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## Recent Decisions

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chance to be heard, they produce publicity if that is wanted, and they make a "record" if a record is wanted. In order to follow the pattern of most state investigations we held in June 1940 public hearings at Albany for a day, Buffalo for a day, and New York City for two days. Some of the witnesses we invited to speak and some volunteered. In all, 54 witnesses appeared, including representatives of labor organizations, business organizations and bar associations. One witness confined his testimony to an attack on the Securities and Exchange Commission, which was of course not in our bailiwick. At the end of the last day of hearings we found ourselves listening to a wandering story about an alleged old injustice in the New York City school system, not of fresh interest and little enough related to what we were doing. On the whole the statements at the public hearings were of a high order, and it was wise to hold the hearings.

## RECENT DECISIONS

ATTORNEY AND CLIENT—DUTY OF AN ATTORNEY TO RENDER GRATUITOUS LEGAL SERVICES TO INDIGENT DEFENDANTS ON THE ORDER OF THE COURT.—An attorney duly licensed to practice law in the State of Utah was appointed by the court to defend an indigent defendant on a charge of burglary. Following the services rendered, the court ordered the County to pay the attorney a fee of \$75.00. When the County refused to comply, the attorney filed a petition for a writ of mandamus. The County interposed a demurrer which was overruled. On appeal, *held*, a court can compel an attorney, as an officer of the court, to perform gratuitous services for an indigent defendant. *Ruckebrod v. Mullins et al.*, 133 P. (2d) 325 (Utah 1943).

In these days of higher wages and increased cost of living, the declaration that an attorney can be compelled to serve without compensation seems to be strangely inconsistent with current trends in mercantile and commercial relations. The origin and explanation of the unusual burden placed upon the attorney must be sought in the history of the advocate's calling. Beginning with the Roman Law and running through the civil and common law, there seems to be the constant recognition of the high duty of an attorney to serve his client without right to demand a fee. His relationship to his client has never been considered as a purely commercial one, but rather as one of an advisor and confidant, in which personal service was the dominant factor. In the Roman Law, while it was customary to pay a fee in advance of the performance of legal services, this tender was called a gratuity and created no legal obligation upon the client.<sup>1</sup> Under the French Civil Law, it was permissible for an advocate to recover his fees by legal action, but the Bar of Paris regarded such suit as dishonorable, and penalized the attorney, even to the point of disbarment, for

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1. SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS, (5th Ed., 1907) 138-9. "In the progress of [Roman] society, the busines of advocating causes became a distinct profession; and then it was usual to pay a fee in advance, which was called a gratuity or present. As this was a mere honorary recompense, the client was under no legal obligation to pay it."

bringing such an action.<sup>2</sup> Blackstone records the fact that at common law the attorney was not allowed to demand a fee, although he was privileged to accept a gratuity for his services.<sup>3</sup>

Turning to the early common law in America, many jurisdictions held that, at least in the absence of a special contract, a lawyer could not ethically, or even legally, recover a fee from a client as a matter of right. In New Jersey<sup>4</sup> and in Pennsylvania,<sup>5</sup> the courts followed the rigorous rule of the early common law and prohibited action by an attorney for the recovery of his fees. Turning to the early law of New York, while it was a Dutch colony, a system of fixed fees was established, but it was also provided that attorneys should serve the poor "gratis, for God's sake, but may ask of the wealthy the fees specified".<sup>6</sup> Thus it appears that the entire trend of classical and common law placed upon the attorney severe restrictions regarding his right to charge and collect fees from his client.

But within the past century the rule denying the attorney the right to sue for legal fees, has been greatly changed.<sup>7</sup> The modern viewpoint is emphatically stated by Chancellor Walworth, in *Adams v. Stevens and Cagger*,<sup>8</sup> in the following words ". . . it is wholly inconsistent with all our ideas of equality to suppose that the business or profession by which anyone earns the daily bread of himself, or of his family,

2. SHARSWOOD, *op. cit. supra* note 1, 152.

3. 3 BLACKSTONE, COMMENTARIES (13th Ed., 1800) 28: ". . . serjeants and barristers . . . practised *gratis*, for honour merely, or at most for the sake of gaining influence: and . . . a counsel can maintain no action for his fees; which are given . . . not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation. . . ."

4. Seeley v. Crane, 15 N. J. Law 35 (1835). The law of New Jersey was certainly the same as the common law of England. Speaking through Hornblower, C. J., the Supreme Court said, *id.* at 37: "[We] have reflected . . . to see whether . . . any thing in . . . our judicial institutions . . . would justify us . . . in departing from the ancient rule . . . it would be neither for the honor nor profit of the bar, to be going to law, for the recovery of their fees. Such a practice would . . . render the members of the bar odious, and be derogatory to the character of a liberal and learned profession."

5. Mooney v. Lloyd, 5 Sergeant & Rawless, 411, 415 (Pa. 1819). Pennsylvania was in agreement with New Jersey on this point. Speaking through Tilghman, C. J., the Supreme Court unanimously held that no action for fees lies at common law. "This then is the law which our ancestors brought . . . from England; nor did . . . their successors think proper to alter it. . . . It . . . is not pretended that an action for fees was ever sustained, before our revolution, or in this court, since the revolution."

6. 1 CHESTER, COURTS AND LAWYERS OF NEW YORK (1925) 144 n. These fees are set out in full in a note at pages 246 ff. One rule provides, "No drinking treats, or other extraordinary presents, gifts, or *douceurs* . . . shall be . . . demanded. . . ."

7. See SHARSWOOD, *op. cit. supra*, page 146 ff.

8. 26 Wend. 451 (N. Y. 1841). The rule in this case was extended in *Matter of Montgomery's Estate*, 272 N. Y. 323, holding that an attorney under contract who is dismissed without cause can recover in *quantum meruit* on an implied contract, and if his services are worth it he can even recover more than he was to receive under the original contract that the client canceled.

is so much more honorable than the business of other members of the community as to prevent him from receiving a fair compensation for his services on that account."<sup>9</sup>

The exact problem of the *Ruckenbrod* case concerns the more limited duty of an attorney to act as counsel to an indigent person without compensation. The general rule is stated by Chief Judge Cardozo in *People v. Culkim*:<sup>10</sup> "Membership in the bar is a privilege burdened with conditions' . . . He [an attorney] might be assigned as counsel for the needy, . . . serving without pay."<sup>11</sup> This statement accurately expresses the prevailing common law rule unless altered by constitution<sup>12</sup> or statute.<sup>13</sup> A vigorous dissent is expressed by the minority jurisdictions, even in the absence of a statute or constitutional provision altering the common law.<sup>14</sup>

A pertinent question of constitutionality has been frequently discussed in connection with the attorney's right to practice law: Whether such right is protected by the privileges and immunities clause of the Fourteenth Amendment. The courts have generally held that the right to practice law within a state is not a privilege incident to citizenship of the United States, but is subject to control by the several states.<sup>15</sup>

Thus we may conclude that the principal case correctly appraises the common law obligation of an attorney to render gratuitous services on behalf of indigent defendants under order of a court. Lacking constitutional or statutory provision for such compensation, the high calling of an attorney as an officer of the court places him in a peculiar category.<sup>16</sup> Perhaps the best explanation of the stated rule is found in

9. *Adams v. Stevens and Cagger*, 26 Wend. 451, 455 (N. Y. 1841).

10. *People v. Culkim*, 248 N. Y. 465, 162 N. E. 487 (1928).

11. *Id.* at 470-471, 162 N. E. at 490.

12. Article 1, Section 21 of the Constitution of Indiana has been interpreted as providing that a court has no right to require an attorney to prosecute or defend a case unless at the same time it grants him a fee for so doing. *Blythe v. State*, 4 Ind. 525.

13. N. Y. CODE OF CRIM. PROC., § 308 provides that counsel assigned to an indigent defendant in an action where the possible penalty is death, may be allowed in the discretion of the court up to \$1,000 for his services, and this sum is a charge against the county in which the indictment originated. Under the New York Civil Practice Act, Sec. 196, 198, an attorney can be compelled to serve without pay in a civil suit, but is entitled to his reasonable expenses, if successful, where he has been assigned to prosecute for or defend an indigent. A Nevada statute, Nevada Compiled Laws (Hillyer, 1929), Sec. 11357, grants to the court discretion to allow a maximum of \$50 for a trial, and \$50 more for an appeal, as the fee of an attorney assigned to defend an indigent party.

14. There is a strong presumption that Indiana, at least, would follow the minority view even in the absence of the constitutional provision. In *Webb v. Baird*, 6 Ind. 13 (1854) the court said: "That any class should be paid for their particular services in empty honors, is an obsolete idea, belonging to another age, and to a state of society hostile to liberty and equal rights. The legal profession, having been thus properly stripped of all its . . . peculiar emoluments, the public can no longer justly demand . . . gratuitous services which would not be demandable of every other class."

15. See *Philbrook v. Newman*, 85 Fed. 139 (1898); *Mitchell v. Greenough*, 100 F. (2d) 184 (1938); *Bradwell v. Illinois*, 16 Wall. 130 (U. S. 1872). Cf. also *In re Lockwood*, 154 U. S. 116 (1894).

16. In *Arkansas County v. Freeman & Johnson*, 31 Ark. 266, 267 (1876), it was held:

Sharswood's classic essay on professional ethics: "It is to be hoped, that the time will never come, at this or any other Bar in this country, when a poor man with an honest cause, though without a fee, cannot obtain the services of honorable counsel, in the prosecution or defence of his rights."<sup>17</sup>

**BAILMENTS—LIABILITY OF GARAGE KEEPER FOR UNAUTHORIZED ACT OF SERVANT.**—Plaintiff stored his automobile in a garage owned by defendant. An attendant employed by the defendant garage keeper to wash cars and to watch the premises, without permission and beyond the scope of his employment, took the automobile from the garage and damaged it as a result of an accident. The trial court held the defendant liable on the theory that the rule under which common carriers are liable for the acts of their employees should be extended to garage keepers. Upon appeal to the Appellate Term, the decision was affirmed, upon the theory, however, that the defendant was negligent in not making a more extensive investigation as to the employee who had caused the accident before hiring him; upon appeal to the Appellate Division, *held*, two justices dissenting, the defendant is liable for breach of the contract of bailment. *Castorina v. Rosen*, 265 App. Div. 129, 38 N. Y. S. (2d) 753 (1st Dep't 1942).

A garage keeper is a bailee for hire when the motor vehicle is delivered over to his possession and control.<sup>1</sup> So also is the operator of a parking space, where possession and control of the car is assumed by the attendant.<sup>2</sup> Where, however, possession and control is retained by the car-owner, one of the essential elements of a bailment is lacking,<sup>3</sup> and whether a person simply hires a place in which to leave his car or whether he has turned its possession and custody over to another depends on the place, the conditions and the nature of the transaction.<sup>4</sup> Where the space in which to park the car is rented, the relationship is more akin to that of landlord and tenant, rather than that of bailor and bailee.<sup>5</sup>

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"Attorneys are a privileged class; they only are permitted to practice in the courts, and they are officers of the court. The law confers on them rights and privileges, and . . . imposes duties. . . . The services required . . . are such as charity and humanity demand in behalf of the destitute . . . and the presumption cannot be admitted that they serve in expectation of fee or reward."

17. SHARSWOOD, *op. cit. supra* note 1, 151.

1. *Neff v. Campbell*, 106 Cal. App. 286, 289 Pac. 217 (1930).

2. *Galowitz v. Magner*, 208 App. Div. 6, 203 N. Y. Supp. 421 (2d Dep't 1924); *Beetson v. Hollywood Athletic Club*, 109 Cal. App. 715, 293 Pac. 821 (1930).

