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RECENT DECISIONS

CONTRACTS—CONSIDERATION—CHARITABLE SUBSCRIPTIONS.—A claim arising from a subscription, was filed against the insolvent estate. The subscription instrument directed the decedent's executors to pay the claimants one thousand dollars out of his estate, for the purpose of raising a scholarship endowment fund. The money was payable one day after the death of his wife, if she survived him. Endorsed on the back of the instrument was a provision that the money should be used for a scholarship to be named after the donor and his wife. It is alleged that in reliance on the subscription, the donee proceeded with the erection of a building. *Held,* that the promise to make a gift in the future was unsupported by any consideration and unenforceable against the testator's estate, since neither party altered his respective position in reliance upon the instrument. In re *Trummond's Estate,* 290 N. Y. Supp. 40 (Surr. Ct. 1936).

The orthodox view of consideration has been greatly altered by the courts in cases involving charitable subscriptions. This type of promise is rarely supported by consideration in the approved sense.[1] Public policy[2] has dictated that these contracts should be enforced, and the courts, cognizant of this demand, have enlarged the concept of consideration.[3] In view of the confusion of the concept which results, it is questionable whether the end has justified the means.[4] To validate the subscription the courts must find some consideration[5] or have recourse to the doctrine of "promissory estoppel."[6] Generally consideration has been found in one

1. Billig, *The Problem of Consideration in Charitable Subscriptions* (1927) 12 CORN. L. Q. 467; Carver, *Consideration in Charitable Subscriptions* (1928) 13 CORN. L. Q. 270; 1 WILLISTON, CONTRACTS (rev. ed. 1936) §§ 116, 139.

2. The defense of want of consideration in charitable subscription cases has been characterized as "breaches of faith towards the public," by Judge Allen in Barnes v. Perine, 12 N. Y. 18, 24 (1854); see Eastern States Agricultural and Industrial League v. Vail's Estate, 97 Vt. 495, 500, 124 Atl. 568, 571 (1924); Allegheny College v. National Chautauqua County Bank, 246 N. Y. 369, 375, 159 N. E. 173, 175 (1927).

3. Early American cases held the subscriptions to be mere gratuities without consideration and unenforceable. Boutell v. Cowdin, 9 Mass. 253 (1812); Trustees of Bridgewater Academy v. Gilbert, 19 Mass. 578 (1824); Trustees of Hamilton College v. Stewart, 1 N. Y. 581 (1848); Wilson v. Baptist Education Society, 10 Barb. 308 (N. Y. 1851).

4. In charitable subscriptions consideration is found where the general law of contract would have ruled that it was absent. See Allegheny College v. National Chautauqua County Bank, 246 N. Y. 369, 372, 159 N. E. 173, 174 (1927) and cases cited there. See BIGELOW, ESTOPPEL (6th ed.) 636, the true doctrine of estoppel is applied only when there has been a misrepresentation of fact. Finding of any such misrepresentation in charitable subscriptions seems unwarrantable.

5. Pass v. First National Bank, 25 Ala. App. 519, 149 So. 718 (1933) (consideration need not be present at time of subscribing but may be supplied by the subsequent conduct of the beneficiary); Young Men's Christian Ass'n v. Estill, 140 Ga. 291, 78 S. E. 1075 (1913); New Jersey Orthopedic Hospital & Dispensary v. Wright, 95 N. J. L. 462, 113 Atl. 144 (1921); Trustees of Hamilton College v. Stewart, 1 N. Y. 581 (1848); Presbyterian Church v. Cooper, 112 N. Y. 517, 20 N. E. 352 (1889); *cf.* Caul v. Gibson, 3 Pa. 416 (1846) (moral consideration held to be sufficient); but see, Garrigus v. Missionary Society, 3 Ind. App. 91, 28 N. E. 1009, 1010 (1891).

6. Miller v. Western College of Toledo, 177 Ill. 280, 52 N. E. 432 (1898); see Simpson Centenary College v. Tuttle, 71 Iowa 596, 599, 33 N. W. 74, 76 (1887); Allegheny College v. National Chautauqua County Bank, 246 N. Y. 369, 374, 159 N. E. 173, 175 (1927);

of three forms,[7] to wit; that the mutual promises of the subscribers are consideration one for the other;[8] that by accepting the subscription the beneficiary makes an implied promise to apply the funds to the purpose designated by the promisor, thus making a bilateral contract;[9] that the promise to subscribe is an offer, which, when acted upon in furtherance thereof and in reliance thereon, creates a binding contract.[10] In order to employ "promissory estoppel"[11] as an alternative[12] for consideration, the court must find that the promisee has incurred a substantial detriment, which the promisor should reasonably have anticipated as a consequence of the promise. The New York courts have eliminated the first type of consideration[13] and have never actually[14] substituted "promissory estoppel" for consideration.

First Methodist Episcopal Church of Mt. Vernon v. Howard's Estate, 133 Misc. 723, 233 N. Y. Supp. 451 (Surr. Ct. 1929). But *cf.* Ricketts v. Scothorn, 57 Neb. 51, 77 N. W. 365 (1898) where it was admitted that estoppel is applied ordinarily only in charitable subscription cases; nevertheless the court resorted to it in enforcing a gift between individuals. See Ashley, *The Doctrine of Consideration* (1913) 26 HARV. L. REV. 429 (where abolition of consideration is advocated as preferable to attempt to reach same result by use of such subterfuges as estoppel); Wright, *Ought the Doctrine of Consideration to be Abolished?* (1936) 49 HARV. L. REV. 1225.

7. WILLISTON, CONTRACTS (rev. ed. 1936) § 116.

8. University of Southern California v. Bryson, 103 Cal. App. 39, 283 Pac. 949 (1929); Watkins v. Eames, 63 Mass. 537 (1852); Stewart v. Trustees of Hamilton College, 2 Denio 403 N. Y. (1843), *overruled,* Trustees of Hamilton College, 1 N. Y. 581 (1848); Edinboro Academy v. Robinson, 37 Pa. 210 (1860).

9. Central Maine Gen. Hospital v. Carter, 125 Me. 191, 132 Atl. 417 (1926); Ladies Collegiate Institute v. French, 82 Mass. 196 (1860); Allegheny College v. National Chautauqua County Bank, 246 N. Y. 369, 159 N. E. 173 (1927); Ohio Wesleyan Female College v. Higgins, 16 Ohio 20 (1864).

10. Keuka College v. Ray, 167 N. Y. 96, 60 N. E. 325 (1877) (time and money in getting more subscriptions; promisor's request that the promisee perform the services may be expressed or implied); Presbyterian Board of Foreign Missions v. Smith, 207 Pa. 361, 58 Atl. 689 (1904) (sending missionaries to China) *id.* at 363, 58 Atl. at 690, "A test of good consideration is whether the promisee, at the instance of the promisor, has done, forborne, or undertaken to do anything real, or whether he has suffered any detriment, or whether, in return for the promise, he has done something that he was not bound to do, or has promised to do some act, or has abstained from doing something."; 38 A. L. R. 868.

11. The doctrine of "promissory estoppel" has been defined in RESTATEMENT, CONTRACTS (1932) § 90. In *Study Made in Relation to the Seal and Consideration,* N. Y. LEGIS. DOC. No. 65(D) (1936) 68, it is said that the broad pronouncement of the Restatement of Contracts is hardly justifiable, as the cases applying "promissory estoppel" are rare.

12. In *Study Made in Relation to the Seal and Consideration,* N. Y. LEGIS. DOC. No. 65(D) (1936) 67, it is said, "The enforcement of promises on the basis of promissory estoppel must be regarded as an exception to the doctrine of consideration. . . . In a clear case of promissory estoppel there is a promise and a detriment suffered in reliance upon the promise, but the detriment is, (*a*) *subsequent to the promise and* (*b*), *not bargained for.*" *Contra:* Porter v. Commissioner of Internal Revenue, 60 F. (2d) 673 (1932) where it was held that "promissory estoppel" is a recognized species of consideration.

13. See Presbyterian Church v. Cooper, 112 N. Y. 517, 521, 20 N. E. 352, 353 (1889).

14. The doctrine was not applied in the Allegheny College case. The statement that it had been adopted was mere dictum. The case of First Methodist Episcopal Church v. Howard's Estate, 133 Misc. 723, 233 N. Y. Supp. 451 (Surr. Ct. 1929), was brought within the decision of the Allegheny College case. The court also thought that it came within the view of the law on promissory estoppel.

In the instant case it is submitted that the claim was properly rejected. The subscription could not be upheld on either of the two forms of consideration now acceptable to the New York courts nor upon the doctrine of "promissory estoppel." The view that a bilateral contract is created by an implied promise of the beneficiary was applied in the *Allegheny College Case*[15] to sustain the subscription. But clearly the case at bar cannot be brought within that decision, for in the *Allegheny College Case*[16] the court found the implied promise to use the funds in accordance with the subscription only because of the important fact that part payment of the donation had been made. In the instant case no payment had been made. Mere acceptance of the subscription would not justify the court in finding such an implied promise when there was no conduct by the promisee which would warrant the implication. To hold that the promise is an offer which when acted upon creates a binding contract, the court must find that the donee performed some act or incurred some liability in furtherance[17] of and in reliance upon the subscription. It appeared unlikely to the court that the erection of a building by the beneficiary could have been in furtherance of and in reliance upon the gift for a special scholarship. Nor could the claim be supported on the ground of "promissory estoppel," for the promisor would not have anticipated that the promisee would erect a building as a consequence of the scholarship subscription.

When charitable subscriptions are contested in court it is natural that sympathy be extended to the charity, but it is regrettable that sound principles of law should suffer. Many remedies have been proposed to solve the problem. One writer on the subject has suggested that the phrase "quasi-consideration" be coined as a companion to "promissory estoppel."[18] Restoration of the seal or some substitute for it has been recommended as a method for rendering enforceable a "non-bargain" promise, or that charitable subscriptions be treated *sui generis*.[19] Conceding the desirability of enforcing charitable subscriptions,[20] it is submitted that they should not be invalid for want of consideration. Legislative enactments to this effect have been suggested which would supplant the present judicial legislation which violates the underlying principles of contracts.[21] A promise deliberately made and motivated by generosity or a moral obligation should be enforced.[22]

15. 246 N. Y. 369, 159 N. E. 173 (1927).

16. While there is opinion to the contrary, it is submitted that the Allegheny College case did not extend the concept of consideration; possibly the construction of the facts was so liberal as to bring the case within the principle of an implied in fact bilateral contract.

17. "If the promisee performs acts, expends money, or incurs enforceable liabilities on the faith of the subscription, in furtherance of the enterprise intended to be promoted . . . the subscription is thereby rendered valid, binding and enforceable." Eastern States Agricultural and Industrial League v. Vail, 97 Vt. 495, 504, 124 Atl. 568, 573 (1924). *Cf. In re* Chavey's Estate, 290 Pac. 1020 (N. M. 1930) (where the subscription was for a memorial building but a gymnasium was built).

18. Billig, *The Problem of Consideration in Charitable Subscriptions* (1927) 12 Corn. L. Q. 467.

19. (1925) 23 Mich. L. Rev. 910.

20. (1928) 27 Mich. L. Rev. 88.

21. (1901) 15 Harv. L. Rev. 312; (1914) 62 U. Pa. L. Rev. 296; see, as an example of legislative enactments, Ga. Code (1933) c. 108, § 201 (charitable bequest enforceable in equity).

The suggestion is in line with a recent statute whereby consideration has been abolished in other branches of the law. N. Y. Pers. Prop. Law (1936) § 33, subd. 2 provides that agreements to change, modify or discharge, in whole or in part, existing contracts or obligations are not invalid because of the absence of consideration.

22. Wright, *Ought the Doctrine of Consideration to be Abolished?* (1936) 49 Harv. L. Rev. 1225.

CONTRACTS—INFANCY—MISREPRESENTATION AS TO AGE CREATING ESTOPPEL.—The plaintiffs, members of a partnership, sued the defendant, an infant, for the balance due on the purchase price of a suit of clothes and a pair of shoes. At the time of the purchase the defendant was eighteen years of age, but had represented, orally and in writing, that he had reached his majority. In reliance upon the representation and without making any independent investigation as to its truthfulness, the plaintiffs had extended credit to the defendant. On appeal from a judgment for the plaintiffs, *held*, the defendant was estopped from setting up his infancy as a defense. Judgment affirmed. *Clemons v. Olshine*, 187 S. E. 711 (Ga. 1936).

There is a division of authority as to whether or not an estoppel will be raised against an infant who has induced a person to contract with him by representing himself to be of age.[1] Some jurisdictions have enacted statutes to estop the infant.[2] In the absence of such a statute the majority rule seems to be that the infant cannot be estopped as to his right of disaffirmance.[3] The basis for this doctrine is that a contrary holding would deprive the infant of the protection with which the law has seen fit to enfold him.[4] Although there is authority to the effect that an action in tort for deceit may be maintained against an infant who has misrepresented his age,[5] it should be noted that frequently jurisdictions denying the estoppel against the infant refuse to create a tort liability.[6] In the cases disallowing the tort liability it is argued that an infant should not be made liable when the cause of action arises from a contract, although a tortious element is admittedly present.[7] There is, however, considerable authority which permits the estoppel.[8] The contention urged by

1. See Note (1933) 81 U. OF PA. L. REV. 731, 734; Note and Comment (1926) 24 MICH. L. REV. 391. For a consideration of the law of the contracts of infants, see 1 WILLISTON, CONTRACTS (rev. ed. 1936) §§ 222-248.

2. IOWA CODE (1935) § 10494; UTAH REV. STAT. ANN. (1933) § 14-1-3; WASH. REV. STAT. ANN. (Remington, 1932) § 5830. These statutes are to the effect that no contract can be disaffirmed where, due to the infant's misrepresentation as to his age, the other party had good reason to believe him capable of contracting.

