Fordham Law Review

Volume 9 | Issue 2 Article 8

1940

Recent Decisions

RECENT DECISIONS

BAILBONDS—FORFEITURES—LIMITS ON REMISSION.—A prisoner under indictment for a Federal offense was released when the two petitioners went bail for him. At the trial, the prisoner failed to appear and bail was forfeited. Later, largely through the information given and the efforts made by one of the bondsmen, the fugitive was apprehended, pleaded guilty and was sentenced. The bondsmen petitioned to have the forfeiture of their bail stricken out. *Held,* the mitigating circumstances of the present case are not sufficient to permit a remission of the forfeiture; petition denied. *United States v. La Vine,* 28 F. Supp. 113 (D. Md. 1939).[1]

The statute which controlled the court in its determination of the instant case was originally enacted in 1839.[2] From 1839 until its amendment in 1873 it provided: "When any recognizance in a criminal cause, taken for, or in, or returnable to any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no wilful default of the parties, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced."[3] The construction adopted from 1839 until 1873 allowed the surety to recover the recognizance, if he was without fault even though the principal was admittedly guilty of a wilful default.[4] In a case strikingly similar to the instant case, the fleeing bail jumper was apprehended by his surety and the court decided that the wording of the statute did not prevent the court from remitting a forfeiture where it was clear that the surety was not at fault.[5]

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1. It was pointed out in the opinion that if the court had full discretion to interpret the statute which controls the court in returning a forfeited recognizance, "it would be disposed to grant remission of the forfeiture except to the exent of reimbursement to the Government for expenses entailed." But since the Circuit Court of Appeals has indicated in similar cases that the bondsmen are entitled to no relief, the court is reluctantly constrained to follow. United States v. La Vine, 28 F. Supp. 113, 116 (D. Md. 1939).

2. 5 STAT. 322 (1839).

3. Even before this legislation, Chief Justice Marshall had indicated that it was within the power of the court to remit a forfeited recognizance by virtue of common law authority. He said: "The object of a recognizance is, not to enrich the treasury, but to combine the administration of criminal justice with the convenience of a person accused, but not proved to be guilty." United States v. Feely, 25 Fed. Cas. No. 15,082 at 1056 (W. D. Pa. 1813). During the course of the argument the United States attorney conceded that the courts of this country had all the power to remit forfeited bail that was exercised by the English common law courts.

English cases recognize the power of courts to return forfeited bail. King v. Tomb, 10 Mod. 278, 88 Eng. Reprints 727 (K. B. 1714); *In re* Pillow, 19 Price 299, 147 Eng. Reprints 997 (Ex. 1824). The provisions of a Writ of Privy Seal giving authority to the court of Exchequer to remit forfeited recognizances are set forth in the footnote to *In re* Pillow.

4. United States v. Duncan, 25 Fed. Cas. No. 15,004 (W. D. Pa. 1863); United States v. Santos, 27 Fed. Cas. No. 16,222 (C. C. S. D. N. Y. 1862).

5. United States v. Duncan, 25 Fed. Cas. No. 15,004 (W. D. Pa. 1863). After setting forth the terms of the original statute, Judge McCandless said that the true construction of the act was that where there was no collusion with the principal, the court had power, in its discretion, to relieve the surety from the penalty.

The statute in its present form was enacted in 1873 with the first revision of the Federal statutes. The change was simple and apparently minor. Instead of "no wilful default of the *parties*," the statute now reads "no wilful default of the *party*."[6] As a result of this single verbal change, the courts generally hold the statute now refers to the wilful default of the principal alone, regardless of the innocence of the surety.[7] However, there has not only been a protest against such judicial construction of the new statute,[8] but a squarely antagonistic holding that the change in wording plainly meant that an innocent surety could recover his bail despite the wilful default of a principal.[9]

The conditions demanded by the statute are conjunctive. Hence it matters not that "a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced". The surety cannot recover.

The states have established their own conditions under which a forfeited bail can be returned. New York gives the remittting courts wide latitude[10] although relief must be sought within one year after the forfeiture.[11] It is generally considered a problem to be resolved by judicial discretion untrammeled by any conditions like those prescribed by the Federal statute. Some states require that the application for return of the forfeited bail must be made before final judgment.[12] In some, if the application is made before the judgment, the court is left to its discretion.[13]

6. REV. STAT. § 1020 (1878) 18 U. S. C. A. 601 (1934).

7. United States v. Nordenholz, 95 F. (2d) 756 (C. C. A. 4th, 1938) (even though the government had discontinued prosecution of the defendant, the court refused to remit the forfeited bail since the unexplained failure of the defendant to appear when required "raises the presumption that his default was wilful"); United States v. Costello, 47 F. (2d) 684 (C. C. A. 6th, 1931); Fidelity & Deposit Co. v. United States, 293 Fed. 575 (C. C. A. 5th, 1923); United States v. American Bonding Co., 39 F. (2d) 428 (C. C. A. 9th, 1930; Weber v. United States, 32 F. (2d) 110 (C. C. A. 8th, 1929); Henry v. United States, 288 Fed. 842 (C. C. A. 7th, 1923).

8. See the opinion of Judge Learned Hand in United States v. Kelleher, 57 F. (2d) 684 (C. C. A. 2d, 1932).

9. Griffin v. United States, 270 Fed. 263 (N. D. Ga. 1921). After pointing out that the decisions permitting an innocent surety to recover was somewhat doubtful since the original wording of the statute seemed to make it a condition precedent that all parties be without fault, District Judge Sibley said: "All doubt was removed by the Revised Statutes changing the word "parties" to "party", plainly meaning that party who was applying for the remission. Had the defendant or the principal been meant, a term definitely referring to him would have been used instead of one that would apply as well to the surety." *Id.* at 265-266.

10. "After the forfeiture of the undertaking or deposit, as provided in this article, the court directing the forfeiture, the county court of the country, or in the city of New York, the supreme court may remit the forfeitures or any part thereof, upon such terms as are just." N. Y. CODE CRIM. PROC. (1895) § 597.

11. N. Y. CODE CRIM. PROC. (1926) § 598. See People v. Grundy, 218 App. Div. 541, 218 N. Y. Supp. 420 (1st Dep't 1926).

12. TEX. ANN. CODE CRIM. PROC. (Vernon, 1926) art. 439, which provides: "If, before final judgment is entered against the bail, the principal appear or be arrested and lodged in jail of the proper county, the court may, at its discretion, remit the whole or part of the sum specified in the bond of recognizance." See also MO. REV. STAT. (1929) § 3531.

13. TENN. ANN. CODE (Michie, 1932) §§ 11693, 11695. See also TEX. ANN. CODE CRIM. PROC. (Vernon, 1926) art. 439, note 12, *supra*.

Other states permit the application by a faultless surety to be brought at any time.[14]

The argument is made that although the provisions of the Federal statute must be viewed conjunctively, the second condition, *i.e.*, "that a trial can, notwithstanding, be had in the cause", indicates the statute was meant to apply to those requests for relief from forfeiture made *before* a trial is had.[15] Thus, in the instant case, since the defendant had pleaded guilty before the application was made for a remission of the bail, the court would not be bound by the conditions of the statute and could remit or not remit, according to the equities of the particular situation. But while this reasoning, if adopted, might change the result of the instant case, it is possible to imagine a situation where even such a construction would not save a surety. A surety may cause the return of a prisoner to custody and some event not at all within his control might end the possibility of a trial. A New York case[16] illustrates this. Between the time of the return of the escaped prisoners to the jurisdiction of the court, and a hearing for the return of the forfeited recognizance, the prisoners died. The New York court concluded that the provisions of the applicable statutes[17] were no bar to a remission of the forfeiture. A Federal court, if the suggested interpretation were to prevail, could not reach a similar liberal result under the same circumstances, since there could be no trials.

Although the rule of the instant case has its defenders,[18] it is difficult to maintain. For from a consideration both of the reason for allowing bail which is to assure the presence of the defendant at trial,[19] and the desirability of enlisting the aid of a surety in recapturing the prisoner with whom he may be more familiar that the government, it would appear that a decision in favor of the surety would be sounder. If this result cannot be reached under the present provisions of the statute, Congress should invest the courts with discretionary powers broad enough to permit the courts to reach a result in accord with the merits of the parties seeking relief.

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14. N. C. CODE ANN. (Michie, 1931) § 4588; MASS. ANN. LAWS (Lawyer's Co-op., 1939) c. 276, § 69 provides that a bail (surety) may surrender his principal any time after default upon the recognizance "and the court where the default is recorded may, upon application, remit the whole or any part of the penalty, if satisfied that the default of the principal was not with the connivance or consent of the bail." See also title 8, Section 177 of Purdon's Pennsylvania Statutes (1936) which sets forth provisions for the return of a forfeited bail even after it has been paid into the county treasury.

15. United States v. Kelleher, 57 F. (2d) 684 (C. C. A. 2d. 1932), *cert. denied*, 286 U. S. 565 (1932); United States v. La Vine, 28 F. Supp. 113 (D. Md. 1939).

16. People v. Parkin, 263 N. Y. 428, 189 N. E. 480 (1934).

17. N. Y. CODE CRIM. PROC. (1881) §§ 597, 598.

18. See concurring opinion of Manton, J. in United States v. Kelleher, 57 F. (2d) 684, 685 (C. C. A. 2d, 1932) and United States v. American Bonding Co., 39 F. (2d) 428 (C. C. A. 9th, 1930). Judge Kerrigan in the latter case stated: "In practically every instance where a recognizance is forfeited the surety is innocent. To construe Rev. Stat. § 1020 (18 U. S. C. A. § 601), to permit the remissions of forfeitures in every such case is to virtually nullify the protection afforded to the government by the presence of the surety upon the bond, and is contrary to the entire tenor of that statute." *Id.* at 430. Nevertheless, it is clear that the government is amply protected when the prisoner is brought to trial or as in the instant case, pleads guilty.

19. See note 3, *supra*. See also PETERS, CRIMINAL LAW (2d ed. 1935) 203: "Bail should be fixed in no sense as a punishment. It is intended for the sole purpose of assuring the presence of the defendant to answer the charge made against him."

BANKRUPTCY—APPOINTMENT OF LIMITED RECEIVER AS ACT OF BANKRUPTCY.—Petitioning creditor sought to have respondent adjudicated an involuntary bankrupt. While insolvent he had suffered the appointment of a Martin Act[1] receiver to take charge of his property. This receiver had so far laid claim to, and sought to obtain the possession of, the proceeds of the sale of a seat on the Stock Exchange, which asset existed prior to the commission of any fraudulent practices charged by the Attorney General of New York against the alleged bankrupt when the receiver was appointed.[2] *Held,* under the circumstances, the sufferance of the appointment of the Martin Act receiver constituted an act of bankruptcy. *In re Elfast,* 30 F. Supp. 819 (S. D. N. Y. 1939).

