 19 (1920); see Champion v. McCarthy, 228 Ill. 87, 97, 81 N. E. 808, 812 (1907); 5 WIGMORE, *op. cit. supra* note 2, § 2314.

5. Sheridan v. Houghton, 16 Hun. 628 (N. Y. 1879); Matter of Chapman, 27 Hun. 573 (N. Y. 1882); see Matter of Cunnion, 201 N. Y. 123, 128, 94 N. E. 648, 650 (1911).

6. N. Y. Laws 1876, c. 448, § 835.

7. The Civil Practice Act came into being with the enactment of N. Y. LAWS 1920, c. 925.

8. The late Surrogate Fowler, in questioning the wisdom of the statute, in Matter of Campbell, 136 N. Y. Supp. 1086, 1108 (Surr. Ct. 1912), implied that it was the intent of the legislature to overrule this corollary to the common law rule.

9. 111 N. Y. 220, 19 N. E. 71 (1888).

in 1892, the legislature provided that an attorney could act as witness to the execution of a will and thereafter might give testimony in connection with that execution, and also with the preparation of the will. By making statutory the result of the *Coleman* decision, insofar as it applied to waiver of the privilege, the legislature seemingly renounced by implication the *ratio decidendi* of that case[10] and restored the definition of "express waiver" to a more normal condition.

In 1934, another important amendment further liberalized the slowly disintegrating statutory rule.[11] This amendment allowed the attorney to testify to the preparation of the will in question "whether or not he was one of the subscribing witnesses thereto." The effect of this amendment, of course, was a huge step backward in the general direction of the common law exception.[12]

Then in 1935, in the wake of a decision that the revocation of a will and the making of a new will precluded the attorney who prepared the first will from testifying to its preparation,[13] still another amendment was added.[14] This allowed

10. Although the Court of Appeals in Matter of Cunnion, 201 N. Y. 123, 132, 94 N. E. 648, 651 (1911), denied that the amendment of 1892 affected its reasoning in the Coleman case, Judge Wallace in Butler v. Fayerweather, 91 Fed. 458 (C. C. A. 2d, 1899), at 461, states that since the amendment no waiver is valid unless it is expressly made by the testator.

Both the CODE CIV. PROC. (1904) § 836 and the present CIV. PRAC. ACT (1936) § 354 provided that the privilege applies unless it is "expressly waived upon the trial or examination, by the client." This at first was interpreted very broadly so as to include waivers that were strictly express. See Bartlett v. Bunn, 56 Hun. 507, 10 N. Y. Supp. 210 (1890), and Matter of Coleman, 111 N. Y. 220, 19 N. E. 71 (1888) which, as indicated in the text, impelled the legislature to take a hand. After the amendment of 1892 the courts became stricter and an express waiver had to be shown. See Matter of Sears, 33 Misc. 141, 142, 68 N. Y. Supp. 363, 364 (Surr. Ct. 1900); Matter of Francis, 73 Misc. 148, 153, 132 N. Y. Supp. 695, 700 (Surr. Ct. 1911); Gick v. Stumpf, 126 App. Div. 548, 110 N. Y. Supp. 712 (3d Dep't 1908). This would seem to indicate a recognition by the courts of the implied renunciation by the legislature of the reasoning of the Coleman case.

11. N. Y. Laws 1934, c. 305.

12. Two other minor amendments were introduced by the same chapter. The first broadened the scope of the exception to include attorneys "or their employees." This was merely a legislative patch placed on the law after the courts of the state, in Matter of Putnam, 135 Misc. 311, 238 N. Y. Supp. 112 (Surr. Ct. 1929), *aff'd*, 231 App. Div. 707 (1st Dep't 1930), had revealed this deficiency: Section 353, prohibiting attorneys from disclosing communications made by a client, extended in so many words to employees of the attorney. Section 354, however, left out the word "employees" in permitting an attorney to testify where he had become a subscribing witness to the will; the courts read "employees" into Section 354, so the amendment was merely confirmative.

The other minor change precluded the attorney or his employees from disclosing any communication which would tend to disgrace the memory of the client. While this would seem to be a beneficial addition to the law, the meaning and limitation of the words "tend to disgrace the memory" have not yet been litigated. Under the common law, a lawyer was not bound by any such provision. Bonta v. Sevier, 202 Ky. 334, 259 S. W. 703 (1924); see Wilkinson v. Service, 249 Ill. 146, 149, 94 N. E. 50, 52 (1911); Daniel v. Daniel, 39 Pa. 191, 210 (1861); 5 WIGMORE, *op. cit. supra* note 2, § 2314. *Contra*: Holyoke v. Holyoke, 110 Me. 469, 87 Atl. 40 (1913).

