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Recent Decisions

RECENT DECISIONS

BANKS AND BANKING—STOP PAYMENT ORDERS—LIABILITY OF A BANK FOR PAYMENT OF A STOPPED CHECK.—Plaintiff stopped payment on a check which he had drawn on the defendant and signed a waiver releasing the defendant from liability in case payment of the check was made through inadvertence or oversight. The defendant paid the check and charged plaintiff's account. Sued for the amount of the check, the bank set up the release as a defense, and further alleged that it used reasonable care and was in good faith with respect to the stop order. The lower court overruled plaintiff's demurrer to this defense and rendered judgment for the defendant. The Court of Appeals reversed and rendered judgment for the plaintiff. Upon further appeal, *held,* judgment modified and cause remanded. As a matter of law the release was void for want of consideration and as against public policy, but a retrial should be had on the issue of whether the bank exercised reasonable care and good faith. *Speroff v. First-Cent. Trust Co.,* 79 N. E. 2d 119 (Ohio 1948).

It is fundamental in banking law that the drawer of a check may, by notifying the bank upon which it is drawn, stop payment upon it before payment has actually been made or before the bank has accepted the check.[1] Generally,[2] if a bank makes payment on a check after receiving a stop order, it does so at its own risk and will be liable for the amount paid.[3] To modify this liability banks have required a depositor who gives a stop payment order to agree in writing to release the bank from liability if the check should be paid through error, inadvertence, oversight or accident.[4]

In litigation challenging the right of banks to rely upon such releases, objections have been raised that the releases are not supported by any consideration and are against public policy. The courts have adopted conflicting attitudes on such objections. In *Tremont Trust Co. v. Burack,*[5] a Massachusetts court in upholding a release, found consideration for the bank's obligation not to pay a stopped check in the "mercantile relation of the parties"[6] but did not discuss the question of whether there was consideration for the release. It did, however, refer to the release as "an express contract"[7] limiting the bank's obligation to the drawer and found nothing illegal or opposed to public policy in releasing the bank from the "mere inattention, carelessness, oversightedness or mistakes of its employees."[8] The Appellate Court of Indiana in *Hodnick v. Fidelity Trust Co.,*[9] in addition to relying on *Tremont v. Burack,* sustained a release on a theory resembling estoppel. Quoting a Pennsylvania

1. Hunt v. Security State Bank, 91 Ore. 362, 179 Pac. 248 (1919).

2. For the rule in Ohio which is different, see text accompanying note 25 *infra, et seq.*

3. BRADY, LAW OF BANK CHECKS 344 (2d ed. 1926); 3 PATON, DIGEST 3463 (1944 ed.).

4. There have been few cases on the subject of the bank's liability for payment of a check after a stop order. One possible reason is suggested in a letter from a New York banker quoted in Paton's *Digest* discussing reason for discarding or ignoring the releases: "In the case of an account which we valued and desired to retain, it would not, of course, be good banking policy to attempt to escape liability arising by reason of our own oversight in negligently paying the check after the stop payment had been received." 2 PATON, DIGEST § 4463 A (rev. ed. 1926).

5. 235 Mass. 398, 126 N. E. 782 (1920).

6. *Id.* at 401, 126 N. E. at 784.

7. *Ibid.*

8. 235 Mass. 398, 402, 126 N. E. 782, 784 (1920).

9. 96 Ind. App. 342, 183 N. E. 488 (1932).

case which held similarly,[10] it took the position that once the plaintiff released the bank as "an act of courtesy and not as a matter of right" he waived the bank's legal obligation to him and was bound by his choice.[11] The Indiana court here upheld the release on the question of public policy and pointed out that whether a specific contract was against public policy was "a question of law for the court to determine from all of the circumstances in a particular case."[12]

The leading New York case of *Gaita v. Windsor Bank*[13] held that to question the existence of consideration would interfere with the "freedom of contract"[14] of the parties, and the bank would not be liable after the release, unless there was a "willful disregard"[15] of the order to stop payment.[16] A later New York case in accord with *Gaita v. Windsor* defined "willful" as "more than a voluntary act. It includes the idea of an act intentionally done with a wrongful purpose or with a design to injure another or one committed through mere wantonness or lawlessness."[17]

The California courts have declared releases to be invalid for want of consideration and as against public policy. In the case of *Hiroshima v. Bank of Italy*[18] the court found that there was no consideration for the release and pointed out that it could not be found in the willingness of the bank to stop payment because it was already bound to do so.[19] The court further held that by statute in California[20] it was un-

10. Cohen v. State Bank of Philadelphia, 69 Pa. Super. Ct. 40, 42 (Sup. Ct. 1918).

11. Paton advanced a somewhat similar theory that while the depositor had a legal right to stop payment on his check, since he was asking the bank to do an "abnormal thing" the bank ought to be allowed to take advantage of a release for its possible negligence. 2 PATON, DIGEST § 4463 A (rev. ed. 1926).

12. 96 Ind. App. 342, 350, 183 N. E. 488, 491 (1932).

13. 251 N. Y. 152, 167 N. E. 203 (1929). There were two earlier New York cases. In Elder v. Franklin Nat. Bank, 25 Misc. 716, 55 N. Y. Supp. 576 (Sup. Ct. 1899) the passbook contained a statement that the bank would not be responsible for the execution of an order to stop payment. The court found that the clause did not absolve the bank from the duty of exercising ordinary care and it was liable for the payment of the check through oversight. In Levine v. Bank of U.S., 132 Misc. 130, 229 N.Y. Supp. 108 (Munic. Ct. 1928) in addition to a release in the passbook, the depositor signed a stop order containing the statement (*id.* at 131, 229 N. Y. Supp. at 109) that "In consideration of the acceptance of the stop payment" the bank was released from liability in the event of careless payment. The court held that the bank could not relieve itself of negligence as a matter of public policy and that there was no consideration for the release since the bank was already obliged to stop payment on the depositor's order. The court in Gaita v. Windsor, *supra*, ignores both cases although its effect is seemingly to overrule them.

14. 251 N. Y. 152, 155, 167 N. E. 203, 204 (1929).

15. *Ibid.*

16. In deciding this case the court considered several decisions in which releases from liability for the bank's negligence under other circumstances *i.e.*, the collection of foreign drafts, were upheld. Isler v. National Park Bank of N. Y., 239 N. Y. 462, 147 N. E. 66 (1925); McBride v. Illinois Nat. Bank, 163 App. Div. 417, 148 N.Y. Supp. 654 (1st Dep't 1914).

17. Pyramid Musical Corp. v. Floral Park Bank, 268 App. Div. 783, 48 N.Y.S. 2d 866, 867 (2d Dep't 1944).

18. 78 Cal. App. 362, 248 Pac. 947 (1926). See also Grisinger v. Golden State Bank of Long Beach, 92 Cal. App. 443, 268 Pac. 425 (1928).

19. "It does not present a case of election to enter into a contract, but an instance where the duty cannot be declined." 78 Cal. App. 362, 377, 248 Pac. 947, 953 (1926).

20. CAL. CIV. CODE § 1668 (1941).

lawful to contract against one's own negligence and that in this case both the individuals concerned and the banking public were "interested in seeing that the bank is held accountable for the ordinary and regular performance of its duties. . . ."[21]

The court in the principal case also determines the release to be invalid. It points out that there was no consideration for the release because the bank was already bound not to make payment on the stopped check, and when the plaintiff signed the release it was a new element in the relationship between plaintiff and defendant for which no new consideration had been given.[22] The court says further that it is elementary that a bank is required by law to "act in good faith and exercise reasonable care in its relationship with its depositors"[23] and that the purported release was "contrary to public policy and did not relieve the defendant from its duty"[24] so to act.

The court, however, goes on to say that "the defendant does state a valid defense in alleging that it exercised good faith and reasonable care."[25] While the rule elsewhere[26] is that in the absence of a release the bank will be held absolutely liable for payment of a stopped check, an earlier Ohio case, *Hough Ave. Savings & Banking Co. v. Andersson*,[27] had held that despite the fact that a savings bank is discharged from liability when payment is made on the presentation of a pass book, the bank was still required to act in good faith and exercise reasonable care to avoid payment to other than the true owner. In a later case, *Fourth and Central Trust Co. v. Rowe*,[28] the court found that where the savings bank exercised good faith and reasonable care, under circumstances similar to those in the *Andersson* case, it would not be liable. When confronted with a fact situation similar to that of the principal case[29] the Court of Appeals in *Mahon v. Huntington Nat. Bank of Columbus*[30] quoted the *Andersson* and *Rowe* cases and said that as to the payment of a check by a commercial bank after a stop order had been issued, the "rule by analogy would be that the bank is bound to act in good faith and exercise reasonable care"[31] and that if it so acts, it will not be liable. There is a difference between holding that a savings bank, acting within the limits of rules laid down by it and agreed to by its depositors, is liable neverthless to act with reasonable care, and holding that a commercial bank, instead of being absolutely liable for payment of a stopped check, is responsible *merely* for the exercise of reasonable care. In the first instance the duty of the savings bank to act diligently is extended, while in the second the commercial bank's liability is limited. In the *Mahon* case the court attempts to reconcile the two and says: ". . . the principles are applicable and may be paraphrased to the effect that the reasonable rules and regulations of a bank, agreed to by a depositor form a contract between the parties. . . ."[32] The "reasonable rules and regulations" referred

21. 78 Cal. App. 362, 377, 248 Pac. 947, 953 (1926).
22. 79 N. E. 2d 119, 122 (1948).
23. *Ibid.*
24. *Ibid.*
25. *Ibid.*
26. See note 3 *supra*, and accompanying text.
27. 78 Ohio St. 341, 85 N. E. 498 (1908).
28. 122 Ohio St. 1, 170 N. E. 439 (1930).
29. In this case however, the check number was misdescribed in the stop payment order.
30. 62 Ohio App. 261, 23 N. E. 2d 638 (1939).
31. *Id.* at 264, 23 N. E. 2d at 640.
32. *Ibid.*

to by the court were the exculpatory words of the stop-payment order, the validity of which as an exculpation the court had not passed upon. The decision of the majority of the Supreme Court of Ohio in the principal case held such an exculpatory provision to be void. The Supreme Court did not cite the *Mahon* case but quoted from its own opinion in the *Rowe* case to support the proposition that the bank's attempt to exempt itself from liability for its own negligence is against public policy.

The court in the principal case in holding that the bank would not be liable if it exercised good faith and reasonable care, did so not on any basis of contract—such as the "reasonable rules and regulations" in the stop-payment order, which it had held to be void as an exculpation—but apparently upon the independent and self-sustaining ground that a commercial bank should not be liable where it exercised reasonable care.

Although the original formulation by the Ohio Court of Appeals in the *Mahon* case of the "rule by analogy" would not seem to have been sound and was in effect ignored by the Supreme Court of Ohio in the principal case, the position of the court in the principal case, holding the release invalid but allowing a bank freedom from liability if it has acted in good faith and used reasonable care in handling a stop payment order, seems to be a desirable one.[33] Such a position, unlike that taken in those jurisdictions which uphold releases, does not permit a bank to act without due care by validating signed waivers of liability upon seemingly unsatisfactory grounds of contract law. It recognizes both the lack of consideration for the release and the public policy against contractual exemption from one's own negligence and strikes such attempts at exculpation down. Despite this, it gives a bank adequate protection against inculpable errors which might well arise when a depositor puts into circulation an apparently valid check, and then seeks to revoke it.

CHARITABLE SUBSCRIPTIONS—DETERMINATION OF THE PROMISE AS TESTAMENTARY OR CONTRACTUAL IN NATURE WHEN IT IS TO TAKE EFFECT UPON DEATH.—The promisor delivered a signed paper to the American University, appellant, wherein she promised to pay appellant the sum of one-third of her estate upon her death. The consideration expressed in the promise was threefold, *viz.*, the promisor's interest in Christian education, the mutual promises of other subscribers to the same fund, and the establishment of a memorial fund to perpetuate the promisor's name. The promisor died intestate. Subsequently the appellant brought suit against the administratrix of the promisor's estate for payment according to the promise. *Held*, one judge dissenting, decree of non-suit affirmed. The court stated that the promise was testamentary in nature, and thus void as it had not been executed in accordance with the testamentary laws of the state, and that therefore the sufficiency of the expressed considerations need not be determined. *American University v. Collings*, 59 A. 2d 333 (Md. 1948).

When a written instrument designates that the performance of a promise is to be made upon the death of the promisor the determination of whether the instrument

33. Supporters of this theory will find some authority for it in *Hiroshima v. Bank of Italy*, 78 Cal. App. 362, 373, 248 Pac. 947, 951, in which the court after declaring the releases void, said that one of several bases on which the bank could be held liable in this case was that in paying the check it had acted "heedlessly, negligently and carelessly and without exercising ordinary or reasonable care." It is questionable however, whether this is sufficient authority for a contention that if the bank *had* acted with reasonable care, it would not be liable.

is a contract or a testamentary disposition is of primary importance in deciding whether the promise is legally binding.[1] Although there has been difficulty in making such a determination,[2] one fundamental guide is well established. In *Hydrick v. Hydrick* the court said:[3] "The principle which distinguishes between a document as a will and as a contract is this: If the instrument passes a present interest, although the right to its possession and enjoyment may not accrue till some future time it is a deed or contract; but, if the instrument does not pass any interest or right till the death of the maker, it is a will or testamentary paper." Other authorities have employed this same test where the nature of the instrument was in question,[4] and the standard for determination has been stated to be as follows: "It is the legal effect of the instrument as determined from its operative provisions and not its title or its form that determines whether it is a will or a contract."[5]

It should be noted that the mere fact that the time for payment of a promise is deferred until after the death of the promisor is not sufficient to make the promise testamentary.[6] The court in *Floyd v. Christian Church Widows and Orphans Home* stated relative to this point, "if the considerations for their [the promises] execution had been valuable, the fact that they were made payable after the death of the makers, and then conditionally, would not have prevented their enforcement when the deaths occurred and the conditions were fulfilled, *notwithstanding the testamentary intent thus manifested.* Neither would they have been revocable, and thus an essential characteristic of testamentary dispositions would have been lacking."[7]

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1. It has been stated that public policy demands strict compliance with the detailed statutory requirements concerning the due execution of wills. Floyd v. Christian Church Widows and Orphans Home, 296 Ky. 196, 176 S.W. 2d 125 (1943). Such statutory requirements are generally not present in questions relative to the sufficiency of contracts. Thus a document which is determined to be testamentary in nature would be suspiciously inspected for compliance with the statutes relative to the due execution of wills, while a document which is determined to be contractual in nature would not be subject to this type of analysis.