The Bankruptcy Act, Sect. 3, Subd. a (5) provides that: "acts of bankruptcy by a person shall consist of his having, . . . while insolvent or unable to pay his debts as they mature, procured, permitted or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property."[3] Although the act does not define what kind of a receivership is meant, there are *dicta* to the effect that a *general* receivership is meant, and "not one for specifically described property, as in a mortgage foreclosure, or an effort to enforce some other lien against specific property."[4] This view would seem sound. It met the approval of the court that decided the principal case.[5] On the other hand, a Martin Act receivership has in effect been held to be a limited receivership by the New York Courts.[6] The property that such a receiver may take is limited to property derived by means of fraudulent practices, together with all property with which it has been commingled, and from which it cannot be distinguished in kind, and also all books of account and papers relating to such property.[7] Thus the problem is whether such a receivership is the kind of receivership that is meant by Sect. 3, Subd. a (5) of the Bankruptcy Act.

In determining this question, it seems that a Federal Court is not bound by the name the State Court may apply to the receivership. It was argued by the alleged bankrupt that since a general receivership is intended by the Bankruptcy Act, and since the New York Courts have held that a Martin Act receivership is a 'limited' receivership, the Federal Court was therefore bound under the doctrine of *Erie R.R. v. Tompkins,*[8] to hold that a Martin Act receivership was not the kind of receivership that is meant by the Bankruptcy Act. The *Erie R.R.* case held that

1. N. Y. GEN. BUS. LAW (1934) § 353a.

2. The alleged bankrupt claimed this finding to be without any basis. In his motion for re-argument, he cited an affidavit by an Ass't Attorney-General of New York to the effect that the seat on the stock exchange had been purchased with the funds that the alleged bankrupt had obtained by the fraudulent practices complained of.

3. 52 STAT. 844, 11 U. S. C. A. § 21 (a-5) (Supp. 1938).

4. See Standard Acc. Ins. Co. v. Sheftall & Co., 53 F. (2d) 40, 41 (C. C. A. 5th, 1931); *In re* 2168 Broadway Corp., 11 F. Supp. 404, 405 (S. D. N. Y. 1935). See also Duparquet Co. v. Evans, 297 U. S. 216 (1936) where it was held that a receivership in a foreclosure proceeding was not an equity receivership within the meaning of Section 77 B, subd. a, i, of the Bankruptcy Act [48 STAT. 912, 11 U. S. C. A. 207 (a, i) (1934)].

5. *In re* Elfast, 30 F. Supp. 819, 820 (S. D. N. Y. 1939).

6. Burns v. Maguire, 255 App. Div. 552, 8 N. Y. S. (2d) 313 (1st Dep't 1938), *aff'd* 280 N. Y. 700, 21 N. E. (2d) 203 (1939); Goldberg v. Weihman, 243 App. Div. 734, 277 N. Y. Supp. 657 (2d Dep't 1935), *aff'd* 269 N. Y. 537, 199 N. E. 524 (1935).

7. N. Y. GEN. BUS. LAW (1934) § 353a.

8. 304 U. S. 64 (1938).

under Sect. 34 of the Judiciary Act of 1789, a Federal Court is bound to follow the decisions of the highest court of a state, when the law to be applied in a case is the law of that state, and not a Federal law. Now the principal case is not one where the law of New York is to be applied. Rather, the law to be applied to the case is the Federal Bankruptcy Act. In construing this law the Federal Courts are free to follow their own path.[9] The only way that a New York law effects this case is by the fact situation that its law creates, *viz.*, the Martin Act receivership. The problem before the Federal Court is whether a fact situation which is brought about by a state law is or is not an act of bankruptcy within the meaning of the Federal Bankruptcy Act. Its problem would be almost the same if the alleged bankrupt had voluntarily assigned to a trustee for the benefit of the persons whom he had defrauded, the same property that the Martin Act receiver was authorized to take by the court decree. Thus it is nothing more than applying a Federal Law to a particular state of facts.

In the principal case the court held that "in order to determine whether the appointment of a Martin Act receiver constituted an act of bankruptcy, the entire proceeding must be examined to determine that question and each case must of necessity depend on its own facts".[10] For the purpose of examining the scope of this holding, let us consider the following three broad types of cases: first, where the order of the state court in appointing a Martin Act receiver, gives him more powers than the State Court is authorized to do by the State statute; second, where the order gives him no more power than the statute authorizes, but the receiver exceeds his authority, and seizes more property than he is authorized to take; third, where the order gives him no more powers than the statute authorizes, and the receiver does not exceed his authority.

In the first case, namely, where the court exceeds statutory authority, it is submitted that unless the alleged bankrupt takes steps to have the scope of the receivership modified, his sufferance of the appointment of such a receiver is an act of bankruptcy. For the alleged bankrupt cannot attack collaterally, in a Federal court, the extent of the powers of the state court, if the state legislature *could* grant such powers without violating the Federal Constitution. Rather, the Federal court would be bound to assume that the state court was acting within its authority in giving the receiver the powers that it gave him.

It is submitted that the sufferance of the type of receiver mentioned in the second case, namely where a truly limited receiver afterwards exceeds his limited authority, would not constitute an act of bankruptcy. For under the Bankruptcy

9. This may be illustrated by the following case. The question before a Federal Court is whether a particular state statute violates the United States Constitution. The statute may have meanings *A* and *B*. If it has meaning *A* it is clearly unconstitutional. If it has meaning *B*, it is of doubtful constitutionality. The highest court of the state has held that it has meaning *B*, and that it is constitutional. In such a situation the Federal Court is bound to hold that the statute has meaning *B*, but is free to determine whether, as so construed, it is constitutional or not. See Ward & Gow v. Krinsky, 259 U. S. 503, 510, 520 (1922). But see Coombes v. Getz, 285 U. S. 434, 441 (1932).

10. *In re* Elfast, 30 F. Supp. 819, 820 (S. D. N. Y. 1939). The Court went on to say: "For to hold without exception or reservation that the mere designation of a Martin Act receiver does not constitute an act of bankruptcy would often lead to absurd results. Especially where the facts reveal that the Martin Act receiver was not only empowered by his order of appointment to do anything that a general receiver could do, but where he actually performed the functions of a general receiver." *Id.*, at 820.

Act, it is the *sufferance* by the alleged bankrupt of the *appointment* of a receiver that constitutes the act of bankruptcy.[11] Thus in determining whether a particular receiver is the type of receiver contemplated by the Bankruptcy Act, the facts to be considered are the powers given to the receiver *at the time of his appointment,* and not the powers which he actually exercises. For a receiver who takes control of property which he is not authorized by his appointment to take, is guilty of conversion. The act of a receiver who commits conversion, should not operate to make the sufferance of his appointment an act of bankruptcy, if it was not one in the first place.[12] Thus in the principal case, it was unimportant that the stock exchange seat, the proceeds of the sale of which the Martin Act receiver sought to take, was the property of the alleged bankrupt before any of the fraudulent acts were committed, if it was not such property as the Martin Act receiver was authorized to take by his appointment.[13] On the other hand, this question would be important if the Martin Act receiver was authorized to take this property by his appointment. For then the case would fall within the first class of cases enumerated.

Coming to the third type of case enumerated above, namely, where a truly limited receiver does not afterwards exceeds his limited authority, it directly presents the fundamental question involved, *viz.*, "Does the sufferance of the appointment of a Martin Act receiver constitute an act of bankruptcy?" Its solution depends upon an analysis of the nature of a Martin Act receivership, and the meaning of Section 3 a (5) of the Bankruptcy Act.

The purpose of the Martin Act which is found in the General Business Law[14] in general is to protect the general public from fraudulent practices of those dealing in securities. The purpose of Section 353 *a* of the General Business Law is to bring about the return of property obtained by the fraudulent practices enumerated in the Martin Act,[15] through the instrumentality of a receivership, to the persons who have been defrauded.[16] It seems clear from the language of the statute and from the New York cases,[17] that the property that a Martin Act receiver may take is limited to property obtained by fraudulent practices, together with other property with which it has been mingled so that it cannot be identified in kind, together with all books of account and papers relating to such property.[18] Now it is possible that this may include all the property which such a person has. But such a situation would be rare and merely an accident. Hence we may conclude that a Martin Act receiver is authorized to take only property that has been obtained in a par-

11. See note 3, *supra.*

12. See *In re* Luxor Cab Mfg. Corp., 25 F. (2d) 646 (C. C. A. 2d, 1928).

13. See note 2, *supra.*

14. N. Y. GEN. BUS. LAW (1921) §§ 352-359h.

15. *Id.* at § 352.

16. "The judgment entered in such action may provide that such receiver shall take title to any and all such property and books of account and papers relating to the same and liquidate such property or any part thereof for the benefit of all persons intervening in the said action and establishing an interest in such property. The judgment may also provide that all such property, the title to or interest in which has not been established in such action by interveners or otherwise by due process to be in a person or persons other than the defendant or defendants, shall be returned to the defendant or defendants as their interest may appear."

17. See note 6, *supra.*

18. See N. Y. GEN. BUS. LAW (1934) § 353a.

ticular way, *viz.*, by means of fraudulent practices, and that he is not authorized to take the general assets of such a person.

May a person who suffers the appointment of such a receiver be said to have "suffered . . . involuntarily the appointment of a receiver . . . to take charge of his property"? Assuming that a general receivership is contemplated by this section of the Bankruptcy Act, a distinction must be made between a *de jure* general receivership and a *de facto* general receivership in order to answer this question. A *de jure* general receivership is had where the receiver has an unlimited legal right to take *all* of a person's property. A *de facto* general receivership is had when a receiver who has not the legal right to take *all* of a person's property as such, but who is only authorized to take specific property, accidentally happens to have the right to take all that person's property due to its limited nature. In other words, it is a limited receivership when viewed from the point of the nature of the receiver's rights, but is a general one when viewed from the point of the actual property which such a receiver will be able to take under his limited authority.

If *de facto* general receiverships are included within the Bankruptcy Act, it would seem at least that the appointment of a receiver should not *per se* constitute an act of bankruptcy *merely because it is possible* that such a receiver may be able to take all the person's property; it should further factually appear that substantially all the property that that person actually owns does fall within the description of the specific property which the receiver is authorized to take.