3. *Osborn v. Cline*, 263 N. Y. 434, 189 N. E. 483 (1934).

4. *Thompson v. Mobile Lt. & Ry. Co.*, 211 Ala. 525, 101 So. 177 (1924); *Osborn v. Cline*, 263 N. Y. 434, 189 N. E. 483. In the latter case, a motor vehicle was stored on an open parking space owned by defendant. A fee of twenty-five cents per day was paid for parking the vehicle. There was no system of checking, so that people coming for their cars just drove them away. The persons parking their vehicles were instructed to lock their parked cars. The court held it was a question of fact for the jury whether merely space was hired or a bailment was established.

5. *Albert & Davidson Pipe Corp. v. Gibney Iron & Steel Co.*, 110 N. J. Eq. 285, 159

The established rule in this country is that a bailee for hire is not an insurer<sup>6</sup> and is bound only to exercise reasonable and ordinary care with respect to the subject of the bailment, and in the absence of negligence on the part of the bailee, which occasions loss or injury, the bailee is not liable.<sup>7</sup> However, the authorities are in conflict on the question whether the bailee is liable for damage caused to the property bailed by the unauthorized act of the bailee's servant while acting beyond the scope of his employment. What appears to be the majority view, judging by the more recent cases, holds that the duty of safe return which the bailee owes to the bailor is breached by such an act of the servant, since that duty is one imposed by the bailee's contract, from which he cannot by any conduct of his own alone, much less by shifting the responsibility to his servant, release himself.<sup>8</sup> Liability of the bailee grows out of the fact that the bailee has failed to do a thing he agreed to do. In regard to the duty to protect the subject of the bailment, it has been held that the servant is acting in a representative capacity for the bailee, and the bailee is therefore accountable even for acts outside the scope of his employment.<sup>9</sup> The minority of jurisdictions take the view that a bailee is not an insurer as to his employee's conduct, is responsible only for ordinary and reasonable care in the latter's selection and retention,<sup>10</sup> and where the bailee is thus careful, he is not held liable for acts which violate the duties of the servant's employment.<sup>11</sup> The Courts sustaining this minority view, in

Atl. 676 (1932). In this case, the garage owner who rented space in the garage was held to be a landlord and not a bailee.

6. Fairmount Coal Co. v. Jones & Adams Co., 134 Fed. 711 (C. C. A. 7th 1905); Adams v. New Jersey Steamboat Co., 151 N. Y. 163, 45 N. E. 369 (1896); Copelin v. Berlin Dye Works & Laundry Co., 168 Cal. 715, 144 Pac. 961 (1914); Scott-Mayer Commission Co. v. Merchants' Grocer Co., 147 Ark. 158, 226 S. W. 1060 (1921).

7. Claffin v. Meyer, 75 N. Y. 269, 31 Am. Rep. 654 (1878); White Swan Laundry v. Blue, 233 Ala. 663, 137 So. 898 (1931); Crescent Bed Co. v. Jonas, 206 Cal. 94, 273 Pac. 28 (1928); Bradley v. Cunningham, 61 Conn. 485, 23 Atl. 932 (1892); Taylor v. Downey, 104 Mich. 532, 62 N. W. 716 (1895).

8. Pratt v. Martin, 183 Ark. 365, 35 S. W. (2d) 1004 (1931); Donaldson v. Ludlow & Squier, 94 N. J. Law 306, 110 Atl. 690 (1920); National Liberty Ins. Co. of America v. Sturtevant-Jones Co., 116 Ohio St. 229, 156 N. E. 446 (1927); Stranahan Bros. Catering Co. v. Coit, 55 Ohio St. 398, 45 N. E. 634 (1896).

9. Adams v. Cost, 62 Md. 264, 50 Am. Rep. 211 (1884).

10. The reason advanced by the Appellate Term, 33 N. Y. S. (2d) 75 (Sup. Ct., 1st Dep't, 1941), in the instant case for holding the defendant liable (negligence in failing to investigate the employee sufficiently before hiring him) is not of much aid in the solution of the general problem. In many cases, evidence of such negligence is lacking and this approach seems to evade the decisive issue of law presented.

11. Firestone Tire and Rubber Co. v. Pacific Transfer Co., 120 Wash. 665, 208 Pac. 55 (1922); Halty v. Markel, 44 Ill. 225, 92 Am. Dec. 182 (1867); Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168 (1821). There is language in the texts which seems to lend some support to the minority view; for instance Justice Story writes: "But the master is not universally liable for the misdeeds of his servants; and therefore we are to distinguish whether the *act* complained of *has* been done in the service of the master, or in obedience to his orders or not; for in the former cases only is the master responsible." STORY, BAILMENTS (9th ed. 1878) 352.

relieving the bailee of liability, apply general principles of tort liability based upon the doctrine of *respondet superior*.<sup>12</sup>

The contrasting views on the liability of bailees generally for the acts of their servants outside the scope of their employment also find expression in those cases dealing specifically with garage keepers. Here again the majority opinion is that the garage keeper is liable for the acts of an employee in violation of his duties.<sup>13</sup> Liability is imposed, even though the employee exceeded his duties or contravened his master's directions, because it is held that the act of the servant constitutes a breach of the master's contract.<sup>14</sup> Although the basis for this result is variously expressed, the underlying premise of all the decisions favoring the majority view is that the garage owner's duty arises from "a direct and personal obligation" inherent in this type of bailment agreement.<sup>15</sup> The effect of such a decision is to place upon the garage keeper a non-delegable duty not only to protect the bailed vehicle but to prevent its use except upon the bailor's instructions. Courts supporting this view do not mean to hold that the garage keeper is an absolute insurer against all risks. No court has gone this far. It is universally held that damage to the vehicle occasioned without any fault on the part of this type of bailee, or its theft by a stranger, will exculpate the bailee.<sup>16</sup> However, damage to the vehicle negligently or voluntarily caused, or its theft, by an employee of the garage keeper will render the latter liable on the ground apparently that the mere employment of the wrong-doing employee places him in a position to commit wrong and the garage man's contract in effect insures the owner against such a contingency. Those jurisdictions which follow the minority view on the liability of bailees generally for acts of a servant outside the scope of his employment make no distinction in the case of the garage owner.<sup>17</sup> *Fireman's Fund Ins. Co. v. Schreiber*<sup>18</sup> appears to be the leading case, judging by the frequency of its citation,

12. See 4 WILLISTON, CONTRACTS (Rev. Ed. 1936) 2960.

13. *Walters v. U. S. Garage*, 131 Me. 222, 160 Atl. 758 (1932); *Vanatta v. Tolliver*, 82 Pa. Super. Ct. 546 (1923); *Roberts v. Kinley*, 89 Kan. 885, 132 Pac. 1180 (1913); *Manhattan Fire & Marine Ins. Co. v. Grand Central Garage*, 54 Nev. 147, 9 P. (2d) 682 (1932).

14. *Corbett v. Smeraldo*, 91 N. J. Law 29, 102 Atl. 889 (1918); *Employers' Fire Insurance Co. v. Consolidated Garage & Sales Co.*, 85 Ind. App. 674, 155 N. E. 533 (1927).

15. *Evans v. Williams*, 232 Ill. App. 439 (1924).

16. All courts agree that a garage keeper is not an insurer against all risks in regard to vehicles bailed with him. *Hogan v. O'Brien*, 212 App. Div. 193, 208 N. Y. Supp. 477 (3d Dep't 1925); *Southern Garage Co. v. Brown*, 187 Ala. 484, 65 So. 400 (1914); *Morgan Millwork Co. v. Dover Garage Co.*, 7 Boyce 383, 108 Atl. 62 (Del. 1919). The garage-keeper, as a bailee for hire, is only liable for a breach of the duty to use ordinary and reasonable care with respect to the bailed property. *Mehessy v. Mission Garage*, 60 Cal. App. 275, 212 Pac. 643 (1922); *Blackburn v. Depoyster*, 209 Ky. 105, 272 S. W. 398 (1925); *Tatro v. Baker-Fisk-Hugill Co.*, 215 Mich. 623, 184 N. W. 449 (1921).

17. *Evans v. A. L. Dyke Automobile Supply Co.*, 121 Mo. App. 266, 101 S. W. 1132 (1906); *Montana Auto & Garage Co. v. Kearney*, 61 Mont. 435, 202 Pac. 578 (1921); *Cobb v. Simon*, 119 Wis. 597, 97 N. W. 276 (1903).

18. 150 Wis. 42, 135 N. W. 507 (1912). In *Blashfield* this case is cited as representing the prevalent view, although the author does state that more recent decisions show a trend to the contrary. 3 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW (St. Paul, 1927) 2725.

relieving the garage-owner of liability. It is practically on "all fours" with the principal case and here also the court was closely divided.

Since the bailor-bailee relation results from contract, express or implied, suit by the bailor against the bailee is usually brought for breach of the contract. However, the action may sound in tort, since the act which constitutes the breach of contract in the type of case under consideration may also, under the view which is here assumed to prevail today in the majority of jurisdictions, be a breach of a duty imposed upon the bailee by virtue of the relationship.<sup>19</sup> In either event, whichever theory of liability is adopted, the result should be the same in the final analysis, for liability of the garage keeper will depend upon the courts' determination whether the garage keeper is under a legal duty to insure the fidelity of his employees. However the court attempts to articulate its decision—whether this duty is read into the contract by implication or found to exist independently of the contract by imposition of the law—the result will be determined by the court's judgment as to the position occupied by the garage keeper in modern society.<sup>20</sup>

Exceptional liability has been imposed upon common carriers and innkeepers from early days and for all practical purposes they are considered to be insurers of the property entrusted to them. This extreme liability had its origin in the policy of the law to protect shippers and travelers from collusion between the carrier or the innkeeper and thieves and robbers.<sup>21</sup> While no court has held a garage keeper to a similar degree of responsibility, the nature of the modern garage keeper's calling, conjoined with the nature of the subject matter of the bailment, suggests that similar reasons of policy require a more strict responsibility be placed upon him than in the case of the ordinary bailee, at least in regard to the acts of those whom he employs to perform the contract of bailment.<sup>22</sup> This thought was apparently in the mind of the trial court in the instant case when he held that the common carrier rule of lia-

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19. *La Plante v. Du Pont*, 223 Mich. 343, 193 N. W. 820 (1923); *Voyt v. Bekins Moving & Storage Co.*, 119 Pac. (2d) 586 (Ore. 1941); see annotation, 12 L. R. A. (N. S.) 924 (1908).

20. Holmes, *The Path of the Law* (1897) 10 HARV. L. REV. 457, 466-7.

21. *Railroad Co. v. Lockwood*, 17 Wall. 357 (U. S. 1873); *Chicago & Eastern Illinois Railroad Co. v. Collins Produce Co.*, 249 U. S. 186 (1919); *Hulett v. Swift*, 33 N. Y. 571, 88 Am. Dec. 405 (1865); *Ingallsbee v. Wood*, 33 N. Y. 577, 88 Am. Dec. 409 (1865).