3. This seems to be especially so when the action is one at law. Arkansas Reo Motor Car Co. v. Goodlett, 163 Ark. 35, 258 S. W. 975 (1924); Williams v. Leon T. Shettler Co., 98 Cal. App. 282, 276 Pac. 1065 (1929); Miller v. St. Louis & S. F. R. Co., 188 Mo. App. 402, 174 S. W. 166 (1915); Sternlieb v. Normandie Nat. Sec. Corp., 263 N. Y. 245, 188 N. E. 726 (1934); Greensboro Morris Plan Co. v. Palmer, 185 N. C. 109, 116 S. E. 261 (1923). In the case of Myers v. Hurley Motor Co., 273 U. S. 18 (1927), the adult was allowed a set-off for use and depreciation. It is interesting to note that in New York a similar compensation was permitted the vendor although there had been no misrepresentation as to age by the infant. Rice v. Butler, 160 N. Y. 578, 55 N. E. 275 (1899).

The following cases have denied the estoppel in equity: Sims v. Everhardt, 102 U. S. 300 (1880); Lee v. Hibernia Savings & Loan Society, 177 Cal. 656, 171 Pac. 677 (1918); Carolina Interstate Bldg. & Loan Ass'n v. Black, 119 N. C. 323, 25 S. E. 975 (1896).

4. See Note and Comment (1926) 24 MICH. L. REV. 391, 392; (1924) 72 U. OF PA. L. REV. 450.

5. Rice v. Boyer, 108 Ind. 472, 9 N. E. 420 (1886); Fitts v. Hall, 9 N. H. 441 (1838); Wisconsin Loan & Finance Corp. v. Goodnough, 201 Wis. 101, 228 N. W. 484 (1930).

6. Greensboro Morris Plan v. Palmer, 185 N. C. 109, 116 S. E. 261 (1923) (denying both the estoppel and the tort liability); Collins v. Gifford, 203 N. Y. 465, 96 N. E. 721 (1911) (to the effect that the infant may not be sued in tort since the cause of action arises from a contract).

7. See Slayton v. Barry, 175 Mass. 513, 515, 56 N. E. 574, 575 (1900); Nash v. Jewett, 61 Vt. 501, 503, 18 Atl. 47, 48 (1889).

8. Among the cases at law allowing the estoppel are: Hood v. Duren, 33 Ga. App. 203,

the courts adopting this view is that a denial of the estoppel would enable an infant to use his "shield" as a "sword" to assail others.[9]

In the instant case, the court, in an attempt to justify its decision allowing the estoppel, sought support from statutes dealing with the liability of infants in the fields of tort and criminal law. The infant here, under an application of those statutes[10] was of sufficient age to be capable of having a fraudulent intent, and the court contended that he was competent to act in the situation presented by the case at bar. It is submitted that the court could have found a sounder basis for its decision by applying the rule governing contracts made with incompetents not adjudicated insane. This rule permits cognizance of such contracts where it may be shown that the sane party was not aware of the disability, could not be placed in *statu quo*, and that the contract did not operate to the disadvantage of the incompetent.[11] It would seem that in the case of infancy the estoppel should be applied where there is no knowledge by the other party as to the falsity of the representation as to age, and where, as in the instant case, the contract did not work an injustice and the plaintiff cannot be completely restored to his original position. The infant in such a situation does not require the protection of the law.

While it has always been the policy of the law to protect the infant from his folly and lack of foresight, one should not disregard the fact that the needs of one era are not always those of another. The advent of youth into business makes necessary some relaxation of this policy, for how are persons dealing with the infant to be protected if his word is not given some recognition at law?[12] That the courts have been far too zealous in their desire to shield the infant seems undeniable.[13] Under the submitted rule it is conceded that the burden of reimbursement will, in most instances, fall upon the parent or guardian, and where they have already provided the infant with necessaries, it would appear that the proposed doctrine will work hardship. Although the concession is a practical one, it does not effectively militate against adherence to the submitted rule since the protection which the common law doctrine offers is primarily directed to the *child*, and not to his parent or guardian.

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125 S. E. 787 (1924); Klinck v. Reeder, 107 Neb. 342, 185 N. W. 1000 (1921); La Rosa v. Nichols, 92 N. J. L. 375, 105 Atl. 201 (1918). Cases in equity allowing the estoppel are: Lewis v. Van Cleve, 302 Ill. 413, 134 N. E. 804 (1922); Looney v. Elkhorn Land & Improvement Co., 195 Ky. 198, 242 S. W. 27 (1922); Pemberton Bldg. & Loan Ass'n v. Adams, 53 N. J. Eq. 258, 31 Atl. 280 (1895); Stallard v. Sutherland, 131 Va. 316, 103 S. E. 568 (1921).

9. See La Rosa v. Nichols, 92 N. J. L. 375, 379, 105 Atl. 201, 203 (1918); Stallard v. Sutherland, 131 Va. 316, 319, 108 S. E. 568, 569 (1921).

10. The Georgia Code provides that "Infancy is no defense to an action for a tort, provided the defendant has arrived at those years of discretion and accountability prescribed by this Code for criminal offences." GA. CODE (Harrison, 1935) § 105-1806. The Code further declares that "A person shall be considered of sound mind who is neither an idiot, a lunatic, nor afflicted with insanity, and who has arrived at the age of 14 years, or before that age if such person knows the distinction between good and evil." GA. CODE (Harrison, 1935) § 26-301.

11. Merry v. Bergfeld, 264 Ill. 84, 105 N. E. 758 (1914); Wells v. Wells, 197 Ind. 236, 150 N. E. 361 (1926); Wood v. Newell, 149 Minn. 137, 182 N. W. 965 (1921); McCarthy v. Bowling Green Storage & Van Co., 182 App. Div. 18, 169 N. Y. Supp. 463 (1st Dep't 1918); Mulholland v. Sterling Motor Truck Co., 309 Pa. 590, 164 Atl. 597 (1933).

12. See Sternlieb v. Normandie Nat. Sec. Corp., 263 N. Y. 245, 250, 188 N. E. 726, 728 (1934).

13. See Obiter Dictum (1936) 5 FORDHAM L. REV. 379.

CORPORATIONS—ILLEGAL ACTS—WHAT CONSTITUTES THE PRACTICE OF LAW.—The respondent carried on a business in the collection and adjustment of commercial accounts for goods sold by wholesale merchants. If the claims could not be collected in the ordinary manner, the respondent had the right, under the agreement with its subscribers to appoint an attorney to take legal action. It would determine whether suit should be brought, provide the attorney with the necessary information and finally fix the attorney's fee giving him part of the amount collected. The balance was sent to the client whose claim was involved. On appeal from a decree restraining the continuance of the respondent's acts, pursuant to statute,[1] *held*, such conduct constituted the practice of law and should be restrained. In re *Shoe Mfrs. Protective Ass'n, Inc.*, 3 N. E. (2d) 746 (Mass. 1936).

The powers of a corporation are limited by its charter, and any act which exceeds the limitation imposed is *ultra vires*. The power to practice law has never been granted to a corporation because of its inability to meet the requirements imposed on those who seek to follow the profession.[2] In each state there is a statute relating to the restriction of unauthorized practice of law, both by natural and artificial persons.[3] These statutes, to some degree, act as a stop-gap upon the ever-growing invasion of corporations and laymen into the field of professional activities. Such an encroachment leads inevitably to the lowering of the zealously guarded standards of the profession of law. Independence in thought and action, and service above self, do not go hand in hand with the objectives of a commercial enterprise.[4] The client is deprived of the confidential relationship which must exist between himself and his attorney. This is evidenced clearly in the case at bar, where the attorney was responsible to the agency, which in turn was responsible to the client.

Since a corporation cannot practice law directly, it follows that indirect practice through the employment of competent lawyers should be prohibited.[5] In the restraint of indirect practice difficulty is encountered, for each court must thresh out just what constitutes the practice of law since it is defined by no single norm. It is subject to numerous interpretations and necessarily so, due to varying circumstances

1. MASS. ANN. LAWS (Lawyers Co-op. 1933) c. 221, § 46 amended (1935) c. 346, § 1. In addition to the prohibition against the practice of law it reads as follows: "No corporation or association shall practice or appear as an attorney for any other person other than itself . . . or to hold out to the public, or advertise as being entitled to practice law, and no corporation or association shall draw agreements or other legal documents not relating to its lawful business, or draw wills, or give legal advice in matters not relating to its lawful business."

2. "The practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study. . . . The right to practice law is in the nature of a franchise from the state conferred only by merit . . . it is not a lawful business except for members of the bar who have complied with all the conditions required by the statute and rules of the courts. . . ." Vann, J., *In re* Co-operative Law Co., 198 N. Y. 479, 483, 92 N. E. 15, 16 (1910). *Cf.* WORMSER, FRANKENSTEIN, INCORPORATED (1931) 161.

3. *E.g.*, CONN. GEN. STAT. (1933) § 5345; ILL REV. STAT. ANN. (Smith-Hurd, 1933) c. 32, §§ 411, 412; N. J. COMP. STAT. (Supp. 1931) tit. 52, § 2141; OHIO GEN. CODE (Page, 1926) § 1706; PA. STAT. ANN. (Purdon, 1936) tit. 17, § 1608.

4. *In re* Co-operative Law Co., 198 N. Y. 479, 483, 92 N. E. 15, 16 (1910); Hicks and Katz, *The Practice of Law by Laymen and Lay Agencies* (1931) 41 YALE L. J. 72.

5. Matter of Co-operative Law Co., *ibid.* *Cf.* Hannon v. Siegel-Cooper Co., 167 N. Y. 244, 246, 60 N. E. 597, 597 (1901) (corporations not permitted to practice medicine, or dentistry indirectly by hiring doctors or dentists to act for them); People v. Woodbury Dermatological Institute, 192 N. Y. 454, 85 N. E. 697 (1908).

in each set of facts. In the instant case, the court found the collection company exercising full power over the attorneys employed, so that in effect it was selling legal services for profit. In accord with this case is the recent adjudication in the same jurisdiction wherein an automobile association was restrained from performing an agreement with motor car owners who paid a yearly subscription and in effect, bought in advance, for the period of one year all the legal services which they might need.[6] However, where a company merely furnished a list of lawyers to its subscribers without directing the course of the attorney or the client, and received no direct advantage therefrom, it was held not to be practicing law.[7] One collection agency tried to justify its position by alleging that all the work was carried out by the attorneys, with the exception of collecting the fee, from which the agency received one dollar. The court declared the conduct illegal.[8] A similar ruling was applied to a collection agency which advertised free legal advice through staff attorneys, though it charged one-quarter of the amount collected as its fee.[9]

Banks and trust companies have been declared to be practicing law upon holding themselves as qualified to transact legal business for their customers. These corporations by means of lawyers employed by them, conducted foreclosure proceedings, appeared in probate courts and collected the fees usually allowed for such legal services, while the attorneys received a stated salary.[10] Not infrequently such organizations advertise as being competent to draw wills, trusts, deeds, mortgages and contracts. This all-embracing offer is clearly within the statutory prohibition.[11]

The proper test to be applied when the acts complained of are considered by many to be a legitimate sphere for laymen, is fraught with greater difficulties. Mere ministerial work, such as filling out blanks or drawing instruments of a stereotyped form where legal judgment is not required as to the effect of any condition therein, is permissible. But if an instrument or deed is to be drawn from a set of facts necessarily calling for the considered decision of a legally trained mind, then it becomes unauthorized practice if performed by anyone but a lawyer.[12] Thus it

6. *In re* Maclub of America, 3 N. E. (2d) 272 (Mass. 1936). *Cf.* State v. Retail Credit Men's Ass'n, 163 Tenn. 450, 43 S. W. (2d) 918 (1931) (attorney given part of fee by defendant for collecting claim by suit).

7. *In re* Thibodeau, 3 N. E. (2d) 749 (Mass. 1936).

8. Such conduct would be illegal if the bureau was not actually performing the services rendered as the fact remained that it was illegally soliciting business for attorneys. State v. Merchants Protective Ass'n, 105 Wash. 12, 177 Pac. 694 (1919); *cf.* People v. Merchants Protective Corp., 189 Cal. 531, 209 Pac. 363 (1922).

9. Dworken v. Apartment House Owners Ass'n, 38 Ohio App. 265, 176 N. E. 577 (1931). In New York collection agencies are prevented from practicing law. "The statement of purpose or purposes of a corporation . . . shall not be construed to include the employment or furnishing of attorneys to prosecute any action or pursue any legal or equitable remedy in aid of such collections." N. Y. STOCK CORP. LAW (1923) § 7.

10. People v. Peoples Stock Yards State Bank, 344 Ill. 462, 176 N. E. 901 (1931). *Cf. In re* Otterness, 181 Minn. 254, 232 N. W. 318 (1930); People v. Peoples Trust Co., 180 App. Div. 494, 167 N. Y. Supp. 767 (2d Dep't 1917).

11. *In re* Eastern Idaho Loan & Trust Co., 49 Idaho 280, 288 Pac. 157 (1930).

12. *In re* Eastern Idaho Loan & Trust Co., *ibid.* In New York title companies are not within the prohibitions of N. Y. PENAL LAW (1916) § 280. But only those acts necessarily incident to the charter powers may be performed. *In re* Co-operative Law Co., 198 N. Y. 479, 92 N. E. 15 (1910); People v. Title Guarantee & Trust Co., 227 N. Y. 366, 125 N. E. 666 (1919). Where a title company advertised a schedule of rates for drawing papers, and upon drawing a bill of sale and chattel mortgage for a set fee, it was held that this was not the practice of law, since it was an isolated instance. But if the defendant company

would seem that to attempt to mold one criterion by which acts allegedly unauthorized might be measured to gauge their illegality, would be a fruitless gesture.