Even in a case where a limited receiver is a *de facto* general receiver, it might well be argued that the sounder view is that the appointment of such a receiver would not constitute an act of bankruptcy. For as the late Mr. Justice Cardozo said in *Duparquet Co. v. Evans*:[19] "True indeed it is that in this case it so happens that the property subject to the mortgage is everything that the debtor has. All that is but an accident which has little, if any bearing upon the meaning of the act."[20] Under this construction, the appointment of a Martin Act receiver could not as a matter of law constitute an act of bankruptcy, because such a receiver would not necessarily be entitled to take all of the person's property, but only such of it as had been obtained in a particular way, namely, by fraudulent practices. If the Bankruptcy Act be construed as making the appointment of a *de facto* general receiver, an act of bankruptcy, then the appointment of a Martin Act receiver would or would not constitute an act of bankruptcy, depending upon whether or not the only property which the debtor had, was property which had been obtained by fraudulent practices. If the Bankruptcy Act be construed so as to make the appointment of any receiver, whether general or limited, an act of bankruptcy, then the appointment of a Martin Act receiver would necessarily constitute an act of bankruptcy. In the principal case, enough facts do not appear in the opinion to enable one to determine whether the Martin Act receiver involved was actually a *de facto* general receiver. The court proceeded along other lines.[21] But whether or not the debtor was properly held to have committed an act of bankruptcy within the meaning of the Bankruptcy Act, it would seem that the law *ought to be* that

19. Duparquet Co. v. Evans, 297 U. S. 216 (1936).

20. *Id.* at 223. See note 4, *supra.*

21. The Court seemed more concerned with the actions of the Martin Act receiver rather than his authority. Also the court seemed to be of the opinion that the Martin Act receiver had been given full power to take any and all property owned by the bankrupt. In other words it found as a fact that the receiver had been given the full powers of a *de jure* general receiver.

when a person, while insolvent, has suffered the appointment of a receiver to take charge of property which he has fraudulently acquired, he has committed an act of bankruptcy because ordinarily such a person would be the type of person who would attempt, if possible, to put all his property beyond the reach of his creditors.[22]

CONSTITUTIONAL LAW—POWER OF LEGISLATURE TO DELEGATE LEGISLATIVE AUTHORITY TO ADMINISTRATIVE BOARD.—Defendants, milk distributors, were convicted for violation of a regulation of the Louisiana Milk Commission making it unlawful for distributors or pasteurizers of milk to engage in such business or to buy milk from a producer without having first posted a bond to cover the cost of at least 15 days' shipment of milk. On appeal from conviction, *held*, those parts of the act, which provide that the violation of the rules of the Commission shall constitute a misdemeanor, are unconstitutional and void as an unlawful delegation of legislative power; therefore the particular regulation for violation of which defendants were indicted is void and the conviction and sentence are set aside. *State v. Maitrejean*, 193 La. 824, 192 So. 361 (1939).

One of the most recent developments in the administrative field has been the milk control commission, created to bring order out of the chaos in which this highly important industry has found itself.[1] Milk control commissions have been created in twenty-one of the states, and in eighteen of these jurisdictions their power to fix prices has been upheld by state courts on the authority of the *Nebbia* case.[2] This

22. See Treiman, *Acts of Bankruptcy* (1938) 52 HARV. L. REV. 189. The author of that article contends that acts of bankruptcy are medieval heirlooms, which ought to be abandoned, because modern bankruptcy law is primarily concerned with the economic situation that arises out of a debtor's insolvent condition.

[Since the above note was written, the principal case was reversed and the proceedings dismissed by the Circuit Court of Appeals which held that the appointment of a Martin Act receiver is not an act of bankruptcy under the Chandler Act. *In re* Elfast, C. C. A. 2d, April 29, 1940.]

1. N. Y. AGRICULTURE AND MARKETS LAW (1939) § 258-k.

2. These cases follow Nebbia v. New York, 291 U. S. 502 (1934); Franklin v. State ex rel. Alabama State Milk Control Board, 232 Ala. 637, 169 So. 295 (1936); Stanislaus County Dairymen's Protective Ass'n v. Stanislaus County, 8 Cal. (2d) 378, 65 P. (2d) 1305 (1937); Bohannon v. Duncan, 185 Ga. 840, 196 S. E. 897 (1938); Albert v. Milk Control Board, 210 Ind. 283, 200 N. E. 688 (1936); State v. Newark Milk Co., 118 N. J. Eq. 504, 179 Atl. 116 (1935); Noyes v. Erie & Wyoming Farmers Co-op. Corp., 281 N. Y. 187, 22 N. E. (2d) 334 (1939); Rohrer v. Milk Control Board, 322 Pa. 257, 186 Atl. 336 (1936); Reynolds v. Milk Commission of Va., 163 Va. 957, 179 S. E. 507 (1935); State v. Lincoln Dairy Co., 221 Wis. 1, 265 N. W. 197 (1936). *Contra*: Maryland Co-Operative Milk Producers v. Miller, 170 Md. 81, 182 Atl. 432 (1936), which held that the provision that the act should go into effect when a "substantial proportion of the producers, consumers or distributors in any marketing area request it" was unconstitutional because an unlawful delegation of power to an "indefinite portion of producer, consumer and distributor classes in areas having no legislative description." Ferretti v. Jackson, 88 N. H. 296, 188 Atl. 474 (1936) which held the act defective in not sufficiently declaring policy standards by which the authority delegated might be measured. (The act was not modeled after the

power of price-fixing, the most controversial aspect of the milk commission, was held, by the United States Supreme Court to be within the police power of the state and to be delegable to an administrative board.[3] The issue the present case raises, however, is a rather special phase of the delegation of power problem, *i.e.*, whether it is a violation of the legislative power to define crimes when the administrative board is given authority to make penal regulations.

A long dissenting opinion argues that it is well-settled that the legislature can delegate authority to administrative agencies where it lays out the policy setting forth the ends desired and that this act does no more than that. It states the reason for this bonding requirement[4] and remarks that the requirement that distributors of milk products be licensed or give bonds to secure payment to producers is commonly set down by milk control commissions and has been held valid.[5] Since it is a reasonable requirement and within the scope of the act, it is an exercise of administrative authority and not of legislative power. This dissent relies on the *Nebbia* case, arguing, by analogy, that since the delegation of power to fix prices of milk products has been held constitutional, posting bond to secure payment must be.

Both the majority and the dissent seem to have overlooked *United States v. Grimaud*,[6] in which the United States Supreme Court determined that such delegation is certainly not *per se* unlawful. The Forest Reserve Act, under scrutiny in the *Grimaud* case, gave the Secretary of Agriculture authority to make regulations concerning the use of forest reserves and specifically provided that violations of such regulations should be punished. That provision gave the force of law to the Secretary's regulations.[7] The *Grimaud* case establishes the fact that it is possible to delegate to a board the power to make rules, violations of which shall be punishable as misdemeanors.[8] An earlier case, *United States v. Eaton*, establishes that to do so it is

New York Act.) The Court indicated a belief that the question of delegation of power has been inadequately considered in many of the cases and commented in explanation of the *Nebbia* decision that the New York Act has an extended declaration of policy which the New Hampshire Act lacked.

3. Nebbia v. New York, 291 U. S. 502 (1933).

4. The reason, as explained by the dissenting opinion, for the bond requirement is that the custom in the milk industry is for the distributors to pay the producers for milk shipped to them at the end of 15 days, so that there is always money due and owing to the producers. The distributors are, in effect, operating on the producers' capital without giving security and the Commission's regulation is intended to rectify this situation.

5. People v. Perretta, 253 N. Y. 305, 171 N. E. 72 (1930).

6. United States v. Grimaud, 220 U. S. 506 (1911). In this case ranchmen were indicted for grazing sheep on a forest reserve without a permit as required by the regulations of the Secretary of Agriculture under authority of the Forest Reserve Act of 1897. The defendants attacked the indictment on the same ground as in the principal case but the court held that the delegation was lawful. The court stated: "Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions, Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power." *Id.* at 517.

7. "A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. . . . The Secretary did not exercise the legislative power of declaring the penalty or fixing the punishment for grazing sheep without a permit, but the punishment is imposed by the act itself." United States v. Grimaud, 220 U. S. 506, 522 (1911).

8. See note 9, *infra*.

necessary to provide specifically in the statute for punishment for violation of rules of the administrative agency.[9]

This is not a delegation of legislative power, as the court pointed out in the *Grimaud* case, because: "The statute, not the Secretary, fixes the penalty."[10] However it may become an unlawful delegation of legislative power by the seemingly slight deviation of leaving it within the discretion of the agency to determine whether violations of its rules shall be punishable or not.[11] To allow an administrative board to determine that violations of certain of its rules shall be punishable while violations of certain others shall not, is to allow it to exercise a legislative function.[12] "The offense is created by the rule and not by the statute."[13] It is apparent that the distinction between administrative action and legislative action is very fine in these cases. The question naturally arises: Is the administrative board legislating when it makes the rules it is authorized to make? Are those rules laws? Apparently they are not; they are regulations, the violation of which is a public offense. The court said in the *Grimaud* case: "The authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense."[14]

Under the authority of the *Grimaud* case it would appear that the ground upon which the decision in the principal case is based is wrong. The Act contains the all-important provision emphasized by the court that violations of regulations of the Commission shall be punished in the manner set out in the statute and therefore does not delegate to a subordinate state board the power to declare what shall be an offense against the state, as the court declares.[15]

However, it may well be questioned whether this Louisiana act, in so far as it is set out in the opinion, sufficiently defines the Board's authority. In order that

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9. 144 U. S. 677 (1891). Regulations of the Commissioner of Internal Revenue, approved by the Secretary of the Treasury, concerning the manufacture, distribution and sale of oleomargarine were held not to have the force of law. It was erroneous to indict the defendant for violation of such regulations because the act did not specifically provide that violations were to be misdemeanors.

10. See United States v. Grimaud, 220 U. S. 506, 522 (1911).

11. People v. Grant, 242 App. Div. 310, 275 N. Y. Supp. 74 (3d Dep't 1934), *aff'd without opinion*, 267 N. Y. 508, 196 N. E. 553 (1935). The New York Alcoholic Beverage Control Board had been empowered to lay down rules concerning the sale of liquor, violations of such rules to be misdemeanors if the board so provided. Court held that this made the board the final arbiter as to which acts shall be criminal and which shall not, and was an unlawful delegation of legislative power since the administrative rules and not the legislative statute created the exact offense.

12. The provision which the court held invalid was worded: "Violation by any person of any rule of the state board shall be a misdemeanor *if such rules so provides*". (Italics inserted.)