22. In this connection the language of Judge Porter in *Hulett v. Swift*, 33 N. Y. 571, 572, 88 Am. Dec. 405, 406, is pertinent; he writes: "The care of the property was usually committed to servants, over whom the guest had no control, and who had no interest in its preservation, unless their employer was held responsible for its safety. In case of depredation, by collusion, or of injury or destruction, by neglect, the stranger would, of necessity, be at every possible disadvantage, he would be without the means either of proving guilt or detecting it. The witnesses to whom he must resort for information, if not accessories to the injury, would, ordinarily, be in the interest of the innkeeper. The sufferer would be deprived, by the very wrong of which he complained, of the means of remaining, to ascertain and enforce his rights, and redress would be well nigh hopeless, but for the rule of law casting the loss on the party intrusted with the custody of the property, and paid for keeping it safely."



bility should be extended to garage owners.<sup>23</sup> A motor vehicle in this respect may be said to differ from the subjects of other bailments: its mobility, the easy access which attendants in garages have to its use, coupled with the difficulty which the bailor would experience in detecting and proving its unauthorized use, seem to afford a basis for applying a different rule to garage keepers than to other bailees. Legislative recognition of such factors may very well have prompted the enactment of penal legislation making the unauthorized use of motor vehicles a crime.<sup>24</sup>

It is not clear from the opinion of the majority of the Appellate Division in the principal case whether they intend their decision to be limited to the liability of the garage owners for the unauthorized acts of their employees, or whether the decision represents their view of the New York Law in regard to bailees generally. The statement in the majority opinion that the problem is a novel one in the Appellate Courts of this state<sup>25</sup> would seem to indicate the former, since the early decision of the highest court in the State, *Schmidt & Webb v. Blood & Green*,<sup>26</sup> which relieved a warehouseman of liability for a theft by his employee, has never been reversed and was relied upon by the dissenting justices. The fact that in the principal case the car was merely misused, whereas the hemp in the *Schmidt* case was stolen, apparently does not constitute a distinguishing feature, since the unauthorized use of a car would be larceny today.<sup>27</sup> The *Schmidt* case would seem to have placed New York with the minority of jurisdictions on the question of liability of bailees generally for the act of the servant, and unless the fact that the defendant in the principal case was a particular type of bailee (that is, a garage keeper) distinguishes the case, it seems contrary to the earlier decision. An adjudication by the Court of Appeals will be welcomed in clarifying not only the liability of bailees generally for the unauthorized acts of employees beyond the scope of their employment, but specifically in defining the exact liability of garage owners for such unauthorized actions.

CONFLICT OF LAWS—FOREIGN TORT—EFFECT OF SUBSEQUENT MARRIAGE OF THE LITIGANTS.—Plaintiff, a resident of New York, commenced an action in New York for personal injuries sustained in Massachusetts while she was riding as a guest in an automobile owned and operated by the defendant. Following the commencement of the action the plaintiff married the defendant in New York. Defendant in a supplemental answer pleaded the stated marriage and that the law of Massachusetts barred suits

23. *Castorina v. Rosen*, 265 App. Div. 129, 130, 38 N. Y. S. (2d) 753, 754.

24. N. Y. Penal Law § 1293 a; see *Van Vetchen v. American Eagle Fire Ins. Co.*, 239 N. Y. 303, 146 N. E. 432 (1925); cf. *Pennsylvania Indemnity Fire Corp. v. Aldridge*, 117 F. (2d) 774 (App. D. C. 1941); see language of Hinkley, J., in *De Long v. Massachusetts Fire & Marine Ins. Co.*, 142 Misc. 654, 256 N. Y. Supp. 300 (1932) *reversed* 238 App. Div. 760, 262 N. Y. Supp. 165 (1933).

25. In *New Amsterdam Casualty Co. v. Greenberg*, 153 Misc. 347, 274 N. Y. Supp. 854 (1934), the garage keeper was held not liable for the unauthorized act of a servant. In *Einhorn v. West 67th Street Garage Inc.*, 191 App. Div. 1, 180 N. Y. Supp. 704 (1920), the court considered it necessary to find the negligent act of the employee within the scope of the attendant's employment as a basis for sustaining a verdict against the garage keeper.

26. 9 Wend. 268 (N. Y. 1832).

27. Note 24, *supra*.

between husband and wife. *Held*, the Massachusetts statute denying the right of a wife to sue her husband dealt with substantive rights and not with matters of remedy. Such a law conditioning the plaintiff's right is binding upon the forum. The fact that the defendant had liability insurance does not provide an independent basis for the plaintiff's action. *Coster v. Coster*, 289 N. Y. 438, 46 N. E. (2d) 509 (1943).

The instant case brings back the now historic distinction between substance and procedure.<sup>1</sup> The problem of distinguishing right and remedy has presented a most difficult question to the courts. There is little dispute as to the rule that the *lex fori* generally governs all matters relating to remedy and that the *lex loci* binds in matters of substantive rights.<sup>2</sup> But what is "right" and what is "remedy"? The distinction is incapable of exact or final definition; the difference is sometimes a question of minute degree.<sup>3</sup>

In the instant case it was necessary to establish the existence of a continuing right of action in the plaintiff in order to permit the plaintiff to sue in New York. If the Massachusetts statute<sup>4</sup> extinguished the right of the wife to sue her husband, rather than merely barred her remedy such statute would be binding on the New York courts.<sup>5</sup> Legislation in some states granting each spouse a right to sue the other has materially lessened the common law unity, which was the classical basis of the marital relation.<sup>6</sup> In these states a substantive right is clearly created in favor of the injured spouse.<sup>7</sup> Though New York and Massachusetts both adhere to the concept of unity in the marital relation, they differ in the extent to which they permit suits of one spouse against the other. Recent amendments to the New York law create unlimited rights of action in the wife against the husband.<sup>8</sup> The contrary viewpoint, evidenced

1. McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws* (1930) 78 U. OF PA. L. REV. 933; Cook, *Substance and Procedure in the Conflict of Laws* (1933) 42 YALE L. J. 333, 341; Kocourek, *Substance and Procedure* (1941) 10 FORDHAM L. REV. 157.

2. GOODRICH, CONFLICT OF LAWS (2d ed. 1938) § 92; 2 BEALE, CONFLICTS OF LAWS (1920) § 378.4; Gray v. Gray, 87 N. H. 82, 174 Atl. 508 (1934); Buckeye v. Buckeye, 203 Wis. 248, 234 N. W. 342 (1931); Vanderwerken v. N. Y. & N. H. R.R., 6 Abb. Prac. 239 (N. Y. 1893); Phillips v. Eyre, L. R. 6 Q. B. 1 (1870); Loucks v. Standard Oil Co., 224 N. Y. 99, 120 N. E. 198 (1918); Baltimore & Ohio R.R. v. Joy, 173 U. S. 226 (1899).

3. Dexter v. Edmands, 89 Fed. 467, 468 (C. C. D. Mass. 1898).

4. Mass. Gen. Law (Ter. Ed. 1931) c. 209, § 6.

5. Young v. Masci, 289 U. S. 253 (1933); Mertz v. Mertz, 271 N. Y. 466, 3 N. E. (2d) 597 (1936); but even if the right were granted by Massachusetts it would not be enforced if contra to the public policy of New York. Mertz v. Mertz, *supra*; (1936) 5 FORDHAM L. REV. 496.

6. Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1914) where the court reviews the bases of the statutes of the various states which modify the common law. In Williamson v. Osenton, 232 U. S. 619, 625 (1914) Justice Holmes speaks of the domestic unity as ". . . the now vanishing fiction of the identity of person".

7. Keister v. Keister, 123 Va. 157, 96 S. E. 315 (1918); Thompson v. Thompson, 218 U. S. 611; Rogers v. Rogers, 265 Mo. 200, 177 S. W. 382 (1915); Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924).

8. N. Y. DOMESTIC RELATIONS LAW § 57 creates a right of action in one spouse against

in Massachusetts, opposes this relaxation in suits between the spouses on the following grounds: fear of fraud,<sup>9</sup> further disturbance of the domestic peace<sup>10</sup> and the adequacy of other remedies afforded the wife by the equity, criminal and divorce courts.<sup>11</sup>

The language of the Massachusetts statute is at least ambiguous, it provides: "A married woman may sue and be sued in the same manner as if she were sole; but this section shall not *authorize* suits between husband and wife."<sup>12</sup> In *Zwick v. Goldberg*<sup>13</sup> the court said: "Our statute . . . does not in terms prohibit suits between husband and wife. It simply provided that 'this section shall not *authorize* suits between husband and wife.'" Though this case seems to infer that the statute merely withholds a remedy, the weight of authority in Massachusetts,<sup>14</sup> the federal court<sup>15</sup> and the neighboring states<sup>16</sup> holds that the statute denies a substantive right and does not merely withhold a remedy. If we apply the rule suggested for testing out the substantive or procedural aspect of the law of a foreign state,<sup>17</sup> namely, examining the statute in the light of the evils which led to its enactment, the policy which underlies it and all the consequences which have resulted from it, there is little doubt that the Massachusetts statute negatives any substantive right of action between the spouses.

But in the principal case the marriage followed the filing of the defendant's answer. However, it is well settled that where the right to maintain tort actions between spouses has been denied the subsequent marriage of the parties will extinguish a prior existing right of action unless the cause had been reduced to judgment.<sup>18</sup> Even the termination of the marital status will not create a right of action for a tort committed

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the other; while N. Y. INSURANCE LAW § 167, s. 3 to prevent collusion, provides that no policy or contract shall be deemed to insure against any liability of an insured because of injuries to his or her spouse or because of injury to or destruction of property of his or her spouse unless express provision relating specifically thereto is included in the policy. N. Y. Vehicle & Traffic Law § 94 (q) provides that motor vehicle liability policies ". . . shall not insure any liability on account of bodily injury . . . to the spouse of the injured".

9. *Lord v. Paker*, 3 Allen 127 (Mass. 1861); *Bassett v. Bassett*, 16 Browne 99 (Mass. 1873); *Bahr, Intermarital Torts* (1939) 4 NEWARK L. J. 355, 403; *McCurdy, Torts between Persons in Domestic Relation* (1930) 43 HARV. L. REV. 1030, 1050.

10. STUMBERG, *CONFLICT OF LAWS* (1937) 187; *Edwards v. Stevens*, 3 Allen 315 (Mass. 1861); *Ingham v. White*, 4 Allen 412 (Mass. 1862).

11. *Thompson v. Thompson*, 218 U. S. 611, 619 (1910).

12. Mass. Gen. Law (Ter. Ed. 1931) c. 209, § 6. (Italics added).

13. 304 Mass. 66, 70, 22 N. E. (2d) 661, 663 (1939).

14. *Lubowitz v. Taines*, 293 Mass. 39, 198 N. E. 320 (1935); *Gahm v. Gahm*, 243 Mass. 374, 376, 137 N. E. 876 (1922); *Young v. Young*, 251 Mass. 218, 146 N. E. 574 (1925).

15. *Pepper v. Morrill*, 24 F. (2d) 320 (C. C. A. 1st, 1928).

16. *Miltimore v. Milford Co.*, 89 N. H. 272, 197 Atl. 330 (1938); *Dawson v. Dawson*, 224 Ala. 13, 138 So. 414 (1931).

17. *McClintock, Distinguishing Substance and Procedure in the Conflict of Laws* (1929) 78 U. OF PA. L. REV. 933, 941.

18. *Spector v. Weisman*, 40 F. (2d) 792 (App. D. C., 1930); *Notes v. Synder*, 4 F. (2d) 426 (App. D. C. 1923); *Newton v. Weber*, 119 Misc. 240, 196 N. Y. Supp. 113 (1922); *contra: Shirley v. Ayres*, 201 N. C. 5, 158 S. E. 840 (1931).

during coverture.<sup>19</sup>

The principal case is further complicated by the existence of a liability insurance policy held by the husband, as the insured. It is argued that, considering the insurer the real party in interest, the existence of such policy provided an independent ground for the plaintiff's action. The question has been left open in Massachusetts,<sup>20</sup> and is governed by statutory provisions in New York,<sup>21</sup> which would defeat the plaintiff's recovery in this case. The courts, aware of the danger of collusion, have held that the presence of insurance does not alter the spouse's rights;<sup>22</sup> liability insurance does not create a right in the injured spouse but only recompenses it when it otherwise exists.<sup>23</sup> Here there was no original liability of husband to wife, hence it would be incongruous to create liability because of the mere existence of a policy of insurance.