2. "A will is dispositive; a contract promissory. A will is gratuitous; while a contract . . . requires consideration. If the instrument provides for performance at the death of the promisor, there is greater chance for confusion; and, if the consideration is insufficient the distinction becomes of the highest importance." 1 PAGE, WILLS 179 (3d ed. 1941).

3. 142 S.C. 531, 551, 141 S.E. 156, 163 (1927).

4. 1 PAGE, WILLS 179 (3d ed. 1941) "If the instrument creates a right in the promisee before the death of the testator, the instrument is a contract, or, at least, a defective attempt to make a contract rather than a will." and (at 184): "If it appears from the terms of the instrument, and from the surrounding circumstances, that no interest is to pass until the death of the promisor, the instrument is a will as distinguished from a contract." (citing Basket v. Hassell, 107 U.S. 602 (1882) for this proposition).

5. 1 *id.* at 180.

6. A party who signs an instrument creating an obligation which is payable after his death creates a *debitum in praesenti solvendum in futuro,* which is as irrevocable as any other obligation, Patterson v. Chapman, 179 Cal. 203, 176 Pac. 37 (1918); Junkins v. Sullivan, 110 Md. 539, 73 Atl. 264 (1909); Cover v. Stem, 67 Md. 449, 10 Atl. 231 (1887). *Accord,* Hegeman v. Moon, 131 N.Y. 462, 30 N.E. 487 (1892); Carnwright v. Gray, 127 N.Y. 92, 27 N.E. 835 (1891).

7. 296 Ky. 196, 206, 176 S.W. 2d 125, 131 (1943). (Italics supplied.) The court also says (at 206): "That the instruments sued on are testamentary in character is but another way of saying that while they manifest the donative intent of their makers, they neither

It may be contended that a promise to pay out of the promisor's estate does not create a binding obligation enforceable by the promisee inasmuch as the promisor is at liberty during his life to exhaust his estate, thus rendering nugatory the fund out of which payment was due. In the case of *In re Griswold's Estate*[8] the court was faced with this contention when it was suggested that payment of the promise would exhaust the estate, thus resulting in the lack of any legacy for the deceased's widowed sister. The court dismissed the contention by stating, "No difficulty is presented by the suggestion that a donor might so deplete his estate as to require his creditors to prorate their claims with the donee, for a contract perfectly valid between the parties may be void as to creditors."[9] It should also be noted in this connection that the validity of a promise payable upon death is not affected by a later attempt of the promisor to dispose of his estate by will. In *Central University of Kentucky v. Cox's Executor*[10] the promisor made his promise payable upon the death of the survivor of himself and his wife and subsequently made a will in which he repudiated his promise. On the death of the wife, who was the survivor, the university brought suit for payment, and the court gave judgment to the plaintiff and invalidated the will insofar as it interfered with the payment of the plaintiff's claim.[11]

Another apparent difficulty is presented in connection with promises to pay upon the death of the promisor, when no definite sum is mentioned, but rather a fractional part of the estate is promised. It might be argued that in such a case the promise is too indefinite for performance and hence no contract could have been created. Williston takes the position that it is not necessary for a promise to be certain within itself if it contains a reference to some extrinsic facts from which its meaning may be made clear. A promise to pay a certain percentage of the receipts from a sale, even though the amount of these receipts is not known at the time the promise is made, is sufficiently definite.[12] Once a bilateral contract is determined to exist, then no difficulty is presented by the fact that there is a condition precedent which must take place before the promise can take effect.[13]

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confer nor evidence an intent to confer upon the donees any property, right, or benefit during the lifetime of the makers." See also Southwestern College of Winfield v. Hawley, 144 Kan. 652, 62 P. 2d 850 (1936); *In re* Griswold's Estate, 113 Neb. 256, 202 N.W. 609 (1925). (These three cases are factually parallel with the principal case, and in all three cases the contention that the promise was of a testamentary character is rebutted.)

8. 113 Neb. 256, 202 N.W. 609 (1925).

9. *Id.* at 273, 202 N.W. at 616. *Accord, In re* Luce's Estate, 137 Neb. 846, 291 N.W. 562 (1940). (The court applied this principle, quoting from the *Griswold* case, and stated that there are conditions implied in such contracts that the promise would be paid out of the estate remaining after the payment of debts.)

10. 136 Ky. 260, 124 S.W. 299 (1910).

11. *Id.* at 265, 124 S.W. at 300 the court said: "he reserved to himself and wife the right to use, spend, and consume the estate, and did not intend that the obligation should interfere with them in the enjoyment of his property. If after their death there was enough property to pay the obligation, he evidently intended that it should be paid, and not that he and his wife should defeat this subscription by disposing of his property by will." In Southwestern College of Winfield v. Hawley, 144 Kan. 652, 62 P. 2d 850 (1936) there was a subsequent will which granted away the estate which was payable to the charity. In this case also the court enforced the promise and rendered the will ineffective as it attempted to dispose of the estate contrary to the promise.

12. 1 WILLISTON, CONTRACTS § 47 (rev. ed. 1938).

13. 3 *id.* § 666A. *Accord,* Lake Bluff Orphanage v. Magill's Ex'rs., 204 S.W. 2d 224, 228 (1947) where the court said: "It is a rule of general acceptation that where a contract

It can be seen from the analysis up to this point that the question to be answered in cases where the promise is payable upon the death of the promisor is whether a legally binding obligation arose during the promisor's lifetime.

The general tendency of the courts in the United States relative to promises made to charitable institutions is to regard these promises, whether payable upon death or not,[14] as legally binding obligations whenever sufficient consideration is found to support them.[15] Adverse criticism has been made relative to the presence of any real consideration in these cases,[16] but the courts, nevertheless, have held these promises as legally binding obligations in decisions which are marked by a desire to sustain the written promises made to the charitable institutions involved.[17] Many jurisdictions, it appears, will deem the consideration to be sufficient where the promisee can show that he has incurred obligations, performed work, or expended money in direct reliance on the promise and in pursuance of the object for which it is made.[18] In the absence of this showing courts of various jurisdictions have found sufficient consideration from other factors, where, *e.g.*, (1) the subscription is given for the mutual promises of others to subscribe;[19] (2) the acceptance by the promisee of the subscription is upon the condition that a memorial fund be founded to perpetuate the promisor's name;[20] (3) the doctrine of promissory estoppel

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limits payment of an obligation to a particular fund, the existence or sufficiency of that fund is a condition precedent to payment, subject, of course, to the qualification that a dereliction in duty of the promisor in respect thereto cannot be permitted to defeat its creation or sufficiency."

14. See note 15 *infra*. All cases discuss the general rules to be applied in such cases, and no distinction is made as to whether the promise is payable after promisor's death or not.

15. *In re* Drain's Estate, 311 Ill. App. 481, 36 N.E. 2d 608 (1941); First Church v. Dennis, 178 Iowa 352, 161 N.W. 183 (1917); Brokaw v. McElroy, 162 La. 288, 143 N.E. 1087 (1913); Missouri Wesleyan College v. Shulte, 346 Mo. 628, 142 S.W. 2d 644. See 1 WILLISTON, CONTRACTS § 116 (rev. ed. 1936) for numerous cases on this point.

16. 1 WILLISTON, CONTRACTS § 116 (rev. ed. 1936). The author also states that the English courts have rigidly held that all subscriptions to charitable institutions are promises without consideration which may be withdrawn at any time before acceptance, and are therefore *nudum pactum*.

17. "Courts lean toward sustaining such contracts when the same may be done without violating established rules of law." *In re* Drain's Estate, 311 Ill. App. 481, 484, 36 N.E. 2d 608, 609 (1941). In Allegheny College v. National Chautauqua County Bank, 246 N.Y. 369, 370, 159 N.E. 173, 174 (1927) Chief Judge Cardozo said: "On the other hand, though professing to apply to such subscriptions the general law of contract, we have found consideration present where the general law of contract, at least as then declared, would have said that it was absent."

18. "In a note, 17 Ann. Cas. page 1076, the law on the subject of revocation is stated as follows: 'In determining whether a subscription is legally enforcible, the courts have uniformly held that the subscription becomes irrevocable and enforcible when work is done or liabilities or expenses are incurred on the faith of it and in pursuance of the object for which it is made.'" Missouri Wesleyan College v. Shulte, 346 Mo. 628, 639, 142 S.W. 2d 644, 651 (1940).

19. Cotner College v. Hyland, 133 Kan. 322, 299 Pac. 607 (1931); Board of Home Missions v. Manley, 129 Cal. App. 541, 19 P. 2d 21 (1933).

20. New Jersey Orthopaedic Hospital & Dispensary v. Wright, 95 N.J.L. 462, 113 Atl. 144 (1921). It is interesting to note that the celebrated case of Allegheny College v.

obtains;[21] (4) the fact that the charitable institution continues work for which the promise was given.[22]

It is to be emphasized, however, that the courts *have* repeatedly treated promises in cases of this kind as contractual in nature, the binding obligation of which is always considered to be dependent upon the presence or absence of sufficient consideration. Apparently a solitary exception to this view is found in a New Jersey case[23] where, after declaring that the promise constituted a contract,[24] the court held the promise to be a void testamentary disposition on the basis of preventing a circumvention of the statutes relative to the due execution of wills.

In the principal case the promise was made payable out of the promisor's estate upon her decease. The court seems to have seized upon this fact as alone sufficient to make the instrument testamentary in character and hence non-contractual. But the time when payment is to be effected is unimportant from the viewpoint of contract, except as a condition precedent to payment, provided consideration to support a binding obligation is present.[25]

The court in the principal case cited *American University v. Conover*[26] as authority for holding that the promise in question was testamentary in nature. The court in the *Conover* case declared that the promise there constituted a contract, and further, that the contract was based upon sufficient consideration.[27] All the requisites of a

National Chautauqua County Bank, 246 N.Y. 369, 159 N.E. 173 (1927) is not authority for this proposition inasmuch as in that case there was a $1000 payment made during the promisor's lifetime and accepted by the promisee. The court concluded that the acceptance by the promisee of the payment on account was an assumption of the obligation to set up the memorial. For a later New York case discussing this type of consideration see Matter of Tummonds, 160 Misc. 137, 290 N.Y. Supp. 40 (1936).

21. Lake Bluff Orphanage v. Magill's Ex'rs., 305 Ky. 391, 204 S.W. 2d 224 (1947); Floyd v. Christian Church Widows and Orphans Home, 296 Ky. 196, 176 S.W. 2d 125 (1943).

22. In Brokaw v. McElroy, 162 Iowa 288, 292, 143 N.W. 1087, 1089 (1913) the court stated: "If the original promise, when made, was intended to induce activities and expenditures by the beneficiary in pursuance of the purpose of its organization, and if such activities and such expenditures were induced thereby even in part, it is a sufficient consideration. . . . It is not indispensable that DIRECT evidence be had that such activities and expenditures . . . were thus induced, or that such inducement was within the contemplation of the parties. If these facts can be found by fair inference from all the circumstances in evidence, it is sufficient at least to make a jury question." In Missouri Wesleyan College v. Shulte, 346 Mo. 628, 142 S.W. 2d 644 (1940) the court draws attention to a Missouri statute which states that in signed promises of the type under discussion there is a presumption of consideration and the burden of proof is on the party denying the consideration to prove his contention. See Irwin v. Lombard University, 56 Ohio St. 9, 46 N.E. 63 (1897), followed in Albert Lea College v. Brown's Estate, 88 Minn. 524, 93 N.W. 672 (1903).

23. American University v. Conover, 115 N.J.L. 468, 180 Atl. 830 (1935).

24. *Id.* at 468, 180 Atl. at 831.

25. See notes 6 and 7 *supra*, and accompanying text.

26. 115 N.J.L. 468, 180 Atl. 830 (1935).