13. People v. Grant, 242 App. Div. 310, 313, 275 N. Y. Supp. 74, 75 (3d Dep't 1934).

14. United States v. Grimaud, 220 U. S. 506, 521 (1911).

15. Louisiana Laws, 1938, Act 195, § 8: "That any person who shall violate any of the provisions of this Act, or any of the rules and regulations adopted by the Louisiana Milk Commission under the provisions of this Act, shall be punished upon conviction, by a fine of no less than Ten Dollars, nor more than Two Hundred Dollars, or by imprisonment in the Parish jail for no less than ten days nor more than six months, or by both, such fine and imprisonment at the discretion of the Court."

a delegation of administrative authority be valid, it is necessary that the scope of the board's authority be well-defined, that the policy and standards by which it is to be guided be stated in some detail.[16] The New York Milk Control Act, which has been used as a model by numerous other states, specifically provides that dealers and distributors of milk be licensed[17] and requires that they post bond.[18] The Louisiana act has no such specific provisions. The regulation requiring bond was made by the Board under its general authority to make necessary rules and regulations for the carrying out of the purposes of the act,[19] one of the purposes being, "to provide such means for the protection of producers in the collection of amounts due and to become due them from such distributors, wholesalers or pasteurizers of milk, or milk products as may be deemed advisable."[20] Therefore, although the dissent is clearly correct in contending that the constitutionality of such requirements has been established, it is quite possible that the statement in this act is too broad and general to constitute definite guiding principles warranting the making of such a regulation. Careful draftsmanship is essential in the enabling acts which create administrative bodies. It would seem that the court would have been wise to base its decision on this latter ground rather than upon a contention which appears to be *contra* to established authority.[21]

CONTRACTS—STATUTE OF FRAUDS—ORAL CONTRACTS OF EMPLOYMENT NOT TO BE PERFORMED WITHIN ONE YEAR.—Plaintiff brought this action against his employer for breach of an oral contract of employment. The contract, made at some unstated date during 1934, was for the remainder of that year and provided further that it was to continue from year to year thereafter unless 90 days notice to terminate for any succeeding year was given by either party prior to December 31 (*i.e.* before Oct. 2nd) of the preceding year. The question certified was whether this was an agreement within the statute of frauds. *Held,* this was an agreement to execute a contract not to be performed within one year, hence within the statute of frauds and unenforceable thereunder. *White* v. *Simplex Radio Co.*, 3 S. E. (2d) 890 (Ga. 1939).

16. A declared legislative policy, a standard for administrative action and a definite finding in the exercise of the authority conferred are each necessary requisites for vesting of federal officers with the power to carry out the legislative policies of Congress. Panama Refining Co. v. Ryan, 293 U. S. 388 (1934). See Keefe, *Administrative Rule-Making and the Courts* (1939) 8 FORDHAM L. REV. 303.

17. N. Y. AGRICULTURE AND MARKETS LAW (1937) § 258-a.

18. *Id.* § 258-b.

19. Louisiana Laws, 1938, Act 195, § 3. See State v. Maitrejean, 193 La. 824, 192 So. 361, 362 (1939).

20. Louisiana Laws, 1938, Act 195, § 1.

21. The *Grimaud* case has been cited scores of times on the question of delegation of power, recently in Currin v. Wallace, 306 U. S. 1, 18 (1938) upholding the authority granted the Secretary of Agriculture under the Tobacco Inspection Act, 49 STAT. 731, 7 U. S. C. A. 511 (Supp. 1935). Other notable instances in which it has been relied upon are: Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 215 (1912) which upheld certain regulatory powers of that pioneer administrative body; United States v. Shreveport Grain & Elevator Co., 287 U. S. 77, 85 (1932) which held valid regulations made under the Food and Drug Act; Panama Refining Co. v. Ryan, 293 U. S. 388, 428 (1934) in which there was found undue delegation of power to the executive branch of the national government.

In determining whether oral contracts come within the one year provision of the statute of frauds,[1] the courts, governed by the words "not to be performed within a year", have treated them as words which preclude the possibility of performance within a year. Therefore: (1) contracts that may or may not be performed within a year have been held not within the statute;[2] (2) contracts, which by their terms cannot be performed within one year from their creation, have been held within the statute;[3] (3) contracts of employment for one year, to commence in the future have been held within the statute.[4]

Despite the termination provisions, the court in the instant case construed the contract to be substantially like a contract made expressly for a definite number of years although terminable on notice by either party. Courts will disregard the fact that performance was actually completed within a year, if by the terms of the contract it might not be so performed.[5] In the principal case the court said the contract "by

1. GA. CODE (1933) § 20-401 (5); N. Y. PERS. PROP. LAW (1933) § 31 sub. 1.

2. Hudgens v. State, 126 Ga. 639, 55 S. E. 492 (1906) (one year contract to begin immediately); Owensboro v. Owensboro, 185 Ky. 717, 216 S. W. 72 (1919); Passino v. Brady, 83 N. J. L. 419, 85 Atl. 615 (1912) (hiring for a fixed period less than one year); Cater v. Ford, 47 Neb. 409, 66 N. W. 536 (1896) (a contract was held not within the statute where it was to continue until business ceases or until employee may want to cease working); Municipal Gas v. Gilkeson, 160 Okla. 284, 16 P. (2d) 247 (1932) (a contract of employment under which plaintiff worked on the construction of a gas pipe line at so much per foot of pipe laid was not within the statute as performance might occur with a year); Overland Auto Co. v. Cleveland, 250 S. W. 453 (Tex. Civ. App. 1923). See also, Moore v. Fox, 10 Johns. 244 (N. Y. 1813); Rochester v Broune, 179 N. Y. 542, 71 N. E. 1139 (1904).

3. Oddy v. James, 48 N. Y. 685 (1872); Badger v. Scobell Chemical, 221 App. Div. 490, 224 N. Y. Supp. 648 (4th Dep't 1927), *aff'd*, 247 N. Y. 58, 161 N. E. 193 (1928) (oral contract for the remainder of the year and the following year). In Drummond v. Burrell, 13 Wend. 307 (N. Y. 1835) defendant made an oral contract to work for two years and to receive $100. He left after six months. The plaintiff couldn't sue for non-performance as the contract was within the statute. See Comstock v. Ward, 22 Ill. 248 (1859) (oral contract "not to be performed within a year"); Kelly v. Thompson, 175 Mass. 427, 56 N. E. 713 (1900) (oral two year contract); ANSON, CONTRACTS (16th Ed. 1924) § 100 (a); (1930) 14 MINN. L. REV. 813-4.

4. Williams v. Garrison, 21 Ga. App. 442, 93 S. E. 510 (1917) (oral contract on June 1, 1931 to begin July, 1931 for one year—void); Morris v. Virginia Carolina Co., 48 Ga. App. 702, 173 S. E. 486 (1934) (oral contract for services to start in the future and continue for a year is within the statute); Whiting v. Ohler, 52 Mich. 462, 18 N. W. 219 (1884) (oral agreement in April for a year's tenancy to start in May is valid); Young v. Dake, 5 N. Y. 463 (1851); Trull v. Granger, 8 N. Y. 115 (1853); Loughran v. Smith, 75 N. Y. 205 (1878). Year to year leases were held valid in Ward v. Hasbrouck, 169 N. Y. 407, 62 N. E. 434 (1902); Tonsdale v. Midgel, 22 App. Div. 197, 225 N. Y. Supp. 593 (2d Dep't 1927) (oral contract made in June for one year to start the following January).

5. Blue Valley Creamery v. Consol. Products, 81 F. (2d) 182 (C. C. A. 8th, 1936); Akins v. Hicks, 109 Mo. App. 95, 83 S. W. 75 (1904) (full and complete performance as set forth by the terms of the contract was held to be the criterion). The reason for these decisions was expressed in Meyers v. Roberts, 46 Ark. 80, 55 Am. Rep. 567 (1885) as follows: "Nor does it make any difference that the contract if for more than one year is subject to determination sooner on a given event . . . when once the contract exceeds the year, the circumstance that it is defeasible will not make it other than a contract for more than one year."

its express terms . . . was to continue for more than a year from its date in 1934, and then for an indefinite number of years unless it was terminated by notice". Therefore, as this contract is not to be performed within one year from its execution in 1934, the fact that it may be terminated within the year will not take it out of the statute. So, also, in *Biest v. Ver Steeg*,[6] an oral agreement of employment for one year made in February to start in April, and then for two more years, if no notice to quit be given before the end of the first year, was held to be within the statute.

The plaintiff, in the case at bar, argued that this contract was one with a renewal provision and cited *Woodal* v. *Davis*,[7] where an oral contract was upheld on the renewal theory. Courts have made a distinction between contracts containing termination provisions before its completion and contracts with renewal provisions as to its further continuance.[8] Contracts for a period longer than one year, subject to termination within a year by subsequent event or notice by either party, have been generally held to be within the statute.[9] Contracts for a year subject to renewal or extension of a similar term or less, where the original term is for a year or less, have been held not within the statute.[10] The renewal provisions in these cases have been considered as a condition precedent to the continuance of the contracts. By compliance with the terms of the renewal provision, an implied agreement and acquiescence is presumed for a new term.[11] Hence, as the renewal each year depends upon a new acquiescence and implied agreement, the period of the initial contract must necessarily be within a year and valid.[12]

In the instant case, even if the court implied a tacit renewal by the failure of

6. 97 Mo. App. 137, 70 S. W. 1081 (1902).

7. 9 Colo. App. 198, 48 Pac. 670 (1897). Here, the plaintiff was to be given $1800 for the rest of the year and for the next year if the employer could see his way clear. See Passino v. Brady, 83 N. J. L. 419, 84 Atl. 615 (1912) (year contract, then year to year—valid yearly contracts).

8. This distinction was pointed out and made in Warren v. Texas & Pac. R. R., 164 U. S. 418 (1896). See Reyniere v. Associated Dyeing, 116 N. J. L. 816 (1936) where an unfixed term could be terminated by notice by either party within a year.

9. Radio Corp. v. Cable Radio Tube, 66 F. (2d) 778 (C. C. A. 2d, 1933); Biest v. Ver Steeg, 97 Mo. App. 137, 70 S. W. 1081 (1902). See Wagniere v. Dummel, 29 R. I. 580, 73 Atl. 309 (1909) (a three year oral contract to terminate whenever employee's services becomes unsatisfactory—void).

10. Marble v. Clinton, 9 N. E. (2d) 522 (Mass. 1937) (one year contract and option to renew for another year); General Electric v. Ebling, 52 Misc. 145, 101 N. Y. Supp. 648 (App. Term, 1906) (contract for one year and renewal if no notice to quit). But see Smith v. Campania Litografica, 127 Misc. 508, 217 N. Y. Supp. 648 (Sup. Ct. 1936) (oral contract for five years and renewal rights—invalid due to five year original term).

11. Reynick v. Allington, 179 Mich. 630, 146 N. W. 252 (1917) (when the one year contract ends and employment is held over, there is an implied year to year contract); Conrad v. Eillison Harvey Co., 120 Va. 458, 91 S. E. 763 (1917) (written one year contract becomes oral year to year contract after the end of the first year if implied continuance). See to same effect Passino v. Brady Brass Co., 83 N. J. L. 419, 84 Atl. 615 (1912).