It is evident—in the light of the principles distinguishing substance and procedure, the judicial interpretations of the Massachusetts statute, despite the incident of a subsequent marriage and the existence of a liability insurance policy—that the New York court was correct in dismissing the complaint and in finding that the Massachusetts statute extinguished a substantive right at the moment of the intermarriage of the plaintiff and defendant.

EVIDENCE—PRESUMPTIONS OF LAW AND FACT—BURDEN OF PROOF.—The claimant, the divorced wife of the decedent, presented a claim for \$7500 against his estate. She introduced into evidence a promissory note for that amount and rested. The executors then placed in evidence six checks totaling \$7500, the proceeds of which were admittedly received by the claimant. They also introduced into evidence a separation agreement between the claimant and the decedent, under which the decedent was obligated to pay claimant \$150,000 in ten equal annual installments. It was stipulated that approximately \$73,000 had been received by the claimant under the separation agreement, and the executors introduced into evidence checks totaling \$60,000 concededly a part of these payments. They also introduced into evidence other checks totaling about \$12,700. It was stipulated that the above six checks totaling \$7500 were not paid under the separation agreement. On this record the Surrogate found that the note had been paid and the Appellate Division affirmed. Upon appeal, *held*, three judges dissenting, the order should be reversed upon the

19. *Strom v. Strom*, 98 Minn. 427, 107 N. W. 1047 (1906); *Phillips v. Barnett*, [1876] 1 Q. B. D. 436; *Lunt v. Lunt*, 53 Ga. App. 663, 187 S. E. 116 (1938), where the marriage was annulled and no action was allowed for a tort committed during coverture.

20. *Johnson v. Johnson*, 303 Mass. 204, 21 N. E. (2d) 224 (1939).

21. N. Y. DOMESTIC RELATIONS LAW § 57; N. Y. INSURANCE LAW § 167 subd. 3; N. Y. VEHICLE AND TRAFFIC LAW § 94(q); see note 8, *supra*.

22. *Newton v. Weber*, 119 Misc. 240, 196 N. Y. Supp. 113 (1922); *Harvey v. Harvey*, 239 Mich. 142, 214 N. W. 305 (1927).

23. *Maine v. James Maine Co.*, 198 Iowa 1278, 201 N. W. 20 (1924); *Emerson v. Western Seed Irrigation Co.*, 116 Neb. 180, 216 N. W. 297 (1927); *Harvey v. Harvey*, 239 Mich. 142, 214 N. W. 305 (1927). *But cf.* *Dunlap v. Dunlap*, 84 N. H. 352, 150 Atl. 905, 914 (1930); *Lusk v. Lusk*, 113 W. Va. 17, 166 S. E. 538 (1932).

ground that the executors had failed to prove payment. *In re Seigle's Estate*, 289 N. Y. 300, 45 N. E. 809 (1942).

This case indicates the importance of presumptions in proving facts in issue, in determining the burden of going forward with the proof and in sustaining the ultimate burden of proof. Before discussing the presumptions indulged in by the court in making its decision, it may be helpful to review briefly the nature and operation of presumptions in our law. A presumption is the assumption of the truth of a fact for the purpose of a given inquiry.<sup>1</sup> Its basis may be general experience, probability of any kind or merely policy and convenience.<sup>2</sup> Writers sometimes divide presumptions into rebuttable presumptions of law or fact and conclusive presumptions. The conclusive presumption may be dismissed immediately, since a conclusive presumption is nothing more than a positive rule of substantive law stated presumptively.<sup>3</sup>

A rebuttable presumption of law is the only real presumption.<sup>4</sup> It is more accurately termed a rule of presumption, for it is a rule of law which sometimes, in advance of evidence, takes some fact for granted<sup>5</sup> and at other times requires that, in the absence of proof to the contrary, a certain inference be drawn from a fact established in evidence.<sup>6</sup> All true presumptions are rebuttable for they have the procedural effect of casting upon the one against whom they operate the burden of introducing evidence in rebuttal.<sup>7</sup> The so-called presumption of fact is not really a presumption at all, for it neither assumes the existence of any fact nor does it demand that any particular inference be drawn from any fact in evidence.<sup>8</sup> It is nothing more than a natural inference from certain facts which ordinary logic tells us is permissible, and it is much more simply described merely as an inference.<sup>9</sup> At most the phrase

1. *Greer v. United States*, 245 U. S. 559, 561 (1918); *Matter of Raisbeck*, 52 Misc. 279, 282, 102 N. Y. Supp. 967, 969 (Surr. Ct. 1906).

2. *Turner v. Williams*, 202 Mass. 500, 505, 89 N. E. 110, 112 (1909).

3. 9 WIGMORE, EVIDENCE (3rd ed. 1940) § 2492; see *Heiner v. Donovan*, 285 U. S. 312 (1932).

4. 9 WIGMORE, *op. cit. supra* note 3, § 2491.

5. Sanity being man's normal condition, every man is presumed to be sane. *In re Langdon*, 173 App. Div. 737, 160 N. Y. Supp. 3 (3rd Dep't 1916).

6. Seven years unexplained absence creates the presumption of death. *Butler v. Mutual Life Ins. Co.*, 225 N. Y. 197, 121 N. E. 758 (1919).

7. Professor Thayer holds that, as presumptions, this is their only true purpose in the law. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW, (1898) 336-339.

8. Professor Thayer points out that the presumption of law, as distinguished from the so-called presumption of fact, is apparently the result of an attempt to apply the contrast which continental writers made between *presumptio juris*, as that which has a place in the law, and *presumptio hominis*, which has no place in the law and addresses itself merely to the rational faculty. THAYER, *op. cit. supra* note 7, 341; *Rose v. Missouri District Telegraph Co.*, 328 Mo. 1009, 43 S. W. (2d) 562 (1931).

9. *Judson v. Bee Hive Auto Service Co.*, 136 Ore. 1, 297 Pac. 1050 (1931). "The presumption has a technical force or weight . . . but, in the case of a mere inference, there is no technical force attached to it. . . . An inference is nothing more than a permissible deduction from the evidence, while a presumption is compulsory and cannot be disregarded by the jury." *Cogdell v. Wilmington & W. R. Co.*, 132 N. C. 852, 44 S. E. 618, 619 (1903).

"presumption of fact", as it is commonly understood by lawyers, serves the purpose of indicating that the evidence is logically probative of the fact to be proved, that is, that the inference is a legitimate one as distinguished from one which lacks a proper foundation.

It follows that a true presumption of law is not evidence;<sup>10</sup> its sole purpose is to give a *prima facie* effect to a certain fact or facts in the sense that it casts upon the opponent the *onus* of adducing evidence in rebuttal, so that by operation of the presumption the duty of going forward with the evidence is "shifted" from the proponent to his adversary.<sup>11</sup> The burden of proof—what Professor Wigmore calls the risk of non-persuasion—which is placed upon a party by the substantive law and the pleadings, never shifts; at the close of the trial it remains where it had been in the beginning.<sup>12</sup> A presumption, which the proponent may have utilized to perform the office of shifting to his adversary the burden of going forward with the evidence, will become *functus officio* when the adversary has adduced the evidence.<sup>13</sup> However, where the adversary fails to do this, the presumption will entitle the proponent to a finding in his favor on the fact presumed; for, there being no contrary evidence, he has sustained the burden of proof as to this fact.<sup>14</sup> It should be noted that the same result may follow where the proponent is not aided by a true presumption (that is, by a settled rule of law always requiring a certain inference in a certain case), but where he has presented merely presumptive evidence of the fact in issue—where in other words he is aided by the so-called presumption of fact. This presumptive evidence may be sufficient to allow the issue to go to the jury and in an exceptional case, where the adversary fails to put in any evidence, the inference may be so strong and certain as to require a direction that the jury find the fact to be inferred.<sup>15</sup> This is for the reason that, aside from the operation of any specific rule of presumption, the evidence is such that it must be accepted as a matter of ordinary logic. The result is the same in each case, and hence the difference in the means by which the results are reached may seem unimportant. However, the importance of the difference lies in the fact that in one case the inference is required by a definite rule of law, whereas

10. THAYER, *op. cit. supra* note 7, 337; *Watkins v. Prudential Ins. Co.*, 315 Pa. 497, 173 Atl. 644 (1934). Some courts speak of a presumption as though it were evidence; see note (1935) 95 A. L. R. 878.

11. *Doheny v. Lacy*, 168 N. Y. 213, 220, 61 N. E. 255 (1901); *Jordan v. Jordan Co.*, 94 Conn. 384, 109 Atl. 519 (1919).

12. *Claffin v. Meyer*, 75 N. Y. 260 (1878); *Central Bridge Corp. v. Butler*, 2 Gray 130 (Mass. 1854).

13. *N. Y. Life Ins. Co. v. Gamer*, 303 U. S. 161 (1938). "Presumptions . . . may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts, . . ." *Mackowik v. Kansas City, St. J. & C. B. R. Co.*, 196 Mo. 550, 94 S. W. 256, 262 (1906).

14. ". . . for the judge will instruct the jury that *if* they find the fact of absence for seven years unheard from, and find no explanatory facts to account for it, then *by a rule of law they are to take for true the fact of death.* . . ." 9 WIGMORE, EVIDENCE (3d ed., 1940) § 2490.

15. *Kelly v. Burroughs*, 102 N. Y. 93, 6 N. E. 109 (1886); *Hull v. Littauer*, 162 N. Y. 569, 57 N. E. 102 (1900).

in the other the inference is a matter of reasoning and logic<sup>16</sup> and, as will be seen when the principal case is considered, the judges, without a settled legal norm to guide them, may, and often do, disagree.

In the majority of cases, where the fact to be presumed is merely one of several facts in issue, the decisive effect of presumptions upon the final outcome of the trial is not so readily discernible as in a case such as the principal one which involves a single issue of fact. From a factual standpoint the proof was simple enough. When the claimant introduced the promissory note in evidence, a presumption arose that the claimant was the owner of the note<sup>17</sup> and that it was unpaid.<sup>18</sup> She had made out a *prima facie* case, and, if the executors had failed to neutralize the presumption by evidence, she would have been entitled to judgment.<sup>19</sup> When the executors introduced the six checks totaling \$7500, such evidence obviated this presumption and gave rise to a counter-presumption<sup>20</sup> that a debt had been paid.<sup>21</sup> Since there was no evidence of other indebtedness to which such payment might be applied and considering the further fact that the amounts of the checks totalled the amount of the note, at that point an inference was justified, if not required, that the checks were given in satisfaction of the note. The statutory rule which disqualifies a claimant from testifying against the executor of a deceased person concerning a personal transaction between the claimant and the deceased, except where testimony of the deceased is given in evidence,<sup>22</sup> prevented the claimant from rebutting this latter inference by testifying, as she attempted to, that the checks were not given in payment of the note.<sup>23</sup> As the matter then stood it seems clear that judgment must go to the executors. The executors introduced into evidence the separation agreement, but this alone would not have changed the result, since it was conceded by the claimant that the checks had not been given in payment thereunder.

What ultimately defeated the executors was the introduction into evidence of the checks amounting to \$12,700. This proved to be a boomerang, for the majority of the Court of Appeals held that this evidence, even though introduced by the executors

16. See the full and interesting discussion in the recent case, *Foltis, Inc. v. City of New York*, 287 N. Y. 108, 38 N. E. (2d) 455 (1941), (1942) 11 FORDHAM L. REV. 226.

17. *Corporation Holding Co., Inc. v. Wieber*, 230 App. Div. 636, 246 N. Y. Supp. 109 (3rd Dep't 1930). However, the presumption does not exist where the instrument is non-negotiable, and indorsed in blank. *Cuyler v. Wallace*, 183 N. Y. 291, 76 N. E. 1 (1905).