Furthermore there is a conflict of opinion with regard to how the unauthorized practice of law should be treated. One viewpoint, based upon a frank acceptance of present day conditions and upon a realization of the influential rôle corporations play in the commercial world, would be curative in its operation. It would not attempt by prosecution to restrain corporations from continuing the illegal practice, but would rather impose on them the "same requirements, standards and obligations of the moral law and conscience which are imposed on individual lawyers."[13] The antithetical viewpoint is found in the current method of treating illegal practice. It is preventative in its operation as restraining orders are utilized. Adherents of this view admit it may be ineffectual in part, but believe that certain legislative changes in present statutes would ameliorate the situation. It has been suggested that statutes imposing a penalty on any corporation undertaking to practice law should be enacted in those states where they do not exist. Exceptions in favor of any type of business should be shunned, as such exceptions open the way for abuses and impair the effectiveness of the statute. Lastly it is believed that no statute should take upon itself the task of defining just what does constitute the practice of law. This phase of the question should be left to sound judicial interpretation[14]

EVIDENCE—ADMISSIBILITY IN WRONGFUL DEATH ACTION UNDER STATUTES RELATING TO TRANSACTIONS WITH DECEASED.—The deceased, arrested on a criminal charge, was held in the county jail pending trial. It was alleged in the complaint that while thus incarcerated, he was severely beaten by the sheriff and his deputies, and as a result, died. The plaintiff, the widow of the deceased, as his administratrix joined an action for wrongful death with one for physical injuries and mental pain suffered by the deceased. The defendants, seeking to escape liability, sought to testify that the injuries which caused decedent's death were self-inflicted, and that they had used only a reasonable amount of force in attempting to restrain him from injuring himself in a temporary fit of insanity. This testimony was excluded as to both causes of action. On appeal from a judgment in favor of the plaintiff, *held,* the evidence was competent in the action for wrongful death, but inadmissable in the suit which survived for injuries suffered by the decedent, as it constituted a

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had made a business of drawing such instruments which were unconnected with its authorized work, it would be illegal. Pound J., concurring in People v. Title Guarantee & Trust Co., *supra,* at 380, 125 N. E. at 670, found the oral advice test unsatisfactory in determining whether or not illegal practice was committed further. "If such services as were rendered in this case are customarily rendered I think they should be characterized as legal services. This does not imply that a real estate broker may not prepare leases, mortgages and deeds; or that an installment house may not prepare conditional bills of sale in connection with the business, and as a part thereof. The preparation of the legal papers may be ancillary to the daily business of the actor, or it may be the business itself."

13. Wormser, *Corporations and the Practice of Law* (1936) 5 FORDHAM L. REV. 207, 218; *Encroachments by Corporations on Private Practice,* 1 LECTURES ON LEGAL TOPICS 547, 561; WORMSER, FRANKENSTEIN INCORPORATED (1931) pp. 161-180; *Note* (1931) 44 HARV. L. REV. 1114.

14. Jackson, in *foreword* to HICKS AND KATZ, UNAUTHORIZED PRACTICE OF LAW (1934) 3.

transaction with the deceased within the meaning of a statute[1] prohibiting such testimony. Judgment reversed. *Maciejczak v. Bartell,* 60 P. (2d) 31 (Wash. 1936).

In the early development of American jurisprudence no witness, who was interested in the event was permitted to testify.[2] The unfairness of this rule soon became apparent and statutes were passed in almost every jurisdiction abolishing this disqualification;[3] but a noteworthy exception was retained excluding the testimony of the survivor of a transaction with a decedent, when offered against the latter's estate. This fragment of the ancient disqualification, prevails at the present time in all but a very few jurisdictions of the United States.[4] The statutes are quite varied in their wording, some making the disqualification absolute;[5] others permitting testimony when the representative of the decedent has introduced evidence relevant to the transaction.[6] The basis for the rule seems to be that when death has closed the

1. WASH. REV. STAT. ANN. (Remington, 1933) § 1211.

2. This general disqualification was apparently adopted by our common law from the common law of England, where it originated in the early seventeenth century. For a history of this rule see 1 WIGMORE, EVIDENCE (2d ed. 1923) § 575.

3. The disqualification was abolished in England in 1843 by the statute 6 & 7 Vict. c. 85. In the United States the first statute enacted was MICH. REV. STAT. (1846) c. 102 § 99. The New York statute, which drew a great deal of attention, was passed in 1848, and the other states soon followed suit. N. Y. Laws (1848) c. 379, §§ 351, 352.

4. Some of the more important statutes establishing the disqualification are: ALA. CODE ANN. (Michie, 1928) § 7721; FLA. COMP. GEN. LAWS ANN. (1927) § 4372; IND. STAT. ANN. (Burns, 1933) § 2-1715; ME. REV. STAT. (1930) c. 96, § 119; N. J. COMP. STAT. (1911) tit. Evid., § 4; N. Y. CIV. PRAC. ACT § 347; TENN. CODE (Will. Shan. & Harlow, 1932) § 9780; WIS. STAT. (1935) § 325.16. *Contra:* ARIZ. REV. STAT. (1928) § 4414; CONN. GEN. STAT. (1930) §§ 5582, 5608; MONT. REV. CODE ANN. (Choate, 1921) § 10535; N. H. PUB. LAWS (1926) c. 336, §§ 27, 28; N. M. STAT. ANN. (Courtright, 1929) § 45-601; ORE. CODE ANN. (1930) § 9-403.

5. Parties or persons in whose behalf an action is brought against a representative of the decedent estate are absolutely disqualified from testifying in the following jurisdictions: CAL. CODE CIV. PROC. (Deering, 1935) § 1880; IDAHO CODE ANN. (1932) § 16-202; MISS. CODE ANN. (1930) § 1529. The State of Washington imposes absolute disqualification on any party interested or of the record, whether suing or being sued. WASH. REV. STAT. ANN. (Remington, 1932) § 1211.

6. Some statutes provide an exception when the testimony of the deceased is placed in evidence. KAN REV. STAT. ANN. (1923) § 60-2804; MINN. STAT. (Neason, 1927) § 9817; N. D. COMP. LAWS ANN. (1913) § 7871; S. D. COMP. LAWS (1929) § 2717 (2); or when called as witness by the other side: DEL. REV. STAT. (1915) § 4212; TENN. CODE (Will. Shan. & Harlow 1932) § 9780; TEX. ANN. CIV. STAT. (Vernon, 1936) § 3716; UTAH. REV. STAT. ANN. (1933) § 104-49-2. Some provide for exceptions in both instances: ALA. CODE ANN. (Michie, 1928) § 7721; MD. ANN. CODE (Bagby, 1924) art. 35, § 3. Others provide for an exception when the representative of the deceased or a person interested in the event takes the stand in his own behalf and testifies to the transaction: GA. CODE (1933) § 38-1603; IOWA CODE (1935) §§ 11257, 11258; N. J. COMP. STAT. (1911) tit. Evid., § 4. Others provide for an exception when the representative of the deceased, or a person interested in the event, testifies to the transaction, or where testimony of the deceased is introduced in evidence: FLA. COMP. GEN. LAWS ANN. (1927) § 4372; IND. STAT. ANN. (Burns, 1933) §§ 2-1715, 2-1717; ME. REV. STAT. (1930) c. 96, § 119; NEB. COMP. STAT. (1929) § 20-1202; N. Y. CIV. PRAC. ACT § 347; N. C. CODE ANN. (1935) § 1795. Two jurisdictions do not apply the statutes in actions for wrongful death: OHIO CODE ANN. (Page, 1926) § 11495; WYO. REV. STAT. ANN. (Courtright, 1931) § 89-1704.

mouth of one party to the transaction, the courts will close the mouth of the other.[7]

Praiseworthy as it is, aiming to protect decedents' estates from false claims by the introduction of testimony which cannot be controverted, it would seem that the rule may at times work an injustice to the survivor whose testimony is excluded. The rule is founded upon a false premise: "Every man, interested in the event, will falsify when his words are incapable of contradiction." The opposite tenet is, of course, equally false.[8] It would seem that some mean should be reached whereby neither the living nor the dead will be granted an advantage. Some legislatures have attempted to achieve this result by allowing the admission of the survivors' testimony, if corroborated,[9] or by making the rule discretionary rather than absolute, so that the trial court may admit the evidence or bar it in the interest of justice.[10]

A majority of jurisdictions apply the disqualification not only to personal communications in the field of contracts, but also to actions *ex delicto*.[11] Under this view, in actions by an administrator for injuries suffered by the decedent, it is clear that the tort which caused the injuries is a personal transaction and so within the prohibiting statute. But a different situation arises in actions for the wrongful death of a decedent. In jurisdictions where the statute grants the right of action directly to the widow or next of kin, it is held that the tort is not such a transaction for the purposes of the action since suit is not brought by a representative of the decedent, but rather by a third party in his individual capacity.[12] In other jurisdictions where the right of action is placed in the administrator, with the damages inuring to the benefit of the widow and children, or next of kin, there is a conflict upon the point. Some hold, as in the instant case, that the testimony is admissible on the ground that the administrator is a nominal party only;[13] others bar the testimony, holding that the statute should apply to every action brought by an administrator, without reference to the disposition to be made of the recovery.[14] It would seem that the former view is sound, for the estate of the decedent is not interested in the result and moreover the right of action never existed in the deceased but arose only upon his death. It is true that at first glance practical difficulties may seem to beset this

7. "This right and privilege [of testifying] must be mutual. It cannot exist in one party and not in the other. If death has closed the lips of one party, the policy of the law is to close the lips of the other." Louis v. Easton, 50 Ala. 470, 471 (1873).

8. For an excellent general criticism of the interest disqualification see 7 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827) (Bowring's ed.) 393, quoted in 1 WIGMORE, EVIDENCE (2d ed. 1923) 997.

9. ORE. CODE ANN. (1930) § 9-403; N. M. STAT. ANN. (Courtright, 1929) § 45-601.

10. ARIZ. REV. STAT. (1928) § 4414 (as construed in Goldman v. Sotelo, 7 Ariz. 23, 60 Pac. 696 [1900] and in Costello v. Gleeson, 15 Ariz. 280, 138 Pac. 544 [1914]); N. H. PUB. LAWS (1926) c. 336, §§ 27, 28; MONT. REV. CODE ANN. (Choate, 1921) § 10535.

11. Napier v. Elliott, 152 Ala. 248, 44 So. 552 (1907); Di Nardi v. Standard Lime & Stone Co., 3 Boyce 369, 84 Atl. 124 (Del. 1912); Sherlock v. Alling, 44 Ind. 184 (1873); Kentucky Utilities Co. v. McCarthy, 169 Ky. 38, 183 S. W. 237 (1916); Abelein v. Porter, 45 App. Div. 307, 61 N. Y. Supp. 144 (4th Dep't 1899)

12. McEwan v. Springfield, 64 Ga. 159 (1879); Entwhistle v. Feigner, 60 Mo. 214 (1875); Mann v. Weiland, 81 Pa. 243 (1876).

13. Central Iron and Coal Co. v. Hamacher, 248 Fed. 50 (C. C. A. 5th, 1918); Kuykendall v. Edmonson, 205 Ala. 265, 87 So. 882 (1921); Lake Erie & W. R. Co. v. Charman, 161 Ind. 95, 67 N. E. 923 (1903); Hale v. Kearly, 8 Baxt. 49 (Tenn. 1874).

14. Di Nardi v. Standard Lime & Stone Co., 3 Boyce 369, 84 Atl. 124 (Del. 1912); Forbes v. Snyder, 94 Ill. 374 (1880); Kentucky Utilities Co. v. McCarthy, 169 Ky. 38, 183 S. W. 237 (1916); Abelein v. Porter, 45 App. Div. 307, 61 N. Y. Supp. 144 (4th Dep't 1899); Minns v. Crossman, 118 Misc. 70, 193 N. Y. Supp. 714 (Sup. Ct. 1922).

view making it unwise to join a cause of action for wrongful death with one for injuries suffered by the decedent. Since the defendant is a competent witness in the action for wrongful death, and incompetent in the one for injuries suffered by the decedent, the jury might unwittingly consider the evidence admitted in the one in its decision of the other. However this difficulty is of little consequence as most jurisdictions provide for a severance of causes of action when a joinder at one trial would work injustice or unfairness.

It would seem that the rule adopted by a few jurisdictions, replacing the absolutism of generalization by the discretionary judgment of the court,[15] is the most equitable and practical rule of all. Justice is far better served by deciding each question on its own merits, than by striving to promulgate a single standard to embrace all potentialities.

LANDLORD AND TENANT—WHAT CONSTITUTES CONTROL OF PREMISES—LIABILITY OF LESSEE OF ENTIRE PREMISES FOR INJURIES TO THIRD PARTIES.—The plaintiff was struck by the body of a painter falling from an insecurely fastened scaffold which had given way while the painter was working on a sign. Gotham & Co., lessees of the entire building, had subleased the sign in question to Strauss & Co., who in turn employed one Weil as an independent contractor to paint the sign. The plaintiff sued all three for injuries. The Supreme Court dismissed the complaint as to Gotham & Co. and Strauss & Co. On appeal from a judgment of the Appellate Division reversing the dismissal of the complaint and granting a new trial, *held*, two judges dissenting, Gotham & Co. was liable as lessee of the entire building, being in the position of an owner in possession who had retained control over certain parts thereof and was thus answerable for the safe maintenance of those parts. Judgment affirmed. *Rohlfs v. Weil*, 271 N. Y. 444, 3 N. E. (2d) 588 (1936).

There can be no quarrel with the statement of the law in this case, inasmuch as it holds in accord with the weight of authority[1] that where the landlord retains control of part of the premises and the injury is caused by a defect in such part, the landlord is liable to third parties injured thereby. But the test of what actually constitutes control is at best a nebulous affair and subject to varying interpretations.[2] It seems to be a universal rule that where the landlord, under his contract with the tenant, reserves the right to enter to make repairs, he has retained sufficient control to subject him to liability to third parties for the defective condition of the premises.[3] Whether the reverse of this principle is equally true is extremely doubtful, although there are cases holding that the landlord is not liable for injuries to third parties where he has not covenanted to repair.[4] Generally,

15. See note 7, *supra*.

1. Davis v. Pacific Power Co., 107 Cal. 563, 40 Pac. 950 (1895); Shipley v. Fifty Associates, 101 Mass. 251 (1869); Poor v. Sears, 154 Mass. 539, 28 N. E. 1046 (1891); Jennings v. Van Schaik, 108 N. Y. 530, 15 N. E. 424 (1888); O'Connor v. Andrews, 81 Tex. 28, 16 S. W. 628 (1891).