12. Standard Bitulethic Co. v. Curran, 256 Fed. 68 (C. C. A. 2d, 1919) (a contract of employment for six months and if satisfactory, then nine years longer; original term of six months is valid and enforcible as contract can be performed within a year; the contract is outside the statute; but the renewal terms would be invalid as it cannot be performed within a year).

either party to give notice of termination before October 2nd in any year, the court would still have held this contract within the statute. The court construed the renewal to be effective as of October 2nd. This would result in an unconditional agreement to continue employment under a contract for the succeeding year to begin January 1st, next and extend to Dec. 31st. This would be a one year oral contract to begin in the future and thus unenforceable because it couldn't be performed within one year from the creation, and within the statute. Considering the contract date as of 1934, the contract was to continue till January 1st, 1936, and terminate then if notice to quit was given before October 2nd, 1935. Thus, the contract still would fall within the statute.

The court was careful in the decision to point out the consistency of this decision with the rule of *Young Men's Christian Ass'n* v. *Estell*.[14] This rule provides that "if there is no time mentioned in the contract except that the performance depends upon a contingency that may happen within a year, the contract is not within the statute." Thus in the case of contracts to do an act on the return of a ship or death of a person, without further specifications as to time; since such events may happen in a year, the contracts are not within the statute. Our contract does not violate this rule as it expressly specifies the time of performance—that it was to continue for more than one year with termination privileges after the first year. It does not terminate on notice but at the end of the year.

There can be no analogy made between this contract of employment and lease contracts as a separate statute is particularly applicable to leases. They make *leases* for more than one year unenforceable if oral. On oral *lease* for one year to start in the future need not be in writing due to the fact that the *lease, i.e.,* the *future estate,* does not begin with the contract, but with the lease date. The statute applicable to contracts to lease has been thus interpreted.[15] This is true even if the oral one

13. Conoley v. Harrel, 182 Ala. 243, 62 So. 511 (1913) (from November 1905 to January 1908); Goldberg v. Cohen, 110 N. Y. Supp. 185 (App. Term 1908) (contract made before October 15 to run for a year from October 15—void). Also to same effect, Union Car Adv. Co. v. Boston Elevated Ry., 26 F. (2d) 755 (C. C. A. 1st, 1928).

14. Young Men's Christian Ass'n v. Estill, 140 Ga. 291, 78 S. E. 1075 (1913). A promise to give money upon the beginning of construction work in furtherance of general corporate design was enforcible although oral. It was not within the statute as construction might be begun within a year. See also, Arkansas Midland R. R. v. Whitney, 54 Ark. 199, 15 S. W. 465 (1891), in which an agreement by a railroad company to maintain cattle guards in consideration of a right of way was held to be not within the statute; since the railroad might cease to use the right of way before the expiration of a year. See Carter v. Kinlin, 47 Neb. 409, 66 N. W. 536 (1896) (contract of employment to continue "until the business fails or the employee wishes to quit" may be performed within one year). In McClanahan v. Otto Marmet Coal Co., 74 W. Va. 543, 82 S. E. 752 (1914), the plaintiff was hired to cut down all the timber from two tracts of land. No time was fixed by the contract. This was held to be a valid oral contract since the contract by its terms did not make performance within a year impossible. CLARK, CONTRACTS (4th ed. 1931) § 44a.

15. N. Y. REAL PROP. LAW (1934) § 259: *"When Contracts to Lease or Sell Void*: A contract for the leasing for a longer period than one year . . . is void unless the contract is in writing. . . . " Thus a parol lease of lands for the term of one year, to commence in the future is valid under the statute of frauds.

Butler v. Godley, 51 Ga. App. 784, 181 S. E. 494 (1935) (oral lease made in September 26 to start October 1 held valid); Young v. Dake, 5 N. Y. 463 (1851) (one year lease to start in the future—valid); Ward v. Hasbrouck, 169 N. Y. 407, 62 N. E. 434 (1902).

year lease may be further continued from year to year, if no notice to vacate is given, *i.e.*, tenancies from year to year.[16] This rule is based upon the theory that if there is a lease for a year and if by the consent of the parties the tenant continues in possession thereafter, "the law implies a tacit renovation of the contract." But in the case at bar, the inapplicability of the renewal theory distinguishes it from the lease from year to year.

DECEDENT'S ESTATE—RIGHT OF SURVIVOR—PRIOR SUIT BY DECEDENT.—Deceased had recovered a judgment for personal injuries which was satisfied by the defendant during the decedent's lifetime. Thereafter he died as a direct result of the injuries. The administrator of the deceased's estate instituted an action for wrongful death for the benefit of the next of kin. Defendant interposed as a defense the satisfaction of judgment for personal injuries during the lifetime of the injured person. On appeal from an order granting the plaintiff's motion to strike out the defense as insufficient in law, *held*, order reversed. *Fontheim v. Third Ave. Ry.*, 257 App. Div. 14, 12 N. Y. S. (2d) 90 (1st Dep't 1939).

Before the enactment of the survival statutes[1] it was held in New York that a recovery had by a decedent for personal injuries would bar the statutory death action by the next of kin under section 130 of the Decedent Estate Law.[2] With the passage in 1935, upon the recommendation of the Law Revision Commission,[3] of the survival statutes, some persons believed that a change in the law had taken place and that the death action was not barred by a previous recovery by the decedent. Any such conclusion is erroneous. The law is as it was before the 1935 amendment, except that the following inequities which existed prior to the amendment have been rooted out by the survival statutes: (1) The right of recovery in favor of the injured person was lost if the wrongdoer died before judgment had been recovered. (2) There could be no recovery if the injured person died before judgment from causes other than the injury. (3) There could be no redress after death for the pain and suffering endured by decedent and for his loss of earnings from the time of the injury to the death.[4] Under the new section 118 of the Decedent Estate Law an action for per-

16. Hatfield v. Lawton, 108 App. Div. 113, 95 N. Y. Supp. 451 (3d Dep't 1905) (oral lease for one year held valid even when extended into a year to year lease). See (1930) 16 VA. L. REV. 857-63; (1936) 20 MINN. L. REV. 833-4.

1. N. Y. DEC. EST. LAW (1935) §§ 118, 119, 120, providing in substance that personal injury actions do not abate with the death of the wrongdoer or victim but survive him and may be instituted or continued by or against his executor or administrator. See Herzog v. Stern, 264 N. Y. 379, 191 N. E. 23 (1934), on the question of survival and revival of actions in New York prior to the 1935 amendments. See also Comment (1935) 4 FORDHAM L. REV. 89.

2. Littlewood v. Mayor etc., 89 N. Y. 24 (1882); see Kelliher v. N. Y. Central R. R., 212 N. Y. 207, 211, 105 N. E. 824, 826 (1914).

3. N. Y. LAWS 1934, c. 597, § 60, creating the Law Revision Commission. The changes recommended in the law are found in the REPORT OF LAW REVISION COMM. (1935) 157-225.

4. The situation at common law was aptly stated by Lord Ellenborough. In an oft-quoted statement he said, "In a civil court the death of a human being cannot be complained of as an injury". Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (K. B. 1808); Zabriskie v. Smith, 13 N. Y. 322 (1855). See also Moore v. McKinstry, 37 Hun. 194 (N. Y. 1885).

sonal injury no longer abates on the death of the wrongdoer, and under section 119 a personal injury action is no longer lost because of the death of the injured person, but such action may now be "brought or continued by the executor or administrator of the deceased person". By provisions of section 120 the damages recoverable where an injury causes the death of a person are limited to those accruing before death and form part of the estate of the deceased; the right of action existing in favor of the next of kin for the wrongful death under section 130 continues unaffected.[5]

The Court appears to be correct in its analysis of the amended statutes. Section 130 of the Decedent Estate Law provides that an action under it may not be maintained unless the "defendant would have been liable to an action in favor of decedent by reason thereof if death had not ensued."[6] In the instant case the defendant would not be liable to the decedent were he living because the decedent had already received satisfaction of his judgment against the defendant. So, while it is apparent from the statute that when death results from personal injuries a right of action vests in the administrator of the estate for the benefit of the next of kin, such right of action is not absolute.[7] Such was and is the character of a death action in New York[8] and elsewhere,[9] as amply set forth in the analysis by the Law Revision

5. Section 120 of the Decedent Estate Law provides that the cause of action under section 130 and the cause of action in favor of the estate "to recover damages accruing before death may be prosecuted to judgment in a single action". In England the administrators were, in the following cases, successful in recovering under both the Fatal Accidents Act and the Law Reform Act, 1934, 24 & 25 GEO. V., c. 41. May v. Sir Robt. McAlpine [1938] 54 T. L. R. 850; Ellis v. Raine [1939] 55 T. L. R. 344. It is to be noted that these two sections are practically identical with sections 119 and 130 of the N. Y. Decedent Estate Law.

6. N. Y. DEC. EST. LAW (1921) § 130 provides that "the executor or administrator . . . of a decedent who has left him surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act neglect or default, by which the decedent's death was caused against a . . . person . . . who would have been liable to an action in favor of decedent by reason thereof if death had not ensued."

7. Where the decedent had recovered judgment for the injuries while living or had let the statute of limitations run or had given a release to the wrongdoer, there could be no recovery under section 130 of the Decedent Estate Law. See Crockett v. Missouri, 179 Ark. 527, 16 S. W. (2d) 989 (1929); Littlewood v. Mayor, 89 N. Y. 24 (1882); Kwiatkowski v. Lowry, 276 N. Y. 126, 11 N. E. (2d) 563 (1937); Fontheim v. Third Ave. Ry., 257 App. Div. 14, 12 N. Y. S. (2d) 90 (1st Dep't 1930); Brodie v. Washington, 92 Wash. 574, 159 Pac. 791 (1916).

8. See note 7, *supra*.

9. And such is the weight of authority in this country. Hect v. Ohio Co., 132 Ind. 507, 32 N. E. 302 (1892); Melitch v. United R. and E. Co., 121 Md. 457, 88 Atl. 229 (1913); Hill v. Penn. R. R., 178 Pa. 223, 35 Atl. 997 (1896). See also TIFFANY, DEATH BY WRONGFUL ACT (2d ed. 1913) 124. These courts base their decisions on the reasoning that the words "decedent would have been able to sue if living" mean that the decedent's cause of action must be outstanding and unsettled. This has been criticized as unsound on the grounds that the better reasoning would be that such words were intended to limit recovery to cases where the acts which gave rise to the injury were in their nature and essence actionable. King v. Henkie, 80 Ala. 505, 60 Am. Rep. 119 (1886); Meyer v. King, 72 Miss. 1, 16 So. 245 (1894). See Schumacher, *Rights of Action under Death and Survival Statutes* (1924) 23 MICH. L. REV. 114, 116.