13. Matter of McCulloch, 263 N. Y. 408, 189 N. E. 473 (1934).

14. N. Y. Laws 1935, c. 200.

an attorney (or his employees) to testify to the preparation and execution of the will offered for probate or the preparation and execution of any prior will.

There was still doubt whether the attorney could testify in a proceeding for the construction of a will as well as in a probate proceeding. This doubt was temporarily removed by Surrogate Foley in *Matter of Tinker*,[15] when he held, in consonance with the changed public policy of courts and legislature in this regard, that Section 354 of the Civil Practice Act was not to be construed in a technical manner, but liberally, and allowed an attorney to testify to incidents of the preparation of a will, in a hearing involving construction of the will. And the doubt was permanently put at rest when the legislature added the latest amendment in 1936,[16] expressly allowing such testimony in construction proceedings.

The effect of this last change was to complete the cycle. Its liberality inspired Surrogate Slater to say:[17] "The bar (of privileged communications) has been removed by words ample to apply to all wills and in any proceeding whatsoever for their construction. I interpret the amendment (of 1936) to the effect that an attorney, or his employee, is no longer disqualified from becoming a witness in any probate or construction proceeding."

Even this broad dictum by Slater was not proper foundation for the decision in the instant case. The common law exception had been brought back; the cycle was complete and there was certainly no need to exceed that rule in a heedless attempt to be liberal. The proposed will discussed by the lawyer and the one actually executed were apparently totally independent of each other. A lawyer *prepares* a will when he receives instructions from the testator and sets these instructions up in legal form. The lawyer who testified in this case never even received instructions.[18]

But apart from the purely technical question of the interpretation of "preparation", the decision seems to strain the limits of the common law exception governing privileged communications. We must remember that the right to secrecy rests with the client, not with the lawyer.[19] Presumably, in the present case, the testator rejected the assistance of the lawyer. This would mean, to the average man that his relations with his attorney were closed and should be shielded from publication. There has been a tendency to limit the privilege of communications between lawyer and client but it still lives and should continue to live.

15. 157 Misc. 200, 205, 283 N. Y. Supp. 151, 157 (Surr. Ct. 1935).

16. N. Y. Laws 1936, c. 139.

17. See Matter of Caspen, 161 Misc. 199, 200, 291 N. Y. Supp. 585, 586 (Surr. Ct. 1936).

18. The fallacy of the decision of the majority in this case is well demonstrated by a *reductio ad absurdum* put forth by Lazansky, J., dissenting: "If it be assumed that a decedent told his lawyer that he wished his estate to go to A and the lawyer left his client without anything being done or said except the lawyer's advice to the client to draw a will at an early date and that the lawyer would wait further word and then it appeared that three days later the will was drawn by another and executed under the guidance of still another, leaving all the decedent's property not to A but to B, could it be said that the lawyer had participated in the preparation of the will?"

19. See Matter of McCulloch, 263 N. Y. 408, 416, 189 N. E. 473, 475 (1934); 5 WIGMORE, *op. cit. supra* note 2, § 2321. See (1928) 38 YALE L. J. 117.

INSURANCE—TRAILER—CONSTRUCTION OF TERMS.—Plaintiffs brought action to recover double indemnity for insured's death against defendant insurance company, under a clause in a life insurance policy insuring against injury "by collapse of the outer walls or burning of a *building* if the insured is therein at the time of the collapse or commencement of the fire." The insured, an oil operator, used a detached, jacked-up trailer, whose wheels had been removed, as his home while working on a lease, and was fatally injured when it caught fire. Both parties moved for judgment after verdict. *Held*, plaintiff's motion granted, as the trailer was a "building" within the meaning of the policy. *Aird v. Aetna Life Insurance Company*, 27 F. Supp. 141 (W. D. Tex. 1939).

The only issue in this case was whether the trailer was a building at the time it was destroyed by fire, thus bringing the plaintiff's injury within the double indemnity clause. No cases directly in point have been found.[1] However, some American courts have held that box cars[2] and lunchwagons[3] were buildings. In *State v. Ebel*[4] it was held that a movable sheep wagon occupied by a sheep herder as his dwelling house was a building. This was so held despite the fact that the wheels were always in place and it only needed motivating force to be a vehicle. A railway car, which is a vehicle when traveling along the tracks, was held to be a building when taken off the tracks and used by section hands as a lodging place.[5] All of these cases were criminal cases involving the definition of the word "building" as used in the particular state's penal code.[6]

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1. See Aird v. Aetna Life Ins. Co., 27 F. Supp. 141, 142 (W. D. Tex. 1939). But see City of Pontiac v. Gumarsol, N. Y. Sun, Nov. 13, 1936, p. 21, col. 3, where a trailer was held to be a home under a municipal housing ordinance requiring a certain amount of cubic feet per occupant. See (1937) 6 FORDHAM L. REV. 332. In the United States, it seems that state highway and motor vehicle laws are not applied to trailers when not being used as vehicles on the highways. Off the highways, those laws have no application. Atkins v. State Highway Department, 201 S. W. 226 (Tex. Civ. App. 1918), *semble*.