27. *Id.* at 468, 180 Atl. at 830 the court stated: "Furthermore, there was a provision in this instrument that the fund should be used to set up a scholarship fund to be named in honor of Miss Grant and her sister, and under New Jersey Orthopaedic Hospital & Dispensary v. Wright, 95 N.J. Law, 462, 113 A. 144, a provision in a subscription that the money be used for a particular purpose forms consideration."

legally binding obligation having been admitted, the court concluded that the case turned on the fact that the promise was an attempted testamentary disposition and void because it was not executed in accordance with the statutes applicable to the execution of wills. The *Conover* case has been criticized[28] on the ground that once the court found that the promise was based upon sufficient consideration it became a binding contract irrespective of failure to comply with statutes controlling execution of wills. The only real difference between the decision in the principal case and that in the *Conover* case is that in the principal case the court did not deem it necessary to determine whether consideration for a contract existed, basing its decision solely on the testamentary character of the instrument. In this respect the decision in the principal case is at least more logical and consistent than that in the *Conover* case. We have seen that the mere postponement of payment until after death does not deprive the promise of its contractual character or make it testamentary.[29] In addition the form of the instrument in the principal case is more contractual than testamentary.[30]

CONSTITUTIONAL LAW—FOURTH AMENDMENT—VALIDITY OF SEARCH AND SEIZURE WITHOUT A WARRANT WHEN INCIDENTAL TO A LAWFUL ARREST.—The defendants conspired to operate an illegal still and their intentions were communicated to the Alcohol Tax Unit of the Bureau of Internal Revenue by the farmer whose barn they rented to house their paraphernalia. An agent assigned to the case obtained a position working with the defendants. During the three weeks he worked with them he made frequent reports of their operations to his superiors. On the advice of their agent, the Alcohol Tax Unit made a raid on the still, arrested one of the defendants who at the time was engaged in operating some of the equipment, and seized and carried off evidence of the still and its products. Both arrest and seizure were made without a warrant. Defendants filed a motion to suppress evidence against them on the ground that it had been obtained illegally. From a judgment of the circuit court of appeals affirming judgment of the district court denying the motion, defendants brought certiorari. *Held,* four justices dissenting, judgment reversed on grounds that the evidence sought to be suppressed was obtained by an illegal search and seizure within the meaning of the Fourth Amendment. *Trupiano v. United States,* 334 U. S. 699 (1948).

At about the time of the English Revolution of 1688 there arose the practice of issuing general warrants which were used for the purposes of arbitrary searches and seizures.[1] These warrants were issued by the Secretary of State and empowered agents of the Crown to search the homes of Englishmen who were suspected of

28. 5 FORD. L. REV. 374 (1936); 16 B.U.L. REV. 269 (1936); 36 COL. L. REV. 834 (1936).

29. See note 6 *supra,* and accompanying text.

30. In Southwestern College of Winfield v. Hawley, 144 Kan. 652, 62 P. 2d 850 (1936) the form of the promise was similar to that of the instant case and the court stated (at 654): "It is contended the subscription was testamentary in character and was revoked by the will. The testator knew how to make a will, and the other instrument (the promise) shows *on its face* what Lundstrom (the promisor) intended it to be. *It was not in form or content, or in legal effect, a will.* (Italics supplied.) *Accord,* First Church v. Dennis, 178 Iowa 352, 161 N.W. 183 (1917); Garrigus v. Society, 3 Ind. App. 91, 28 N.E. 1009 (1891).

1. Entick v. Carrington, 19 How. St. Tr. 1029 (1765).

publishing, distributing or hoarding seditious libel.[2] The practice was often condemned before Parliament,[3] but nothing substantial was accomplished to correct this abuse of personal liberties until 1765 when Lord Chief Justice Camden, in *Entick v. Carrington*,[4] gave his historical decision which condemned the practice of issuing general warrants and the dubious theory behind them.[5] This case appropriately has been termed one of the landmarks of English liberty.[6]

During this same period, the American colonists were burdened by the notorious Writs of Assistance which were received with the same disfavor as general warrants.[7] Under these writs, English customs agents were permitted to enter and search homes of colonists who were merely suspected of harboring smuggled goods. As a safeguard against similar infringements of personal liberties the Fourth Amendment to the Constitution was adopted by the new republic.[8] This amendment prohibited unreasonable searches and seizures and limited strictly the right to obtain a warrant.[9]

It is well settled that a search and seizure will be held unlawful if it is made without a search warrant and unaccompanied by a valid arrest,[10] or if it is made contemporaneously with an invalid arrest.[11] The Court in the principal case held that even though the search and seizure accompanied a lawful arrest, the seizure was in violation of the Fourth Amendment, on the ground that a warrant must be secured wherever reasonably practicable.[12] The majority opinion pointed out that

2. *Id.* at 1035.

3. The following excerpt from a speech before parliament made by the Earl of Chatham, William Pitt the Elder, in which he spoke against the general warrants is found in 1 COOLEY, CONSTITUTIONAL LIMITATIONS 611 n. 1 (8th ed., Carrington, 1927): "The poorest man may, in his cottage, bid defiance to all the forces of the Crown . . . the storm may enter; the rain may enter; but the King of England may not enter. . . ." This was how Pitt thought it should be, and not how the situation really was.

4. 19 How. St. Tr. 1029, 1074 (1765). "I have now taken notice of everything that has been urged upon the present point; and upon the whole we are all of opinion, that the warrant to seize and carry away the party's papers in the case of a seditious libel, is illegal and void."

5. *Id.* at 1038. "A power to issue such a warrant as this is contrary to the genius of the law of England; and even if they had found what they searched for, they could not have justified under it . . . no power can lawfully break into a man's house and study to search for evidence against him." And again (at 1066): "Where is the written law that gives any magistrate such a power? [to issue general warrants] I can safely answer, there is none; and therefore it is too much for us without such authority to pronounce a practice legal, which would be subversive of all the comforts of society."

6. Boyd v. United States, 116 U.S. 616, 626 (1886).

7. One of the most notable antagonists against these writs was James Otis who in his defense of a colonist brought to trial under a writ said: ". . . the liberty of every man (is placed) in the hands of every petty officer." Paxton's Case, Quincy, 51-57 (1761).

8. U.S. CONST. AMEND. IV.

9. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

10. Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

11. Amos v. United States, 255 U.S. 313 (1921), United States v. Lefkowitz, 285 U.S. 452 (1932).

12. 334 U.S. 699, 705 (1948). The Court said: "But we cannot agree that the seizure of the contrabrand property was made in conformity with the requirements of the Fourth

under the facts of this case, it was reasonably practicable for the agents to obtain a warrant,[13] and refused to subscribe to the theory that a search and seizure is permissible wherever incidental to a lawful arrest: "A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest. The mere fact that there is a valid arrest does not *ipso facto* legalize a search or seizure without a warrant."[14]

The dissenting opinion, given by Mr. Chief Justice Vinson, is vigorous in upholding the unrestricted right of an arresting officer to make a contemporaneous search and seizure.[15] The minority believes that public interests demand such a right; that the result reached is not consistent with judicial authority as it existed before the adoption of the Fourth Amendment nor as it has developed since that time; that heretofore the rule was thought to be that where law enforcement officers have lawfully entered premises and made a valid arrest, a reasonable accommodation of the interests of society and of the individual permits such officials to seize the instrumentalities of the crime and contraband materials in open view of the arresting officer.[16]

The uncertainty which has prevailed relative to the fundamental issue herein is seen in the frequency of "five to four" decisions[17] on the point in recent years. Of the cases cited in the dissenting opinion, however, only two would appear to lend appreciable support to the contentions of the minority. In *Agnello v. United States*,[18] government agents made arrangements on a Saturday to purchase narcotics from petitioner and others, and returning the following Monday arrested them, and then went to petitioner's home and seized a quantity of illicit drugs.[19] It was held that, in the absence of a warrant, the seizure was illegal under the Fourth Amendment, since the petitioner was not arrested in his home. The Court in the *Agnello* case, however, citing *Weeks v. United States*,[20] and *Carroll v. United States*,[21] said: "The right without a search warrant contemporaneously to search persons lawfully arrested while committing a crime and to search the place where the arrest is made in order

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Amendment. It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable."

13. *Id.* at 706.

14. *Id.* at 708.

15. *Id.* at 713.

16. *Id.* at 716.

17. Harris v. United States, 331 U.S. 145 (1947); Johnson v. United States, 333 U.S. 10 (1948); Trupiano v. United States, 334 U.S. 699 (1948). It is interesting to note that Mr. Justice Douglas who voted with the majority in the *Harris* case, upholding the validity of the search and seizure, changed his position in the last two cases, thereby enabling the dissent in the *Harris* case to become the present law on this subject.

18. 269 U.S. 20 (1925).

19. Clearly under the facts of the *Agnello* case, it would seem that the agents had ample time to obtain a search warrant.

20. 232 U.S. 383 (1914). The language in the *Weeks* case cannot properly be used as authority for the position that the Court in the *Agnello* case took in citing it. In the cited case the Court said (at 393): "What then is the present case? Before answering that inquiry specifically, it may be well . . . to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested. . . ." (Italics supplied.)

21. 267 U.S. 132 (1925).

to find and seize things connected with the crime as its fruits or as the means by which it was committed . . . is not to be doubted."[22] The Court admitted that this precise question had never been directly decided by the Supreme Court before but noted with approval the search of the home of one Alba (a co-defendant, whose conviction, however, was not appealed) since the arrest of all the defendants was made in Alba's home. In the case of *Maron v. United States*,[23] agents obtained a search warrant which permitted the search of a bar and which described merely illicit liquor and implements for its manufacture. The agents entered the bar and arrested the bartender. In their search of the premises they came upon evidence incriminating the petitioner. The Court held that the search and the seizure of this evidence were invalid under the warrant,[24] for, as required by the Fourth Amendment, the warrant did not specify the evidence seized. But the Court did hold the seizure of this evidence valid as incidental to the arrest of the bartender. They held that the officers were authorized to make an arrest for a crime being committed in their presence, and as an incident to this arrest, they had a right, without a warrant, contemporaneously to search the situs of the arrest in order to find and seize the things used to carry on the criminal enterprise.[25]

The foregoing cases do indeed lend themselves to the interpretation that, provided only there be a valid arrest, a search and seizure of the premises where the arrest took place would be valid although no warrant had been obtained. The relevant statements contained in these opinions are unqualified, there is no suggestion of limitation, and in each instance that it was physically possible to obtain a warrant is at least arguable. An examination of other and equally significant decisions of the same Court, however, raises a serious question whether such a broad position ever was intended. In *Harris v. United States*,[26] the defendant was arrested in his apartment by officers who had obtained a valid warrant for his arrest, charging fraudulent use of the mails. The officers made a thorough search of the entire apartment and discovered a number of illicit draft cards, for the possession of which defendant was convicted. The search and the seizure of the draft cards were held to be valid as incidental to the lawful arrest. It is to be noted, however, that in so deciding, the court said: "The opinions of this Court have clearly recognized that the search incident to arrest may, *under appropriate circumstances*, extend beyond the person of the one arrested to include the premises under his immediate control."[27] Such a statement strongly suggests that the determination of the validity of a search and seizure without a warrant must involve a consideration of factors other than the mere concomitance of a valid arrest. This thought is further developed in the case of *Carroll v. United States*[28] where government agents, having probable cause to believe that an automobile, stopped on a highway, was transporting liquor, arrested the occupants and searched the car, seizing a quantity of illicit whiskey. The Court, in upholding the legality of the search and seizure, discussed statutes passed for the proper administration of the Eighteenth Amendment, in which a distinction was drawn be-

22. 269 U.S. 20, 30 (1925).

23. 275 U.S. 192 (1927).

24. The Court said: "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Id.* at 196.

25. *Id.* at 198.

26. 331 U.S. 145 (1947).

27. *Id.* at 151. (Italics supplied.)

28. 267 U.S. 132 (1925).

tween the search of a house or store and the search of a vehicle,[29] and concluded that the way was left open for the search of an automobile or other vehicle of transportation, without a warrant, if the search was predicated on probable cause and done without malice.[30] The Court points out that the guaranty of freedom from unreasonable searches and seizures under the Fourth Amendment has been construed as recognizing a necessary difference between a search of a stationary structure in respect of which a proper official warrant readily may be obtained, and a search of a vehicle for contraband goods where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.[31] This principle of predicating the validity of a search and seizure without a warrant on the impracticability of obtaining the warrant would appear to have been the norm used in *United States v. Lee*.[32] Here a coast guard boatswain boarded a motor boat twenty-four miles at sea, seized cases of illicit liquor and arrested defendants. The Court, citing the *Carroll* case[33] as authority, said: "In the case at bar, there was probable cause to believe that our revenue laws were being violated by an American vessel and the persons thereon, in such manner as to render the vessel subject to forfeiture. Under such circumstances, search and seizure of the vessel, and arrest of the persons thereon, by the coast guard on the high seas is lawful, as like search and seizure of an *automobile*, and arrest of the persons therein, by prohibition officers on land is lawful"[34] and held the seizure to be valid.[35]

The same tendency to define legality of a seizure in terms of opportunity to obtain a warrant is seen in *Taylor v. United States*.[36] Agents, without a warrant, searched the garage of defendant and, finding illicit liquor, arrested him. In holding the search illegal, the court said: "Although over a considerable period numerous complaints concerning the use of these premises had been received, the agents had made no effort to obtain a warrant for making a search. They had abundant opportunity so to do and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure such warrant. Moreover, a short period of watching would have prevented any such possibility."[37]

29. *Id.* at 144 they cite in part the National Prohibition Act § 26 Title II providing *inter alia*: "When the Commissioner . . . or any officer of the law shall discover any person in the act of transporting . . . intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law." Then the court continues, "By section 6 of an Act supplemental to the National Prohibition Act, c. 34, 42 STAT. 222, 223, it is provided that if any officer or agent or employee of the United States . . . 'shall search any private dwelling,' . . . and 'without a warrant directing such search,' . . . he shall be guilty of a misdemeanor and subject to fine or imprisonment or both."

30. *Id.* at 147.

31. *Id.* at 153.

32. 274 U.S. 559 (1927).

33. See note 28 *supra*, and accompanying text.

34. 274 U.S. 559, 563 (1927). (Italics supplied.)