18. The giving of a promissory note is *prima facie* evidence of an accounting and settlement of all demands between the parties, and that the maker was indebted to the payee upon such settlement in the amount of the note. *Lake v. Tysen*, 6 N. Y. 461 (1852); *In re Callister*, 153 N. Y. 294, 47 N. E. 268 (1897).

19. *Conkling v. Weatherwax*, 181 N. Y. 258, 73 N. E. 1028 (1905).

20. Sometimes inaccurately referred to as a conflicting presumption, 9 WIGMORE, *op. cit. supra* note 3, § 2493.

21. The presumption arising from the delivery of a check is that it was delivered in payment of a debt. *Nay v. Curley*, 113 N. Y. 575, 21 N. E. 698 (1889).

22. N. Y. CIV. PRAC. ACT, § 347.

23. *In re Callister*, *supra* note 18, it was held that although a note proved by the decedent's next of kin was evidence, it was not the "testimony of a deceased person," and that such evidence did not constitute a waiver of the protection of the statute.

themselves, had the effect not only of destroying the presumption of payment which had existed in their favor but of creating an inference (presumption of fact<sup>24</sup>) that there were other transactions between the claimant and the deceased and that consequently it was not to be presumed that the checks were given in payment of the note. Once the fact that there existed other transactions was established by inference, the proof of the checks amounting to \$12,700 lost their effect as evidence rebutting the original presumption of non-payment. This inference of other transactions, the court held, was confirmed when the executors offered no proof that they had produced all the checks in their possession which had passed between claimant and the deceased.<sup>25</sup> The conclusion was reached that the presumption of non-payment was the only one which remained in the case.

The majority of the Appellate Division<sup>26</sup> and the three dissenting judges in the Court of Appeals took the view that the Surrogate could legitimately infer that the checks in the sum of \$12,700 were paid under the separation agreement, and that consequently their introduction into evidence by the executors did not impair the presumption that the note was paid, the note evidencing the only transaction, aside from the separation agreement, shown to exist between the claimant and her deceased husband.

At this final stage of the proof the evidence of the unexplained checks amounting to \$12,700 was susceptible of conflicting inferences, and the stronger of the two conflicting inferences should prevail. Whether the Surrogate was justified in drawing the inference which he did was the question constituting the nub of the case. Inference is a matter ordinarily for the trier of the fact<sup>27</sup> and the dissenting judges took the position that the Surrogate, having before him some evidence and having drawn the inference, his finding should not be disturbed. The decision, therefore, turned upon a simple question of reasoning based upon experience. The question whether an inference is plain enough to justify a finding of fact, whether it is one which men of ordinary reason and fairness would draw, is a question of common sense. But the courts are the ultimate arbiters of what is common sense as applied to a particular finding in a litigation.<sup>28</sup>

In the progress of this case through the courts eight judicial minds saw the inference drawn by the Surrogate as a permissible one, and yet one can perceive about it some of the characteristics of speculation. In any event the result reached by the majority has this appeal to one's sense of justice: it seems right to place upon the executors the burden of explanation (which the executors failed to furnish) which the statute<sup>29</sup> disqualified the claimant from giving.

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24. Conway, J., was careful to characterize it as an inference.

25. See Mullen v. J. J. Quinlan & Co., 195 N. Y. 109, 87 N. E. 1078 (1909).

26. *In re Seigle's Estate*, 264 App. Div. 76, 34 N. Y. S. (2d) 489 (2nd Dep't 1942). The opinion of the Surrogate may be found in 31 N. Y. S. (2d) 623 (1941).

27. "... when the process is to be had at a trial of ascertaining whether one fact had being, from the existence of another fact, it is for the jury to go through with that process." Hart v. Hudson River Bridge Co., 80 N. Y. 622, 623 (1880).

28. *Baulec v. N. Y. & H. R. R., Co.*, 59 N. Y. 356, 366 (1874). *Pollock v. Pollock*, 71 N. Y. 137, 153 (1877). "Insufficient evidence is, in the eye of the law, no evidence."

29. *Supra*, note 22.



LANDLORD AND TENANT—IMPOSSIBILITY OF PERFORMANCE—EFFECT OF INTERNMENT OF ENEMY ALIEN.—On April 7th, 1941, a Japanese national leased an apartment to be occupied as a residence for himself and his family, for a term of one year, commencing on May 15th, 1941. This action was brought to recover the rent for the unexpired term of the lease. The tenant interposed, as an affirmative defense, impossibility of performance owing to his internment. The plaintiff's motion for summary judgment was denied on the ground that there appeared to be a triable issue as to whether governmental interference with the defendant's further performance of the lease arose from any fault or wrongdoing on his part. *Chase National Bank of New York v. Katsivi Onishi*, 109 N. Y. L. J. (Sup. Ct. Feb. 19, 1943) p. 689, col. 2.

It is generally stated that impossibility of performance arising subsequent to the formation of a contract does not excuse the promissor from the usual consequences of non-performance.<sup>1</sup> There are three notable exceptions to this rule: (1) where the impossibility is caused by a change in domestic law;<sup>2</sup> (2) where the impossibility is caused by the destruction of the subject matter of the contract without fault on the part of the promissor;<sup>3</sup> (3) where, in a contract of personal service, the impossibility is due to the death or illness of the person who is to perform.<sup>4</sup> The instant case falls into the first of these broad categories. If the impossibility is due to a change in statutory law arising after the formation of the contract, the parties are released from their covenant.<sup>5</sup> It seems that prevention of performance by an executive or administrative order promulgated for the benefit of the general public excuses the promissor from liability for non-performance.<sup>6</sup> The defense of impossibility of performance during time of war is not new.<sup>7</sup> With unvarying agreement, the courts of

1. *Rishel v. Pacific Mutual Life Ins. Co. of Calif.*, 78 F. (2d) 881, 883 (C. C. A. 10th, 1935); *Summers v. Midland Co.*, 167 Minn. 453, 209 N. W. 323 (1926); *Forty-fifth Street Realty Co. v. 17-19 W. 45th St. Corp.*, 142 Misc. 310, 254 N. Y. Supp. 284 (1931); Comment (1919) 28 YALE L. J. 399.

2. *Bailey v. De Crespigny*, L. R. 4 Q. B. 180 (1869); *Poledor v. Mayerfield*, 94 Ind. App. 601, 176 N. E. 32 (1931); *Neumond v. Farmers' Feed Co. of N. Y.*, 244 N. Y. 202, 155 N. E. 100 (1926). Accord: RESTATEMENT, CONTRACTS (1932) § 458; 6 WILLISTON, CONTRACTS (Rev. ed., 1938) § 1938.

3. *North Amer. Oil Co. v. Globe Pipe Line Co.*, 6 F. (2d) 564 (C. C. A. 8th, 1925); *Adams v. Foster*, 5 Cush. 156 (Mass. 1849); *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595 (1891), RESTATEMENT, CONTRACTS (1932) § 281.

4. *Cutler v. United Shoe Machinery Corp.*, 274 Mass. 341, 174 N. E. 507 (1931); *Buccini v. Paterno Constr. Corp.*, 253 N. Y. 256, 170 N. E. 910 (1930).

5. *Brauer v. Hyman*, 98 N. J. Law 743, 121 Atl. 667 (1923); *Baker v. Johnson*, 42 N. Y. 126 (1870); *Doherty v. Eckstein Brewing Co.*, 115 Misc. 175, 187 N. Y. Supp. 633 (1921); *Kaiser v. Zeigler*, 115 Misc. 281, 187 N. Y. Supp. 638 (1921); Notes L. R. A. 1917C 935.

6. *U. S. v. Warren Transportation Co.*, 7 F. (2d) 161 (D. C. Mass., 1925); *Hizington v. Eldred Refining Co. of N. Y.*, 235 A. D. 486, 257 N. Y. Supp. 464 (4th Dep't 1932). See RESTATEMENT, CONTRACTS (1932) § 458. See also *Canrock Realty Corp. v. Vim Electric Co., Inc.*, 179 Misc. 391, 37 N. Y. S. (2d) 139 (1942).

7. Blair, *Breach of Contract Due to War* (1920) 20 COL. L. REV. 413; Dodd, *Impossibility of Performance of Contracts Due to War-Time Regulations* (1919) 32 HARV. L. REV. 789.

Due to the present war several cases have arisen where a tenant has pleaded the defense

the nation and of the various states have held, that in time of war, the federal government is empowered not only to impair, but also to destroy, existing contracts in behalf of national safety and security.<sup>8</sup>

The particular question in the *Onishi* case is the effect of the stated doctrines of impossibility of performance in relation to alien enemies. The defense of *force majeure* offered by a party is a valid defense<sup>9</sup> and the mere fact that a party is an alien enemy does not deprive him of his rights. In the words of Attorney General Biddle ". . . no native, citizen or subject of any nation with which the United States is at war and who is a resident in the United States is precluded by federal statute or regulations from suing in federal or state courts."<sup>10</sup> But this treatment of enemy aliens is of course limited to those who are residing peaceably within the United States under its laws.<sup>11</sup> Consequently it might well be doubted whether an interned alien enemy, who has been interned because of his own wrongdoing, will be within the terms of the stated privilege and immunities granted to alien enemies generally.

It might be argued that the position of the interned alien enemy is comparable with that of the incarcerated criminal. Considerable law exists to the effect that where the impossibility of performance is due to the decree or order of the state, confining the criminal wrongdoer, he is nevertheless excused from liability for non-performance of his contracts.<sup>12</sup> In *Hughes v. Wamsutta Mills* the court defended the excuse

of impossibility on a lease for premises to sell materials whose manufacture has been curtailed or banned by the O.P.A. *Schantz v. American Auto Supply Co., Inc.*, 178 Misc. 909, 36 N. Y. S. (2d) 747 (1942); *Colonial Operating Corp. v. Hannon Sales & Service Inc.*, 178 Misc. 308, 34 N. Y. S. (2d) 116 (1942); *Canrock Realty Corp. v. Vim Electric Co., Inc.*, 179 Misc. 391, 37 N. Y. S. (2d) 139 (1942).

8. *Henderson v. Smith-Douglass Co.*, 44 Fed. Supp. 681 (D. C. E. D. Va., 1942); *Helena Rubenstein Inc. v. Charline's Cutrate Inc.*, 132 N. J. Eq. 254, 28 Atl. (2d) 113 (1942); *Schantz v. Amer. Auto Supply Co., Inc.*, 178 Misc. 909, 36 N. Y. S. (2d) 747 (1942); *Export Syndicate of Steel Producers, Inc. v. Dilsizian Inc.*, 36 N. Y. S. (2d) 868 (Sup. Ct., 1942).

9. "It is no longer a debatable proposition in juridical fields that when a contract is rendered impossible of performance by act of God or by act of law or by act of nature that under such circumstance performance can not be had. In this particular instance, by virtue of rule or order or command of the national government with reference to the quota of admissible Cuban sugar, the contract upon which the plaintiff relies was rendered impossible of performance." *Garcia Sugars Corp. v. N. Y. Coffee & Sugar Exchange Inc.*, 7 N. Y. S. (2d) 532, 534 (Sup. Ct., 1938). See also *Colonial Operating Corp. v. Hannon Sales & Service Inc.*, 178 Misc. 308, 34 N. Y. S. (2d) 116 (1942), 11 *FORDHAM L. REV.* 317.

10. 107 N. Y. L. J. (Feb. 5, 1942) p. 545, col. 5. See also *Trading with the Enemy Act* § 7b, 40 Stat. 1020 (1917), 50 U. S. C. A. App. § 7b (1928); *Kaufman v. Eisenberg*, 177 Misc. 939, 32 N. Y. S. (2d) 450 (1942); *Comment* (1942) 17 *TEMP. L. Q.* 87, 89.