2. State v. Lintner, 19 S. D. 447, 104 N. W. 205 (1905). An ordinary box car in use as a freight car was held to be a building within purview of the S. D. PENAL CODE § 543 which defines a building as ". . . an erection capable of affording shelter for human beings . . . " This, plus the fact that arson is such a heinous crime, seems to control the decision, although the writer doubts that such a broad meaning should be given without specifying what conditions must be satisfied.

3. Town of Montclair v. Amend, 68 Atl. 1067 (N. J. 1908). Under a municipal ordinance concerning wooden structures or buildings, a lunch wagon moved within the fire limit is included. See Wells Fargo & Co. v. Mayor and Aldermen of Jersey City, 207 Fed. 871, 876 (D. N. J. 1913) where the court says the "word 'building' imports tangibility, and while it is ordinarily classed as real property, it may be *personal property*."

4. 92 Mont. 413, 15 P. (2d) 233 (1932) (defendant charged with burglary. The statute covered "every . . . house, room, . . . shop, warehouse, store, barn, . . . or other building . . ." The wagon had been used for habitation and for housing of goods of the herder).

5. State v. Anderson, 154 Iowa 701, 135 N. W. 405 (1912) (the indictment charged defendant with entering a railway car. The court said that it undoubtedly was a building).

6. *Cf.* Nagel v. People, 229 Ill. 598, 82 N. E. 315 (1907). In the indictment charging plaintiff in-error with the burglary, the place of the crime was defined as a houseboat and not a building. The court held that the term building could not be correctly used since there was no evidence showing that the houseboat was to remain out of the water permanently. The reasoning seems unsound to this writer.

. Other courts have held that box cars,[7] movable schoolhouses[8] and floating docks[9] were not buildings. The trailer in the present case may be distinguished from the structures involved in the latter group of cases. On analysis, it appears that the stated decisions should be restricted to the statutory requirements or technical terminology involved therein.[10]

It seems that in England a "caravan" is the same type of structure as an American trailer. In 1924, it was decided that a caravan, when removed from its wheels and set up on blocks of wood, was considered a "temporary" building.[11] It was called "temporary" because it could be transformed into a movable vehicle, but as long as it remained off its wheels, the caravan was a building. In 1936, an even more liberal view was taken in *Battle Rural District Council v. Rock*.[12] There the caravan was still on its wheels and only needed motive power to start it in motion. The court, in holding it a building, based its decision on the fact that the caravan was used as a dwelling place and had been situated for eleven months on one site. It was equipped with all the ordinary conveniences. The court also stated that the intent of the owners—which was that the caravan was intended to be a dwelling house—was a strong point in the decision.

As was said in the Supreme Court,[13] the phraseology of insurance contracts is that chosen by the insurer, and if the language is reasonably open to two constructions, the one which is most favorable to the insured will be adopted. However, the same court,[14] decided that the rule furnishes no warrant for forcing from plain words unusual and unnatural meanings. However, it is a well settled rule that if the word used is commonly susceptible of two or more meanings, and "building" seems to be such a word, then its more extended application may be given in order to

7. St. Louis, I. M. & S. Ry. v. Berry, 86 Ark. 309, 110 S. W. 1049 (1908).

8. Whiteley v. Mayor & City Council of Baltimore, 113 Md. 541, 77 Atl. 882 (1910).

9. Israel Coddington v. Dry Dock Co., 31 N. J. L. 477, 486 (1863).

10. In St. Louis, I. M. & S. Ry. v. Berry, 86 Ark. 309, 110 S. W. 1049 (1908), the deed that was being discussed called for a "depot" to be erected at a certain point. In railroad terminology, a depot is not only a stopping place but also a building that can be used as a place of convenience or protection for passengers and freight. In this case, the box car was used as a depot and since it did not line up to all the requirements of a convenient shelter and depot, it was not considered a building.

In Whiteley v. Mayor & City Council of Baltimore, 113 Md. 541, 77 Atl. 882 (1910) under a municipal ordinance, the city was required to compensate for "buildings or improvements which shall be taken or destroyed" when property was turned over to the city under the authority of eminent domain. A school, a movable structure, was moved onto such property after the city decided to take it. The court held that the city did not have to compensate the plaintiffs since this was not a "building or improvement taken or destroyed."