Commission[10] which the Court felt free to consult in determining the legislative intent.[11]

Section 130 is modeled after Lord Campbell's Act in England which was the original death statute. By these statutes the legislative bodies provided that persons who are next of kin have a cause of action for the pecuniary injury done them by the wrongful death.[12] Although the instant decision denies a recovery to the next of kin, it is not out of sympathy with this reasoning. It acknowledges that section 130 of the Decedent Estate Law was enacted to change the common law and that its enactment is due to the hiatus in justice which existed when death accomplished an abatement of the injured person's unliquidated cause of action and neither the injured party nor his survivors were able to secure compensation. But as the next of kin inherit the decedent's estate, they will probably take any residue of the recovery or of a settlement of the action which may exist at the time of his death and thus they receive some monetary benefit. Indirectly the purposes behind section 130 are satisfied, for normally the next of kin inherit the decedent's estate. The purpose of the law as evidenced in the decisions of the Courts is not frustrated when they say it is "a new cause of action based upon . . . the pecuniary injury to the next of kin of the deceased . . ."[13] and it is the "enforcement of the personal rights of the next of kin. . . ."[14]

In any event it is now the law that if a person recovers and collects money for personal injuries and subsequently dies as a result of such injuries, his next of kin have no right of action under section 130, despite the provisions of section 119.

EVIDENCE—SUBJECTING ATTORNEY TO DISCIPLINE FOR CLAIMING PRIVILEGE AGAINST SELF-INCRIMINATION.—An attorney, called to testify at a judicial inquiry into solicitation of negligence cases and unethical practices of the law in Richmond County, refused to answer questions on the ground that the answers would tend to incriminate him. In later disciplinary proceedings brought against him therefor, *held*, two justices dissenting, the claim of privilege not having been asserted to prevent self-incrimination, but as a sham and pretext, the attorney should be suspended for professional misconduct; further, assuming he was acting in good faith, he still would be guilty of professional misconduct, and such conduct shall result in disbarment in the future. *Matter of Ellis*, 258 App. Div. 558, 17 N. Y. S. (2d) 800 (2d Dep't 1940).

In the face of what appears to be an attack upon the constitutional privilege against

10. See note 3, *supra*.

11. "As Blackstone tersely expressed it, in the interpretation of statutes due regard must be had to the old law, the mischief and the remedy. The mischief may be indicated or made apparent by the debates attending the adoption of the remedy, as well as by contemporaneous events and the relevant situation as it existed." Woolcott v. Schubert, 217 N. Y. 212, 221, 111 N. E. 829, 831 (1916). See also Cohen v. Neustadter, 247 N. Y. 207, 210. 160 N. E. 12, 13 (1928).

12. Lord Campbell's Act, 1846 St. 9 & 10 VICT. c. 93. Commenting on this statute the court in Nunan v. Southern Ry. Co., [1924] 1 K. B. 223, seems to put a limit on the artificial reasoning which bars causes of action because the decedent had no right of action at the time of his death. See note 8, *supra*.

13. Greco v. Kresge Co., 277 N. Y. 26 32, 12 N. E. (2d) 557, 560 (1938).

14. *In re* Kaufman's Estate, 167 Misc. 83, 84, 3 N. Y. S. (2d) 486, 487 (Surr. Ct. 1938).

self-incrimination it may be helpful to mention briefly its development and its purposes. Its underlying theory is that a system of compulsory self-incrimination develops an inclination in prosecutors to rely on third-degree methods, to the detriment of the innocent. The privilege is not provided out of solicitude for the guilty.[1] Although the privilege originated largely as the incidental result of the common law's assault upon canonical jurisdiction,[2] it has since found its way into the constitutions of every state but those of New Jersey and Iowa, where it is part of the common law and codified in the statutes.[3] The New York Constitution, Art. I, Sec. 6, provides, ". . . No person shall . . . be compelled in any criminal case to be a witness against himself. . . ."[4] The cases have said that the privilege should be construed liberally,[5] but there has been, of late, a good deal of criticism of it, and some states have cut down its operation.[6]

The instant case raises the problem as to when an attorney may exercise the privilege with impunity. Clearly, there is no right to the privilege when the answer does not tend to incriminate,[7] and the holding of the court to this effect is perfectly sound. But what of the rule when an attorney invokes the claim of privilege in good faith? The instant case allowed for three possible solutions: first, that an attorney has no right to exercise the privilege at any time; second, that an attorney has the right, but its exercise in a judicial inquiry into legal practices results in a forfeiture of his office; lastly, that an attorney has the right and may exercise that right without suspension or loss of his position as an attorney. Of these three solutions, the majority in the instant case adopted the second. They argue that so far as one's privilege to be an attorney is concerned, our State Constitution has not created a standard of duty for attorneys or given them the right to do what this attorney has done; that it is rather for the court to fix the standard of duty for its officers and to say what constitutes professional misconduct. The majority therefore concludes that the exercise of the privilege against self-incrimination at a judicial inquiry into improper practice of the law is a violation of an attorney's duty, and is professional misconduct.

It has been held that an attorney could rightfully assert the privilege at the trial of another and was not subject to discipline therefore.[8] Courts have recognized that

1. Twining v. New Jersey, 211 U. S. 78 (1908); 4 WIGMORE, EVIDENCE (2d ed. 1923) § 2251.

2. 4 WIGMORE, EVIDENCE (2d ed. 1923) § 2250. For its history in America, see Pittman, *Colonial and Constitutional History of the Privilege against Self-Incrimination in America.* (1935) 21 VA. L. REV. 763.

3. State v. Hillman, 203 Iowa 1008, 213 N. W. 603 (1927); State v. Zdanowicz, 69 N. J. L. 619, 55 Atl. 743 (1903). See IOWA CODE (1935) §§ 11267-11269; 2 N. J. COMP. STAT. (1910) 2223 (§ 8).

4. See also N. Y. CRIM. CODE (1846) § 10; N. Y. CIV. PRAC. ACT (1934) § 355.

5. People v. Newmark, 312 Ill. 625, 144 N. E. 338 (1924); People *ex rel.* Moll v. Danziger, 238 Mich. 392, 213 N. W. 448 (1927). People *ex rel.* Taylor v. Forbes, 143 N. Y. 219, 38 N. E. 303 (1894).

6. 9 N. Y. STATE CONST. CONV. COMM. (1938) 920. See also N. Y. STATE CONST. (1939) Art. I, § 6, providing that a public officer's refusal to answer questions before the grand jury shall result in his dismissal.

7. Matter of Rouss, 221 N. Y. 81, 116 N. E. 782 (1917); Matter of Becker, 255 N. Y. 223, 174 N. E. 461 (1931).

8. People v. Zazove, 311 Ill. 198, 142 N. E. 543 (1923): Matter of Kaffenburgh, 188 N. Y. 49, 80 N. E. 570 (1907). In Matter of Rouss, 221 N. Y. 81, 90, 116 N. E. 782, 785, the court said of the *Kaffenburgh* case, "He has placed his refusal on the ground of a

an attorney has the right to use the privilege in a disbarment proceeding against him without subjection to discipline for that.[9] The exercise by an attorney of the privilege at judicial inquiries into improper practices of the law also has been held proper,[10] and in this connection it should be noted that decisions on this point are in their reasoning contrary to the principal case. However, in a case of spurious assertion of the privilege at a judicial inquiry, the Court of Appeals in New York in *Matter of Becker* said, "We pass as unnecessary for consideration at this time the question whether the assertion in good faith of the privilege against self-incrimination is ground for disbarment."[11] The opinion in *In re Solovei*,[12] which held that an attorney's assertion of privilege before the grand jury did not subject him to discipline, expressed surprise at the statement above quoted, considering it a departure from former views of that court. Not one case, with the exception of the instant one, has been found which held or approved the view that an attorney had not the right to assert the privilege in good faith with impunity.

Thus, the law prior to the instant case appeared to be that an attorney's assertion and exercise of the privilege was on the same plane as that of a layman. The courts had always inquired whether or not the question which an attorney was refusing to answer was one which would incriminate, recognizing that the decision of this point would materially affect the result.[13] If it were true that an attorney had not the right to assert the privilege in any case, such discussion would be superfluous.[14]

Is there anything that can be said in support of this unprecedented case? We must remember the nature of the privilege. It was said in *Commonwealth v. Cameron*[15] that this exemption is not a natural right. Not only may a party waive the privilege at the hearing,[16] but it has been held that an agreement of waiver in advance of the trial is equally valid.[17] Mr. Justice Holmes once said: "In order to enter most of the relations of life people have to give up their constitutional rights.

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tendency to criminate him and that of itself was sufficient to sustain him." See also People v. Hunter, 139 Misc. 270, 249 N. Y. Supp. 66 (Gen. Sess. 1931).

9. *In re* Bailey, 30 Ariz. 407, 248 Pac. 29 (1926). See also *In re* Vaughan, 189 Cal. 491, 209 Pac. 353, 24 A. L. R. 863 (1922).

10. *In re* Schneidkraut, 231 App. Div. 109, 246 N. Y. Supp. 505 (2d Dep't 1930) (disciplinary charges dismissed). See also People *ex rel.* Karlin v. Culkin, 248 N. Y. 465, 471, 162 N. E. 487, 489 (1928), and Matter of Becker, 229 App. Div. 62, 241 N. Y. Supp. 369 (1st Dep't 1930).

11. 255 N. Y. 223, 225, 174 N. E. 461, 462 (1931).

12. 250 App. Div. 117, 293 N. Y. Supp. 640 (2d Dep't 1937), *aff'd without opinion*, 276 N. Y. 647, 12 N. E. (2d) 802 (1938).

13. Matter of Rouss, 221 N. Y. 81, 116 N. E. 782 (1917).

14. That it was thought necessary, and was held necessary [Cantelline v. McClellan, 171 Misc. 327, 12 N. Y. S. (2d) 642 (Sup. Ct. 1939)] to amend the state constitution in order to provide that a public officer's refusal to waive the privilege in a grand jury investigation of the conduct of his office, gives further support to this view. N. Y. STATE CONST. (1939) Art. I, § 6.

15. 229 Pa. 592, 79 Atl. 169 (1911).

16. People v. Trybus, 219 N. Y. 18, 113 N. E. 538 (1916).

17. Hickman v. London Assur. Corp., 184 Cal. 524, 195 Pac. 45 (1920). See McConnell v. State, 180 Okla. Cr. 688, 696, 197 Pac. 521, 523 (1921); 4 WIGMORE, EVIDENCE (2d ed. 1923) § 2275; *Waiver of the Privilege against Self-Incrimination by Public Officers* (1930) 30 COL. L. REV. 1160.