2. Note (1914) 50 L. R. A. (N. S.) 312.

3. Smith v. Preston, 104 Me. 156, 71 Atl. 653 (1908); Appel v. Muller, 262 N. Y. 278, 186 N. E. 785 (1933); see Heaven v. Pender, 9 Q. B. D. 302 (1882). The landlord is not responsible, however, unless he has received notice of need for repairs.

4. Frischberg v. Hurter, 173 Mass. 22, 52 N. E. 1086 (1899) (injury by falling into a coal hole); Curran v. Flammer, 49 App. Div. 293, 62 N. Y. Supp. 1061 (1st Dep't 1900) (injury caused by defective grating); Hirschfield v. Alsberg, 47 Misc. 141, 93 N. Y. Supp. 617 (Sup. Ct. 1905) (injury from breaking of window and falling of

however, in the absence of a covenant to repair, the courts are necessarily guided by the facts peculiar to the case before them.[5]

An analogous situation is presented where a third party receives injuries from the fall of a sign attached by the tenant to the wall outside the leased premises. New York has denied the landlord's liability for such injuries because of the want of control over the premises by him.[6] Massachusetts, on the other hand, has held the landlord liable for the defective condition of the sign, charging him with the necessity of making sure that the sign was maintained in a safe condition.[7] New York was faced with the necessity of construing a building ordinance which states: " . . . signs . . . may be placed on the front of buildings with the consent of the owner thereof. They shall be securely fastened. . . ."[8] It was forced to be more specific in treating the subject of control than was the other jurisdiction. It decided that the consent of the owner did not thereby give him control over the erection and maintenance of the sign, since consent to its erection was not an authorization to set it up negligently.[9] This holding is in accord with the general rule that the tenant is entitled to exclusive possession as against the landlord[10] and that certain parts of the premises, although not specifically mentioned in the lease, go to the tenant by implication because of their value to the part leased.[11] Had the accident, in the case at bar, resulted from a condition of the wall itself, defective at the time it was leased to the tenant, then the landlord would unquestionably have been liable.[12]

It is difficult to reconcile the instant case with these general principles. The court herein has based its conclusion that the landlord was in control of the scaffold upon the fact that the ropes could scarcely have been fastened without the landlord's permission to enter the building,[13] and that the landlord did not alienate the entire

glass); Harte v. Jones, 287 Pa. 37, 134 Atl. 467 (1926), 47 A. L. R. 846 (1927) (injury by falling through door guarding excavation between buildings).

5. The basic theory of liability is as expressed in Smith v. Preston, 104 Me. 156, 160, 71 Atl. 653, 656 (1908): "Such liability rests upon the elementary principle that the party whose neglect of duty causes the damages is responsible therefor."

6. Zolezzi v. Bruce-Brown, 243 N. Y. 490, 154 N. E. 535 (1926).

7. Woodman v. Shepard, 238 Mass. 196, 130 N. E. 194, 13 A. L. R. 985 (1921).

8. N. Y. C. Code of Ordinances (1934) c. 23, art. 16, § 210.

9. Zolezzi v. Bruce-Brown, 243 N. Y. 490, 154 N. E. 535 (1926).

10. Brock v. Desmond, 154 Ala. 634, 45 So. 665 (1908); Genardini v. Kline, 19 Ariz. 558, 173 Pac. 882 (1918); Kellogg v. King, 114 Cal. 378, 46 Pac. 166 (1896); St. Vincent's Roman Catholic Congregation v. Kingston Coal Co., 221 Pa. 349, 70 Atl. 838 (1908); Huffman v. Cooley, 283 S. D. 475, 134 N. W. 49 (1912).

11. Clark v. Koesheyan, 26 Cal. App. 305, 146 Pac. 904 (1915); Bee Building Co. v. Peters Trust Co., 106 Neb. 294, 183 N. W. 302 (1921); Voorhees v. Burchard, 55 N. Y. 98 (1873); Edmisson v. Lowry, 3 S. D. 77, 42 N. W. 583, 17 L. R. A. 275 (1892); Stonegap Colliery Co. v. Kelly, 115 Va. 390, 79 S. E. 341 (1913).

12. "But when injuries result to a third person from the faulty or defective construction of the premises, or from their ruinous condition at the time of the demise, or because they then constitute a nuisance, even if this only becomes active by the tenant's ordinary use of the premises, the landlord is still liable, notwithstanding the lease." TAYLOR, LANDLORD AND TENANT (8th ed.) § 174.

13. The landlord's permission to enter upon the premises to do anything in connection with the carrying out of the lease would seem to be implied from the lease itself. Trustees of Canandaigua v. Foster, 156 N. Y. 354, 50 N. E. 971, 41 L. R. A. 554 (1898). It certainly must have been within the contemplation of the parties here that the tenant would have to suspend a scaffold occasionally to keep the sign painted. Such use would

property. In effect the Court of Appeals reverses the test of control that it applied in *Zolezzi v. Bruce-Brown*,[14] decided only a decade earlier, where the court specifically stated that the consent of the owner to the erection of the sign did not constitute control over the sign by the owner.[15] Nor does the fact that the owner did not alienate the entire property have any significance so long as he withdrew control over the leased premises.[16] The court is not so sanguine as to suggest that the landlord would have had the right to enter upon the scaffold to see that it was being carefully fastened even had he a premonition that all was not well. The negligence causing the injury was occasioned by the careless fastening of the ropes by the painters; it was therefore confined to the scaffold. As in the *Zolezzi Case*, the tenant here under the rights of his lease, erected the object which caused the injury and maintained it himself.[17] His subsequent wrongful acts, after he had received the owner's consent, should not make the owner a party to the wrong.[18]

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carry with it the implied right to use whatever other parts of the premises might be necessary to the enjoyment of the tenant's rights.

14. " . . . it does not expressly or by fair implication impose upon the owner the duty to see that the sign is securely erected or carefully maintained after the consent is given. An owner may lawfully part with control of his property which at that time constitutes no danger to others. The ordinance does not compel him to maintain limited control for the purpose of seeing that no nuisance is thereafter placed upon it. The erection of a sign constitutes no nuisance in itself, and consent to its erection is no authorization to do such act in unlawful manner. . . . There can be no presumption that, under a consent to do an act which is lawful in itself, a tenant will act unlawfully, and the ordinance does not require a consenting owner, who has leased all or part of a buildling, to guard against abuse of his consent by a tenant who attaches a sign to the front wall of a loft leased to him." Lehman, J., in Zolezzi v. Bruce-Brown, 243 N. Y. 490, 496, 154 N. E. 535, 537 (1926).

It is interesting to note that Lehman, J., wrote the dissenting opinion in the case at bar.

15. In the instant case, the court said: "The ropes by which the scaffold was suspended were secured to the roof of the building. The photographs in evidence show that it is scarcely possible that they could have been so fastened except by this appellant's permission to enter into the building by the men who attached the hooks to the cornice or parapet. A jury could reasonably infer that this dangerous obstruction to street travel was erected with the consent of this appellant." Rohlfs v. Weil, 271 N. Y. 444, 449, 3 N. E. (2d) 588, 589 (1936).

16. The court seems to imply a distinction between alienation of the entire property and the surrender of control over the leased premises. As a practical matter it would seem that there is no such distinction.

17. It might be argued that there is a ground of distinction between the Zolezzi case and the present case, since in the former the owner had leased the entire property to another and was out of possession, while in the latter the lessee of the entire building occupied the position of owner in possession. Yet the same court has held, in Kirby v. Newman, 239 N. Y. 470, 147 N. E. 69 (1925), that an owner in possession was not liable for the negligent opening of the cellar doors of his building by the tenant's servants, although the owner had not leased the cellar to the tenant but merely allowed him the use of it for storage, on the ground that the owner was not liable for the carelessness of third parties in using doors which the owner had properly constructed. The court said: "The burden, however, is not one of insurance of the safety of the opening, . . ." *Id.* at 474, 147 N. E. at 70. And in the opinion in the Zolezzi case, Lehman, J. says: " . . . the ordinance does not require a consenting owner who has leased *all or part* of a building to guard against abuse of his consent. . . ." Zolezzi v. Bruce-Brown, 243 N. Y. 490, 496, 154 N. E. 535, 537 (1926). The theoretical distinction does not seem to have been stressed by the court.

18. Where the premises or the part thereof causing the injury are properly con-

LIFE INSURANCE—PUBLIC POLICY—RECOVERY ALLOWED WHERE INSURED WAS EXECUTED.—The deceased had taken out a life insurance policy from the defendant company. No express stipulation therein gave the insurer a defense in the event of the insured's death at the hands of justice. Found guilty of a capital crime, the insured was executed. On appeal from a judgment in favor of the beneficiary in an action to recover the amount due, *held,* public policy does not prevent recovery on a life insurance policy where the insured has been executed by the state. Judgment affirmed. *Progressive Life Ins. Co. v. Dean,* 97 S. W. (2d) 62 (Ark. 1936).

The problem presented to the court in the instant case has been the source of great judicial conflict. The view of the court coincides with the modern trend of authority in allowing recovery in such cases.[1] The question first arose in *Fauntleroy's Case,*[2] decided in England, which held that public policy forbade recovery on the life insurance of one executed for a capital crime. This ruling has been explained[3] on the ground that the court gave judicial expression to the public policy declared in the law of forfeitures[4] which was in force at that time. The reasoning of the English Court was adopted by the United States Supreme Court, first denying recovery in an analogous situation where the deceased was a suicide[5] and, secondly, in a case where the deceased was executed.[6] It is to be

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structed and not out of repair, the injury being caused solely by the tenant's negligence, there is respectable authority for the holding that the landlord should not be liable. Kalis v. Shattuck, 69 Cal. 593, 11 Pac. 346 (1886); Schlitz Brewing Co. v. Shiel, 45 Ind. App. 623, 88 N. E. 957 (1909); Lufkin v. Zane, 157 Mass. 117, 31 N. E. 757, 17 L. R. A. 251 (1892); Fehlhauer v. St. Louis, 178 Mo. 635, 77 S. W. 843 (1903); Shroeck v. Reiss, 46 App. Div. 502, 61 N. Y. Supp. 1054 (1st Dep't 1900); Opper v. Hellinger, 116 App. Div. 261, 101 N. Y. Supp. 616 (1st Dep't 1906); Gensler v. Kemble, 227 Pa. 508, 76 Atl. 223 (1910).

1. Allen v. Diamond, 13 F. (2d) 579 (C. C. A. 7th, 1926); Collins v. Metropolitan Life Ins. Co., 232 Ill. 37, 83 N. E. 542 (1907); Weeks v. New York Life Ins. Co., 128 S. C. 223, 122 S. E. 586 (1924); Fields v. Metropolitan Life Ins. Co., 147 Tenn. 464, 249 S. W. 798 (1923); Corey v. Massachusetts Mutual Life Ins. Co., 178 S. E. 525 (W. Va. 1935). Several decisions have allowed recovery on these facts but have based their finding on the presence of an incontestability clause in the policy. Supreme Lodge v. Overton, 203 Ala. 193, 82 So. 443 (1919); Afro-American Life Ins. Co. v. Jones, 113 Fla. 158, 151 So. 405 (1933); Murphy v. Metropolitan Life Ins. Co., 152 Ga. 393, 110 S. E. 178 (1921). It would seem that the presence of this clause should not be a factor, but public policy should be the primary consideration in arriving at the decision. See Corey v. Massachusetts Mutual Life Ins. Co., *supra,* at 526 where Kenna, J., said ". . . why not permit the company simply to stipulate that it will not contest liability under the policy on the ground of public policy at any time or in any event, and thus render the courts powerless to enforce the public policy of the state in so far as life insurance contracts are concerned?"

2. Amicable Society v. Bolland, 4 Bligh (n. s.) 194, 5 Eng. Reprints 70 (Ch. 1830).

3. See Collins v. Metropolitan Life Ins. Co., 232 Ill. 37, 83 N. E. 542 (1907).

4. Forfeitures for crime were abolished in England by 33 and 34 VICT., c. 23 (1870).

5. Ritter v. Mutual Ins. Co., 169 U. S. 139 (1898). It is to be noted that there was a strong element of fraud in this case, the deceased being heavily in debt by reason of the improper use of moneys entrusted to him in a fiduciary capacity. Just before his death he wrote to his partner, ". . . but I deserve all the punishment I may get, only I feel my debts must be paid. This sacrifice will do it and only this."

6. Burt v. Union Central Life Ins. Co., 187 U. S. 362 (1902). The court in this

noted that in cases where a beneficiary of a suicide seeks recovery, the states have almost universally rejected the decision of the Supreme Court.[7] And it has been discredited by later decisions of the same court[8] even though it appears that in such a situation there would be likelihood of the insurer being defrauded.

The cases that deny recovery when the deceased has been executed find justification for their decision on the ground that public policy would forbid payment, in that payment would serve to induce crime.[9] This ruling has been criticized as being "fanciful"[10] and "bordering on the absurd"[11] by courts holding the opposite view and it would seem that they are justified. The possibility of the insured being superinduced to turn criminal by the prospect of his beneficiaries collecting on his life policy is so remote as to be negligible. Another weakness of the inducement theory is the fact that it is not the crime itself which causes the forfeiture of the policy but the punishment which follows its commission. For example, a man could be convicted of a capital crime and escape execution by the intervention of a pardon, natural death, or other cause and in such a case his life policy would remain enforceable. It would seem that public policy would be best served by requiring payment of the amount of the policy, for then creditors would be protected,[12] and dependent families would be provided with some means of securing

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case and in Ritter v. Mutual Ins. Co., 169 U. S. 139 (1898) note 5, *supra*, adopted in its opinion the argument of the English court in Amicable Society v. Bolland, 4 Bligh (n. s.) 194, 5 Eng. Reprints 70 (Ch. 1830) in which the Lord Chancellor decided that since an express stipulation to insure against death by legal execution is against public policy as tending to encourage crime, the court could not allow recovery in the case of an ordinary life policy. This argument which was said to be unanswerable in (1908) 21 HARV. L. REV. 530, 531, appears to be refuted in Weeks v. New York Life Ins. Co., 128 S. C. 223, 229, 122 S. E. 586, 588 (1924) where it was said: ". . . where one takes out an ordinary life policy, to be matured by death by any cause, no basis in reason or experience exists for assuming that the insured had any intent at the time of making the contract to accelerate the maturity of the policy by committing a capital crime and suffering the death penalty."