Again in Israel Coddington v. Dry Dock Co., 31 N. J. L. 477 (1863) a floating dock was not considered a building to which a lien could attach. But to be such a building the statute involved required that it stand upon land whereon it was erected.

11. Rodwell v. Wade [1924] 23 L. G. R. 174 D. C.

12. In Battle Rural District Council v. Rock (1936) (an unreported English case), Mackinnan, J. states, "there is no difficutly when the caravan is off its wheels and placed on blocks, for then it becomes a building."

13. Aschenbrenner v. U. S. Fid. & G. Co., 292 U. S. 80 (1934). VANCE, INSURANCE (2d ed. 1930) 689.

14. See Bergholm v. Peoria Life Ins. Co., 284 U. S. 489 (1932).

procure a construction favorable to the insured.[15] "Building" is a comprehensive term, and may be ambiguous, having no universal inflexible meaning in all its uses. While usually the term indicates some sort of edifice or structure located on or affixed to land, it does not *necessarily* imply that it is fixed to the soil.[16] In the instant case, the insurance company could easily have restricted the word "building" to immovable structures if it meant to limit its meaning, but since the word is not modified, then the general rule should apply. The variation in the views of cases pointed out above indicates that there is no compelling precedent against holding the movable trailer within the term "building."

This court seems to indicate that in some measure the legal tests to be applied in determining whether a structure is a building are: (1) whether it is at rest;[17] (2) whether it is detached from motive power;[18] and (3) whether its owner intends to keep it at the same location more or less permanently.[19]

In the present case, all of these tests are applied and found to be fulfilled. The trailer is off its wheels and raised on jacks and the owner is using it as his dwelling house. The mental element, especially important from the viewpoint of the English cases in point,[20] is satisfied. Remembering the fact that we are referring to the term "building" as used in an insurance policy, where the rule is to favor the insured when construing terms that may have more than one meaning, seems to indicate that the court is preeminently sound in its application of this ambiguous word.

MUNICIPAL CORPORATIONS—IMMUNITY FROM LIABILITY FOR NEGLIGENCE.—The plaintiff was injured when his toboggan ran into a snow drift at the bottom of a slide maintained by the City of Green Bay. City employees delegated to smooth the surface along the course of the slide had permitted a snow drift to remain at the foot of the slide for three or four days without posting a warning. On appeal from order overruling defendant's demurrer, *held,* that the slide was located in a park or playground maintained by the city for the amusement and benefit of the public in performance of a governmental function and that the city was not liable for harms connected therewith. Order reversed. *Cegelski v. City of Green Bay,* 285 N. W. 343, (Wis. 1939).

A municipal corporation is conceived by the courts as capable of exercising dual functions: that of agent of the state, called governmental, and that of an ordinary private corporation, labeled proprietary. In the former role, it is immune from liability;[1] in the latter it is liable for its negligence.[2] Governmental functions are

15. Stipcich v. Met. Life Ins. Co., 277 U. S. 311 (1928); Stroehmann v. Mutual Life Ins. Co., 300 U. S. 435 (1937); Great Eastern Casualty Co. v. Blackwelder, 21 Ga. App. 586, 94 S. E. 843 (1918).

16. See State v. Ebel, 92 Mont. 413, 414, 415, 15 P. (2d) 233, 234, 235 (1932).

17. See Aird v. Aetna Life Ins. Co., 27 F. Supp. 141, 143 (W. D. Tex. 1939).

18. *Id.* at 142.

19. *Id.* at 143.

20. Battle Rural District Council v. Rock (1936) (an unreported English case); Keeling v. Wirral Rural District [1925] 23 L. G. R. 201 D. C.

1. Harper v. Topeka, 92 Kan. 11, 139 Pac. 1018 (1914); Irvine v. Town of Greenwood, 89 S. C. 511, 72 S. E. 228 (1911); see Baltimore v. State, 168 Md. 619, 622, 179 Atl. 169, 171 (1935) and Granirer, *Some Observations upon the Immunity of Municipalities from Liability in Tort Actions,* N. Y. L. J., Aug. 22, 1939, p. 428, col. 1.