35. "Moreover search, if any, of the motorboat at sea did not violate the constitution, for it was made by the boatswain as an incident of a lawful arrest." 274 U.S. 559, 563 (1927).

36. 286 U.S. 1 (1932).

37. *Id.* at 6. *Accord*, Johnson v. United States 333 U.S. 10 (1948). Here the police were informed that the defendant was using opium in her hotel room. They went to the room, were admitted, and arrested the defendant when they smelled the odor of burning

The exigencies of law enforcement practices would seem clearly to require that the validity of a search and seizure should not be confined to instances where it is absolutely or physically impossible to obtain a search warrant. On the other hand the acceptance of a principle that every legal arrest will validate every concomitant search and seizure goes far to make a nullity of the protection sought in the adoption of the Fourth Amendment. It is submitted that the test is and should be one of feasibility. Where arresting officers have no reason prior to the arrest to believe that a search and seizure will be necessary, or where they have obtained a search warrant but unexpected developments at the time of the arrest prove the warrant to be too narrow in scope, there should be no requirement that prior to the search and seizure the orderly processes should be stayed and the arrested person held at the scene of the arrest while an officer attempts to find a jurist qualified to issue a search warrant sufficiently broad to accomplish the result. Where, on the other hand the officers are reasonably on notice that a search and seizure in connection with the contemplated arrest will be necessary, where the delay incident to obtaining the search warrant will not jeopardize the accomplishment of their mission a failure to obtain the warrant should, as in the principal case, be held to result in an unreasonable search and seizure in violation of the Fourth Amendment.

DOMESTIC RELATIONS—FOREIGN DIVORCE DECREES—SUBSEQUENT COLLATERAL ATTACK BY SPOUSE WHO PARTICIPATED IN FOREIGN PROCEEDING.—Petitioner, wife of respondent, left Massachusetts and instituted a divorce proceeding in Florida in which respondent personally appeared. The Florida court entered a decree of divorce after specifically finding that petitioner was a bona fide Florida resident. The respondent subsequently instituted a proceeding in Massachusetts in which the Florida divorce decree was collaterally attacked, and the court there, finding that the wife in fact never had been domiciled in Florida, granted respondent the relief requested. On writ of certiorari to the Supreme Court, *held*, two justices dissenting, decree of the Massachusetts court reversed. The requirements of full faith and credit bar the respondent from collaterally attacking the Florida decree on jurisdictional grounds after he had previously participated in the foreign suit where he was accorded full opportunity to contest the jurisdictional issues, and where the decree was not subject to such attack in the courts of the state which rendered it. *Sherrer v. Sherrer*, 334 U. S. 343 (1948).

The requirements of the Full Faith and Credit Clause[1] in relation to migratory

opium. A search of the room uncovered a warm opium pipe. The court, in holding the search illegal, admitted the existence of a rule that permitted a search without a warrant, but stated that this was not a case for the application of the rule. They refused to justify the search on the ground that it was incident to a lawful arrest, for, they reasoned, that on being admitted by the defendant into the room, the police had in fact made a search for they detected at that moment the odor of burning opium which induced them to arrest the defendant. The Court feels that the Government tried to justify the arrest by the search and at the same time, to justify the search by the arrest. It is submitted that this case is important merely to show the present trend of the Court minutely to scrutinize any attempt on the part of the government to justify a search and seizure as an incident to a lawful arrest.

1. "Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general laws prescribe

divorces has long been a question which has frequently troubled not only the members of the bar but the Supreme Court of the United States as well.[2] The principal case brings into focus the question of who may attack the jurisdictional findings of a court granting a divorce decree within the bounds of the Full Faith and Credit Clause, and also under what circumstances.

In the first case of *Williams v. North Carolina*[3] the Supreme Court held that where one spouse acquires a bona fide domicile within a state, such domicile shall be sufficient to enable a court of that state to render a decree which is entitled to full faith and credit. The fact of constructive service in that case was deemed not to be such a circumstance as would justify another state in collaterally attacking the decree. The Full Faith and Credit Clause does not preclude a state from re-examining the jurisdictional facts upon which a foreign decree is based, however, and so in the second case of *Williams v. North Carolina*[4] the state was allowed collaterally to attack the decree on jurisdictional grounds.

There were in the principal case two material circumstances which distinguish it from the two *Williams* cases. Instead of an *ex parte* decree having been attacked by the state, a decree in which there had been participation by both spouses was attacked by one of the parties to the previous action.

A judgment in a former suit between the same parties, on the same cause of action, by a court of competent jurisdiction is res judicata as to every matter which might with propriety have been litigated in that action.[5] The courts have held that although competent jurisdiction is a necessary element of res judicata, where two parties litigate the question of jurisdiction they shall be bound by the court's determination of this issue.[6]

The majority in the principal case relies upon *Davis v. Davis*[7] as controlling authority in the divorce field for the proposition that a previous determination of jurisdiction is res judicata as between the parties. Confronted with a factual situation similar to that in the principal case, the Court in *Davis v. Davis* denied the defendant the right to re-litigate the question of jurisdiction after having participated in a foreign proceeding in which that question was in issue. The Supreme Court stated that "she may not say that he was not entitled to sue for divorce in the state court, for she appeared there and by plea put in issue his allegation as to domicile . . . the determination of the decree upon that point is effective for all purposes in this litigation."[8]

As a basis for not precluding the respondent in the principal case from re-litigating the jurisdictional facts, the minority, citing *Shelley v. Kraemer*,[9] relies upon the proposition that the state expresses its sovereign power when it speaks through the

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the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U. S. CONST. Art. IV, § 1.

2. See 334 U. S. 343, 357 (1948), where Mr. Justice Frankfurter dissenting says: "If all that were necessary in order to decide the validity in one State of a divorce granted in other was to read the Full Faith and Credit Clause . . . generations of judges would not have found the problem so troublesome as they have."

3. 317 U. S. 287 (1942).

4. 325 U. S. 226 (1945).

5. United States v. De Angelo, 138 F. 2d 466 (C. C. A. 3d 1943).

6. Baldwin v. Traveling Men's Ass'n, 283 U. S. 522 (1931).

7. 305 U. S. 32 (1938).

8. *Id.* at 40.

9. 334 U. S. 1 (1948).

courts in civil litgation.[10] The state has a vital interest in the marital status of its citizens, says the dissent, so it is of primary importance that the state be allowed to speak through the participants in a civil action concerning that state, even though the matter might be res judicata as to the parties.

Shelley v. Kraemer[11] held that judicial action is to be regarded as the action of the state for the purposes of the Fourteenth Amendment,[12] and that judicial enforcement of private agreements amounts to state action.[13] Enforcing a judicial decree and participating in a civil action are different matters. It is true that the state speaks through its courts in civil litigation when it enforces a decree, but it is submitted that this does not warrant the conclusion that the rule of res judicata should be discarded in civil litigation whenever the state has an interest in the matter. There is ample opportunity for the state to protect itself in a suit of its own.[14]

The holding in the principal case has been interpreted in opposite ways due apparently to the sweeping language employed by the majority at the end of the opinion.[15] The minority in the principal case interprets the opinion to mean that if there once has been a decree in which both spouses have participated, all interested parties, including the state, are thereafter foreclosed from subsequently attacking the jurisdictional findings.[16] Two recent New York Supreme Court cases are divided as to the meaning to be given to the decision. In *de Marigny v. de Marigny*[17] defendant's second wife was allowed to attack the jurisdictional findings of a previous decree in which there had been participation by the defendant and his first wife, whereas in *Bane v. Bane*,[18] upon similar facts, the court denied the second spouse the right to attack the previous decree. In the *de Marigny* case the court restricts the holding in the principal case to actual participants in the decree; in *Bane v. Bane* the court interprets the opinion in much the same way as does the minority in the principal case.

Neither of the foregoing interpretations of the decision in the principal case is to be criticized as unwarranted. Although the precise issue there raised is whether a *defendant* may subsequently attack the divorce decree,[19] the manner in which the ma-

10. 334 U. S. 343, 362 (1948) (dissenting opinion).

11. 334 U. S. 1 (1948).

12. U. S. CONST. AMEND. XIV, § 1. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

13. The case decided that private agreements excluding persons of designated race or color from use of real property do not violate the 14th Amendment, but that it is violative of the equal protection clause of the 14th Amendment for state courts to enforce such agreements.

14. Williams v. North Carolina, 325 U. S. 226 (1945).

15. 334 U. S. 343, 356 (1948). "We do not conceive it to be in accord with the purposes of the full faith and credit requirement to hold that a judgment rendered under the circumstances of this case may be required to run the gauntlet of such collateral attack in the courts of sister States before its validity outside of the State which rendered it is established or rejected. . . . And where a decree of divorce is rendered by a competent court under the circumstances of this case, the obligation of full faith and credit requires that such litigation should end in the courts of the State in which the judgment was rendered."

16. 334 U. S. 343, 377 (1948) (dissenting opinion).

17. 81 N. Y. S. 2d 228 (1948).

18. 80 N. Y. S. 2d 641 (1948).

19. 334 U. S. 343, 349 (1948).

jority employ the term "full faith and credit"[20] has reasonably caused the minority and the court in *Bane v. Bane*[21] to believe that the effect of the holding in the principal case is that the full faith and credit clause is to be construed as preventing collateral attack by any party if there has been participation in the previous proceeding.

Another factor making interpretation of the opinion difficult is the manner in which the majority interpret the second case of *Williams v. North Carolina*.[22] They construe the fact of non-appearance of the one spouse in the *Williams* case as the basis for the Court's holding that the state had a right to re-examine the jurisdiction of the Nevada court, and state that judicial re-examination of jurisdiction is permissible in *ex parte* proceedings but quite another thing where there has been participation by both spouses.[23] It is submitted that the fact that the Nevada decree was *ex parte* was not the basis for the *Williams* case but rather that the state's interest in the marital relationship "ought not to be foreclosed by the interested actions of others. . . ."[24] The *Williams* case makes no distinction between *ex parte* proceedings and proceedings in which both spouses have participated and it is submitted that such a distinction is unwarranted. To say that the state may look into the question of jurisdiction if there has been participation by one spouse but may not if there has been participation by two, would appear to be a distinction without a difference. Such a view would indeed foster perjury and collusion because if it were followed all that two spouses need do to insure an unimpeachable divorce decree would be to arrange a friendly contest.[25]

It is submitted that the Full Faith and Credit Clause does not preclude subsequent re-examination of the jurisdictional facts of the foreign court by the state of domicilliary origin. The courts have long held that a judgment without the requisite jurisdiction is not entitled to the protection of this clause,[26] and as stated in the second *Williams* case, the fact that a foreign court found it had power to award a divorce decree cannot foreclose re-examination by another state. "Otherwise, a court's record would establish its power and the power would be proved by the record. Such circular reasoning would give one State a control over all the other States which the Full Faith and Credit Clause certainly did not confer."[27]

The court in *Bane v. Bane*[28] arrived at its conclusion that Full Faith and Credit prohibits collateral attack by an interested third party where there has been participation by both spouses, by deciding that even as to jurisdiction such a divorce decree "is clearly one which must be deemed binding upon the world insofar as it dissolves that *res*."[29] This reasoning is seemingly *contra* to that of the Supreme Court in the first *Williams* case where that Court found that "the decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicil is a jurisdictional fact."[30] And as pointed out above, the *Williams* case should not be distinguished because it was an *ex parte* proceeding.

20. See note 15 *supra*.
21. See note 18 *supra*.
22. 325 U. S. 226 (1945).
23. 334 U. S. 343, 355, 356 (1948). See note 35 *infra*.
24. Williams v. North Carolina, 325 U. S. 226, 230 (1945).
25. See 334 U. S. 343, 368, 369 (1948) (dissenting opinion).
26. Thompson v. Whitman, 18 Wall. 457 (U. S. 1873).
27. Williams v. North Carolina, 325 U. S. 226, 234 (1945).
28. See note 18 *supra*.
29. 80 N. Y. S. 2d 641, 646 (1948).
30. 325 U. S. 226, 232 (1945).

The Full Faith and Credit Clause does preclude a party in the original proceeding from subsequently attacking the jurisdictional findings because that issue is res judicata as to those participating in the foreign decree, and in general, the effect of the Full Faith and Credit Clause is to make the local doctrine of res judicata a part of a national jurisprudence by extending the res judicata effect of a judgment from the state of its rendition to all other states.[31] In the principal case the jurisidictional findings were made res judicata as to the parties because the Supreme Court has reasoned that a spouse who participates in a foreign decree should not be allowed later to say that the foreign court had no power to entertain such an action.[32] Clearly such reasoning does not apply to a state of domicilliary origin or other third party who has not participated in the foreign proceeding.

Although there are *dicta* in the principal case which would seem to indicate a restricting of the second *Williams* case to its exact facts, namely an *ex parte* proceeding,[33] it is submitted that Supreme Court decisions to date would lead one to conclude that the foreign courts' determination of jurisdiction in both *ex parte* proceedings and proceedings in which there has been participation by both spouses has the effect of an *in personam* decree in that it only binds the actual participants in said decree.[34] On the other hand, all other issues involved in the foreign proceedings should be given the effect of an *in rem* decree in that all the world is bound by the foreign courts' determination.