Some rights, no doubt, a person is not allowed to renounce, but very many he may."[18] Hence, it is not improper for the state to impose on one a condition restricting this constitutional right in exchange for granting a benefit.[19] An attorney is an officer of the court.[20] His membership in the bar is a privilege burdened with conditions. Whenever a condition is broken, the privilege is lost.[21] While it is the duty of every member of society to assist in the prevention and suppression of crime, this is so in a higher degree in the case of an attorney, who is pledged to the service of assisting in the administration of justice.

But while it is permissible to assume freely burdens along with benefits and to contract away constitutional privileges, it seems this should be accomplished by express stipulation, and the court should not by dubious inference whittle away an attorney's constitutional safeguards. When admitted to the bar, no waiver of the privilege against self-incrimination is demanded.

In *McAuliffe v. Mayor*,[22] a rule prohibiting members of the police from soliciting funds for political purposes was held not open to constitutional objection, the court saying, "there is nothing in the constitution . . . to prevent the city from attaching obedience to this rule as a condition to the office of a policeman", and "he has no constitutional right to be a policeman." To the same effect is *People ex rel. Clifford v. Scannell*.[23] But in both those cases and in *In re Cohen*,[24] wherein an attorney advertised for clients, there were express provisions with respect to the constitutional right, and there is none here. Perhaps the strongest case in support of this view is *Christal v. Police Comm. of San Francisco*,[25] wherein several policemen refused to testify before a grand jury investigation of criminal activities among policemen on the ground that they would incriminate themselves. The court held they were properly dismissed for conduct unbecoming officers. The court conceded that the officers could exercise the privilege, but at the same time said that their duty as policemen required them to answer. In that case, there was an express rule requiring police officers to testify, but the court placed little or no reliance thereon, and said that the rule was necessarily implied. Thus in all these cases express provisions were present, whereas in the instant case, it is only a fiction that the attorney and the state have agreed that the exercise of the constitutional privilege will terminate one's position as attorney.

The solution adopted by the minority[26] in the instant case has much to recommend

18. Power Co. v. Saunders, 274 U. S. 494, 497 (1927).

19. Merrill, *Unconstitutional Conditions* (1929) 77 U. OF PA. L. REV. 879, 893. In People v. Rosenheimer, 209 N. Y. 115, 102 N. E. 530 (1913) it was held that a statute requiring a driver to make himself known before leaving the scene of an accident, *if* it be an infringement on the privilege against self-incrimination, is a proper imposition since operating a motor vehicle on a public highway is a privilege which may be denied.

20. People *ex rel.* Karlin v. Culkin, 248 N. Y. 465, 471, 162 N. E. 487, 489 (1928).

21. Matter of Rouss, 221 N. Y. 81, 84, 116 N. E. 782, 783 (1917). See N. Y. JUDICIARY LAW (1909) § 88, which provides that an attorney may be disciplined if ". . . guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice."

22. 155 Mass. 216, 29 N. E. 517 (1892).

23. 74 App. Div. 406, 77 N. Y. Supp. 704 (1st Dep't 1902), *aff'd*, 173 N. Y. 605, 66 N. E. 1114 (1903).

24. 261 Mass. 484, 159 N. E. 495 (1928).

25. 98 Cal. App. 73, 92 P. (2d) 416 (1939), discussed in (1939) 28 CALIF. L. REV. 94.

26. Matter of Ellis, 258 App. Div. 558, 17 N. Y. S. (2d) 800 (2d Dep't 1940); (1939) 53 HARV. L. REV. 871.

it. While it recognizes that the court has the right to regulate the conduct of attorneys, it realizes that in so doing the court is bound by the constitution, a point which the majority apparently fails to comprehend. The constitution of our State grants the privilege against self-incrimination. One who exercises this constitutional privilege is acting upon his constitutional rights. The dissent therefore concludes that the courts may not brand as misconduct, conduct upon which the constitution places a seal of approval. The conduct may not be classed as "prejudicial to the administration of justice",[27] for the very purpose of allowing the constitutional privilege is, as has been pointed out, to preserve healthy judicial conduct.

Undoubtedly, few would commend this attorney's conduct. The attorney, nevertheless, is within the constitutional protection. It is submitted that the logic and reasoning of the minority is sound and inescapable. The solution lies in constitutional amendment or in extracting an express waiver of the privilege against self-incrimination as a condition to granting the privilege to be an attorney.*

HUSBAND AND WIFE—LIABILITY OF INSURER—EFFECT OF MARRIAGE DURING PENDENCY OF ACTION.—Plaintiff sued defendant for negligence in operating his automobile. Thereafter she married him. Defendant's insurance company disclaimed liability before trial of the action, which resulted in a default judgment. The judgment still remaining unsatisfied more than 30 days after the serving of notice of its entry, plaintiff brings this action against the insurance company. Motion for summary judgment was denied. On appeal, *held,* there can be no recovery by the wife on the indemnity policy, in view of the Insurance Law, Section 109, subd. 3-a, which declares that no policy shall insure against liability between spouses, unless express coverage is included in the policy. Further, since an insurer's obligation to pay does not arise until the entry of judgment against the insured, the marriage of the parties prior to judgment, even though after the commencement of the action, prevented the insurer's liability from arising. Order affirmed. *Fuchs v. London & Lancashire Indemnity Co. of America,* 258 App. Div. 603, 17 N. Y. S. (2d) 338 (2d Dep't 1940).

Recent cases have adhered to the majority view in this country as well as in England and Canada that statutes granting additional rights to married women to sue in their own name for wrongs done to them, confer no right on either spouse to sue the other for personal injuries.[1] The courts have been fearful of disrupting the family unit,[2] and have not allowed personal tort actions between spouses, on the ground of public policy. However, it is difficult to see how the personal tort action

27. N. Y. JUDICIARY LAW (1909) § 88.

* Since the writing of the above case note, the instant decision was reversed by the New York Court of Appeals which held, in an unanimous opinion, that the privilege against self-incrimination is a fundamental personal right, the exercise of which cannot be a breach of duty to the court. Law Report News, April 17, 1940, p. 6, col. 2.

1. Harvey v. Harvey, 239 Mich. 142, 214 N. W. 305 (1927); Howard v. Howard, 200 N. C. 574, 158 S. E. 101 (1931); Allen v. Allen, 220 App. Div. 759, 222 N. Y. Supp. 762, (1st Dep't 1927) *aff'd* 246 N. Y. 571, 159 N. E. 656 (1927); Ralston v. Ralston, 2 K. B. 238 (1930); Goldman v. Goldman, 61 Ont. L. Rep. 657, 2 D. L. R. 152 (1928).

2. See Ritter v. Ritter, 31 Pa. 396, 398 (1858) where the court said: "The flames which litigation would kindle on the domestic hearth would consume in an instant the conjugal bond."

could disrupt the family any more than property tort actions or any other civil actions among members of the family.[3] Once the spouses or the children are at opposing counsel tables, the family no longer is the amiable unit it formerly was. The urge for the preservation of individual rights led to the passage of the original "Married Women's Acts" and New York passed Chapter 669 of the laws of 1937, amending Section 57 of the Domestic Relations Law giving the spouses the right of personal tort actions against each other.[4] In order to prevent possible collusive frauds and to give to insurance companies a considerable amount of protection, the above statute also provided that insurance companies should not be held to assume liability for injuries to the spouse of the insured unless so specifically stated in the policy.[5]

Justice Close, in the principal case, really puts the question when he says, "No one doubts the plaintiff's right to sue her husband. That right is expressly sanctioned by statute. The question is whether, having availed herself of that right successfully, she may collect her damages from the husband's insurer."[6] The insurer's obligation under the policy was "To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law. . . ."[7] The court held that this was a contract of indemnity[8] and there is no right of recovery thereunder until the insured has sustained damage through the entry of judgment against him.[9] The court reasons that at the time of entry of judgment against him, the insured was a married man with an insurance policy containing no express coverage for injury to his wife and therefor this action must be defeated.

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3. See Comment (1935) 4 FORDHAM L. REV. 475, 478-480. *Cf.* (1939) 8 FORDHAM L. REV. 266 discussing Rozell v. Rozell, 256 App. Div. 61, 8 N. Y. S. (2d) 901 (3rd Dep't 1939) *aff'd* 281 N. Y. 106, 22 N. E. (2d) 254 (1939) where it was held that an unemancipated minor may maintain an action against his unemancipated minor sister for personal injuries.

4. This action on the part of the New York Legislature was not a blind step forward, since the evils presumed from allowing personal tort suits between spouses had not been realized in other jurisdictions where such suits were permissible. Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Fitzpatrick v. Owens, 124 Ark. 167, 186 S. W. 832 (1916); Rains v. Rains, 97 Colo. 19, 46 P. (2d) 740 (1935); Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1914); Roberts v. Roberts, 185 N. C. 566, 118 S. E. 9 (1923); Fitzmaurice v. Fitzmaurice, 62 N. D. 191, 242 N. W. 526 (1932); Gilman v. Gilman, 78 N. H. 4, 95 Atl. 657 (1915); Fiedeer v. Fiedeer, 42 Okla. 124, 140 Pac. 1022 (1914); Prosser v. Prosser, 114 S. C. 45, 102 S. E. 787 (1920); Wait v. Pierce, 191 Wis. 202, 209 N. W. 475 (1926).

5. N. Y. INS. LAW (1937) § 109, subd. 3-a. *Cf.* Roberts v. United States Fidelity & Guaranty Co., 188 N. C. 795, 125 S. E. 611 (1924) where North Carolina doesn't recognize as important the possibility of collusion, between husband and wife against the insurance company, the court suggesting that the matter is one for legislative action.

See also, WIS. STAT. (1935) §§ 204-33 (2) and 204-34 (2): "No policy of insurance (or) agreement of indemnity (1) . . . shall exclude from the coverage afforded or the provisions as to the benefits therein provided persons related by blood or marriage to the assured."

6. 258 App. Div. 603, 606, 17 N. Y. S. (2d) 338, 340 (2nd Dep't 1940).

7. *Id.* at 604, 17 N. Y. S. (2d) 338, 339.

8. See Fuchs v. London & Lancashire Ind. Co., 258 App. Div. 603, 605, 17 N. Y. S. (2d) 338, 339 (2d Dep't 1940); Weatherwax v. Royal Indemnity Co., 250 N. Y. 281, 165 N. E. 293 (1929).

9. Fuchs v. London & Lancashire Ind. Co., 258 App. Div. 603, 605, 17 N. Y. S. (2d) 338, 339 (2d Dep't 1940); 755 Seventh Ave. Corp. v. Carroll, 266 N. Y. 157, 194 N. E. 69 (1935).