2. Waco v. Branch, 117 Tex. 394, 5 S. W. (2d) 498 (1928); Ashworth v. Clarksburg, 118 W. Va. 476, 190 S. E. 763 (1937). See Granirer *loc. cit. supra* note 1.

generally understood to be those which can be performed by the state or its agents alone by virtue of the authority delegated to it by the people.[3] Proprietary functions are those pertaining to ownership of property and which an individual or a private corporation is capable of performing.[4] The line of demarcation between the two is difficult to determine. In fact there are few topics on which the decisions of the various state courts are in greater conflict.[5]

States differ on whether maintaining a public park or playground is the exercise of a proprietary or governmental function. The majority, in accord with the principal case, consider maintenance of parks to be a public or governmental function. They are open to all regardless of residence, and therefore they benefit the inhabitants of the whole state.[6] They are generally not sources of revenue, as are systems of waterworks, gas, sewerage, electric light plants, or markets.[7] Infrequently have they been regarded as subjects for private enterprise as have other services performed today by the states and cities.[8] They are also a matter of real concern to the state in congested areas where the presence or absence of parks may affect the public health.[9]

The minority decisions hold that the function which the city performs in the

3. See State v. Schweickardt, 109 Mo. 496, 501, 19 S. W. 47, 49 (1892); Workman v. New York City, 179 U. S. 552, 556 (1900).

4. See Christopher v. El Paso, 98 S. W. (2d) 394, 397 (Tex. Civ. App. 1936); Mobile v. Lartigne, 23 Ala. App. 479, 483, 127 So. 257, 259 (1930).

5. Professor Borchard in his plea for reconstruction and re-evaluation of the law on this point, remarks that "in few, if any branches of the law have the courts labored more abjectly under the supposed inexorable domination of formulas, phrases and terminology, with the result that facts have often been tortured into the framework of a formula, lacking in many cases any sound basis of reason or policy." Borchard, *Government Liability in Tort* (1925) 34 YALE L. J. 129.

6. See Heino v. Grand Rapids, 202 Mich. 363, 369, 168 N. W. 512, 516 (1918); Harper v. Topeka, 92 Kan. 11, 15, 139 Pac. 1018, 1020 (1914).

7. Foss v. Lansing, 237 Mich. 633, 212 N. W. 952 (1927) (if profit is realized in garbage collection, the city is liable in tort as is a private corporation); Baron v. Bayonne, 7 N. J. Misc. 565, 146 Atl. 665 (1929) (same reasoning applied to waterworks); Peccolo v. Los Angeles, 8 Cal. (2d) 532, 66 P. (2d) 651 (1937) (same reasoning as applied to electric light and power plant). See Blue v. Union, 159 Ore. 5, 11, 75 P. (2d) 977, 980 and cases cited therein.

Where the city derives no revenue from the activity (as for instance from parks), it is reasoned that this is a valid ground for granting the city immunity in tort. Park Commissioners v. Prinz, 127 Ky. 460, 105 S. W. 948 (1907); Blair v. Granger, 24 R. I. 17, 51 Atl. 1042 (1902). See Kellar v. Los Angeles, 179 Cal. 605, 609, 178 Pac. 505, 507 (1919). On this theory a child, bitten through the bars of a cage by a coyote in a public zoo, was denied a recovery for the injury. Hibbard v. Wichita, 98 Kan. 498, 159 Pac. 399 (1916). On similar reasoning a child injured on a defective see-saw in a public playground was denied a recovery. Piasecny v. Manchester, 82 N. H. 458, 136 Atl. 357 (1926).

8. See Schmidt v. Chicago, 284 Ill. App. 570, 578, 1 N. E. (2d) 234, 238 (1936). Garbage collection was until recently considered a function to be performed by private enterprise only. See Irvine v. Greenwood, 89 S. C. 511, 515, 72 S. E. 228, 230 (1911), for a general discussion of growth in the number of services performed by municipalities.

9. See Capp v. St. Louis, 251 Mo. 345, 347, 158 S. W. 616, 617 (1913); Anadarko v. Swain, 42 Okla. 741, 744, 142 Pac. 1104, 1105 (1914); Bernstein v. Milwaukee, 158 Wis. 576, 577, 149 N. W. 382 (1914); Park Commissioners v. Prinz, 127 Ky. 460, 463, 105 S. W. 948, 949 (1907); Kellar v. Los Angeles, 179 Cal. 605, 178 Pac. 505 (1919).

maintenance of parks and playgrounds is proprietary and that the city is therefore liable for its negligent maintenance of recreation centers. In New York State, for instance, the courts reason that whenever the duties carried out by the municipality are such as could be carried on by individuals and relate to the convenience, pleasure or welfare of the individual citizen, the municipality is acting as a legal individual as distinguished from a sovereign. This is held to be the case when municipalities maintain parks and playgrounds.[10] Similarly the courts of Missouri believe that the city's ownership and operation of parks is for the benefit and convenience of its own residents alone, and is, therefore, of a quasi-private nature since it is of no concern to the state as a whole.[11] Colorado, without considering to whom the park is of benefit, views parks as private property of the municipal corporation; they do not concern the state as a whole, and the municipality is liable in tort for injuries which occur on its property whenever the circumstances are such as would predicate liability for any other property owner.[12] Another test, applied by Idaho among other states, is whether the service has been provided by authority of a mandatory or a permissive provision of the municipal charter.[13] Under this theory, it is a mandatory duty imposed by the state which the city must perform at its peril. The city in performing it is acting as agent of the state and is acting in a governmental capacity.