11. *Anastasio v. Anastasio*, 44 Fed. Supp. 725 (D. C., 1942). *Uberti v. Maiatico*, 44 Fed. Supp. 724 (D. C., 1942); *Stern v. Ruzicka*, 44 Fed. Supp. 726 (D. C., 1942); *Verano v. De Angelis, Coal Co., Inc.*, 44 Fed. Supp. 726 (M. D. Pa., 1942).

12. *Hughes v. Wamsutta Mills*, 11 Allen 201 (Mass., 1865); *State v. Herber*, 70 Okla. 153, 173 Pac. 651 (1919); *Moshenz v. Independent Order Ahawas Israel*, 215 Mass. 185, 102 N. E. 324 (1913).

enjoyed by the guilty party in the following words: "It may be said that in the case at bar the commission of the offence for which the plaintiff was arrested was his voluntary act, . . . But the difficulty with this argument is, that it confounds the remote with proximate causes."<sup>13</sup> But it might also be argued that the voluntary commission of a crime carries with it the foreseeability and proximity of punishment and that such criminal act is primarily responsible for the impossibility of performance. The Restatement of the Law of Contracts presents a sounder view in its statement that the criminal's duty to perform a contract of personal service is not discharged by reason of his imprisonment for a criminal offense<sup>14</sup> which has no relation to the contract. The rule that seems to be applicable is that impossibility which is foreseeable<sup>15</sup> or caused<sup>16</sup> by the promisor does not excuse.

Before applying the above stated rules of impossibility of performance to the internment of an alien enemy, it is necessary to note the special circumstances bringing about his internment. Today, the enemy alien is interned by authority of presidential proclamation.<sup>17</sup> This executive proclamation which has the force and effect of law,<sup>18</sup> shows that an alien enemy may be interned for reasons other than his own misconduct.<sup>19</sup> These facts together with the further fact that internment may be ordered without trial<sup>20</sup> lead to the conclusion that the interned alien enemy may be in a more favorable position than the incarcerated criminal. If it appears that the alien's internment was due to no fault or improper conduct, he should be excused from liability on his rental obligation.<sup>21</sup> An entirely different situation is presented, however, if

13. 11 Allen 201, 202 (Mass., 1865).

14. RESTATEMENT, CONTRACTS § 458, Illus. 5, "A contracts to employ B for three months and B contracts to serve. Before or during the service B is legally arrested and imprisoned for a criminal offense. Though the offense has no relation to the contract and the imprisonment renders the performance impossible, B's duty is not discharged."

15. *Inter-coast S. S. Co. v. Seaboard Transp. Co.*, 291 Fed. 13 (C. C. A. 1st, 1923); *Carter v. Wilson*, 102 Kan. 200, 169 Pac. 1139 (1918); *Davis v. Davis*, 266 S. W. 797 (Tex. Civ. App., 1924); *Standard Oil Co. v. Central Dredging Co.*, 225 App. Div. 407, 233 N. Y. Supp. 279, *affirmed* 252 N. Y. 545 (1929).

16. *Auto-Lec. Stores Inc. v. B & B System Inc.*, 162 So. 231 (La. Ct. App., 1935); *Internal Water Heater Co. v. Burns Bros.*, 114 N. J. Law 368, 176 Atl. 380 (1935); *The City of N. Y. v. Pike Realty Co.*, 247 N. Y. 245, 160 N. E. 359 (1928).

17. Pres. Proc. (Dec. 7, 1941) No. 2525, (1941) U. S. C. Cong. Ser. 885, 888-90.

18. 40 Stat. 537 (1918), 50 U. S. C. A. § 21 (1928) empowers the President to make any regulations concerning alien enemies.

19. While most of the regulations of Pres. Proc. No. 2525 concern rules of conduct, the violation of which leads to arrest and internment, § (9) permits the Attorney General to use wide discretion in removing and interning any alien enemy by reason of his residence in any declared locality.

20. REV. STAT. § 4069 (1875), 50 U. S. C. A. § 23 (1928); Pres. Proc. No. 2525, (1941) U. S. C. Cong. Service 885, 888, regulation § 7; *De Cicco v. Longo*, 46 Fed. Supp. 169 (Conn., 1942).

21. *Adler v. Miles*, 69 Misc. 601, 603, 126 N. Y. Supp. 135, 136 (1910). See also *Mawhinney v. Millbrook Woolen Mills*, 105 Misc. 99, 172 N. Y. Supp. 461 (1918); *Colonial Operating Corp. v. Hannon Sales & Service Inc.*, 178 Misc. 308, 34 N. Y. S. (2d) 116 (1942).

further performance of the lease was rendered impossible because of active fault or even passive wrongdoing on the part of the alien lessee. In this situation the rule that he who prevents a thing from being done may not avail himself of the excuse of non-performance which he himself has occasioned, should apply.<sup>22</sup> It would seem, therefore, that under this line of reasoning the principle of the *Hughes* case should not be extended or even applied in favor of an alien guilty of misfeasance or non-feasance.

The denial of the plaintiff's application for summary judgment in the instant case was proper, since it is well established that any fact issue bars summary judgment.<sup>23</sup> There is little doubt that the plaintiff will prevail unless the defendant can show that the reason for his internment was merely that he resided in a restricted area<sup>24</sup> and that he was without fault.

**LIBEL—JUDICIAL PRIVILEGE.**—Plaintiff, an attorney, alleged in his complaint that defendant, a judge of the County Court, "acting unofficially and privately" procured publication of two opinions in the *New York Law Journal* and in *New York Supplement*, Second Series; that the opinions were "maliciously composed" by defendant in deciding motions in a criminal case in which plaintiff appeared as attorney for the defendant and that they contained defamatory statements concerning the plaintiff. Defendant's answer asserted that each opinion complained of was a judicial opinion duly written by the defendant in the exercise and discharge of his duties as a County Judge and that they were, therefore, absolutely privileged. Defendant's motion for judgment upon the pleadings was denied. The Appellate Division reversed and granted the motion. Upon appeal, *held*, three judges dissenting, that the publication was not in the exercise of a judicial function and therefore was not absolutely privileged, *Murray v. Brancato*, 290 N. Y. 52 (1943).

There are certain situations where it is so important that the persons engaged in them should be able to speak freely that the law takes the risk of their abusing the occasion and speaking not only untruthfully, but even maliciously, about another.<sup>1</sup> In order that their duties may be carried on freely and without fear of legal proceedings being brought against them the written or oral statements of such persons are absolutely privileged, that is, they are immune from suit even though such statements are

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22. *Dolan v. Rodgers*, 149 N. Y. 489, 44 N. E. 167 (1896); *Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435, 55 N. E. 941 (1900); see also ANSON, *CONTRACTS* (Amer. Ed., Corbin, 1919) 447; 6 WILLISTON, *CONTRACTS* (rev. ed. 1938) § 1959 n. 7.

23. *Airflow Taxi Corp. v. C. I. T. Corp.*, 258 App. Div. 857, 15 N. Y. S. (2d) 965 (4th Dep't 1939); *Brand v. Gurley*, 259 App. Div. 835, 20 N. Y. S. (2d) 172 (1940); *Oleck v. Blustein W & L Stores*, 262 App. Div. 870, 28 N. Y. S. (2d) 325 (2d Dep't 1941); *Canrock Realty Co. v. Vim Electric Co.*, 179 Misc. 391, 37 N. Y. S. (2d) 139 (1942).

24. Pres. Proc. (Dec. 7, 1941) No. 2525, reg. § 9, U. S. C. Cong. Serv. 885, 889 (1941).

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1. *More v. Weaver*, [1928] 2 K. B. 520, 521; *Bottomley v. Brougham*, [1908] 1 K. B. 584; 3 RESTATEMENT, *TORTS* (1938) 223, Introductory Note; Holmes, *Privileges, Malice and Intent* (1894) 8 HARV. L. REV. 1.

defamatory and made maliciously.<sup>2</sup> Such absolute immunity has been confined to a very few situations where there is a manifest policy in favor of permitting complete freedom of expression. It is limited to judicial and legislative proceedings, and proceedings of executive officers charged with responsibility of importance.<sup>3</sup> Some degree of absolute privilege extends to all parties to the judicial proceedings.<sup>4</sup> In England, judges,<sup>5</sup> counsel,<sup>6</sup> parties<sup>7</sup> and witnesses<sup>8</sup> are absolutely exempt from liability in a civil action for words, otherwise defamatory, published in the course of judicial proceedings. American courts apply the same doctrine in regard to statements uttered by a judge<sup>9</sup> but extend absolute privilege to parties, counsel and witnesses only where the communication is "pertinent" or "relevant" to the case.<sup>10</sup> However, these words have been considered to connote not technical relevancy but rather mere reference or relation to the subject matter of the judicial inquiry.<sup>11</sup> According to the general American view, while an absolute privilege does not attach to the irrelevant statement, such a statement is the subject of a qualified privilege which means that recovery depends upon proof of actual malice.<sup>12</sup>

Considering the reason for the rule of immunity and the office he performs, it would seem that the cloak of immunity should be especially accorded to the judge; otherwise as one Scottish judge has said, "no man but a beggar or a fool would be a judge."<sup>13</sup> Although the language in some opinions would seem to restrict the immunity to "judges of courts of superior or general jurisdiction",<sup>14</sup> judges of inferior

2. Veeder, *Absolute Immunity in Defamation: Judicial Proceedings* (1909) 9 COL. L. REV. 463, 600 explains that where the social interest which it is desirable to promote is not of paramount importance the privilege attaching to the communication may be qualified, that is, the person claiming to be defamed must prove that the communication was not made in good faith. Evans, *Legal Immunity for Defamation* (1940) 24 MINN. L. REV. 607.

3. PROSSER, TORTS (1941) 821. Professor Prosser, following 3 RESTATEMENT, TORTS, § 592, includes communications between husband and wife. *Id.* at 831.

4. *Scott v. Stansfield*, L. R. 3 Ex. 220 (1868) (judge); *Dunham v. Powers*, 42 Vt. 1 (1868) (juror); *Hastings v. Lusk*, 22 Wend. 409 (N. Y. 1839) (attorney); *Rice v. Coolidge*, 121 Mass. 393 (1876) (witness); *Laing v. Mitten*, 185 Mass. 233, 70 N. E. 128 (1904) (party).

5. *Scott v. Stansfield*, L. R., 3 Ex. 220 (1868).

6. *Munster v. Lamb*, 11 Q. B. D. 586 (1883).

7. *Henderson v. Broomhead*, 4 H. & N. 569, 157 Eng. Rep. R. 964 (1859).

8. *Seaman v. Netherclift*, 1 C. P. D. 540 (1876).

9. *Karelas v. Baldwin*, 237 App. Div. 265, 261 N. Y. Supp. 518 (2d Dep't 1932).

10. *Dodge v. Gilman*, 122 Minn. 177, 142 N. W. 147 (1913); *Bussewitz v. Wisconsin Teachers' Asso.*, 188 Wis. 121, 205 N. W. 808 (1925).

11. *Youmans v. Smith*, 153 N. Y. 214, 47 N. E. 265 (1897); *Chapman v. Dick*, 197 App. Div. 551, 188 N. Y. Supp. 861 (2d Dep't 1921). The requirement of the Restatement is that the publication have "some relation to" the subject matter. 3 RESTATEMENT, TORTS (1938) § 585 *et seq.*

12. *Lawcon v. Hicks*, 38 Ala. 279, 81 Am. Dec. 49 (1862).

13. *Miller v. Hope*, 2 Shaw, Sc. App. Cas. 125 (1824).