This seems to be confusing the issue. The injury when accomplished was not to his wife. It was to a stranger, who later became his wife. The court is highly technical in its reasoning[10] and the claim that it was the intent of the legislature to cover a situation of this kind within Section 109, subd. 3-a of the Insurance Law seems dubious. In tort actions between husband and wife, where an insurance company is the real party in interest as defender of the action, there is manifest opportunity for fraud. The court holds directly that the temptation is no less in a case like this where the parties marry before the judgment is actually granted in the action. There is of course some opportunity for collusion after the accident between the spouses. But the court disregards the fact that at the time of the accident the parties were strangers in the eyes of the law. If neither the courts,[11] nor the legislature[12] see fit to include under the section brother and sister, or other family members as possible conspirators, it is difficult to see why this court takes it upon itself to apply the section to two strangers. The result of the ruling is only to impair a vested, natural right of the plaintiff,[13] which accrued at the time of the accident. Had the plaintiff realized the financial consequences of her marriage at the time, it would no doubt have been delayed. If the parties were contemplating marriage, either at the time of the accident or after the determination of the action, would the section apply? Again if the courts commit themselves to the proposition that liability of an insurer does not arise at the same time the right of action accrues to a plaintiff, but only on the entry of a judgment against him by a competent court, this would mean that the insured under any term insurance policy would have to be covered not only up to the time of the accident, but till the time of the judgment against him.[14] This of course, is not the general law, but if it were, couldn't the insurance company argue, as the court does in this case, that if their liability doesn't arise until the entry of judgment, they are protected since at that time the insured is no longer insured?

INSURANCE—LIABILITY UNDER TERM POLICY.—The plaintiff company, owner of the steamship Exmoor, had two one-year term policies of marine insurance with two companies covering loss arising from liability for damage to cargo. The policies ran consecutively, the first ending at noon February 20, 1937, and the second beginning as of that time. The Exmoor picked up a cargo of valonia and later on January 19, 20 and 21, 1937, added tobacco to the cargo. On arrival at New York, March 13, 1937, the tobacco cargo was found damaged by heat and moisture thrown off by the valonia. On appeal from a judgment charging the first insurer

10. See Brown v. Mechanics & Traders' Bank, 43 App. Div. 173, 176, 59 N. Y. Supp. 354, (1st Dep't 1899), which is the basis for the holding in 755 Seventh Ave. Corp. v. Carroll, 266 N. Y. 157, 194 N. E. 69 (1935).

11. Rozell v. Rozell, 256 App. Div. 61, 8 N. Y. S. (2d) 901 (3rd Dep't 1939), *aff'd* 281 N. Y. 106, 22 N. E. (2d) 254 (1939)

12. See discussion advocating such legislation in (1939) 8 FORDHAM L. REV. 266.

13. 1 BL. COMM. 124.

14. See 106 F. (2d) 9 (C. C. A. 2d, 1939) where it was held that in a time policy insuring against loss arising from legal liability, insurer is bound to make insured whole from losses due to liability that accrued against insured during the term covered by the policy, but the insurer has no obligation as to losses from liabilities accruing before or after the term, the time of accrual of insured's liability being the determining factor, not the time of event which ultimately results in liability.

with the entire loss, *held,* one judge dissenting, that the loss should be borne by both defendant companies in accordance with the extent of the damage done during the period that their respective policies covered the cargo, one company bearing 26% and the other 74% of the loss. *Export S.S. Corp. v. American Ins. Co.,* 106 F. (2d) 9 (C. C. A. 2d, 1939).

It is well recognized, as pointed out in the instant case,[1] that the insurer has no obligation to indemnify the assured against liabilities accruing before or after the term of a policy. Herein the difficulty presented to the court is whether the insurer is liable for damages which *occurred after* the termination of the policy but which were due to the operation of a cause which began to operate during the term and continued to act thereafter. The case appears to be one of first impression. The crux of the case is whether, since the insurance shifted at noon February 20, 1937, either insurer can cast on the other the whole obligation to make good. The majority of the court, reached the conclusion that the damage occurring after February 20, 1937 had not *accrued* during the term of the first policy and that the first insurer was not liable for it.

The general rule in all insurance policies is that the provisions should be construed most strongly against the insurer and most favorably toward the insured; the language employed being that of the insurer, a construction will not be adopted which will defeat a recovery if the policy is susceptible of reasonable interpretation that will permit recovery by the insured.[2] However the agreement will be interpreted so as to carry out its main purpose.[3]

The court, in the instant case,[4] refuses to follow the lead pointed to in the fire insurance cases.[5] In those cases the rule is that where a fire has commenced to destroy property and the policy expires during the progress of the fire the insurer is liable for the entire loss. This court calls those cases a departure from the general rule.

Of this fire rule it is said that "this is but an application of the general and reasonable principle that the insurer shall be liable for all direct loss by fire during the term of the insurance. If the destructive force is set in operation before the expiration of the policy, the mere fact that part of the actual destruction takes place afterward does not make it any less the proximate result of that force."[6] Undoubtedly the basis for the rule is the great difficulty encountered in allocating the loss. This seems to apply the maxim that "a damage begun is a damage done, where the culmination is the natural and unbroken sequence of the beginning."[7]

1. See Export S.S. Corp. v. American Ins. Co., 106 F. (2d) 9, 10 (C. C. A. 2d, 1939).

2. DeLancy v. Ins. Co., 52 N. H. 581 (1873). VANCE, INSURANCE (2d ed. 1930) § 109; 1 COUCH, INSURANCE (1929) § 188.

3. Industrial Mut. Indemnity Co. v. Hawkins, 94 Ark. 417, 127 S. W. 457 (1910); Jennings v. Brotherhood Accident Co., 44 Colo. 68, 96 Pac. 982 (1908); General Accident Assur. Co. v. Louisville Home Telephone Co., 175 Ky. 96, 193 S. W. 1031 (1917). The question does not arise in the instant case as to the meaning of the contract. Both insurers agree that the assured is entitled to full indemnity.

4. Export S.S. Corp. v. American Ins. Co., 106 F. (2d) 9, 11 (C. C. A. 2d, 1939).

5 Globe & Rutgers Fire Ins. Co. v. David Moffat Co., 154 Fed. 13 (C. C. A. 2d, 1907); Hartford Fire Ins. Co. v. Doll, 23 F. (2d) 443 (C. C. A. 7th, 1928); Davis v. Conn. Fire Ins. Co., 158 Cal. 766, 112 Pac. 549 (1910); Wiig v. Girard Fire and Marine Ins. Co., 100 Neb. 271, 159 N. W. 416 (1916).

6. VANCE, INSURANCE (2d ed. 1930) § 182.

7. Rochester German Ins. Co. v. Peaslee Gaulbert Co., 120 Ky. 752, 87 S. W. 1115, 1119 (1905). See also 3 JOYCE, INSURANCE (1897) § 2792.

So with reference to marine cases it is said that where certain consequences will inevitably result after the expiration of the period of the policy from the operation of the perils insured against during the policy, they are the proper subjects of indemnity.[8] Parsons,[9] after stating the same proposition qualifies it somewhat by stating that there he might agree with the rule on voyage policies but not on time policies.

These writers seem to base their views on the general rule of proximate cause.[10] It must be said, however, that they were contemplating a situation exemplified by the "death-wound" cases rather than facts such as the instant case presents. These "death-wound" cases hold that the loss of a vessel insured should be deemed effectual and certain from the time the vessel was so injured that her destruction became inevitable; and the claim for damage must be deemed to have then attached, although she was kept afloat for some time after such injury.[11] It is true that the case of *Howell v. Protection Ins. Co.*[12] is analogous. The court refused to find liability for damage which accrued after the policy expired even though it was caused by an injury occurring before termination. In that case the boat after striking a rock in the Mississippi River sprang a bad leak. Its operators instead of putting in to shore manned the pumps and continued on their course. The wind forced the boat on a submerged wreck which so greatly injured the vessel that it sank within a few hours. The policy expired after striking the wreck but before sinking. But no reason for the decision is given.

This court, in the instant case, appears to have refused to extend the liability to damage occurring after the termination of the policy even though the proximate cause of such damage was within the term on the ground that those damages did not *in time* happen until after the policy lapsed. The rule sees the insurer's contract to be one to indemnify only for losses *caused and suffered* during the term. The damage suffered after Feb. 20 was not part of the first insurer's risk. The causing agency began to operate and continued to operate for some months so that the valonia was actively *causing damage* during both terms. But in term No. 1 only 26% of the damage was suffered; in term No. 2, 74%.

The dissenting opinion of Judge Clarke would seem to be better balanced.[13] In

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8. 1 PHILLIPS, INSURANCE (3d ed.) § 1148.

9. 2 PARSON, MARINE INSURANCE (1868) §§ 65, 66. See also ARNOULD, MARINE INSURANCE (1840 ed.) § 754.

10. Consequences which follow in unbroken sequence without an intervening independent efficient cause from the original negligent act, are natural and proximate. Wright v. Powers, 238 Ky. 572, 38 S. W. (2d) 465 (1931); Slater v. T. C. Baker Co., 261 Mass. 424, 158 N. E. 778 (1927); Christianson v. Chicago, St. P. M. & O. Ry., 67 Minn. 94, 69 N. W. 640 (1896).

11. Duncan v. Great Western Ins. Co., 5 Abb. Pr. (N. S.) 173 (N. Y. 1867).

12. 7 Ohio 284 (1835) (vessel sank after termination of time policy due to damage done during term of policy). However in the case of Coit v. Smith, 3 Johns. 16 (N. Y. 1802) (horses injured on board ship during the term of the policy, died three days after its termination due to the injuries) the court said, "If the plaintiff would have had a right of action for an injury to the horse by which his value was lessened, had the horse survived, they surely must have that right of action, notwithstanding the subsequent increase of loss." See also Duncan v. Great Western Ins. Co., 5 Abb. Pr. (N. S.) 173 (N. Y. 1867) (a "death-wound" case).

13. Export S.S. Corp. v. American Ins. Corp., 106 F. (2d) 9, at 12.

speaking of *Howell v. Protection Ins. Co.*,[14] he suggests that possibly the question there may have been whether the vessel was lost in attempting to pursue the voyage. He adheres to the principle that once liability has accrued, the entire loss is to be included, and liablity accrued once the tobacco showed damage. Such doctrine appears more workable than any theory employing the testimony of experts and their inevitable inaccuracies and disputes. The testimony of experts at its best is merely speculative. Since this is so, the line between damage happening before February 20, and after cannot be drawn with any degree of exactitude. Therefore it seems more consistent to follow the precedent of the fire cases and to place all responsibility on the insurer during whose term the destructive influence *began* to work.

14. 7 Ohio 284 (1835).