INSURANCE—MEASURE OF DAMAGES FOR BREACH OF LIFE INSURANCE CONTRACT.—The plaintiff had been insured for twenty-four years by the defendant company under a life insurance policy that permitted the insured in case of lapse for nonpayment of premiums to reinstate the policy within a stated period of time under given conditions which included the payment of the premium in arrears with interest. The plaintiff, who had defaulted in payment of premiums, made timely application to have the policy reinstated. He complied with all of the conditions governing reinstatement, but the defendant wrongfully refused to reinstate the policy on its original terms. The plaintiff elected to treat this as a breach of the insurance contract and brought suit to recover damages. *Held,* the defendant is liable in damages and the measure of its damages is the amount of premiums paid with legal interest without any deduction

31. Riley v. New York Trust Co., 315 U. S. 343, 349, 350 (1942). The court in this case went on to say, however, that "the full faith and credit clause allows Delaware . . . to determine the question of domicile anew for any interested party who is not bound by participation in the Georgia proceeding. . . . this reexamination may result in conflicting decisions upon domicile, but this is an inevitable consequence of the existing federal system, which endows its citizens with the freedom to choose the state or states within which they desire to carry on business . . . or establish their residences."

32. Davis v. Davis, 305 U. S. 32 (1938).

33. 334 U. S. 343, 355, 356 (1948). "It is one thing to recognize as permissible the judicial reexamination of findings of jurisdictional fact where such findings have been made by a court of a sister State which has entered a divorce decree in *ex parte* proceedings. It is quite another thing to hold that the vital rights and interests involved in divorce litigation may be held in suspense pending the scrutiny by courts of sister States of findings of jurisdictional fact made by a competent court in proceedings conducted in a manner consistent with the highest requirements of due process and in which the defendant has participated." See note 15 *supra.*

34. But see Lynn v. Lynn, 82 N. Y. S. 2d 397 (1948).

for protection afforded the insured under the policy while it was in effect. *Belser v. Mutual Life Ins. Co. of New York*, 77 F. Supp. 826 (E. D. S. C. 1948).

Where a life insurance company wrongfully cancels, repudiates, or terminates a contract of insurance, the insured may at once pursue any one of several remedies: 1) He may consider the contract rescinded and sue to recover back money paid under the contract as money had and received.[1] 2) He may sue on the contract to recover damages for the breach.[2] 3) He may institute proceedings in equity to have the policy adjudged to be in force.[3]

In the principal case the insured elected to treat the refusal of the insurer to accept premiums as a breach of the contract and sought to recover damages.[4] That the insured may treat the wrongful refusal of the insurer to accept premiums as a repudiation of the contract is sustained by the weight of authority[5] but the method of computing his damages has not been treated uniformly.[6] In connection with the measure of recovery allowed by the court, it should be noted that the recovery of premiums paid, with or without a deduction for protection afforded, is properly an action on the theory of *indebitatus assumpsit* to recover money had and received, and not a suit for damages based on a breach of the contract.[7] The theory of damages for breach of contract is to place the plaintiff in the same position he would have been in had the contract been completed,[8] while in rescission, the theory is simply to return the parties to status quo.[9] Therefore, the measure of recovery adopted by the court is based on the theory of quasi-contract and not breach of contract as announced by the court.

If the insured elects to seek damages basing his action on a breach of the contract, it has been held that if the insured is still in such a state of health that he can secure other insurance of like nature and kind, his measure of damages will be the difference between what it would have cost to carry the canceled insurance for the balance of its term and the cost of new insurance for a like term.[10] If the insured, however, is no

1. Van Werden v. Equitable Life Assur. Soc., 99 Iowa 621, 68 N. W. 892 (1896); American Life Ins. Co. v. McAden, 109 Pa. St. 399, 1 Atl. 256 (1885).

2. American Ins. Union v. Woodard, 118 Okla. 248, 247 Pac. 398 (1926); Protective Mut. Life Ass'n v. Duke, 91 S. W. 2d 753 (Tex. Civ. App. 1936). *Contra*: Kelly v. Security Mut. Life Ins. Co., 186 N. Y. 16, 78 N. E. 584 (1906) where the Court of Appeals held the doctrine of allowing damages for anticipatory breach should not be extended to life insurance cases. The New York decision has been criticised in 5 WILLISTON, CONTRACTS § 1330 (rev. ed. 1937).

3. Alexander v. Durham Life Ins. Co., 181 S. C. 331, 187 S. E. 425 (1936); *See* Burnet v. Wells, 289 U. S. 670, 680 (1933). The plaintiff may also seek a declaratory judgment defining his rights, Honetsky v. Russian Consol. Mut. Aid Soc., 114 N. J. L. 240, 176 Atl. 670 (1935).

4. 77 F. Supp. 826, 827 (E. D. S. C. 1948).

5. Mutual Relief Ass'n v. Ray, 173 Ark. 9, 292 S. W. 396 (1927); O'Neill v. Supreme Court Council, A. L. H., 70 N. J. L. 410, 57 Atl. 463 (1904). For further authorities and an analysis of the problem see Williston, *Repudiation of Contracts*, 14 HARV. L. REV. 421, 432 (1901).

6. For a discussion of the problem see 2 COUCH ON INSURANCE § 1429 (Cum. Sup. 1945).

7. See note 1 *supra*.

8. MCCORMICK, DAMAGES 583 (1935); and see 5 WILLISTON, CONTRACTS § 1339 (rev. ed. 1937).

9. RESTATEMENT, CONTRACTS § 347 (1932); 5 WILLISTON, CONTRACTS § 1454 A (rev. ed. 1937).

10. In Illinois Bankers' Life Assur. Co. v. Payne, 62 S. W. 2d 315 (Tex. Civ. App. 1933)

longer an insurable risk, his measure of damages would be the value of the canceled policy as of the date of death, less the estimated cost of carrying the same from the date of cancellation to that of his prospective death.[11]

If, however, the insured elects to treat the repudiation of the policy by the insurer as a rescission of the contract and seeks to recover the premiums paid there remain two basic problems: 1) should the defaulting party to an entire contract be entitled to offset the benefits conferred on the other party during the life of the contract, and if so 2), what benefits, if any, has the insurer conferred on the insured during the life of the policy? With regard to the first problem, it was a condition precedent to recovery at common law that all the conditions in an entire contract be performed.[12] This rule was followed absolutely until the case of *Britton v. Turner*[13] where the court ignored the common law rule and allowed an employee who had failed, without cause, to perform the agreed service to recover its reasonable value upon a quasi-contractual theory. This landmark case has been severely criticised[14] and rejected in many jurisdictions[15] but its doctrine has been followed in some courts in cases involving personal service contracts,[16] building contracts[17] and sales contracts.[18] Since the weight of authority holds that a life insurance contract is entire,[19] it seems that the doctrine enunciated in *Britton v. Turner* is the basis for allowing an insurer to offset the benefits that it may have conferred on the insured during the life of the policy.

There still remains the problem whether the insurer has conferred any benefits on the insured for which it is entitled to set off. The majority view,[20] which includes South Carolina[21] where the principal case was decided, rejects the position that the insurer has conferred a benefit on the insured during the life of the policy, apparently on the theory that since the insured is still alive no pecuniary benefit has been re-

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the replacement rule of damages was held to be proper where the insured's health was such that he could get adequate insurance with another insurer. For the New York rule prior to *Kelly v. Security Mut. Life Ins. Co.*, see Keyser v. Mut. Reserve Fund Life Ass'n, 60 App. Div. 297, 70 N. Y. Supp. 32 (1st Dep't 1901).

11. Lovell v. St. Louis Mut. Life Ins. Co., 111 U. S. 264 (1884); *accord*, Protective Mut. Life Ins. Ass'n v. Duke, 91 S. W. 2d 753 (Tex. Civ. App. 1936).

12. Miller v. Goddard, 34 Me. 102, 105 (1852); Lantry v. Parks, 8 Cow. 63 (1827).

13. 6 N. H. 481 (1834). Discussed in Laube, *The Defaulting Employee, Britton v. Turner Reviewed*, 83 U. OF PA. L. REV. 825 (1935), and in a Note, *Recovery in Quasi-Contract by a Defaulter under an Express Contract*, 24 COL. L. REV. 885 (1924).

14. Ashley, *Britton v. Turner*, 24 YALE L. J. 544 (1915); and WOODWARD, QUASI CONTRACTS § 172 (1913) states that the case is unsound even under a quasi-contractual theory.

15. Peterson v. Mayer, 46 Minn. 468, 49 N. W. 245 (1891); Diffenback v. Stark, 56 Wis. 462, 14 N. W. 621 (1883).

16. Parcell v. McComber, 11 Neb. 209, 7 N. W. 529 (1880).

17. Germain v. Stanton School Dist., 158 Mich. 124, 122 N. W. 524 (1909); Gregg v. Dunn, 38 Mo. App. 283, 288 (1889).

18. UNIFORM SALES ACT § 44 provides that if the buyer has used or disposed of goods delivered before he knows that the seller is not going to perform his contract in full, he will not be liable for more than the fair value of the goods received.

19. New York Life Ins. Co. v. Statham, 93 U. S. 24 (1876); also see VANCE, INSURANCE 262 n. 8 (2d ed. 1930) wherein many cases following the majority rule that insurance contracts are entire may be found.

20. The cases are collected in Notes, 48 A. L. R. 107, 111 (1927) and 107 A. L. R. 1233, 1236 (1937).

21. Rogers v. Jefferson Standard Life Ins. Co., 182 S. C. 51, 188 S. E. 432 (1936); Peck v. Metropolitan Life Ins. Co., 178 S. C. 272, 182 S. E. 747 (1935).

ceived by him or his estate. The minority view,[22] which includes New York,[23] holds that the insurer has conferred a benefit on the insured for which the company is entitled to recover. It proceeds upon the theory that the insurer, while the contract was in force, assumed a risk that otherwise it would not have to bear and that this assumption of risk has an actual monetary value which should be recouped when the insured seeks to rescind.

It is submitted that the decisions following the majority rule proceed upon a narrow view as to the benefits enjoyed by an insured during the life of the policy and involve a misconception of the nature and characteristics of life insurance. It is obvious that in an aleatory contract the duty of the insurer to pay the face amount of the policy only matures upon the fortuitous event of the death of the insured. However, prior to death the insured did have a benefit in the fact that the insurer had voluntarily assumed the risk of the death of the insured with the consequent benefits and protection to the beneficiaries of the insured. By joining the group who are insured, the insured had the benefit of the low premium rate which is made possible by the entry of so many into similar contracts. There is a benefit, therefore, in the very assumption of the relationship by the insurance carrier. It would seem a matter of simple logic that a person who has life insurance protection is in a position which is more secure emotionally and financially than his uninsured brother and further that these benefits are real and tangible in his lifetime and not dependent upon his death.

PRACTICE—EXAMINATIONS BEFORE TRIAL—REQUIREMENT THAT THE EXAMINING PARTY HAVE THE BURDEN OF PROOF.—Plaintiff, seeking to enjoin the defendant from the use of the trade-name "Dorros Bros." alleged in its complaint an exclusive right in and continual use of the name. Defendant, interposing a general denial and alleging non-user, moved for an examination of the plaintiff before trial as to plaintiff's failure to use the name over a specified period. Special Term granted the motion. On appeal, *held,* one justice concurring in the result only, order affirmed on the ground that it is no longer consonant with good practice or justice to require that the party permitted an examination have the burden of proving the issues upon which examination is sought. *Marie Dorros, Inc. v. Dorros Bros., Inc.,* 274 App. Div. 11, 80 N. Y. S. 2d 25 (1st Dep't 1948).

Around the acknowledged indispensability of pre-trial investigation, judges and legislators have built a barrier encrusted with historical restrictions which have denied the procedure of pre-trial fact-gathering the availability its necessity demands. Tradition has given this barrier a deep foundation,[1] and chancery procedure, by restricting the use of deposition-discovery devices to the party having the burden of proof

22. See note 20 *supra.*

23. Dougherty v. Equitable Life Assur. Soc., 144 Misc. 363, 259 N. Y. Supp. 146 (Sup. Ct. 1932), *rev'd in part,* 238 App. Div. 696, 265 N. Y. Supp. 714 (1st Dep't 1933), *rev'd on other grounds,* 266 N. Y. 71, 193 N. E. 897 (1934); also see Gilbert v. New York Life Ins. Co., 238 App. Div. 544, 265 N. Y. Supp. 277 (1st Dep't 1933) where further New York cases on this point are discussed.

1. "The conception of justice has always been subordinate to the conception of the law suit as a game between opposing counsel. . . . An open consideration of the facts has not seemed to be a primary aim of the game." Pike and Willis, *The New Federal Deposition-Discovery Procedure,* 38 COL. L. REV. 1179, 1180 (1939).

on the issue about which inquiry is sought, has provided it with a firm buttress.[2] Underlying this stricture is the principle that a party may not pry into his adversary's affirmative case;[3] a concept which survives in many jurisdictions today as the controlling consideration in pre-trial investigation.

Motions for examinations before trial, notices to take depositions or bills for discovery confront the court with the problem of determining what facts are to be disclosed before the trial of the issue. The basis for resolving this problem frequently has been the firmly imbedded theory that the law-suit is a law-game with each party entitled to his "secret arsenal."[4] The courts habitually described any attempt at prying into the secrecy of the opposite party's case with the words "fishing expedition"[5] and various limitations arose around pre-trial investigations, chief among which was the restriction against inquiry as to issues upon which the moving party did not have the burden of proof.[6] In support of these limitations, it was traditionally argued that indiscriminate inquiry before trial gave an unscrupulous litigant a great advantage and constituted an invitation to perjury,[7] but this contention has not weathered the test of modern practice.[8]

The limitation rooted securely in the law preventing the unburdened party's search into his opponent's case is exemplified in the case of *Texas Co. v. Cohen*.[9] Here the

2. "This theory, that discovery should be available only for attack, was no inadvertence on the part of chancery judges. It was the result of a definite purpose, and every effort to extend the scope of the remedy was met by a judicial opposition which never relaxed." Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L. J. 863, 866 (1933).