14. *Bradley v. Fisher*, 13 Wall. 335, 351 (U. S. 1871).

courts have been accorded the privilege as well.<sup>15</sup> Want of jurisdiction in the court has also been said to prevent the absolute immunity from attaching,<sup>16</sup> but this has been questioned.<sup>17</sup> In any event, where the judge makes the statement merely in excess of the jurisdiction which he possesses, there seems to be no question that the statement is privileged.<sup>18</sup>

However, since the immunity is not due to any merit in the judge as an individual but attaches rather to the office he holds, the utterance must have been delivered by him as a judge, in his judicial capacity; it must be a judicial act. "For it is plain that the fact that a man sits in the seat of justice, though having a clear right to sit there, will not protect him in every act which he may choose or chance to do there."<sup>19</sup> Thus it has been recently held in a New York case that absolute immunity does not exist where the judge makes slanderous remarks about counsel after court has been adjourned and is not in session.<sup>20</sup> But where the remarks are made by a magistrate in permitting a criminal charge to be withdrawn, they are privileged, since the magistrate in making the statement is exercising a judicial act. His consent is necessary to the withdrawal of the charge and what he says in permitting the withdrawal is, therefore, a part of the judicial function.<sup>21</sup>

With the above general principles there seems to have been no disagreement among the members of the court in the principal case, and no doubt was expressed that rendering the opinion constituted performance of a judicial act.<sup>22</sup> The point of sharp

15. *Law v. Llewellyn*, [1906] 1 K. B. D. 487; *Cooke v. Bango*, 31 Fed. 640 (C. C. Minn. 1887); *Karelas v. Baldwin*, 237 App. Div. 265, 261 N. Y. Supp. 518 (2d Dep't 1932).

16. *Johnson v. Brown*, 13 W. Va. 71 (1878); *Hoar v. Wood*, 3 Metc. 193 (Mass. 1841); *Jones v. Brownlee*, 161 Mo. 258, 61 S. W. 795 (1901).

17. *Thorn v. Blanchard*, 5 Johns. 507 (N. Y. 1809); *Runge v. Franklin*, 72 Tex. 585, 10 S. W. 721 (1889); *Allen v. Crofoot*, 2 Wend. 515 (N. Y. 1829).

18. *Lange v. Benedict*, 73 N. Y. 12 (1878); *Mundy v. McDonald*, 216 Mich. 444, 185 N. W. 877 (1921).

19. *Lange v. Benedict*, 73 N. Y. 12, 26 (1878); *Yates v. Lansing*, 5 Johns. 282 (N. Y. 1810); *Bailey v. Dodge*, 28 Kan. 72 (1882). Also see *Coffin v. Coffin*, 4 Mass. 1, 30 (1808) where Judge Parsons in speaking of the privilege of a member of the legislature said:

"But to consider every malicious slander, uttered by a citizen, who is a representative, as within his privilege, because it was uttered in the walls of the representatives' chamber to another member, but not uttered in executing his official duty, would be to extend the privilege farther than was intended by the people, or than is consistent with sound policy, and would render the representatives' chamber a sanctuary for calumny. . . ."

20. *Douglas v. Collins*, 152 Misc. 839, 273 N. Y. Supp. 663 (1934), *rev'd* 243 App. Div. 546 (2d Dep't 1934) and 267 N. Y. 557, 196 N. E. 577 (1935). See also *Burlingame v. Burlingame*, 8 Cowen 141 (N. Y. 1828).

21. *Law v. Llewellyn*, [1906] 1 K. B. D. 487.

22. See *Nadeau v. Texas Co.*, 104 Mont. 558, 69 P. (2d) 593 (1937), in which the highest court of the state expunged from its records the separate concurring opinion of the chief justice, which defamed a party to the action and its attorneys, in order to "prevent the perpetuation of this document among the records of this court, as well as its publication in its reports and other law reports." The court granted this relief because it held that the movants could not secure relief under the laws relating to libel.

disagreement between the members of the court was the question whether the act of the defendant in causing his opinions to be published in the New York Law Journal<sup>23</sup> and New York Supplement constituted an act in the defendant's judicial capacity so as to be absolutely privileged. The Judiciary Law provides that the State Law Reporting Bureau of New York State shall report a case decided in the lower courts of the state which is considered "worthy of being reported because of its usefulness as a precedent or its importance as a matter of public interest."<sup>24</sup> The majority of the Court of Appeals were of the opinion that, since a judge in New York has no official duty in connection with any publication of opinions except in the official reports,<sup>25</sup> the defendant's act of furnishing the opinion to the newspaper and the unofficial reports was not a judicial act. The minority opinion took the view that the publication of judicial opinions in recognized and widely used legal publications is an accepted and constituent part of the legal process and referred to the provisions of the State Constitution<sup>26</sup> that all judicial opinions or decisions shall be free for publication by any person and also to the Statute<sup>27</sup> granting immunity to those who publish a fair and true report of any judicial proceedings. The minority points out in criticism of the majority view that such a ruling does not afford protection to attorneys and others using the record. It is difficult to perceive why an absolute privilege should be extended to secondary publications made by persons having no connection with the litigation.

There is very little authority upon the precise question presented to the court. Research has disclosed only one decision which seems to be nearly in point, *Francis v. Branson*.<sup>28</sup> In that case it was held that the defendant had a right to set out in an opinion or from the bench his reasons for not participating in a cause though by the exercise of such right he exceeded his jurisdiction and defamed the plaintiff. However, it was also held that in acting in concert with someone else to print, publish and circulate the opinion, the judge was not acting in his judicial capacity and the rule of immunity did not apply. There are also English decisions which have a bearing upon the question. It has been determined that members of Parliament who publish in the newspapers reports of the speeches they have delivered may be prosecuted for criminal libel since the parliamentary privilege does not attach to such a publication.<sup>29</sup>

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23. This newspaper had been designated as the official newspaper in the First Judicial Department of New York State for the publication of calendars and official notices. It is to be noted that the criminal action in which the opinions were rendered was pending in the County Court of Kings County which is in the Second Judicial Department.

24. N. Y. JUDICIARY LAW § 431. In England there are no official reports. Even though Coke, Bacon and Blackstone thought that the Year Books were official publications, this does not appear to be the fact. 2 HOLDSWORTH, HISTORY OF ENGLISH LAW (1927) 532-536.

25. N. Y. JUDICIARY LAW § 432.

26. NEW YORK CONST. ART. VI, SEC. 22.

27. C. P. A. § 337. The majority of the court expressed doubt whether this provision, originally enacted for the protection of the press, would apply to the publication by a judge of an opinion written by himself and the minority opinion did not even suggest such an application.

28. 168 Okl. 24, 31 P. (2d) 870 (1933).

29. Rex v. Lord Abingdon, 1 Esp. 226, 170 Eng. Rep. R. 337 (1794) and Rex v. Creoney,

In final analysis the decision of the majority of the court in the principal case is based upon the ground that the County Judge had no official duty in connection with any publication of opinions except in the official reports. The majority thought that if the immunity were extended to publication in the Law Journal and New York Supplement it should likewise be extended to publication in Law Reviews, or even in popular magazines and the daily press. While the basis of the decision is a narrow one it has sound reason to support it. The immunity was created to permit the judge to perform the duties of his office fearlessly and with impunity. This duty is performed when he renders his opinion and causes it to be filed for it is primarily the function of a judge sitting *in nisi prius* merely to decide the immediate controversy which is presented to him; the appellate courts have the task of settling the law of the state.<sup>30</sup> While it is of public importance that the decisions of the latter courts be promulgated, no ground of public policy requires that the opinion of a judge of a court of original jurisdiction should be published officially or unofficially, at least where its "usefulness as a precedent or its importance as a matter of public interest"<sup>31</sup> is not apparent. As it is, our law reports are being overloaded with decisions and opinions which might well be omitted.<sup>32</sup> Where the policy underlying the privilege attaching to reports of judicial proceedings has compelled our courts to "disregard the overwhelming weight of authority elsewhere and start with a rule of our own, consistent with practical experience" they have done so.<sup>33</sup> The instant case does not appear to be in that category.

The question arises whether a qualified privilege remains to protect a judge acting as the defendant did in the principal case. There is an intimation in the majority opinion that such may be the case,<sup>34</sup> and there is authority which seems to support such a result.<sup>35</sup> The judge might be considered to have a duty or interest in regard to the matter which would bring the communication within the rule of qualified privilege when made to persons having a corresponding duty or interest.

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1 M. & S. 273, 105 Eng. Rep. R. 102 (1813). The latter case distinguishes *Lake v. King*, 1 Wms. Saund. 131, 85 Eng. Rep. R. 137 (1670) which held that the printing and delivery of a scandalous petition to the members of a Committee of the House of Commons was privileged since this was the customary procedure.

30. CARDOZO, *JURISDICTION OF THE COURT OF APPEALS* (2d ed. 1909) 11; COHEN, *THE POWERS OF THE NEW YORK COURT OF APPEALS* (1934) 118.

31. N. Y. JUDICIARY LAW § 431.

32. Warren, *The Welter of Decisions* (1916) 10 ILL. L. REV. 25.

33. *Campbell v. New York Evening Post*, 245 N. Y. 320, 328, 157 N. E. 153, 156 (1927).

34. "The judge's rights and duties there are the same as those of any private person and if he chooses to act he must be held liable like any other person for damages resulting from a wrongful act *maliciously performed with intent to injure another.*" Lehman, Ch. J., in closing, again suggested that plaintiff must prove actual malice in order to recover. *Murray v. Brancato*, 290 N. Y. 52 (1943). (Italics in original).

35. *Veeder, op. cit. supra* note 2, cites *Coffin v. Coffin*, 4 Mass. 1 (1808) for the statement that the rule of qualified privilege applies to publications not made "in office".



TAXATION—CANCELLATION OF INDEBTEDNESS—GIFT OR INCOME.—A corporation owed back rent amounting to \$15,298.99 and also interest of \$11,435.22 on notes which had been given to creditors in payment for merchandise. The landlord offered to accept \$7500 in full payment of the back rent and in 1937 the corporation accepted the offer. The merchandise creditors were approached by the president of the corporation and agreed to cancel the liability for interest. The cancellation of interest was effected in 1937, without the payment of any consideration by the corporation. The corporation was solvent throughout the period, and had reduced its income subject to income tax in prior years by deductions for the accruing rent and interest. Upon audit of the corporation's income tax return for 1937, the Commissioner of Internal Revenue increased, by the amount of the indebtedness cancelled, the income reported for that year. The Circuit Court of Appeals reversed the decision of the Board of Tax Appeals which had confirmed this determination of a deficiency. Upon appeal, *held*, two justices dissenting, the cancellation of indebtedness constituted a gift and not income, since it was the receipt of a financial advantage gratuitously conferred. *Helvering v. American Dental Co.*, 317 U. S. —, 63 Sup. Ct. 577 (1943).

The extent to which taxable income is realized from the liquidation of indebtedness for less than its face amount has been the subject of considerable litigation and discussion.<sup>1</sup> The Internal Revenue Code contains no specific statement that income is realized from the cancellation of indebtedness. The definition of gross income is so broad,<sup>2</sup> however, that legislation has been enacted providing that cancellation of indebtedness under certain circumstances shall not give rise to taxable income.<sup>3</sup>

Normally cancellations of indebtedness occur only when the beneficiary is insolvent or at least in financial straits and under the statutes, such cancellations do not result in taxable income.<sup>4</sup> There are other situations in which cancellations of indebtedness do not result in income: where the indebtedness has represented a portion of the purchase price of property, and it was demonstrated that due to the decline in value of the property purchased, some portion of the indebtedness was cancelled, this cancellation has been treated as a reduction of the purchase price rather than as income;<sup>5</sup> if a stockholder gratuitously forgives a debt owed to him by the corporation, the

1. For discussions of the general problem see Surrey, *The Revenue Act of 1939 and the Income Tax Treatment of Cancellation of Indebtedness* (1940) 49 YALE L. J. 1153; Warren and Sugarman, *Cancellation of Indebtedness and the Tax Consequences* (1940) 40 COL. L. REV. 1326; Darrell, *Discharge of Indebtedness and the Federal Income Tax* (1940) 53 HARV. L. REV. 977; MAGILL, TAXABLE INCOME (1936).