7. Supreme Conclave v. Miles, 92 Md. 613, 48 Atl. 845 (1901); Kerr v. Minnesota Mut. Ben. Ass'n, 39 Minn. 174, 39 N. W. 312 (1888); Lange v. Royal Highlanders, 75 Neb. 188, 110 N. W. 1110 (1907); Campbell v. Supreme Conclave, 66 N. J. L. 274, 49 Atl. 550 (1901); Marcus v. Heralds of Liberty, 241 Pa. 429, 88 Atl. 678 (1913); Jackson v. Loyal Additional Ben. Ass'n, 140 Tenn. 495, 205 S. W. 318 (1918); Patterson v. Insurance Co., 100 Wis. 118, 75 N. W. 980 (1898).

8. Whitfield v. Aetna Life Ins. Co., 205 U. S. 489 (1907); Northwestern Mutual Life Ins. Co. v. Johnson, 254 U. S. 96 (1920).

9. Northwestern Mutual Life Ins. Co. v. McCue, 223 U. S. 234 (1912); Collins v. Metropolitan Life Ins. Co., 27 Pa. Sup. Ct. 353 (1905); Scarborough v. American Nat. Ins. Co., 171 N. C. 353, 88 S. E. 482 (1916); Smith v. Metropolitan Life Ins. Co., 125 Misc. 670, 211 N. Y. Supp. 755 (Sup. Ct. App. Term 1925); Burt v. Union Central Life Ins. Co., 187 U. S. 362 (1902) is the leading case on this point in the United States. It would seem that the decision would have been different had the court taken cognizance of a statute enacted by Congress which said: "No conviction or judgment shall work corruption of blood or any forfeiture of estate." 1 STAT. 117 (1790), 18 U. S. C. A. § 544 (1909).

10. Fields v. Metropolitan Life Ins. Co., 147 Tenn. 464, 476, 249 S. W. 798, 801 (1923).

11. Collins v. Metropolitan Life Ins. Co., 232 Ill. 37, 45, 83 N. E. 542, 544 (1907).

12. It is a common practice for people to use their life insurance policies as security for loans.

the necessities of life. Another basis advanced for the denial of recovery is that there is a condition implied in fact in the contract of insurance to do nothing which wrongfully accelerates the maturity of the policy. This is founded on the supposed similarity between cases of the type of the instant case and a situation in which arson is committed. It appears that the criticism, which labels such reasoning specious and condemns the analogy as false, is justified for fire and life insurance are radically different.[13]

It would seem that since the consideration to be paid for life insurance is computed from the experience tables of mortality which embrace death by legal execution as well as from other causes, recovery should be allowed where the insured has been executed.[14] This possibility might be considered a circumstance within the contemplation of the parties. If the insurer desires to avoid payment under such circumstances, it would be a simple solution to insert a clause to that effect in the policy. Caution should be exercised before introducing by construction or implication exceptions into such contracts which usually contain special exceptions.

MORTGAGES—NEGLIGENCE—EFFECT OF FAILURE TO SEARCH RECORD ON RIGHT OF SUBROGATION AS AGAINST SECOND MORTGAGEE.—The defendant, on the assurances of *X* that she was to receive a first mortgage, advanced money to *X* for the purpose of releasing a first mortgage on *X*'s property. The senior mortgage was canceled of record and a new mortgage executed to the defendant. The defendant, relying on the false representations of *X* that no other incumbrance existed on the property, neglected to examine the record which would have disclosed that the property was subject to a second mortgage in favor of the plaintiff. On the plaintiff's suit to foreclose his lien the defendant cross-complained and prayed that her mortgage be declared a first mortgage on the property. On appeal from a judgment for the defendant, *held,* two justices dissenting, that the negligence of the defendant in not searching the record did not preclude her subrogation to the rights of the original first mortgagee. Judgment affirmed. *Martin v. Hickenlooper,* 59 P. (2d) 1139 (Utah 1936).

The instant case represents a modern development of the doctrine of subrogation prevalent in numerous jurisdictions, sometimes titled "conventional subrogation."[1] This extension of the right of subrogation is invoked only in cases where a lender, under an express or implied agreement with the borrower to be placed in the position of the creditor whose debt will be canceled by his loan, fails to take an assignment of the security released.[2] Equity, upon such facts where no innocent parties

13. Campbell v. Supreme Conclave, 66 N. J. L. 274, 279, 49 Atl. 550, 552, where Collins, J., said, "But the case of life insurance is not parallel. Strict insurance is indemnity. Voluntary and unnecessary destruction of the property insured is inconsistent with the basis of the contract, but the basis of that which by a misnomer is called 'insurance upon life' is altogether different. That is an arbitrary agreement to pay a fixed sum upon the happening of an inevitable event, to wit, the death of the insured, without regard to the value of his life or the loss sustained by the assured." See also VANCE, INSURANCE (2d ed. 1930) 81.

14. VANCE, INSURANCE (2d ed. 1930) 813; see Weeks v. New York Life Ins. Co., 128 S. C. 223, 237, 122 S. E. 586, 590 (1924); Note (1925) 36 A. L. R. 1255.

1. 2 JONES, MORTGAGES (8th ed. 1928) § 1114.

2. Simon Newman Co. v. Fink, 206 Cal. 143, 273 Pac. 565 (1928); Home Sav. Bank v. Bierstadt, 168 Ill. 618, 48 N. E. 161 (1897); First Nat. Bank v. Moore, 88 Ind. App. 580, 163 N. E. 602 (1928); Jackson Trust Co. v. Gilkinson, 105 N. J. Eq. 116, 147 Atl.

will suffer, or no superior equities have intervened, will treat the matter as if an assignment had been executed.[3] But in addition to cases where the intervening equities of third parties preclude subrogation, the conduct of a lender himself has at times constrained equity from extending assistance. Thus waiver[4] and laches[5] are elements which preclude the courts from granting relief.[6]

There is a definite division of authority as to the weight to be given to the element of negligence in failing to examine the record as a basis for the denial of relief. The minority rule has opposed the subrogation of negligent lenders where the record gives constructive notice of an intervening interest on the ground that the affirmative aid would be a reward for negligent conduct.[7] On the other hand, those courts which permit subrogation on these facts have argued that the recording statutes raise no barrier to subrogation. Such statutes, they contend, were enacted for the purpose of protecting subsequent purchasers or lenders from changing their position without knowledge of prior liens; they were not intended to permit an

113 (1929); Gans v. Thieme, 93 N. Y. 225 (1883); Miller v. Scott, 23 Ohio App. 50, 154 N. E. 358 (1924); Bankers' Loan & Invest. Co. v. Hornish, 94 Va. 608, 27 S. E. 459 (1897). In Gans v. Thieme, *supra*, at 231, the court said, "It is no doubt true, however, . . . that a volunteer cannot acquire either an equitable lien or the right to subrogation, but one who, at the request of another, advances his money to redeem or even to pay off a security in which that other has an interest, or to the discharge of which he is bound, is not of that character, and in the absence of an express agreement one would be implied, if necessary, that it shall subsist for his use, and it will be so enforced." *Contra:* Browder & Co. v. Hill, 136 Fed. 821 (C. C. A. 6th, 1905) (requiring an express agreement); *cf.* Gore v. Brian, 35 Atl. 897 (N. J. Ch. 1896) (mere understanding not in the nature of an agreement is insufficient); see Walter Baker & Co. v. New York, N. H. & H. R. Co., 162 Fed. 496, 497 (S. D. N. Y. 1908).

3. Ahren v. Freeman, 46 Minn. 156, 48 N. W. 677 (1891) (innocent purchaser for value without notice); Fears v. Albea, 69 Tex. 437, 6 S. W. 286 (1887) (assignee of mortgage who in good faith, and without knowledge of the agreement under which the money was borrowed for the payment of the first mortgage, took assignment after the discharge of the first of record); see Peoples v. Peoples Bros., 254 Fed. 489, 492 (E. D. Pa. 1918); Makeel v. Hotchkiss, 190 Ill. 311, 320, 60 N. E. 524, 528 (1901); Title Guarantee & Trust Co. v. Haven, 196 N. Y. 487, 495, 89 N. E. 1082, 1085 (1909); Integrity Trust Co. v. St. Rita Building & Loan Ass'n, 112 Pa. Super. Ct. 343, 345, 171 Atl. 283, 284 (1934) (". . . . right of subrogation . . . will not be enforced where the equities are equal, or the rights not clear, nor to the prejudice of the legal or equitable rights of others".)

4. *In re* Rogers Palace Laundry Co., 275 Fed. 829 (C. C. A. 7th, 1921) (right waived where new and different security was accepted); see Defiance Mach. Works v. Gill, 170 Wis. 477, 483, 175 N. W. 940, 943 (1920).

5. Maryland Casualty Co. v. Cincinnati, 291 Fed. 825 (S. D. Ohio 1923); *In re* Stinger's Estate, 61 Mont. 173, 201 Pac. 693 (1921); American Surety Co. v. White, 142 Va. 1, 127 S. E. 178 (1925). It requires no citation of authority for the proposition that the Statutes of Limitations in the various states will bar suits not commenced within the periods therein provided.

6. In addition, where the right is based on an usurious mortgage subrogation will be denied. Perkins v. Hall, 105 N. Y. 539, 12 N. E. 48 (1887); Terwilligen v. Beecher, 58 Hun 605, 11 N. Y. Supp. 834 (Sup. Ct., 3d Dep't 1890).

7. Coonrod v. Kelly, 119 Fed. 841 (C. C. A. 3d, 1902); Troyer v. Bank of De Queen, 170 Ark. 703, 281 S. W. 14 (1926); Boley v. Daniel, 72 Fla. 121, 72 So. 644 (1916); Mather v. Jenswold, 72 Iowa 550, 32 N. W. 512 (1887); Ft. Dodge Bldg. & Loan Ass'n v. Scott, 86 Iowa 431, 53 N. W. 283 (1892).

existing lienholder to fortuitously advance his lien as the result of the inadvertent release of a prior lien.[8] Furthermore, it is asserted that since an intervening incumbrancer is not prejudiced if the lender is given priority, as he would be in exactly the same position if subrogation is granted that he occupied originally, he should not be heard to complain.[9] It is submitted that the latter rule, announced in the majority of the cases and applied in the instant case, is the better view. The right of subrogation, entirely equitable in character,[10] is to be withheld or applied according to sound judicial discretion under the rule.

The courts in denying subrogation under this majority rule because of superior equities, waiver or laches have, however, generally stated that *culpable negligence* would also preclude relief.[11] The glib use of this last phrase would seem to be mere verbiage, since it is difficult to conceive what conduct would constitute culpable negligence, when it has been held that even an omission to procure an assignment of the security released in the face of actual notice would not bar subrogation where no third party has been prejudiced.[12] It is submitted that the rule possesses sufficient flexibility of application without the inclusion of the confusing and indefinite concept of culpable negligence.

PICKETING—RIGHT TO ENJOIN STRANGERS WHERE NO DISPUTE BETWEEN EMPLOYER AND EMPLOYEE.—The plaintiff corporation was the operator of an "open shop" theatre, giving its employees the privilege of joining a union if they so desired. The defendants, members of labor unions of theatre employees, were engaged in picketing the plaintiff's theatre. None of the plaintiff's present or former employees had ever belonged to these unions. The sole purpose of the picketing was to force unionization of the theatre. On appeal from a decree of the trial court refusing to issue an injunction, *held,* that the employer was entitled to injunctive relief against picketing by third persons seeking to secure unionization where non-striking employees were entirely satisfied with their employment. Injunction granted. *Keith Theatre, Inc. v. Vachon,* 187 Atl. 692 (Me. 1936).

8. Louisville Joint Stock Land Bank v. Bank of Pembroke, 225 Ky. 375, 9 S. W. (2d) 113 (1928); Emmert v. Thompson, 49 Minn. 386, 52 N. W. 31 (1892); Dixon v. Morgan, 154 Tenn. 389, 285 S. W. 558 (1926); Hill v. Ritchie, 90 Vt. 318, 98 Atl. 497 (1916). "The doctrine of constructive notice is resorted to from necessity, its object being to protect the rights of innocent third persons, and should never be applied in favor of parties not entitled to the protection it affords." Merchants' & Mechanics' Bank v. Tillman, 106 Ga. 55, 60, 31 S. E. 784, 797 (1898).

9. See Louisville Joint Stock Land Bank v. Bank of Pembroke, 225 Ky. 375, 381, 9 S. W. (2d) 113, 115 (1928); Dixon v. Morgan, 154 Tenn. 389, 405, 285 S. W. 558, 563 (1926); Hill v. Ritchie, 90 Vt. 318, 322, 98 Atl. 497, 498 (1916).

10. 2 JONES, MORTGAGES (8th ed. 1928) § 1111. See the analogous principle in the law of quasi contract of unjust enrichment where negligence will not preclude relief. WOODWARD, THE LAW OF QUASI CONTRACTS (1913) § 15.

11. Stephenson v. Grant, 168 Ark. 927, 271 S. W. 974 (1925); Merchants' & Mechanics' Bank v. Tillman, 106 Ga. 55, 31 S. E. 794 (1898); Traders' Bank v. Myers, 3 Kan. App. 636, 44 Pac. 292 (1896); Jackson Trust Co. v. Gilkinson, 105 N. J. Eq. 116, 147 Atl. 113 (1929); Hill v. Ritchie, 90 Vt. 318, 98 Atl. 497 (1916).

12. One can easily understand why there are only one or two cases involving actual notice since a person with ordinary business acumen would, in the face of actual knowledge, demand an assignment of the lien which his money is releasing. However, in Wilkins v. Gibson, 113 Ga. 31, 38 S. E. 374 (1901), a lender, who failed to act upon actual notice, was held not culpably negligent where no third party was prejudiced.