3. "The province of discovery is not to disclose in what manner the other party intends to make out his case at law. A plaintiff in equity is entitled only to the discovery of such matters within the knowledge or possession of his opponent as will enable him to make out his own case." Indianapolis Amusement Co. v. M.G.M. Dist. Corp., 90 F. 2d 732, 734 (C. C. A. 7th 1937). *Cf.* Looney v. Saltonstall, 212 Mass. 69, 98 N. E. 698 (1912); Zaritzky v. Prudential Ins. Co. of America, 14 N. J. Misc. 527, 186 Atl. 42 (1936).

4. Pike and Willis, *supra* note 1, at 1436-7.

5. "The remedy of discovery . . . is not merely to vex or harrass litigants. Neither can it be utilized for a mere fishing expedition, nor for an impertinent intrusion." Keenan v. Texas Production Co., 84 F. 2d 826, 828 (C. C. A. 10th 1936). *Accord*, May v. Midwest Refining Co., 10 F. Supp. 927 (D. Me. 1935); Segschneider v. Waring Hat Mfg. Co., 134 App. Div. 217, 118 N. Y. Supp. 1000 (2d Dep't 1909).

6. "The plaintiff's right of discovery extends only to facts . . . material to the support of the plaintiff's case, and the defendant's correlative right of discovery, only to facts and matters material to his defense, and neither is entitled to discovery of an inquisitorial character as to the ground of action or the defense of the other. . . . " Kinney v. Rice, 238 Fed. 444, 445 (D. Mass. 1916). *Cf.* Zeltner v. Fidelity & Deposit Co. of Md., 220 App. Div. 21, 220 N. Y. Supp. 356 (1st Dep't 1927). Some other restrictions which are in effect in most jurisdictions are those limiting the persons whose depositions might be taken and those defining the scope of the deposition in specific types of action.

7. "Experience . . . has shown . . . that the possible mischiefs of surprise at the trial are more than counter-balanced by the danger of perjury, which must inevitably be incurred when either party is permitted, *before* a trial, to know the precise evidence against which he has to contend." WIGRAM, DISCOVERY § 347 (1842).

8. "Far from encouraging perjury, unrestrained, mutual discovery has been found by experience to be one of the greatest preventives of perjury." Sunderland, *supra* note 2, at 872. For a survey of various jurisdictions' treatment of the point to the detriment of the old argument regarding perjury, see RAGLAND, DISCOVERY BEFORE TRIAL 120 (1932).

9. 15 F. 2d 358 (C. C. A. 2d 1926).

Texas Co., in aid of the defense to an action for compensation for services rendered, brought a bill for discovery in equity[10] to acquire information as to the character and circumstances of the employment. Since the defendant had entered only a general denial at law, the court dismissed the defendant's bill, saying, "it is enough, we think, that it [Texas Co.] seeks what never has been granted in any case . . . that is, the disclosure before trial, of the evidence by which the opposite party will support its own allegations."[11] No attempt was made by the court to evaluate the merit of preventing discovery, the clear implication of "prying" being sufficient to dismiss the bill since it sought "what equity, *for good reasons or bad,* has always steadfastly set its face against. . . . "[12]

The *Texas Co.* case demonstrates one phase of federal practice prior to the new Federal Rules.[13] In no way, however, does it indicate the "separate, unrelated and haphazard developments resulting in a wide variety of distinctions and limitations . . . "[14] which constituted the procedure in federal courts before 1938 regarding pre-trial investigations. Ancient deposition statutes,[15] applicable only when substituting for testimony at the trial, were based on the severest kind of non-availablity[16] and were interpreted as making no distinction between parties and witnesses.[17] A comparatively recent statute,[18] providing that "In addition to [the Federal mode], it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held,"[19] gave to those, looking for a more liberal opportunity at pre-trial fact-gathering, a hope which was quickly dispelled.[20]

As indicated in the *Texas Co.* case, discovery devices in the federal courts were also ineffective. There was no provision for discovery at law, and equitable relief,

10 See note 21 *infra,* and accompanying text.

11. 15 F. 2d 358 (C. C. A. 2d 1926).

12. *Ibid.* (Italics supplied.) That the court would not have granted relief to the Texas Co. seems clear, even if it could have been shown that the information sought was necessary to the preparation of its case. Though prohibiting the production of the sought-after documentation the court indicates that certain relief by way of a bill of particulars might be available to the petitioner. However, since a bill of particulars presents the facts, not as they are but only as they are claimed to be by the party giving it, such relief seems hardly adequate.

13. FED. R. CIV. P., 26-37.

14. Pike and Willis, *supra* note 1, at 1186.

15. 17 STAT. 89 (1872), 28 U. S. C. § 639 (1940); 17 STAT. 89 (1872), 28 U. S. C. § 644 (1940).

16. " . . . when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial before the time of trial, or when he is ancient and infirm. . . . " 17 STAT. 89 (1872), 28 U. S. C. § 639 (1940).

17. Hawks v. Yancey, 2 F. 2d 471 (D. Tex. 1924).

18. 27 STAT. 7 (1892), 28 U. S. C. § 643 (1940).

19. *Ibid.*

20. "In our view the statute of 1892 does not enlarge the instances in which the depositions may be taken. . . . It was only intended to simplify the practice of taking depositions." National Cash-Register Co. v. Leland, 77 Fed. 242, 243 (D. Mass. 1896). For a later reaffirmation of this interpretation, *cf.* Morris and Co. v. Skandanavia Ins. Co., 17 F. 2d 951 (D. Miss. 1927).

though broadly stated,[21] was narrowly construed.[22] Even the presence of a statute providing that "In the trial of actions at law, the courts of the United States may . . . require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue"[23] did not, in practice, afford an adequate opportunity for discovery at law. The apparent breadth of this provision was definitely restricted in *Carpenter v. Winn*.[24] Here the Supreme Court explicitly stated that "in" did not mean "before", and the effect of this was to void all attempts at law to obtain pre-trial discovery.[25] In the meantime, petitioners were finding equity indisposed to grant their bills, since, despite *Carpenter v. Winn*, it was asserted frequently[26] that the statute afforded an adequate law remedy.

The one constant factor that remained unaffected by this confusion was the stricture against a court compelling a party to disclose his own case as illustrated by the burden of proof limitation. There was one obvious relaxation of the rule's rigidity. "[Where] the information tends to support the case of the party seeking it, it may not be withheld merely because it is also part of the case of the party from whom . . . disclosure is sought."[27]

The new Federal Rules of Civil Procedure, adopted only after many jurists had realized the inadequacy of the old practice[28] and the obvious advantages of a change,[29] sprung the locks upon pre-trial investigation in federal courts. It is not

21. "The plaintiff, at any time after filing the bill, and not later than twenty-one days after the joinder of issue, and the defendant at any time after filing his answer, and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by leave of the court or judge may file interrogatories in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause. . . . " FEDERAL EQUITY RULES 58 (1912).

22. "I think it clear that the 58th Equity Rule . . . was not intended to change the long established rule in reference to the subject matter of such discovery or to extend such right in favor of either party beyond the matters relating to his own ground of action or defense. . . . " Day v. Mountain City Mill Co., 225 Fed. 622, 623 (D. Tenn. 1915); *accord*, Wolcott v. National Electric Signaling Co., 235 Fed. 224 (D. Mass. 1916). *Contra*: Texas Co. v. Gulf Refining Co., 12 F. 2d 317 (D. Tex. 1926); Quirk v. Quirk, 259 Fed. 597 (D. Cal. 1919).

23. 1 STAT. 82 (1789), 28 U. S. C. § 636 (1940).

24. 221 U. S. 533 (1911).

25. *See* Sinclair Refining Company v. Jenkins Petroleum Process Company, 289 U. S. 689, 693 (1933).

26. *See* American Lithographic Company v. Werckmeister, 221 U. S. 603, 609 (1911); Wilson v. New England Navigation Co., 197 Fed. 88, 89 (E. D. N. Y. 1912).

27. James, *Discovery*, 38 YALE L. J. 746, 756 (1929); *see* Marquette Mfg. Co. v. Oglesby Coal Co., 247 Fed. 351, 353 (D. Ill. 1918); Day v. Mountain City Mill Co., 225 Fed. 622, 623 (D. Tenn. 1915).

28. "It is unfortunate that the practice of automatic compulsory discovery is not in force here." Zolla v. Grand Rapids Store Equipment Corp., 46 F. 2d 319 (S.D.N.Y. 1931); *cf.* Texas Co. v. Gulf Refining Co., 12 F. 2d 317 (D. Tex. 1926); see Munger v. Firestone Tire and Rubber Co., 261 Fed. 921 (C.C.A. 2d 1919), *cert. denied*, 252 U.S. 582.

29. "The rationale of this attitude is, of course, not only that the court wants to know the truth, but also that it is good for both the parties to learn the truth far enough ahead of the trial, not only to enable them to prepare for trial, but also to enable them to decide whether or not it may be futile to proceed to trial." Zolla v. Grand Rapids Store Equipment Corp., 46 F. 2d 319, 320 (S.D.N.Y. 1931).

difficult to appreciate the almost limitless scope of the pertinent sections[30] since the provision that "the deponent may be examined regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party"[31] inexorably has erased the burden of proof limitation from the consideration of the federal courts.[32]

The most liberal feature of the change is that under the new rules "the right to take statements and the right to use them in court have been kept entirely distinct . . . *the utmost freedom is allowed in taking depositions; restrictions are imposed upon their use.*"[33]

The resolution of the difficulties in the federal practice regarding pre-trial inquiry is an illustration of but one part of the gradually broadening tendency in our courts to make information available before trial.[34] New York however, has been slow to unlock the parties' "arsenals." The New York Civil Practice Act, Section 288 provides in part that "Any party to an action in a court of record may cause to be taken by deposition, before trial, his own testimony or that of any other party, which is material and necessary in the prosecution or defense of the action. . . . "[35] The "materiality and necessity" of such depositions has traditionally been interpreted as not applying to the party who did not have the burden of proof on the issue about which an examination was sought.[36] The consistency of New York courts on this particular subject had been shaken only slightly on the question whether or not this limitation was to be regarded as a "rule of law." The Court of Appeals, recognizing that the lower courts "have allowed a practice . . . to crystallize into a rule of law, that an examination of a party plaintiff before trial cannot be had except to establish an affirmative defense"[37] has clearly stated that "the examination . . . is not dependent

30. FED. R. CIV. P., 26-37.

31. FED. R. CIV. P., 26 (b).

32. See Hickman v. Taylor, 329 U.S. 495, 507 (1947).

33. Pike and Willis, *supra* note 1, at 1187: "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26 (b); *cf.* Engl v. Aetna Life Ins. Co., 139 F. 2d 469 (C. C. A. 2d 1943).

34. Some statutes which have, either by their language or interpretation, eliminated the restriction are: IND. ANN. STAT. (BURNS, 1933) § 2-1028; MASS. GEN. LAWS c. 231 §§ 61-67 (SUPP. 1946); MO. REV. STAT. ANN. (1939) §§ 1753-59; OHIO CODE ANN. (1940) § 11497; TEX. STAT. REV. CIV. (1936) art. 3769 §§ 1-6. For an example of a strict preservation of the rule, see N. J. REV. STAT. § 2: 27-172, 176 (Supp. 1946).

35. Aside from certain procedural changes, this is an embodiment of the outdated New York Code of Civil Procedure §§ 870-872.

36. Kessler v. North River Realty Co., 169 App. Div. 814, 155 N.Y. Supp. 799 (1st Dep't 1915); Lawson v. Hotchkiss, 140 App. Div. 297, 125 N.Y. Supp. 261 (1st Dep't 1910).

37. Public Nat. Bank of New York v. National City Bank of New York, 261 N.Y. 316, 318, 185 N.E. 395, 396 (1933). In the principal case, though the defendants pleaded non-user "by way of defense" the court, in emphasizing that the affirmative is with the plaintiff, points out that "the burden is not affected by defendant's plea of non-user, their denial being as effective as their defense for the purpose of raising the issue." 274 App. Div. 11, 12, 80 N.Y. Supp. 25, 26 (1st Dep't 1948). Despite the more liberal attitude of the third and fourth departments of the appellate division, the *Public National Bank* case remains the more rigid doctrine of the New York Court of Appeals on the burden of proof limitation. Combes v. Masse, 209 App. Div. 330, 204 N.Y. Supp. 440 (3d Dep't 1924).

as a matter of law, upon any such burden or upon the question of who has the affirmative of proof."[38] It is essential to note, however, that this language merely stripped the burden of proof limitation of its right to exist "as a matter of law." The court left no doubt as to its survival as a rule of practice to be defeated only by "exceptional circumstances."[39]

It is obvious that such a restriction against a party who has the misfortune of not being required to plead affirmatively, had to be refined in the interests of justice. New York courts have developed a standard inclined toward the benefit of the party, upon whom the onus of proof does not rest, when he can demonstrate that "exceptional circumstances" merit his invasion of the opposite party's "arsenal." The definition of this theory appears in *Alden v. O'Brien.*[40] The defendants, in the real estate business, were sued for one-half their commissions on the basis of a certain contract of employment. They moved for an examination of the plaintiff before trial regarding the terms of the contract on the grounds that their partner, who had made the alleged contract with the plaintiff, was dead and they had no record of the services performed.[41] The court granted their motion, asserting that "extraordinary and peculiar circumstances exist which require the court to exercise its discretion and permit the examination."[42] Thus the patent inability of a party to frame its pleading gave rise to the doctrine of "discretionary power" to be used in favor of the unburdened party, but only under "exceptional circumstances."[43]

The relation of the theory of exceptional circumstances and the doctrine of discretionary power is illustrated in the case of *Public National Bank of New York v. National City Bank of New York.*[44] The plaintiff sued to recover certain of its deposits in the defendant's branch in Petrograd, Russia. The defendant interposed an affirmative defense of payment and moved for the production before trial of the plaintiff's pertinent records, since its own records had been destroyed. The court, although it dismissed defendant's appeal of a denial of its motion on other grounds, stated "it is discretionary with the courts to permit an examination of a party even where the burden of proof is entirely with that party."[45] Despite the breadth of its language, the court's decision makes it clear[46] that in conjunction with the practice

Cf. Caskie v. International Ry. Co., 230 App. Div. 591, 245 N.Y. Supp. 427 (4th Dep't 1930). See also notes 47, 49 *infra* and accompanying text.