The minority decisions which impress us with their cogency, are the product of a viewpoint which regards the many public services undertaken by municipalities in recent years as a far cry from the long-established police, fire and judicial services which have been traditionally considered the governmental functions, and realizes that some distinction must be drawn between the two types of service. It seems unreasonable that a municipal corporation should be immune from liability for care in its

10. Van Dyke v. Utica, 203 App. Div. 26, 196 N. Y. Supp. 277 (4th Dep't 1922); Augustine v. Brant, 249 N. Y. 198, 163 N. E. 732 (1900). The definition dividing the powers of the municipal corporation into those of legal individual and those of a sovereign, seems to have been first made in New York by the court in Maxmillian v. Mayor, 62 N. Y. 160, 164 (1875).

11. See State v. Schweickardt, 109 Mo. 496, 504, 19 S. W. 47, 51 (1892). In Capp v. St. Louis, 251 Mo. 345, 158 S. W. 616 (1913), the court emphasizes the importance of parks for the health and character of the children of the city.

12. Denver v. Spencer, 34 Colo. 270, 82 Pac. 590 (1905).

13. Boise Development Co. v. Boise City, 30 Idaho 657, 167 Pac. 1032 (1917). In some instances the courts have ignored the distinction between governmental and proprietary functions and have simply imposed the ordinary rules of private liability. Glase v. Philadelphia, 169 Pa. 488, 32 Atl. 600 (1895). In other instances liability has been predicated on the theory that the city has allowed an attractive nuisance to exist. Hoffman v. Bristol, 113 Conn. 386, 155 Atl. 499 (1931); Glirbas v. Sioux Falls, 64 S. D. 45, 264 N. W. 196 (1932). *Contra*: Mocha v. Cedar Rapids, 204 Iowa 51, 214 N. W. 587 (1927); Bolster v. Lawrence, 225 Mass. 387, 114 N. E. 172 (1917).

A number of states have passed statutes which define the liability of their municipal corporations in some activities. New York amended its HIGHWAY LAW in 1936, now N. Y. GEN. MUNIC. LAW § 50 a, b, c, to make municipalities liable for the negligence of police and firemen in the operation of vehicles on the public highways. A California statute, CALIF. LAWS 1923, p. 675, defining the conditions under which cities may be held liable in tort, is similar to the statute, WIS. STAT. (1933) § 101.06, referred to in the principal case, Cegelski v. Green Bay, 285 N. W. 343, 344 (Wis. 1939). This statute holds cities liable for those reasonable precautions which the ordinary person would take. See Crane v. El Cajon, 133 Cal. App. 624, 628, 24 P. (2d) 846, 847 (1933).

maintenance of a swimming pool,[14] while if the same pool were in the hands of a private individual or corporation, liability in tort would exist without question.[15] It is not of much avail to reason that because the public health is being benefitted and the enterprise, park, pool, or whatever it may be, is operated on a non-profit basis, it is a governmental function. The first argument is too vague and general; it would be difficult to find any service which did not in some way benefit the public health and welfare, and thus merit the designation of governmental. Both arguments overlook the basic philosophy underlying the law of torts. Whether the wrongdoer has profited from the enterprise which caused injury to another, or whether the wrongdoer has suffered equally himself from the injury and his enterprise is totally unprofitable, or, again, whether the enterprise is of benefit to the public or not, is completely beside the point; compensation for a damage done and a right invaded is the primary object of the tort law. Both arguments overlook the fact that municipal immunity is based on a totally unrelated principle, the ancient belief in the infallibility of the sovereign. Some authorities question the wisdom of retaining this principle.

We submit that the trend of future decisions should be toward more and more strict construction of the meaning of the term "governmental." When the modern state and each of its subdivisions are entering into so many fields, formerly the province of private corporations, it is becoming increasingly necessary to define clearly its tort liability. Certainly it is not sound public policy to allow the municipal corporation to observe a lower standard of care than that required of private corporations. Yet that is the extremely unfortunate result of the immunity rule.