The power of a court of equity to restrain the activities of employees in their struggles with employers has increased steadily with use since its origin at the end of the last century.[1] The generally hostile attitude of the courts as evidenced by the injunctive limitations which they have placed on labor's chief weapons, the strike, the boycott and the picket, has been a particular source of grievance to labor leaders.[2] The right to picket has been limited to such an extent that it has led some writers to conclude it is ineffectual.[3] This legal treatment of the right to picket has made it the storm-center of labor's antipathy to the courts.[4]

The right to picket has been denied, in some jurisdictions, as illegal *per se*, either by statute[5] or on the ground that picketing is unlawful because it can never be peaceful and without some element of intimidation.[6] In other jurisdictions, the right is recognized but limited to the extent that the purpose of picketing must be justifiable.[7] Its broad purpose is to influence the public, the employer or the employees to such an extent that the employer will be forced to accede to the demands of the labor union.[8] When the immediate demand of the labor union is an increase in wages, the betterment of working conditions or shorter hours, the direct and obvious benefits to the employees furnish a sufficient legal justification for the right to picket.[9] However, if the purpose is merely to further the cause

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1. The first recorded injunction granted in a labor case was contained in Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307 (1888). See FRANKFURTER AND GREENE, THE LABOR INJUNCTION (1930) app. 1 for a compilation showing frequency of issuance of injunctive relief against the activities of employees in federal courts.

2. FREY, THE LABOR INJUNCTION (1922) 29; Witte, *The Federal Anti-Injunction Act* (1932) 16 MINN. L. REV. 638, 657; Comment (1931) 44 HARV. L. REV. 971; Legis. (1935) 22 VA. L. REV. 83.

3. FREY, THE LABOR INJUNCTION (1922) 29. See Cooper, *The Fiction of Peaceful Picketing* (1936) 35 MICH. L. REV. 73, 87.

4. Fraenkel, *Recent Statutes Affecting Labor Injunctions and Yellow Dog Contracts* (1936) 30 ILL. L. REV. 854, 870; Sayre, *Labor and the Courts* (1930) 39 YALE L. J. 682. For an excellent discussion of the subject, see dissenting opinion of Brandeis, J., in Truax v. Corrigan, 257 U. S. 312, 354 *et seq.* (1921).

5. ALA. CODE ANN. (Michie, 1928) § 3448; NEB. COMP. STAT. (1929) §§ 28-812 to 28-814; UTAH REV. STAT. ANN. (1933) §§ 49-2-3 to 49-2-7.

6. Atchison, Topeka & Santa Fe Ry. Co. v. Gee, 139 Fed. 582 (C. C. S. D. Iowa 1905); Local Union v. Stathakis, 135 Ark. 86, 205 S. W. 450 (1918); Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324 (1909); Franklin Union v. People, 220 Ill 355, 77 N. E. 176 (1906); A. R. Barnes & Co. v. Chicago Typographical Union, 232 Ill. 424, 83 N. E. 940 (1908); Beck. v. Railway Teamster's Protective Union, 118 Mich. 497, 77 N. W. 13 (1898). The U. S. Supreme Court has stated that "the name 'picket' implied a militant purpose, inconsistent with peaceable persuasion." American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 205 (1921).

7. Sarros v. Nouris, 15 Del. Ch. 391, 138 Atl. 607 (1927); Fenske Bros., Inc. v. Upholsterers' International Union, 358 Ill. 239, 193 N. E. 112 (1934); Exchange Bakery & Restaurant, Inc. v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927).

The intentional infliction of injury *prima facie* gives rise to a cause of action unless there is sufficient justification. Aikens v. Wisconsin, 195 U. S. 194, 204 (1904); Holmes, *Privilege, Malice and Intent* (1894) 8 HARV. L. REV. 1, 3; FRANKFURTER AND GREENE, THE LABOR INJUNCTION (1930) 24 *et seq.*

8. HARPER, TORTS (1935) 490.

9. Scofes v. Helmar, 205 Ind. 596, 187 N. E. 662 (1933); Exchange Bakery & Res-

of unionization, the decisions as to whether or not such picketing is justifiable are in conflict. Under such circumstances, the intimate relationship between the unions and the economic welfare of employees has been regarded by some courts as ground on which to refuse to enjoin picketing.[10] This contention is based on the theory that the chances of an individual employee to secure favorable terms and conditions of employment from a powerful business organization will be greatly enhanced by combination with other employees.[11] On the other hand, some jurisdictions have held that unionization is too remote to the actual needs of the employees, inasmuch as it will not directly and immediately result in benefit to the employees in the form of increased wages, shorter hours or better working conditions.[12] It has also been argued that to permit picketing for the sole purpose of unionization is against public policy in that it will result in a monopoly of labor by the unions and the consequent deprivation of the rights of individual non-union employees to contract for themselves.[13]

In those jurisdictions which permit picketing, there is a further restriction to the right for the measures used, may not, in themselves, be tortious.[14] As a consequence, peaceful picketing is permitted but considerable confusion has resulted from the attempts to define this term.[15] Some measures used in picketing against which the courts have issued injunctions are the employment of violence,[16] the

taurant, Inc. v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927); Stillwell Theatre, Inc. v. Kaplan, 259 N. Y. 405, 182 N. E. 63 (1932).

In some jurisdictions, the privilege of picketing exists only when it is the concomitant of a strike or of a trade dispute between an employer and his employees. This condition is imposed on the ground that an unrelated third party should not be permitted to inflict injury to the property of the employer when his own employees are satisfied with the terms of their employment. Harvey v. Chapman, 226 Mass. 191, 115 N. E. 304 (1917); Gevas v. Greek Restaurant Workers' Club, 99 N. J. Eq. 770, 134 Atl. 309 (1926). This rule was rejected in New York, (see Exchange Bakery & Restaurant, Inc. v. Rifkin, 245 N. Y. 260, 263, 157 N. E. 130, 132 [1927]) and has often been criticized (Comment [1933] 33 COL. L. REV. 1188).

10. See Plant v. Woods, 176 Mass. 492, 505, 57 N. E. 1011, 1016 (1900); Exchange Bakery & Restaurant, Inc. v. Rifkin, 245 N. Y. 260, 263, 157 N. E. 130, 132 (1927).

11. This argument was advanced by Holmes, J., in Vegelahn v. Guntner, 167 Mass. 92, 108, 44 N. E. 1077, 1081 (1896).

12. See Hughes v. Kansas City M. P. M. O., 282 Mo. 304, 315, 221 S. W. 95, 97 (1920); Moreland Theatres Corp. v. Portland M. P. M. O. Union, 140 Ore. 35, 47, 12 P. (2d) 333, 338 (1932); Webb v. Cooks', Waiters', & Waitresses' Union, 205 S. W. 465, 468 (Tex. Civ. App. 1918).

13. See Plant v. Woods, 176 Mass. 492, 503, 57 N. E. 1011, 1015 (1900); Elkind & Sons, Inc. v. Retail Clerks, International Protective Ass'n, 114 N. J. Eq. 586, 591, 169 Atl. 494, 496 (1933); Wasilewski v. Bakers' Union, 118 N. J. Eq. 349, 350, 179 Atl. 284, 285 (1935); Safeway Stores, Inc. v. Retail Clerks' Union, 184 Wash. 322, 338, 51 P. (2d) 372, 379 (1935).

14. Lisse v. Local Union No. 31, 2 Cal. (2d) 312, 41 P. (2d) 314 (1935); McMichael v. Atlantic Envelope Co., 151 Ga. 776, 108 S. E. 226 (1921); F. C. Church Shoe Co. v. Turner, 218 Mo. App. 516, 279 S. W. 232 (1926); Iverson v. Dilno, 44 Mont. 270, 119 Pac. 719 (1911); Exchange Bakery & Restaurant, Inc. v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927). As a consequence, some jurisdictions prohibit all picketing on the ground that there is always present an element of intimidation and coercion, and that picketing cannot be effected peaceably. See note 6, *supra*.

15. See Cooper, *The Fiction of Peaceful Picketing* (1936) 35 MICH. L. REV. 73, 86.

16. McMichael v. Atlanta Envelope Co., 151 Ga. 776, 108 S. E. 226 (1921); Wil-Low Cafeterias, Inc. v. Kramberg, 134 Misc. 841, 237 N. Y. Supp. 76 (Sup. Ct. 1929).

use of false or misleading signs,[17] the obstruction of the public right of way,[18] and even the mere utterance of words in a loud tone.[19] In all these instances, the courts were of the opinion that the activities amounted to intimidation or coercion of the employer and were consequently unlawful.

As a result of the hampering effects of these decisions on the activities of labor unions, a number of jurisdictions have passed statutes intended to limit the issuance of injunctions against picketing.[20] But it appears that these statutes, aside from the correction of previous procedural defects, have only slightly influenced the attitude of the courts, because of the tendency to construe them as being declaratory of the common law.[21]

The court, in the instant case, granted its restraining injunction because the defendants were entirely unrelated to the plaintiff or its employees. The plaintiff's employees were satisfied with the terms and conditions of their employment. Insofar as the court limited itself to the facts of the instant case, the decision would seem to be sound. However, there is language in the case which seems to indicate that the court might condemn all picketing as intimidating and coercive, regardless of the relationship between the parties.[22] An objective view of the problem might indicate that picketing should be encouraged by the courts as a legitimate means of influencing public opinion in favor of the employees when the purpose is justifiable, the measures used not tortious, and there is a privity between the parties. However, where the picketers are complete strangers to the employer-employee relationship, the court might well weigh the uncertainty of their success in securing the desired unionization against the tangible damage to the business of the employer, especially in view of the fact that the remedy sought is an equitable one.

TAXATION—CONSTITUTIONALITY OF TAX ON INCOME FROM FOREIGN REALTY—SITUS OF MORTGAGE INTEREST FOR TAXATION PURPOSES.—The plaintiff, a resident of New York, received, as beneficiary of a life estate managed and administered under the laws of New Jersey, certain income, part of which was rent from real estate in New Jersey, and part, interest on bonds and mortgages upon real property in that

17. Robison v. Hotel & Restaurant Employees' Local No. 782, 35 Idaho 418, 207 Pac. 132 (1922). If signs are not misrepresentations, they will be permitted. Exchange Bakery & Restaurant, Inc. v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927).

18. Greenfield v. Central Labor Council, 104 Ore. 236, 207 Pac. 168 (1922). On the question of mass picketing, see American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184 (1921).

19. Wise Shoe Co. v. Lowenthal, 266 N. Y. 264, 194 N. E. 749 (1935). But see Walter A. Wood Mowing & Reaping Mach. Co. v. Toohey, 114 Misc. 185, 186 N. Y. Supp. 95 (Sup. Ct. 1921).

20. For a citation of these statutes, see Cooper, *The Fiction of Peaceful Picketing* (1936) 35 MICH. L. REV. 73, n. 1.

21. *Id.* at 76-79. For a discussion of this problem, see Legis. (1935) 5 FORDHAM L. REV. 125.

22. "We do not wish to be understood as denying the right of the representatives of the unions by proper speech and persuasive argument to attempt the conversion of any employer to their belief that unionization is best; we would not so limit freedom of speech; but we see a distinction between peaceable persuasion by speech and peaceable picketing. True, the latter is said not to have in it force or violence, threats, intimidation, or coercion, yet in all picketing there is an element not appearing in fair argument and a reasonable appeal for justice." Keith Theatre, Inc. v. Vachon, 187 Atl. 692, 702 (Me. 1936).

state, said securities being kept in a New Jersey bank. The plaintiff paid a tax upon this income in New York under the newly amended Tax Law[1] and now asks a refund, claiming that this state had no right to tax such income. The Appellate Division granted relief to the plaintiff, determining that the identical question presented here had been decided in a former case,[2] and that the amended State Tax Law did not affect the rule enunciated there, since the basis of that decision had been an infringement of the Federal Constitution, which could not be cured by state legislative action. The Tax Commission appealed, asserting that such income was taxable under the personal income tax law. *Held*, three judges dissenting, that a tax upon rents from real property located in New Jersey, as well as upon interest from mortgages on real property within the same state, is taxable income in New York when received by a resident. Judgment reversed. *People* ex rel. *Cohn v. Graves*, 271 N. Y. 353, 3 N. E. (2d) 508 (1936).

In reaching the conclusion that a federal income tax on rents from real property and income from personal property was a "direct" tax within the meaning of the Constitution, the Supreme Court in *Pollock v. Farmers' Loan & Trust Co.*,[3] proceeded on the theory that such a tax on income from property was equivalent to a direct tax on the property itself. However, subsequent decisions[4] of the Court have tended to lessen the rigor of this decision with regard to personalty, and the majority opinion, in the instant case, argues against the application of the principle to state income taxes. Still, should the *Pollock Case*,[5] with all its implications, be controlling in the Court's treatment of state income taxes, the New York tax on rents from realty outside this state would not be valid, since a state may only tax land within its jurisdiction.[6]

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1. N. Y. TAX LAW (Supp. 1936) § 359 reads "gross income includes gains, profits and income derived from . . . interest, rent (including rent derived from real property situated outside the state) . . . it being intended to include all of the foregoing items, without regard to the source thereof, location of property involved or any other factor, except only a case where inclusion thereof would be violative of constitutional restrictions."

2. In Matter of Pierson v. Lynch, 237 App. Div. 763, 263 N. Y. Supp. 259 (3d Dep't 1933), *aff'd*, 263 N. Y. 533, 189 N. E. 684 (1933), *cert. dismissed*, 293 U. S. 52 (1934), it was held that rental from real property located in another state may not be included by this state as part of owner's income for the purpose of computing her income tax.

3. 157 U. S. 429 (1895), *on rehearing*, 158 U. S. 601 (1895).

4. In Knowlton v. Moore, 178 U. S. 41 (1900) an inheritance tax was declared not one on property but upon the right to receive it. Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397 (1904) held that a tax on a sugar refining business was an excise tax on the right to carry on such business even though the amount of such tax was based on income of the company. Flint v. Stone Tracy Co., 220 U. S. 107 (1911), decreed that a tax on corporations measured by income was an excise tax upon the privilege of doing business in the corporate character and not a direct tax upon the corporation. In Brushaber v. Union Pacific R. R. Co., 240 U. S. 1, 17 (1916), Mr. Justice White, speaking for the Court, said "The Pollock case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property but on the contrary recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such. . . ." Maguire v. Trefry, 253 U. S. 12 (1920), permitted a tax, by Massachusetts, upon the income received by a resident beneficiary from a trust fund located and administered in Pennsylvania. Lawrence v. State Tax Commissioner, 286 U. S. 276 (1932), declared an income tax to be one based on domicile and might be taxed as such, regardless of its origin.