38. Public Nat. Bank of New York v. National City Bank of New York, 261 N.Y. 316, 318, 185 N. E. 395, 396 (1933). *Contra:* Moffat v. Phoenix Brewery Corp., 247 App. Div 352, 288 N.Y. Supp. 281 (4th Dep't 1936).

39. See notes 40 and 46 *infra,* and accompanying text.

40. 138 App. Div. 249, 122 N.Y. Supp. 910 (1st Dep't 1910).

41. The resemblance to the *Texas Co.* case, *supra* notes 9-12 and accompanying text, is quite obvious. However, even had the Texas Co. been able to show similar difficulty in framing its defenses, it seems fair to assume from the language of the court in that case, that its bill would have been just as summarily dismissed. Texas Co. v. Cohen, 15 F. 2d 358 (C.C.A. 2d 1926).

42. 138 App. Div. 249, 251, 122 N.Y. Supp. 910, 912 (1st Dep't 1910).

43. "Such power, however, will only be exercised in respect to matters upon which the examining party does not have the affirmative under exceptional circumstances." Caskie v. International Ry. Co., 230 App. Div. 591, 593, 245 N.Y. Supp. 427, 429 (4th Dep't 1930).

44. 261 N.Y. 316, 185 N.E. 395 (1933).

45. *Id.* at 318, 185 N.E. at 395.

46. "In other words, the matter is discretionary with the court, although we recognize the wisdom of the practice adopted in the Appellate Divisions for the guidance of this discretion, and which confines the examination of a party to the occasion where it is

in the Appellate Divisions, it will not exercise its discretionary power and grant an examination before trial to the party not having the affirmative.[47] His failure to plead affirmatively, or his attempted inquiry into that phase of the issue which the rules of pleading make it his adversary's duty to prove, render the information thus sought not "material and necessary."[48] The Second Department of the Appellate Division has refined the "exceptional circumstances" concept and specified the three situations in which it will apply:[49] (1) litigations involving a fiduciary or quasi-fiduciary relationship, when the facts are peculiarly within the adverse party's knowledge; (2) litigations involving a principal-agent relation, when the facts are peculiarly within the knowledge of the adverse party and, (3) litigations in which a defense unanswered and established would destroy the plaintiff's cause of action.[50] Despite this liberality it is clear that these concessions are based upon the old "law-game" concept with its one-way avenue of inquiry open only to the party having a "case" to prove.

The decision in the principal case represents a change in the parties' status before trial so far as the First Department is concerned. The court is not blinded by the words, "fishing expedition." It sets aside that narrow area of exceptions over which previous New York courts used their discretionary power to facilitate an unburdened party's chances at inquiry, and places in its stead, an equal opportunity for both parties to seek and obtain all pertinent information before trial.[51] It demonstrates the distinction between the technical and real necessity for examinations before trial in pointing out that the difficulties in the procedural fallacy of determining what is necessary according to the formalities of pleading should no longer bar the litigant who can demonstrate a real need for getting at the facts.[52] The decision in the princi-

necessary or useful in establishing the plaintiff's case or an affirmative defense, thus preventing the so-called fishing expedition to get evidence." Public Nat. Bank of N.Y. v. National City Bank of N.Y., 261 N.Y. 316, 318, 185 N.E. 395, 396 (1933).

47. "[New York] courts will deny the application unless the testimony be necessary to prove the claim or an affirmative defense." McCULLEN, EXAMINATIONS BEFORE TRIAL 262 (1938).

48. As early as 1934, changes had been recommended in the New York statute, advocating the word "relevant" to replace the words "material and necessary" and advising that the following addition should be made: "(The examination) shall not be limited to matters concerning which the party seeking the examination has the burden of proof." REPORT OF THE COMMISSION ON THE ADMINISTRATION OF JUSTICE IN NEW YORK STATE 332-33 (1934).

49. Oshinksy v. Gumberg, 188 App. Div. 23, 176 N.Y. Supp. 406 (2d Dep't 1919).

50. The last instance is largely academic. In such a case, the New York Civil Practice Act § 243 states that the plaintiff is presumed to have replied thereto "by traverse or avoidance, as the case requires." If the new matter is deemed controverted by avoidance, the plaintiff, in effect, is pleading new matter upon which he has the burden of proof, and thereby, brings himself within the strict letter of the rule. *Accord*, People v. Natural Carbonic Gas Co., 140 App. Div. 802, 125 N.Y. Supp. 610 (3d Dep't 1910). *Contra*: Herzig v. Washington Fire Ins. Co., 144 App. Div. 174, 128 N.Y. Supp. 988 (1st Dep't 1911).

51. "All that may be said in favor of examinations before trial as an instrument of getting at the facts is in favor of bilateral rather than unilateral examinations and equality of opportunity in examining." 274 App. Div. 11, 13, 80 N.Y.S. 2d 25, 27 (1st Dep't 1948).

52. "What is necessary? It is necessary that each party produce material evidence. The burden of proof makes only a difference of degree. It is necessary that the party having the burden of proof go forward and make out a prima facie case in the first place, and in the end prevail by a fair preponderance of the evidence. But the defendant may not with any assurance or realism sit back and rely on the burden being elsewhere or await the development of his adversary's case before preparing to meet the issue. Thus, little

pal case gives literal meaning to the language in the New York statute and emphasizes that the want of necessary information, not the lack of affirmative allegations, should determine a party's right to pre-trial investigation. In effect it removes the need for the "exceptional circumstances" rule. It makes available all material information to the parties regardless of the time it is sought or the party seeking it; it relegates the burden of proof limitation to the background and opens the doors to a more equitable approach by the other New York appellate courts to the problem of pre-trial examination.

SAVINGS BANK TRUSTS—TYPE OF DELIVERY REQUIRED TO CREATE AN IRREVOCABLE TRUST.—Before adjudication as an incompetent, and prior to her admission to the hospital, the incompetent handed to her daughter a sealed envelope containing among other things the passbook to a savings account which was in the incompetent's name "in trust for daughter Lucy Farrell." The only evidence descriptive of the delivery was to the effect that the decedent had told her daughter "to hold it for her." Upon appeal from a decision of the Appellate Division denying the committee's petition to pay the money to the daughter, *held,* three judges dissenting, limiting the decision to the facts, an irrevocable trust was created by the delivery of the passbook. *Matter of Farrell,* 298 N. Y. 129, 81 N. E. 2d 51 (1948).

The general statements in the majority opinion superficially appear to be nothing more than a reaffirmation of the rule set forth in the *Totten*[1] case and well established in the law of trusts. This rule is that a savings bank deposit in the form of a trust is considered a tentative trust only, revocable at will, and it does not become irrevocable until the depositor dies or completes the gift by some unequivocal act such as delivery of the pass book or notice to the beneficiary.

An examination of the record of the case, however, reveals that the only testimony descriptive of the delivery of the bank book is that which is contained in the vigorous dissenting opinion of Lewis J., who points out that the delivery was made under circumstances consistent with the purpose of safekeeping only. Combining this description of the facts with the conclusion of law in the majority opinion would seem to make this case stand for the proposition that a delivery of the pass book to the beneficiary merely for safekeeping is a sufficient delivery under the *Totten* rule. We do not consider here whether this was the result intended by the court, but it seems justifiable to assert that the decision is logically susceptible of such a construction and it has been so interpreted by the minority.

Originally the New York courts held that there were only two alternatives possible when a deposit was made by one person in trust for another; either an irrevocable trust or no trust at all was created.[2] To create a trust, however, there was required in addition to the mere form of the deposit evidence of an intention to create a trust, for as was pointed out in *Beaver v. Beaver,*[3] the courts realized that the trust

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or no difference exists in the necessity of their search for material evidence." 274 App. Div. 11, 12, 80 N.Y.S. 2d 25, 26 (1st Dep't 1948).

1. Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904).

2. Martin v. Funk, 75 N.Y. 134 (1878); *accord,* Willis v. Smyth, 91 N.Y. 297 (1883).

3. 117 N.Y. 421, 430, 22 N.E. 940, 942 (1889) wherein the court said: "We cannot close our eyes to the well-known practice of persons depositing in savings banks money to the credit of real or fictitious persons, with no intention of divesting themselves of ownership. It is attributable to various reasons; reasons connected with taxation; rules

form of deposit was frequently used without any intention of creating a trust, but rather to achieve such results as minimizing taxes or circumventing bank rules limiting the amount which an individual might have on deposit. The practice of using the trust form of deposit without intending a trust precipitated the creation of a third alternative, the tentative trust, in the *Matter of Totten.*[4]

An examination of the express language of the *Totten* case demonstrates that this decision did not contemplate that a delivery for safekeeping would be sufficient to result in an irrevocable trust. Speaking of a deposit in trust for another the court stated, "It is a tentative trust merely, revocable at will, until the depositor . . . completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book. . . ."[5] Thus the *Totten* case does not state that delivery of a pass book *ipso facto* results in an irrevocable trust. Rather delivery of a pass book is mentioned as one example of an unequivocal act which manifests an intention to create an irrevocable trust. A delivery accompanied by the words, "hold this for me" however, manifests no other intention than that the one to whom the book was delivered hold it in custody. Such a delivery in no way indicates an intention to create an irrevocable trust.

Relying on the *Totten* case, the courts in New York have since demanded some unequivocal act or expression manifesting an intention to create an irrevocable trust before ruling that such a trust existed.[6] Mere delivery of the pass book, standing alone and unqualified, has been held sufficient evidence of such intent,[7] and the unexplained possession of the pass book by the beneficiary at death has likewise been found sufficient.[8] But in no case where there was a qualified delivery, such as in the case at bar, have the courts recognized an irrevocable trust.[9] In *Tierney v. Fitz-*

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of the bank limiting the amount which any one individual may keep on deposit; the desire to obtain high rates of interest where there is a discrimination based on the amount of deposits. . . ."

4. For a development of the New York doctrine on savings bank trusts, see 1 SCOTT ON TRUSTS § 58.2 (1939).

5. 179 N.Y. 112, 126, 71 N.E. 748, 752 (1904).

6. In Thomas v. Newburgh Savings Bank, 73 Misc. 308, 310, 130 N.Y. Supp. 810, 812, *aff'd,* 147 App. Div. 937, 132 N.Y. Supp. 1148 (2d Dep't 1911), the court stated: "It is the intention of the decedent, as indicated by his acts and conduct, that must determine whether there was a complete and irrevocable trust created. . . . to constitute a trust . . . there must have been an explicit declaration of trust, or circumstances which show beyond a reasonable doubt that a trust was intended to be created. . . ."

7. Stockert v. Dry Dock Savings Institution, 155 App. Div. 123, 139 N.Y. Supp. 986 (1st Dep't 1913). *But see* Matter of Halligan, 82 Misc. 30, 32, 143 N.Y. Supp. 676, 677 (Surr. Ct. 1913) wherein the court stated: "But delivery of the passbook will not in itself make the trust irrevocable; there must be words of gift or a declaration that the depositor is thereby giving to the cestui que trust the money to the credit of the depositor in the bank which issued the passbook."

8. Matter of Davis, 119 App. Div. 35, 103 N.Y. Supp. 946 (2d Dep't 1907). This case is, in fact, however not a departure from the Totten rule for the court reasoned that, since the pass book was in the possession of the beneficiary, that necessarily implied that he had notice of the trust, and notice to the beneficiary is one of the examples cited in the *Totten* case of an unequivocal act by which the depositor completes the gift.

9. 1 BOGERT, TRUSTS AND TRUSTEES § 208 (1925), "The delivery may be so qualified as to show no intent to create a trust, but merely an intent to have the beneficiary hold the book as a bailee of the depositor."

patrick[10] no irrevocable trust resulted where, after delivery of the pass book to the beneficiary, the depositor was permitted to exercise dominion over the book. Indeed, substantially the same question involved in the principal case was before the Court of Appeals in *Matthews v. Brooklyn Savings Bank*[11] and a delivery of the bank book for safekeeping was not permitted to result in an irrevocable trust.

Although the majority opinion purports to rely on the rule in the *Totten* case, it is clear that a delivery for safekeeping is not within the contemplation of that case. To attempt to extend the rule to include such a deilvery ignores the fact that a transfer of the pass book is effective only as evidence of intent, is squarely opposed to the *Totten* rule, and can serve only to render uncertain the well settled rules applicable to savings bank trusts.