NEGLIGENCE—PROXIMATE CAUSE—ANTECEDENT PROBABILITY.—The defendant manufacturer, representing that the instrument would not cause permanent injury, sold to a florist a tear gas gun disguised as a fountain pen, lacking a safety device. Plaintiff, a customer, being attracted by its appearance, picked it up from the spot where the florist had left it in his store within easy reach. In examining the gun he discharged the gas into his face and eyes and was permanently injured. On appeal from a judgment for the defendant, *held*, two judges dissenting, the complaint was insufficient to allege actionable negligence on the part of the manufacturer. *Scurfield v. Federal Laboratories, Inc.*, 6 A. (2d) 559 (Pa. 1939).

To fix the defendant's liability in a case of this type it must appear that the defendant was negligent and that his negligence was the legal and proximate cause of the injury suffered.[1] In the case at hand the plaintiff charged the manufacturer with negligence chiefly on two grounds; first, in representing that the instrument would not inflict permanent injury when it knew or should have known that it could cause such injury and secondly, in manufacturing and selling in the guise of a harmless fountain pen an article dangerous and harmful. The court decided the case, however, on the element of proximate cause. The majority felt that the defendant manu-

14. Heino v. Grand Rapids, 202 Mich. 363, 168 N. W. 512 (1918). *Contra*: Augustine v. Brant, 249 N. Y. 198, 163 N. E. 732 (1900).

15. Dinnihan v. Lake Ontario Beach Imp. Co., 8 App. Div. 509, 4 N. Y. Supp. 764 (4th Dep't 1896).

1. Garrett Const. Co. v. Aldridge, 73 F. (2d) 814 (C. C. A. 8th, 1934); Palsgraf v. Long Island R.R., 248 N. Y. 339, 162 N. E. 99 (1928); HARPER, THE LAW OF TORTS (1933) § 111.

facturer could not reasonably have been expected to foresee that the vendee, who bought the gun for the purpose of defending himself and his property against persons bent on robbery, would incautiously leave the instrument in a place where it could easily fall into the hands of third persons unaware of the hidden danger. Hence the defendant could not be charged with being the cause of the injury: the negligence of the storekeeper was as a matter of law unforseeable and severed the chain of causality. The dissenting minority, on the other hand, thought that the manufacturer's representations as to the harmless nature of the weapon, which was intended to disable the victim for not more than twenty-four hours, would lead the vendee to be less careful in keeping the gun than he otherwise would have been, and that his carelessness was foreseeable.

In its application of the rule to the facts the majority opinion is apparently well considered. It is difficult to speculate whether the vendee would really have been more careful with his pen if he had been informed that the harmful effects of the gas might be permanent rather than ephemeral. Knowledge that such a pen would discomfort a man for twenty-four hours would be enough to make the normal person careful as to where he placed it. Even though the florist had been made aware of the full danger of the weapon, it seems that the plaintiff might presumably have suffered the same injury. As the majority opinion suggested, he had a cause of action against the florist rather than the manufacturer, if he had a cause of action at all.[2] A significant feature of the case, however, is the fact that the jury was deprived of an opportunity to pass upon the matter. In negligence actions such as this, involving the problem of foreseeability, the distinction between a question of law to be answered by the court and a question of fact to be submitted to the jury is often difficult to draw. And since the jury is, in the common law system an institution so basic and so jealously regarded, any tendency on the part of judges to invade its province must be looked at askance. When the facts are undisputed and from them only one inference can be drawn by the man of ordinary prudence, it is, of course, the duty of the court to take the case away from the jury. But where there is room for difference of opinion among reasonable men as to the defendant's liability for negligence, and the very existence of a dissenting opinion in the instant case gives such an indication, the wiser course seems to be to submit the question to the jury.[3] For this reason it is easy to sympathize with the dissenting judges in their desire to entrust the matter to the jurors' judgment rather than the court's.

As far as the facts themselves are concerned, perhaps the closest approximation is to be found in what may be called the toy cases. The maker of a toy advertises that it is harmless and some child suffers injury in its use. The manufacturer is sometimes compelled to make compensation therefor.[4] But these cases may be dis-

2. See Scurfield v. Federal Laboratories, 6 A. (2d) 559, 561 (Pa. 1939). In the instant case the plaintiff seems to have had no reason, except perhaps his own curiosity, for touching the florist's pen. And while a storekeeper must use ordinary care to keep premises in a reasonably safe condition for the benefit of customers, who are "business invitees", and while he must refrain from setting pitfalls and maintaining machines inherently dangerous, it is questionable whether he may be held responsible under the facts of this case. Achter v. Sears, Roebuck & Co., 105 S. W. (2d) 959 (Mo. App. 1937); HARPER, THE LAW OF TORTS (1933) §§ 96, 97.

3. Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U. S. 469 (1876); 1 SHEARMAN AND REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE (6th ed. 1913) §§ 55, 56.