2. 49 Stat. 1648, 1657 (1936), 26 U. S. C. A. § 22 (1942).

3. For such legislation, see: corporate reorganizations, 52 Stat. 904 (1938), 11 U. S. C. A. §§ 668-670 (1939); arrangements, 52 Stat. 915 (1938), 11 U. S. C. A. §§ 795-796 (1939); real property arrangements, 52 Stat. 929 (1938); 11 U. S. C. A. §§ 920-922 (1939); wage earner's plans, 52 Stat. 938 (1938), 11 U. S. C. A. § 1079; railroad adjustments, 52 Stat. 1140 (1939), 11 U. S. C. A. § 1235 (1939); Int. Rev. Act of 1939 § 215, 53 Stat. 875, 26 U. S. C. A. §§ 22 (b) (9) 113 (b) (3) (1940); Int. Rev. Act of 1942 § 114, 56 Stat. —, 26 U. S. C. A. § 22 (b) (9) (Supp. 1942).

4. See statutes *supra* note 3.

5. *Hirsch v. Commissioner*, 115 F. (2d) 656 (C. C. A. 7th, 1940); *Helvering v. A. L. Killian Co.*, 128 F. (2d) 433 (C. C. A. 8th, 1942).

transaction has long been recognized by the Treasury as a contribution to the capital of the corporation;<sup>6</sup> Treasury Department regulations relating to the Revenue Act of 1932 provided that the cancellation of indebtedness might be a gift, where "a creditor merely desires to benefit a debtor and without any consideration therefor cancels the debt".<sup>7</sup>

Due to the methods of determining net income permitted under the statute,<sup>8</sup> a further complication arises. A taxpayer computing his net income on the accrual basis claims deductions for his expenses in the period during which liability for the expenses is incurred. The income tax liability is determined on the basis of the net income for each year separately.<sup>9</sup> However, events frequently occur in a subsequent accounting period, as in the instant case, which serve to reduce the actual liability for payment of amounts previously accrued. In *Burnet v. Sanford & Brooks Co.*<sup>10</sup> it was held that recoveries of prior year's expenses were to be included in the gross income of the year of recovery, on the theory that the expenses when incurred served to reduce the net income subject to tax in that year. This holding has been enacted into statute with respect to recoveries of taxes, delinquency amounts, and debts previously written off as worthless.<sup>11</sup> On the authority of that decision and similar reasoning, it has been held that abatement of expenses, previously accrued (but not paid) and deducted against taxable income, constitutes income in the year of abatement.<sup>12</sup>

6. Reg. 45, Art. 51 through to Reg. 94, Art. 19.22 (a)—14. In Reg. 101, Art. 22 (a)—14, the regulation was changed to state that the cancellation by a stockholder amounts to a contribution to capital to the extent of the principal of the debt. This is repeated in Reg. 103, § 19.22(a)—14. The change in the Regulations was apparently made in view of the decision in *Edvard Mallinckrodt, Jr.*, 38 B. T. A. 960 (1938), *reversed sub. nom.* *Helvering v. Jane Holding Corp.*, 109 F. (2d) 933 (C. C. A. 2d, 1940).

7. Reg. 77, Art. 64. This provision has not appeared in the later Regulations.

8. 53 Stat. 24 (1939), 26 U. S. C. A. §§ 41-43 (1940).

9. Since 1939, provision has been made for carrying forward net losses against later profits with certain limitations (53 Stat. 867, 26 U. S. C. A. § 122). The Revenue Act of 1942 provided that net losses may be carried forward or back for two years against net income of profit years (56 Stat. —, 26 U. S. C. A. § 122) and that any unused excess profits credit might similarly be carried forward or back for two years (56 Stat. —, 26 U. S. C. A. § 710(c)).

10. 282 U. S. 359 (1931).

11. 56 Stat. — (1942), 26 U. S. C. A. 22 (b) (12) which provides that recoveries of bad debts, taxes and delinquency amounts are to be included in gross income to the extent used to reduce income subject to tax when incurred.

12. *Chicago, R. I. & P. Ry. Co. v. Comm'r*, 47 F. (2d) 990 (C. C. A. 7th, 1931), *cert. denied* 284 U. S. 618 (1931) and *Charleston v. Western Carolina Ry. Co.*, 17 B. T. A. 569, *affirmed* 50 F. (2d) 342 (App. D. C. 1931) (wages, earned by employees and deducted from income when liability was incurred, were not paid but held income when charged back to profit and loss); *The North American Coal Corp. v. Comm'r*, 97 F. (2d) 325 (C. C. A. 6th, 1938) (unpaid claims, accrued for six years prior to the taxable year, held properly added to income); *J. I. Case v. United States*, 32 F. Supp. 754 (Ct. Claims 1940) (state income tax, accrued and deducted in 1926, but, owing to change in state law in 1927, not paid, held income in 1927); *Hoboken Land & Improvement Co.*, 46 B. T. A. 495 (1942) (abatement of taxes previously accrued were held income in the year of abatement).

It must be recognized that the true earnings of an enterprise cannot be perfectly measured over the period of one year,<sup>13</sup> but it would seem equity should require that where a benefit has been obtained from the deduction of accrued expenses, adjustment should later be made if those anticipated expenses are not actually sustained.<sup>14</sup> In the case of a solvent taxpayer, the release of assets previously offset by liabilities has been held to constitute taxable income,<sup>15</sup> except where it was demonstrated that the transaction, viewed as an entirety, resulted in a loss.<sup>16</sup>

The majority opinion in the principal case distinguished the case before it from *U. S. v. Kirby Lumber Co.*<sup>17</sup> and *Helvering v. American Chicle Co.*<sup>18</sup> on the ground that in these cases the financial betterment was realized by the debtor from the purchase of its bonds in an arms length transaction, whereas "the release of interest or the complete satisfaction of an indebtedness by partial payment by the voluntary act of the creditor is more akin to a reduction of sale price".<sup>19</sup> This distinction can be logically maintained since the transaction in which a debtor purchases its own bonds may be separated from the transaction from which the bond issue arose, whereas the cancellation by a creditor of a portion of an indebtedness for goods or services without further consideration ordinarily can have no business purpose other than a readjustment of the original price. Yet the court in effect holds in the instant case, that the release of interest and acceptance of part payment in full satisfaction of the rent indebtedness does constitute a transaction separable from the determination of the price of these services. This is implied from the court's conclusion that these remissions constituted gifts. It would seem that the holding that this was the receipt of a gift negatives the argument advanced by the court that such a transaction is akin to a reduction of sales price. It appears that at this point the reasoning of the majority of the court became somewhat unrealistic. Under the doctrine of the *Sanford & Brooks* case, if the slightest recognizable consideration was given by the taxpayer in procuring this cancellation, the adjustment of liabilities would be includible in the gross income of the year of the adjustment. In construing the statutory exemption of gifts from income, the majority opinion stated: "The fact that the motives leading

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13. In *Weiss v. Wiener*, 279 U. S. 333, 335 (1929), the court stated: "The income tax laws do not profess to embody perfect economic theory."

14. See *Commissioner v. Rail Joint Co.*, 61 F. (2d) 751, 752 (C. C. A. 2d, 1932): "If he [taxpayer] were to report on an accrual basis and were allowed to deduct from gross income the \$1,000 liability incurred in that year, then it might be said that the settlement of the liability in 1931 for a less sum had released the difference to the general uses of the taxpayer and the sum so released should appear as income then received in order that the return for both years might truly reflect the effect of the whole transaction upon the net income."

15. *United States v. Kirby Lumber Co.*, 284 U. S. 1 (1931); *Helvering v. American Chicle Co.*, 291 U. S. 426 (1934).

16. *Bowers v. Kerbough Empire Co.*, 271 U. S. 170 (1926) in which it was shown that the satisfaction of the liabilities at less than face amount served only to reduce the loss sustained on the entire transaction. *MAGILL, op. cit. supra* note 1, at 212, 215, 219-226.

17. 284 U. S. 1 (1931):

18. 291 U. S. 426 (1934).

19. 317 U. S. —, —, 63 Sup. Ct. 577, 581 (1943).

to the cancellations were those of business or even selfish, if it be true, is not significant. The forgiveness was gratuitous, a release of something to the debtor for nothing, and sufficient to make the cancellation here gifts within the statute."<sup>20</sup> Thus the court specifically states that the desire on the part of the creditor to maintain the goodwill of the debtor is not consideration, even though the remission by the creditor may qualify as an ordinary and necessary business expense from his standpoint as a taxpayer.<sup>21</sup> Goodwill is an important asset in the case of most business corporations, even though an intangible asset, and it would appear that expenditures made for the development of business goodwill should be ordinary and necessary business expenses. It would also appear that the converse should apply, and that if a business corporation receives the benefit of a reduction of expenses due to adjustments made by a creditor to maintain goodwill, such adjustments should be considered as purely business transactions and only the amount of expense actually sustained be given effect in determining actual profits. Admittedly this view dispenses with the technical definition of consideration which the majority here holds to be the controlling factor. Such treatment seems necessary, however, in applying a statute which is to determine the net income of a business corporation. Previous judicial constructions of gross income and of amounts exempt from income taxation would appear to require in the present instance a less legalistic decision.<sup>22</sup>

In their opinion, the majority of the court traces the development of the statutory provisions under which cancellation of indebtedness is not to give rise to recognized income, and states that the Revenue Act of 1942 amended the applicable section of the statute<sup>23</sup> "so as to make the exclusion from gross income of income arising from discharge of indebtedness applicable generally to all corporations, whether or not financially sound."<sup>24</sup> That section, however, specifically confines such relief to income from discharge of indebtedness evidenced by a security, as defined in the statute, and as a condition of the granting of the relief, requires that the taxpayer consent to reduce the tax basis of some property.<sup>25</sup> Thus the taxpayer who elects under this statute to exclude income attributable to the discharge of indebtedness is required to reduce the amount of deductions which it might otherwise take against taxable income in latter years.

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20. 317 U. S. —, —, 63 Sup. Ct. 577, 582 (1943).

21. *Corning Glass Works v. Lucas*, 37 F. (2d) 798 (App. D. C. 1929).

22. Exemptions from taxation should be narrowly construed. *Trotter v. Tennessee*, 290 U. S. 354 (1933); *United States v. Stewart*, 311 U. S. 60 (1940). Income, on the other hand, has been interpreted very broadly. *Heiner v. Colonial Trust Co.*, 295 U. S. 232 (1927); *Helvering v. Midland Insurance Co.*, 300 U. S. 216 (1937). In *Noel v. Parratt*, 15 F. (2d) 669, 671 (C. C. A. 4th, 1926), the court said: "Although it is held that the motives accompanying a gift are not material, gifts usually proceed from the generosity of the giver; and where there is any doubt as to the nature of the transaction, the absence of such motive is a pertinent circumstance for consideration." This holding was approved in *Old Colony Trust Co. v. Commissioner*, 279 U. S. 716, 730 (1929).

23. 56 Stat. —, 26 U. S. C. A. § 22 (b) (9) (Supp. 1942).

24. 317 U. S. —, —, 63 Sup. Ct. 517, 586 (1943).

25. 56 Stat. —, 26 U. S. C. A. § 22 (b) (9) (Supp. 1942), 53 Stat. 872 (1939), 26 U. S. C. A. § 113 (b) (3) (1940).