5. 157 U. S. 429 (1895), *on rehearing*, 158 U. S. 601 (1895).

6. See State Tax on Foreign-Held Bonds, 82 U. S. 300, 319 (1873); Union Refrigerator

The tax on the interest from mortgages secured by property in another state presents a different problem. The Court has not arbitrarily decided that a mortgage, for taxation purposes, has only one situs, but rather has recognized its dual nature. It has permitted the state of the mortgagee's domicile to tax the debt secured by a mortgage upon extra-state realty[7] and the state in which the realty is located to tax the non-resident mortgagee's interest in the land.[8] This is an instance where the Court has allowed double taxation of the same property. While there is this clash between the two jurisdictions, the paramount control seems to center in the state of the creditor's domicile because the debt, not the mortgage, is the principal part of the chose in action and the income from the mortgage is really compensation for the loan of money. It would seem, therefore, that the income of the mortgage must be considered as interest on the debt and since a debt is localized at the domicile of the creditor,[9] New York in the instant case would be permitted to tax such interest from mortgages. In the dissenting opinion of the case at bar, the contention was made that the mortgages had attained a "business situs"[10] in New Jersey and were therefore outside New York's jurisdiction. Passing the question of whether casual investment spells out a "business situs", which is debatable because there is no going business, still it does not follow that such a tax at the "business situs" excludes the right of the domicile of the creditor[11] to tax the income derived from said "business situs."

Transit Co. v. Kentucky, 199 U. S. 194, 204 (1905); Frick v. Pennsylvania, 268 U. S. 473, 488, 489 (1925); Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 92 (1929); Farmers Loan Co. v. Minnesota, 280 U. S. 204, 210 (1929); Senior v. Braden, 295 U. S. 422, 429 (1935).

7. "Nor is the debt, for the purposes of taxation, affected by the fact that it is secured by a mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt. . . . The debt then having its situs at the creditor's residence, both he and it are, for the purposes of taxation, within the jurisdiction of the State." Kirtland v. Hotchkiss, 100 U. S. 491, 499 (1879).

8. Savings Society v. Multomah County, 169 U. S. 421 (1898), where the Court held constitutional a state statute which considered the mortgagee's interest in the property as realty, for taxation purposes, regardless of his domicile.

9. The Court in determining the situs of a debt, employed the fiction of *mobilia sequuntur personam,* and in so doing has accepted the domicile of the creditor as the proper place for the debt to be taxed. State Tax on Foreign-Held Bonds, 82 U. S. 300 (1873); Kirtland v. Hotchkiss, 100 U. S. 491 (1879); Blodgett v. Silverman, 277 U. S. 1 (1927); Farmers Loan Co. v. Minnesota, 280 U. S. 204 (1929); Baldwin v. Missouri, 281 U. S. 586 (1930); Lowndes, *Jurisdiction to Tax a Debt,* 19 GEO. LAW J. 427 (1931).

10. The "business situs" theory is based on the supposition that where intangibles and credits are used in a continuous course of business within a given state, the owner being without the state, these intangibles attain a situs for taxation within the jurisdiction in which they are so used. New Orleans v. Stempel, 175 U. S. 309 (1899); Bristol v. Washington County, 177 U. S. 133 (1900); Board of Assessors v. Compton Nat'l, 191 U. S. 388 (1903); Liverpool v. Orleans Assessors, 221 U. S. 346 (1911). "We are not dealing here with a single creditor or a series of separate credits but with a business. Company chose to go into business of lending money within Louisiana and employed an agent to conduct that business. It was conducted under the laws of the state. The state undertook to tax the capital employed in the business. Under such circumstances they have a tax situs." Metropolitan Life Ins. Co. v. New Orleans, 205 U. S. 395 (1907); *cf.* Deganey v. Lederer, 250 U. S. 376 (1919). For an interesting new development in the "business situs" theory see Lowndes, *The Tax Burden of the Supreme Court in 1935,* 5 FORDHAM L. REV. 437 (1936).

11. "But, as we have seen, the jurisdiction of the State of his domicile, over the

In its decisions having to do with the jurisdictional right to impose an income tax, the Court has permitted both the state in which the recipient of the income is domiciled[12] and the state in which the income arises[13] to tax. The basis for the tax, in the latter case, would seem to be that it was in the nature of an excise tax upon the privilege of conducting a business within that state and of receiving the protection of its laws in that business. In *Lawrence v. State Tax Commission*[14] the Court determined that domicile in itself established a basis for imposing an income tax. Taking this decision at its face value, it appears that an income tax would be valid regardless of where or from what source the income arose. However, in *Senior v. Braden*,[15] the Court declared a "property" tax, measured by income, unconstitutional when imposed upon transferrable trust certificates relating to land outside of the state. The decision was conditioned upon whether such certificates represented an interest in the land or were mere choses in action, and the Court found them to be the former.[16] The implication of the *Braden Case* is that the Court is giving more consideration to the source from which the income springs in determining its taxability. It may be a warning that the *Pollock Case*[17] has been revived and will present a barrier against the exaction of a tax on income received from realty not within the state.

By emphasizing the fine distinction which the Court made in the *Braden Case*[18] between a property tax measured by income and an income tax, it is still possible that the rules of property taxation will not control in the treatment of state income taxes. But it is not likely that this Court will attempt to withdraw from its position that double taxation is an undesirable practice,[19] even though in the past, it has declared that dual taxation is not unconstitutional.[20]

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creditor's person, does not exclude the power of another State in which he transacts his business, to lay a tax upon the credits there accruing to him against resident debtors and thus to enforce contribution for the support of the government under whose protection his affairs are conducted." Liverpool v. Orleans Assessors, 221 U. S. 346, 356 (1911).

12. Maguire v. Trefry, 253 U. S. 12 (1920); Lawrence v. State Tax Commissioner, 286 U. S. 276 (1932); *cf.* Cook v. Tait, 265 U. S. 47 (1924).

13. Shaffer v. Carter, 252 U. S. 37 (1920); Travis v. Yale & Towne, 252 U. S. 60 (1920); Underwood v. Chamberlin, 254 U. S. 113 (1920); Atlantic Coast Line v. Daughton, 262 U. S. 413 (1923).

14. 286 U. S. 276 (1932).

15. 295 U. S. 422 (1935).

16. The Court based its whole argument on its decision in Brown v. Fletcher, 235 U. S. 589 (1915). However, in that case, the *cestui que trust* had a fixed right in the future to the corpus of the trust.

17. 157 U. S. 429 (1895), *on rehearing*, 158 U. S. 601 (1895).

18. 295 U. S. 422, 431 (1935).

19. The Court has supported these sentiments against double taxation by a number of decisions known as the "single tax" cases, upholding one tax to the exclusion of another. Safe Deposit Co. v. Virginia, 280 U. S. 83 (1929); Farmers Loan Co. v. Minnesota, 280 U. S. 204 (1929); Baldwin v. Missouri, 281 U. S. 586 (1930); Beidler v. South Carolina, 282 U. S. 1 (1930); First National Bank v. Maine, 284 U. S. 312 (1932); Senior v. Braden, 295 U. S. 421 (1935); Brown, *Multiple Taxation by the States—What is Left of It*, 48 HARV. L. REV. 407 (1935).

20. Mr. Justice Brandeis disposes of the question in Cream of Wheat Co. v. Grand Forks, 253 U. S. 325, 330 (1920) by saying, "To this it is sufficient to say that the 14th amendment does not prohibit double taxation."

WILLS—EXECUTION—COMPLIANCE WITH REQUIREMENT THAT WILL BE SIGNED AT END.—The will in controversy was holographic. The testatrix had folded a sheet of paper in half, with the fold lying to the left, making in all four pages. The writing commenced on page one, and was carried over to page four, continuing the sequence of thought and filling in the entire page. It then continued on the other side of that page, which would be page three, and followed in unbroken sequence down to the bottom where the *in testimonium* clause and date, the signature of testatrix, and the signature and residences of subscribing witnesses were placed. The validity of the will was contested on the sole ground that it was not signed at the end as required by the New York Decedent Estate Law, Section 21. *Held,* there was a full compliance with the statute and the will was admitted to probate. In re *Murphy,* 160 Misc. 353 (Surr. Ct. 1936).

In the absence of a statute granting the right to devise property, one may not dispose of it by will or testamentary instrument inasmuch as there is no inherent or natural right at common law allowing such disposition.[1] Where the privilege is granted to the citizens of a state, the sovereign can reserve the right to prescribe regulations and requirements to which the enjoyment of the right is subject.[2] It is fundamental that the intention of the testator is not to be considered, but solely that of the legislature, in determining if the testamentary instrument complies with the statute. The test seems to be, has the devisor conformed with the statute?[3]

The objective of the statutory requisite, that a will be signed at the end, is to prevent the addition of fraudulent provisions and thus defeat the testamentary intent.[4] There are conflicting views as to what constitutes the "end" of a will; the basis of distinction is the varying degree of importance given form as contrasted with substance. Those who favor substance[5] adopt a "constructive end"; that is, they place weight upon the fact that signature is found at the "logical, speaking, or intellectual"

1. "The privilege of making a will is not a natural or inherent right, but one which the state can grant or withhold in its discretion." Matter of Delano, 176 N. Y. 486, 491, 68 N. E. 871, 872 (1903), *aff'd,* 205 U. S. 466 (1907); Lewark v. Dodd, 288 Ill. 80, 123 N. E. 260 (1919). It is a right which is not "inborn" or "fundamental" but is the result of some "free act," namely that of the state. HOLLAND, ELEMENTS OF JURISPRUDENCE (10th ed. 1906) 162.

2. "It is an established principle of law, everywhere recognized, . . . that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated." United States v. Fox, 94 U. S. 315, 320 (1876) (thus it was here decreed that the United States, not being a corporation authorized by New York to take property by devise, could not acquire land by will); Fisher v. Fisher, 253 N. Y. 260, 170 N. E. 912 (1930); Matter of Bergdorf, 206 N. Y. 309, 99 N. E. 714 (1912).

3. Failure to observe one or more of the requirements of N. Y. DEC. EST. LAW (1909) § 21 defeats the will, even though an honest attempt to execute it properly is made. Matter of Conway, 124 N. Y. 455, 26 N. E. 1028 (1891); Matter of Whitney, 153 N. Y. 259, 47 N. E. 272 (1897); Matter of Andrews, 162 N. Y. 1, 56 N. E. 529 (1900).

4. N. Y. DEC. EST. LAW (1909) § 21: "Every last will and testament . . . (1) . . . shall be subscribed by the testator at the end of the will." The object of the statute is "to throw such safeguards around those transactions as will prevent fraud and imposition" by the addition of clauses. Matter of Booth, 127 N. Y. 109, 116, 27 N. E. 826, 827 (1891).

5. In Baker's Appeal, 107 Pa. 381 (1884), under a statute similar to that of New York, the will was written on the first, third, and fourth pages of a folded sheet of paper. It was signed at the bottom of the third page, the signature being preceded by "4th see next page." The court held that a will, signed at the end of what was obviously

end. Where form is adhered to,[6] it is maintained that there is only the "physical or actual end"; thus requiring consecutive and orderly pagination in all instances.[7]

The strength of the decision in the case at bar is dependent upon the dicta of *Matter of Field* for sustenance.[8] The doctrine promulgated there has been construed to modify the strict "physical end" test and to adopt in New York a dual

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the "inherent sense," though not at the end in point of space, and where what follows the signature is expressly and unambiguously referred to in the body, is signed at the end within the meaning of the statute. The court has applied the rule here in a manner so literal as to almost exceed advisable limits. But, it is of interest as a precedent.

The rationale of the English doctrine is that where the sequence is coherent, literary, or logical—or follows in sense, then the end of the will is where the sequence pauses. This end is called "constructive" as opposed to the "physical or actual" end in paginal order. 1 JARMAN, WILLS (6th ed. 1893) 110 note t.

6. In Matter of Andrews, 162 N. Y. 1, 56 N. E. 529 (1900) the will was written upon blank paper folded so as to make four pages. The first page was filled with writing; the reverse side of that page was headed "3rd page" and filled with writing, followed by the *in testimonium* and attestation clauses. The page at the right was headed "2nd page" and contained provisions to the bottom of the page. The Court of Appeals affirmed the decision of the Appellate Division in 43 App. Div. 394, 60 N. Y. Supp. 141 (2d Dept. 1899) to the effect that the signature was not at the end as required by the statute. It would clearly appear that this decision was unjust when viewed in the light of the purpose behind the statute, inasmuch as the instrument was left in the possession of the testatrix by the draftsman; this precluded any fraudulent addition.

7. The real issue is whether, as a matter of law, consecutive pagination is necessary. It is important to note that the pages are unequivocally numbered. It is said that the statute is intended to prevent fraud. Matter of Whitney, 153 N. Y. 259, 47 N. E. 272 (1897). Yet where the opportunity for its existence is apparently not present, it would seem to justify the relaxation of the rule of rigid construction. Despite the fact that page one and its reverse side constituted a complete will in themselves, viewing the facts in the whole, the decision produced was inequitable.

In Sears v. Sears, 77 Ohio 104, 82 N. E. 1067 (1907), construing a statute like the one in New York, the court reviewed with approval the New York Court of Appeals cases, in handing down its decision.

There are cases in New York which, though cited as "contra" a relaxed application of the "end" test, may be distinguished on their facts. In Sisters of Charity v. Kelly, 67 N. Y. 409 (1876) the signature was in the body of the instrument with a material portion of the will following. It was properly concluded by the court that the statute was not complied with, because it was obvious that there was an opportunity to make fraudulent additions until the page was entirely covered.