4. Crist v. Art Metal Works, 255 N. Y. 624, 175 N. E. 341 (1931), *aff'g* 230 App.

tinguished readily enough from the instant case inasmuch as the toy manufacturer is indisputably chargeable with the knowledge that his product will fall into the hands of the inexpert.[5] Thus parties not privy to the transaction are clearly brought within the sphere of the transaction, that is to say, the sale of the toy. It is immaterial, of course, that the person injured is not a party to the contract of sale. The action is not for breach of warranty, which will lie only in favor of the vendee;[6] it is rather, as in the instant case, for the vendor's negligence in making representations about the harmless character of the object while aware that it is apt to be placed, because of the buyer's reliance on such representations, in the hands of others.

A somewhat similar type of action for negligent speech is fairly familiar at the present time in the United States, although it has never found favor in the courts of England.[7] The law, however, is still in an unsettled state and some confusion exists in the minds of the judges. In general it may be said that a special relation arising out of contract or otherwise, making diligence a duty, must obtain between the plaintiff and the defendant, and the defendant should have known that the present plaintiff would rely on his statements.[8] The liability for damages caused by misinformation carelessly given in answer to inquiry is confined within reasonable limits. Not every thoughtless word, though it entails disastrous consequences, affords a cause of action. Plaintiff must show that the defendant's negligence exposed him particularly to danger of injury.[9] In the instant case such special relation did

Div. 114, 243 N. Y. Supp. 496 (1st Dep't 1930) (where a "harmless" toy pistol ignited Christmas play costume of child); Henry v. Crook, 202 App. Div. 19, 195 N. Y. Supp. 642 (3d Dep't 1922) (manufacturer liable where Fourth of July sparklers, "absolutely harmless", burned child); *cf.* Miller v. Sears, Roebuck & Co., 250 Ill. App. 340 (1929) (manufacturer held not liable where toy pistol's sparks caused ignition of gasoline, the manufacturer not being bound to anticipate the extraordinary circumstances that the pistol would be used close to a highly inflammable substance like gasoline vapor and there being no evidence of faulty construction of the toy).

5. See Crist v. Art Metal Works, 230 App. Div. 114, 116, 243 N. Y. Supp. 496, 497 (1st Dep't 1930) where the court says, "The importance of the circumstance that this pistol was made by defendant to be sold for use, not by the general public, but by a class, viz., infants of tender years, is not to be overlooked."

6. Hall Mfg. Co. v. Purcell, 199 Ky. 375, 251 S. W. 177 (1923); Chysky v. Drake Bros., 235 N. Y. 468, 139 N. E. 576 (1923); 2 COOLEY, TORTS (3d ed. 1906) § 1486.

7. For a general discussion of the matter, see Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty* (1929) 42 HARV. L. REV. 733; SALMOND, LAW OF TORTS (9th ed. 1936) § 150.

8. International Products v. Erie R.R., 244 N. Y. 331, 155 N. E. 662 (1927).

9. Ultramares Corporation v. Touche, 255 N. Y. 170, 174 N. E. 441 (1931) involving an action in tort for damages suffered by third parties through the negligent or fraudulent misrepresentations of accountants to their corporate employer concerning the condition of its business, discusses the New York cases extensively and sets down limits of liability of defendants in this type of action. The accountants were held to owe to creditors and investors to whom the employer exhibited the accountant's certificate a duty to make it without fraud, since there was notice in the circumstances of its making that the employer did not intend to keep it to himself. But they were not held to the duty of making the certificate without negligence, so long as such negligence was nothing more than honest blunder. The New York rule is further developed in a remarkably similar case of later date, State Street Trust Co. v. Ernst, 278 N. Y. 104, 15 N. E. (2d) 416 (1938), wherein it was held that negligence might be so gross as to amount to fraud. See also Harriott v. Plimpton, 166 Mass. 585, 588, 44 N. E. 992, 993 (1896).

not exist between plaintiff and defendant nor does it appear that defendant ought to have known that plaintiff would act in reliance on his representations. There was no duty owing except such as was based on the ordinary rules of negligence, and the plaintiff failed to forge the chain of causality between the defendant's alleged negligence and his own misfortune.

The instant case is to be distinguished, finally, from the line of cases involving the so-called "dangerous object".[10] For in that line of cases it is the maker's faulty construction that renders dangerous an article quite safe when properly constructed, and makes him answerable in damages even to parties who were not privy to the contract of sale. The tear gas gun in the case at hand, far from being defective, was perhaps made all too well.

10. Noble v. Sears, Roebuck & Co., 12 F. Supp. 181 (W. D. Wash. 1935); Heckel v. Ford Motor Co., 101 N. J. L. 385, 128 Atl. 242 (1925); MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916).