TORTS—LIBEL—STATUTE OF LIMITATIONS—REPUBLICATION.—Defendant published a book containing defamatory statements concerning the plaintiff who brought a libel action based upon the sale by defendant of a single copy of the book several years after it had been printed. Special Term dismissed the complaint, the Appellate Division reversed and upon appeal the following certified question of law was submitted to the Court of Appeals: "Do sales from stock by a book publisher of copies of a book containing libelous material constitute republications of the libelous matter so as to give rise to new causes of action within the meaning of Section 52, subdivision 3, of the Civil Practice Act, where the copies sold are from an impression made and released for wholesale distribution more than one year prior to the date of such sales?" *Held,* three judges dissenting, order of the Appellate Division reversed. Sales from stock made more than a year after wholesale distribution do not constitute republication of the libel, and consequently the one year Statute of Limitations barred the plaintiff's action. *Gregoire v. G. P. Putnam's Sons,* 298 N.Y. 119, 81 N.E. 2d 45 (1948).

At common law every delivery or showing of a libelous statement to a person other than the one defamed constituted a publication which gave rise to a cause of action.[1] If such a statement was printed in a newspaper the sale of each copy was

10. 122 App. Div. 623, 107 N.Y. Supp. 527 (1st Dep't 1907). Commenting on the fact that the depositor after delivery would take the pass book from the beneficiary at will, the court said (at 625, 107 N.Y. Supp. at 528): "We do not think that this was such a giving of the book to the beneficiary as was meant by the Court of Appeals [in the *Totten* case] when it spoke of the gift of a bank book as an unequivocal act which would change the character of the trust from a tentative one to an irrevocable one."

11. 208 N.Y. 508, 510, 102 N.E. 520, 521 (1913). The court stated: "The deposit was in form a tentative and revocable trust. The acts of the depositor which are or can be invoked by the respondent as making it irrevocable or a completed gift, as matter of law, are . . . permitting the respondent to know of the deposit and its nature, and delivering the pass book to her for safekeeping. Those acts considered separately or jointly do not conclusively establish the one or the other." See Tibbits v. Zink, 231 App. Div. 339, 342, 247 N.Y. Supp. 300, 304 (3d Dep't 1931) wherein the court stated: "We recognize that, if the delivery of the bank book had been for some other purpose, like safekeeping, the trust would have remained tentative and revocable."

1. Jozsa v. Moroney, 125 La. 813, 51 So. 908 (1910); Lindley v. Delman, 166 Okla. 165, 26 P. 2d 751 (1933).

a separate and distinct publication.[2] In *Duke of Brunswick & Luneberg v. Harmer*[3] where seventeen years after the defendant had published a libel in a newspaper a single copy was sold, the court held that the plaintiff's cause of action for the original publication was barred by the five year Statute of Limitations, but as the subsequent sale seventeen years later was a new publication, he should have his action.

Under our modern system of mass publication and nationwide distribution of newspapers it became apparent that the application of the common law rule would cause great inconvenience[4] and would defeat the essential purpose of statutes of repose. Displeasure with the common law rule was expressed by one court[5] when, in discussing the right of a plaintiff to bring an action for every showing or sale of libelous matter it stated: "These old common law principles undoubtedly had their origin in a relation to the single acts of individuals, in a primitive society, and cannot, either as a matter of principle or common sense, be applied without qualification to publication of modern newspapers."[6] If the sale of each copy of a newspaper containing a libel would give rise to a cause of action a publisher would be subject to innumerable suits and our courts would be filled with burdensome litigation.[7] Viewing the old rule as obsolete and realizing the need for a more workable law the courts developed the "single publication" or "newspaper" rule. Under this rule each separate printing of a newspaper issue constitutes, in legal effect, but one publication, although such issue may consist of thousands of copies.[8] The person defamed is permitted but one action which arises on the date of the first distribution of the libelous copies.[9] Originally restricted to newspapers, the scope of the rule was soon extended to include periodicals.[10]

The single publication rule has been accepted by a majority of jurisdictions.[11] In

2. Laudati v. Stea, 44 R.I. 303, 117 Atl. 422 (1922).

3. 14 Q.B. 185, 117 Eng. Rep. 75 (1849).

4. Recognizing that newspapers render an important service to the public many courts drew a distinction between an individual committing the tort of libel and the same act being committed by a newspaper, holding that in the latter case it was necessary to consider a new element, *i.e.*, the interests of the public. The court in Hartmann v. Time Inc., 166 F. 2d 127, 134 (C. C. A. 3d 1947) expresses this thought: "Public policy must guard the freedom of the press . . . newspapers and magazines which are published on a nationwide basis should not be subjected to the harrassment of repeated law suits."

5. Age-Herald Pub. Co. v. Huddlestion, 207 Ala. 40, 92 So. 193 (1921).

6. *Id.* at 43, 92 So. at 196.

7. See note 4 *supra.*

8. "We agree with counsel for defendant that the one issue of the newspaper, though it may have been of many thousands of copies distributed in many different countries, gave but one cause of action." Julian v. Kansas City Star Co., 209 Mo. 35, 71, 107 S.W. 496, 500 (1907).

9. On this point the court in Winrod v. Time, Inc., 334 Ill. App. 59, 62, 78 N.E. 2d 708, 709 (1948) says: "The rule of law to be applied . . . is that one issue of a newspaper or magazine . . . gives rise to one cause of action . . . and the statute of limitations runs from the date of such publication."

10. Hartmann v. Time Inc., 166 F. 2d 127 (C.C.A. 3d 1947).

11. Graham v. Mixon, 177 Cal. 88, 169 Pac. 1003 (1917); Cincinnati Times-Star Co. v. France, 22 Ky. 1666, 61 S.W. 18 (1901); State v. Moore, 140 La. 281, 72 So. 965 (1916); Houston v. Pulitzer Pub. Co., 249 Mo. 332, 155 S.W. 1068 (1922). Texas, Kentucky and Washington follow the common law rule. Holden v. American News Co., 52 F. Supp. 24 (D.C. Wash. 1943); Louisville Press Co. v. Tennelly, 165 Ky. 365, 49 S.W. 15 (1899); Renfro Drug Co. v. Lawson, 138 Tex. 434, 160 S.W. 2d 246 (1942). In Renfro Drug Co. v. Lawson *supra,* the court based its decision upon the Restatement of Torts

the leading New York case of *Wolfson v. Syracuse Newspapers Inc.*[12] the Statute of Limitations had run against the original publication by defendant of a libel in a newspaper, but the plaintiff contended that the defendant had republished the defamatory matter when it allowed a person to examine a copy of the edition in its files. The court was faced with the problem of determining whether such an act on the part of a defendant publisher, after an issue had been regularly distributed, would be in law a republication so as to give rise to a new cause of action. The act of the defendant was held not to be a republication while the court implied that a subsequent *conscious act* of publication on the part of the defendant would have been a republication when it said: "Rather does defendant's conduct impress us as passive in character, with nothing to indicate a conscious intent to induce the public or any individual to read the alleged libels",[13] the case nevertheless has been cited as establishing the "newspaper" or "single publication" rule in New York.[14]

The court in the principal case was presented with a problem essentially similar to that in the *Wolfson* case. The Statute of Limitations having run against the original defamatory publication, the plaintiff contended that the defendant republished the libel when subsequently it sold a copy. In deciding that the later sale was not a republication the court applied the single publication rule to books and held that the Statute of Limitations barred the action. There is but one publication which arises at the time the book is released for sale by the publisher in accord with trade practice,[15] argues the court, and if the bar of the Statute of Limitations was lifted it would "disregard the clear purpose which the Legislature has conceived to be imperative—to outlaw stale claims."[16] If the subsequent sale of a book does not constitute a republication, a publisher might retain on hand copies of a libelous edition and, once the statute has run against the original publication, distribute these copies to the public without fear of legal restriction. Allowing a publisher complete freedom in the redistribution of a libel, whether it be a book or newspaper, once the statute has run its course, is strongly opposed by a federal court which states: "To so hold would mean that the publisher of a libel could be protected against the subsequent libels by the very fact that he had at one time published the libel. To such a doctrine this court cannot subscribe; to such an illogical conclusion this court

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§ 578 (1938) which states the common law rule: "Each time a libelous article is brought to the attention of a third person a new publication has occurred, and each publication is a separate tort. Thus, each time a libelous book or paper or magazine is sold, a new publication has taken place which . . . will support a separate action."

12. 254 App. Div. 211; 4 N.Y.S. 2d 640 (4th Dep't 1938), *aff'd*, 279 N.Y. 716, 18 N.E. 2d 676 (1939).

13. Wolfson v. Syracuse Newspapers Inc., 254 App. Div. 211, 212, 4 N.Y.S. 2d 640, 642 (4th Dep't 1938). It is not clear what the court means by conscious intent. If a publisher subsequently sold a copy of the publication containing the libel it might be supposed that such an act would be with "conscious intent." The court, however, in referring to a sale uses this language: ". . . if the publisher continues to make unsold copies of the single publication available to the public today, by sale or otherwise, [and] such conduct amounts to a republication . . . such a rule would nullify the clear purpose of the Statute of Limitations." *Id.* at 213, 4 N.Y.S. 2d at 642.

14. The court in Hartmann v. Time Inc., 166 F. 2d 127, 133 (C.C.A. 3d 1947) says that New York was one of the first states to break with the common law rule and cites the *Wolfson* case to support this statement.

15. See case cited in note 9 *supra*.

16. 298 N.Y. 119, 126, 81 N.E. 2d 45, 49 (1948).

must register its vigorous dissent . . . . such a holding would leave an innocent person subject to constant libels against his character without any redress on his part."[17]

While holding that a subsequent sale by the publisher of a libelous book does not constitute a republication, that court in the principal case recognizes a legal distinction between a reissuing and a sale from stock. During the course of its decision the court approves the case of *Mack, Miller Candle Co. v. Macmillan Co.*[18] where it was held that a "reissuing" was a republication.[19] To say that a subsequent sale will not give rise to a cause of action but a reissuing will is to draw a "distinction without a difference".[20] To make a plaintiff's remedy depend upon whether the libel has again been run through the printing press does not seem sound or just. Regardless of the means employed by a publisher in subsequently circulating the libel, whether by sale or reprinting, the effect on the plaintiff is the same and he should have the same remedy.

The dissent, going to the other extreme, would restrict the single publication rule to newspapers and apply the common law rule to the publications of books. Pointing out that the "date on a newspaper or weekly or monthly magazine marks the time of its use or importance" the minority argues that any distribution or sale of a newspaper after the date of issue would be "incidental and inconsequential"; whereas a book may grow in popularity and a greater number be distributed after the original printing causing "fresh and damaging assault on the victim". For this reason the dissent suggests that the "good old common law rule that every sale of a book is a new publication"[21] be applied. When it is considered, however, that the single publication rule was applied to newspapers and magazines because of their wide distribution, and that books as well are widely distributed, the argument of the majority, that to apply the common law rule to books would give rise to a multitude of suits, and in effect nullify the Statute of Limitations, is persuasive.[22]

A sounder and more logical rule than that set forth by either the majority or the dissent in the principal case was enunciated in *Winrod v. McFadden Publications.*[23] The court, in that case, applied the single publication rule and held that an original printing and distribution of a magazine containing a libel, though it consisted of thousands of copies, was in law but one publication giving rise to a single cause of action. In determining, however, whether a subsequent act of the publisher, with respect to the magazine, amounted to a republication the court did not distinguish between a sale and a reissuing but held that if the publisher by *any* act on his part caused the libel to be circulated once more, it constituted a republication giving rise to a new cause of action. Under this test the court found *contra* to the court in the

17. Winrod v. McFadden Publications Inc., 62 F. Supp. 249, 252 (N.D. Ill. 1945).

18. 239 App. Div. 738, 269 N. Y. Supp. 33 (4th Dep't 1934), *aff'd*, 266 N. Y. 489, 195 N. E. 167 (1934).

19. There is very little discussion of the "single publication" rule in *Mack, Miller Candle v. The Macmillan Co.* and it is not clear whether the court is applying the common law rule or the "single publication" rule.

20. 298 N.Y. 119, 128, 81 N.E. 2d 45, 50 (1948).

21. *Ibid.*

22. The majority indicates it is aware of the difference between newspapers and books. Thus: "Although it may not be said that the publication . . . of books has reached that degree of mass production . . . now prevalent in fields invaded by newspapers . . . it is our view that the publication of a libelous book . . . which enables a publisher on a given date to release to the public thousands of copies . . . affords the one libeled . . . only one cause of action." 298 N.Y. 119, 126, 81 N.E. 2d 45, 49 (1948).

23. 62 F. Supp. 249 (N.D. Ill. 1945).

principal case and decided that a subsequent sale of a copy of the magazine containing the libel, since it was due to the act of the publisher, was in law a republication. The court in the federal case also defends its position by arguing that the Statute of Limitations could not be a nullity under this test for it is within the control of the defendant publisher whether or not he will be protected by the Statute.[24]

It would seem that the court in the principal case, by holding that a subsequent sale does not give rise to a cause of action, has made an unwarranted extension of the single publication rule. The rule originally was developed to protect a publisher against a multipicity of suits; it was not designed to permit unlimited republications of a libel. It is submitted that any action by a publisher, subsequent to the original printing, which causes further circulation of a libelous book, newspaper, or magazine should be considered a republication of the libel and give rise to a cause of action. Under such a rule not only does a plaintiff have legal redress for the injury he has sustained, but it may be reasonable to suppose that affording such a remedy would act as a deterrent to the redistribution of libelous material by publishers.

24. "It is only some action of the publisher that can cause another cause of action to arise. . . ." *Id.* at 252.