In the Matter of O'Neil, 91 N. Y. 516 (1883) the will was written on a printed blank which was doubled over. The formal commencement was on page one and it was signed at the bottom of page three, below the formal termination. A clause was carried over from page three to page four. The will was read to testator and signed in the presence of witnesses. The court held that it was not subscribed at the end as the statute required, and stated at page 524, "There can be no answer to the proposition that to uphold this will is to defeat the object of the statute. . . . The opportunity of adding indefinitely to a testamentary provision will be legalized by so holding. . . ." Matter of Conway, 124 N. Y. 455, 26 N. E. 1028 (1891)

8. "Form should not be raised above substance in order to destroy a will. . . . The natural end of a will is where the draftsman stopped writing in the consecutive order of composition." Matter of Field, 204 N. Y. 448, 457, 97 N. E. 881, 884 (1912).

standard, namely, that there is a "constructive" end as well as the "physical" end which may prevail under certain circumstances despite the non-consecutive pagination.[9] There are instances where an iron-clad application of the rule that the intention of the legislature must prevail would work hardship.[10] Denial of probate may effect a complete annihilation of the testator's intent, as then his property descends according to the laws of descent and distribution.[11]

While the Court of Appeals has never fully affirmed the effect of the dicta in *Matter of Field,* this is only because the question has not since been broached. But support for the construction upon that decision and dicta by the inferior courts may be found in at least one jurisdiction which has a similar statute.[12] That jurisdiction has long been committed to the English rule that the end is to be determined by the "inherent sense" of the instrument. The statute in effect in England until 1852 was adopted in New York and is still in effect. But Parliament, cognizant of the unjust results reached by the English courts under the statute, modified it to read that "the logical, speaking, or intellectual" test was to be determinative of the "end" within the meaning of the statute.[13] New York has justified the rejection of the present English rule on the ground that it lacks a basis in the New York statute.[14] It is an arbitrary reason.

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9. In the Matter of Field, 204 N. Y. 448, 97 N. E. 881 (1912) the will in question was written on a short form blank. At the top was the expression that the testator devised his properly according to the provisions of the six pages attached which were numbered from one to six. Immediately thereafter was a blank space on which six sheets had been attached by two pins. They were numbered one to six, in order, and written upon one side only. All the provisions of the will were contained therein. Beneath the six sheets were the signatures of testator and those of the witnesses. The contention was that the instrument should be read down to the attached sheets, then page one, and then the signature was to be read. But the court ruled that the natural way to read the instrument was to commence at the top of the form and continue "with form and sense reasonably connected" to read the first attached page; next, read through the remaining pages like a calendar, and then pass on to the signature. The court admitted that the erroneous contention was supported by previous cases, but distinguished the immediate case because it was holographic and none of the six sheets could have been changed without testator's cooperation.

10. See Matter of Andrews, 43 App. Div. 394, 401, 60 N. Y. Supp. 141, 147 (2d Dep't 1899), where Judge Cullen said: ". . . it must be conceded that as to this supposed danger (fraudulent additions) the remedy has proved in practice far worse than the disease." He proceeded to hand down a decision denying the validity of the will only because he was bound by the rule as laid down by Matter of Conway, 124 N. Y. 455, 26 N. E. 1028 (1891), cited note 3, *supra.*

11. N. Y. DEC. EST. LAW (1929) § 81. It provides that both the personal and real property of a person who dies without devising it shall descend to his lineal descendants, father, mother, and collateral relatives. And an invalid will, being a nonentity for all legal purposes, the rules of descent will apply.

12. PA. STAT. (Purdon, 1936) tit. 20, § 191. ". . . every will shall be signed at the end thereof. . . ." Baker's Appeal, 107 Pa. 381 (1884), cited note 5, *supra.*

13. Matter of Andrews, 162 N. Y. 1, 8, 56 N. E. 529, 531 (1900), cited note 3, *supra*: "Our present Statute of Wills, requiring that a will should be subscribed at the end thereof is similar to 1 Victoria, ch. 26. . . . Prior to this amendment, the courts construed the act as strictly as our own have the present Statute of Wills. (Wills v. Lowe, 5 Notes of Cases, 428; . . . Smee v. Bryer, 6 Moore's P. C. Cases, 404) . . . ."

14. "Clearly it needs no other argument than is furnished by a statement of the practice in England respecting the probate of wills prior to 1838, and a reading of the

It would not be too uncertain, in view of the facts presented, to conclude that the decisions[15] of the Surrogates' Courts construe *Matter of Field* in its proper light. But an appropriate opinion by the highest tribunal of the State or legislation such as was enacted in England should be forthcoming. Either would achieve the certainty desired.

WILLS—LIBEL—DELETION OF DEFAMATORY MATTER IN WILL.—The petitioner, executor of an estate, propounded a will for probate. With the consent of all parties interested, he requested the Surrogate to delete from the will certain objectionable language included by the testatrix as an explanation of her refusal to give one of her devisees a greater part of the estate. *Held*, the defamatory matter will be excluded and the will admitted to probate. In re *Draske's Will*, 290 N. Y. Supp. 581 (Surr. Ct. 1936).

There are few recorded instances in which the English prerogative or probate courts have been called upon to inquire into their power to exclude from probate and record defamatory matter contained in a will. Although the earlier courts expressed some doubt of their power, despite the consent of all interested parties, to delete such matter from a will,[1] or from the probate copy,[2] apparently their power to delete objectionable language from the probate copy is no longer questioned.[3] The exercise of the power, moreover, has not been limited to libelous statements but has extended to the exclusion of any matter, the disclosure of which by probate and record would contravene public policy.[4]

In this country, the exact question has been treated only in New York; in no instance has the problem been decided by an appellate court.[5] No little difficulty has been encountered by the courts because of the mandatory language of the statute[6]

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amendment of 1852, to demonstrate the inapplicability of English decisions to a question like that before us." Matter of Conway, 124 N. Y. 455, 462, 26 N. E. 1028, 1030 (1891).

15. Matter of Peiser, 79 Misc. 668, 140 N. Y. Supp. 844 (Surr. Ct. 1913); *In re* Rowe's Will, 159 N. Y. Supp. 615 (Surr. Ct. 1916).

1. Curtis v. Curtis, 3 Addams 33, 162 Eng. Reprints 393 (Prerog. 1825) ("cruel and murderous conduct of my wife").

2. Goods of Wartnaby, 1 Rob. Eccl. 423, 163 Eng. Reprints 1088 (Prerog. 1846); Marsh v. Marsh, 1 Swa. & Tr. 528, 164 Eng. Reprints 845 (Prob. 1860).

3. Estate of White [1914] P. 153 (defamatory matter concerning testator's wife stricken from the probate copy), (1915) 63 U. OF PA. L. REV. 581; Estate of Caie, 43 T. L. R. 697 (1927) (highly defamatory words stricken from probate); *In re* Maxwell, 140 L. T. R. 471 (1929) (court would not physically remove objectionable matter from the will, but struck it from probate).

4. Estate of Heywood, 114 T. L. R. 375 (1915) (military secrets expunged from a testamentary letter made by a soldier at the front).

5. There are only three decisions to be found in New York: *In re* Bomar's Will, 44 N. Y. S. R. 304, 18 N. Y. Supp. 566 (Surr. Ct. 1892); Matter of Meyer, 72 Misc. 567, 131 N. Y. Supp. 27 (Surr. Ct. 1911); Matter of Speiden, 128 Misc. 899, 221 N. Y. Supp. 223 (Surr. Ct. 1926).

6. N. Y. SURR. CT. ACT (1930) § 144 subd. 2— "If it appears to the Surrogate that the will was duly executed, and that the testator at the time of executing it, was in all respects competent to make a will and not under restraint; it must be admitted to probate as a will valid to pass real property, or personal property, or both as the Surrogate determines, and the petition and the citation require, and must be recorded accordingly."

which requires the Surrogate to admit a will to probate upon satisfactory proof that it was duly executed and the testator was competent at the time of execution.[7] The court, in the instant case, states that justification for an excision has been made on the ground that the will which must be admitted consists only of the affirmative expression of the testator's intent;[8] other matter not necessary or operative is legally nugatory and need not be admitted to probate.[9]

Whatever authority the Surrogate may possess to delete defamatory matter from a will, it seems established that a court of probate will not exercise its power to strike out mere expressions of strong feeling, such as the utterances of a disappointed litigant, which are not grave enough to be harmful.[10]

Where the objectionable matter is dispositive or administrative,[11] non-dispositive but probative,[12] or permeates the whole will,[13] the courts will, apparently, be powerless to strike it out; excision under such circumstances would be destructive of the testator's intent, the effectuation of which has been the foremost consideration of the courts.[14] Any attempt to elide would result in an arbitrary rewriting of the will by the courts.

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7. A will fulfilling statutory requirements must be admitted to probate regardless of the invalidity of any or all its provisions. Matter of Webb, 122 Misc. 129, 202 N. Y. Supp. 346 (Surr. Ct. 1923), *aff'd*, 208 App. Div. 793, 203 N. Y. Supp. 958 (1st Dep't 1924); *In re* Lawler's Estate, 123 Misc. 72, 205 N. Y. Supp. 271 (Surr. Ct. 1924) "Any other rule would lead to confusion and to the introduction of false issues in the probate of wills." Vann, J., Matter of Davis, 182 N. Y. 468, 476, 75 N. E. 530, 533 (1905). See also Cartwright v. Cartwright, 158 Ark. 278, 281, 250 S. W. 11, 13 (1923); *In re* Tinsley's Will, 187 Iowa 23, 174 N. W. 4, 6 (1919).

8. *In re* Draske's Will 290 N. Y. Supp. 581, 591 (Surr. Ct. 1936) citing 5 BACON, OF WILLS AND TESTAMENTS 479. Blackstone defines a will as "the legal declaration of a man's intentions, which he wills to be performed after his death." 2 BL. COMM. 499 (9th ed. 1783).

9. But see Matter of Meyer's Will, 72 Misc. 566, 131 N. Y. Supp. 27 (Surr. Ct. 1911).

10. Goods of Honywood, L. R. 2 P. & D. 251 (1871) (the matter which the court refused to strike contained expressions such as, "Robbed me of my birthright," "terrible iniquity," "wicked, remorseless," "deliberately and designedly defraud"); Estate of Cale, 43 T. L. R. 697 (1927); (exhortations to testator's children). See Schecker v. Woolsey, 2 App. Div. 52, 54, 37 N. Y. Supp. 292, 293 (2d Dept. 1896); Marsh v. Marsh, 1 Sw. and Tr., 528, 536, 164 Eng. Reprints 845, 849 (Prob. 1860).

11. See *In re* Bomar's Will, 44 N. Y. S. R. 304, 305, 306, 18 N. Y. Supp. 214, 215 (Surr. Ct. 1892); Matter of Speiden, 128 Misc. 899, 901, 221 N. Y. Supp. 223, 224 (Surr. Ct. 1926) (any matter which does not constitute an operative portion of instrument may be stricken); 1 PAGE, WILLS (2d ed. 1928) § 527.

12. It has been suggested that immaterial matter may not be dispositive yet it may be probative, as in the appointment of a guardian by will as provided by statute, N. Y. DOM. REL. LAW. (1935) § 81. See Matter of Meyer, 72 Misc. 567, 572, 131 N. Y. Supp. 27, 32 (Surr. Ct. 1911).

13. Such a situation is suggested in the case of "'the notorious libertine (who) maliciously gave legacies in alleged compensation to certain ladies who had repulsed his advances.' Suppose the libertine had, in the same formal document, bequeathed nominal sums to other ladies, not kin of his, without further explanation. Any attempt to elide matter from such an instrument would destroy it beyond recognition." Freifield, *Libel by Will* (1933) 19 A. B. A. J. 301, 302.

14. "The first and great rule in the exposition of wills, to which all other rules must bend, is, that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law." Marshall, C. J., in Smith v. Bell, 31 U. S. 68, 74

In those instances wherein the courts would be able to expunge the objectionable phrases from the will without changing its effect, the action may serve a twofold purpose: the deletion of the libel from the will is the more satisfactory remedy available to the person defamed;[15] where the testamentary libel has already been published, the deletion will serve to mitigate the damages obtainable in an action against the estate.[16]

It is fortunate that cases of testamentary libel are rare, and that the Surrogates Courts have so effectively, in many cases, prevented a will from becoming a vehicle of contumely and libel. The result has been obtained in New York, by a judicious exercise of incidental powers, which although not expressly granted by statute, are absolutely essential to the administration of the estates of deceased persons.[17]

(1832); Grove v. Willard, 280 Ill. 247, 117 N. E. 489 (1917); North Adams Nat. Bank v. Curtis, 284 Mass. 330, 187 N. E. 546 (1933); *In re* Martin's Will, 255 N. Y. 248, 174 N. E. 643 (1931).

15. The will is a permanent court record which will be perused actually by some and constructively by many. See Freifield, *Libel by Will* (1933) 19 A. B. A. J. 301, 302.

16. Recovery has been permitted against the estate for testamentary libel. Gallagher's Estate, 10 D. & C. 733 (Pa. 1900); Harriss v. Nashville Trust Co., 128 Tenn. 573, 162 S. W. 584 (1914) (executor is agent of testator for publication of libel); *cf.* Citizens' & Southern Nat. Bank v. Hendricks, 176 Ga. 692, 168 S. E. 213, 87 A. L. R. 235 (1933). *Contra:* Nagle v. Nagle, 316 Pa. 472, 175 Atl. 487 (1934) (matter contained in a will offered for probate is privileged). See Comment (1935) 4 FORDHAM L. REV. 349.

A recent amendment of N. Y. DEC. EST. LAW (1935) § 118 provides for the survival of personal actions without exception. See *In re* Payne's Estate, 290 N. Y. Supp. 407, 415 (Surr. Ct. 1936).

17. In 1830 the New York legislature provided "that no Surrogate shall under pretext of incidental or constructive authority, exercise any jurisdiction whatever not expressly given by some statute of this state." 2 R. S. 221 § 1. The statute was repealed by c. 460 Laws 1837, for as was said by Chancellor Walsworth, " . . . the exercise of certain incidental powers by the courts was absolutely essential to the true administration of justice . . . and the legislature had not by their care and foresight, been able to take the case of the Surrogates Courts out of the operations of the general rule." Pew v. Hastings, 1 Barb. Ch. 452, 454 (N. Y. 1846).