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Notes and Comments

NOTES AND COMMENTS

Admiralty: Jurisdiction in tort for damage to non-navigable and non-floating objects.—In *Postal Telegraph-Cable Co. v. The Steamship Cananova, 1942 A.M.C. 281, — F. Supp. — (S. D. Fla. 1942),* the Cananova's anchor fouled and damaged the Postal's telegraph cable which lay in the bed of the waterway.[1] A libel was filed in admiralty against the ship, and the claimant, its owner, contested the jurisdiction of the court over the subject matter.[2] This objection to jurisdiction was upheld.[3] The case once again presents the problem whether a court of admiralty has jurisdiction over torts to non-navigable submarine objects—a question which the United States Supreme Court has never directly decided, and on which district court decisions are in conflict.

I

Long ago the rule was laid down that to be cognizable in a maritime court, the tort must have occurred on navigable waters and not on land, nor to a land object—the test of jurisdiction is the locality of the consummation of the wrong.[4] This test was supplemented in 1904, in *The Blackheath,*[5] where a beacon set in the ground under navigable waters was damaged through the fault of a ship. The court, speaking through Mr. Justice Holmes, held that since the object damaged was surrounded by navigable waters and was an aid to navigation, the vessel could be libeled in admiralty, even though the supporting piles rested on land in the bed of the waters. Mr. Justice Brown, concurring, thought that the English rule[6] which allowed a libel in admiralty

[1]A libel against a ship for damage to wires strung overhead would not be cognizable in admiralty. See Postal Telegraph Cable Co. v. P. Sanford Ross, Inc., 221 Fed. 105, 108 (E. D. N. Y. 1915). This note is concerned mainly with submarine objects.

[2]For discussions of general tort jurisdiction in admiralty, see ROBINSON, ADMIRALTY (1939), §§ 8, 9; Brown, *Admiralty Jurisdiction in Tort* (1909) 9 COL. L. REV. 1; Farnum, *Admiralty Jurisdiction and Amphibious Torts* (1933) 43 YALE L. J. 34; H. P. Shane, *Jurisdiction of the Admiralty over Torts* (1932) 66 U. S. L. REV. 593; note, (1922) 7 CORNELL L. Q. 86.

[3]The court relied on three cases cited by the respondent, namely, The Nippon Yusen Kabushiki Kaisha v. Great Western Power Co., 17 F. (2d) 239 (C. C. A. 9th 1927), *cert. denied* 274 U. S. 745, 47 Sup. Ct. 591 (1927), a libel for injury to a power cable; *In re* Newtown Creek Towing Co., 1941 Am. Mar. Cas. 1610, 42 F. Supp. 904 (E. D. N. Y. 1941), where jurisdiction was denied for injury to oil-conveying pipe lines; and Western Union Telegraph Co. v. S. S. Mont Agel, 1924 Am. Mar. Cas. 401 (E. D. La. 1924), where injury to telegraph cables was held not to be cognizable in admiralty. In the last case jurisdiction was denied on the precedent set by The Oskaloosa, 1923 Am. Mar. Cas. 44 (E. D. La. 1923), a case involving pilings set in the middle of a navigable stream, and used for mooring vessels while unloading. The *Oskaloosa* decision is shaken by the Supreme Court decision in Doullut and Williams Co., Inc. v. The United States, 268 U. S. 33, 45 Sup. Ct. 411 (1925) where jurisdiction was upheld on identical facts. The claimants citations from the textbooks in the field also had weight: BENEDICT, ADMIRALTY (6th Ed. 1941) Vol. 1, 361; HUGHES, ADMIRALTY (2 Ed. 1920) 198; ROBINSON, ADMIRALTY (1939 Ed.) 62-64.

[4]The Plymouth, 3 Wall. 20 (U. S. 1865); The DeSoto, 5 How. 441 (U. S. 1847).

[5]195 U. S. 361, 25 Sup. Ct. 46 (1904). Of the beacon damaged by the ship, the court said: "It is enough to say that we now are dealing with an injury to a government aid to navigation from ancient times subject to the admiralty. . . ."

[6]24 Vict. c. 10, § 7 (1861).

for any damage done by a ship was being adopted.[7] The court made it plain, however, in *The Cleveland Terminal and Valley R. R. Co. v. Cleveland Steamship Co.*,[8] that the English view had not been taken, and held that the maritime tort still must not only occur on navigable waters, but must also concern a maritime object. In *The Raithmoor*,[9] the "aid to navigation" theory was extended to an unfinished beacon which was *intended* to be used *exclusively* in maritime commerce.

Telegraph, telephone, and power cables. When libels first appeared in admiralty concerning injury to submarine cables, and were objected to on the basis of lack of jurisdiction, the district courts could not decide whether to apply a strict locality test, or a locality test plus a requirement of maritime purpose.[10] They divided on the question. Those in New York and New Jersey have consistently granted maritime jurisdiction in cases involving injury by vessels to submarine telegraph and telephone cables, on the basis of location in navigable waters and connection with maritime matters.[11] In the ninth circuit,[12] however, jurisdiction was refused when the claimant's ship damaged the libelant's power cables. The circuit court in that case expressly disapproved of the telegraph and telephone cable cases which had granted jurisdiction, and said there could be no separation of a "legal amphibian"[13]—*i.e.*, a part land and part maritime object—unless every injury by a ship was compensable in admiralty, and such was not the law set forth in *The Blackheath*. The Supreme Court denied certiorari.[14]

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[7]195 U. S. 361, 369, 25 Sup. Ct. 46, 48 (1904).

[8]208 U. S. 316, 28 Sup. Ct. 414 (1908). The ship negligently collided with the center pier of a drawbridge spanning navigable water. Since the injured property was connected to land, was concerned with commerce on land, and was not an aid to navigation, jurisdiction was refused.

[9]241 U. S. 166, 36 Sup. Ct. 514 (1915). Both the location and purpose of the damaged object must be maritime before admiralty can take jurisdiction of a libel against the ship.

[10]The Cleveland Terminal and Valley R. R. Co. v. Cleveland Steamship Co., *supra* note 8.

[11]New York Telephone Co. v. Cities Service Transportation Co., 28 F. Supp. 426 (E. D. N. Y. 1938) (telephone cable); United States v. North German Lloyd, 239 Fed. 587 (S. D. N. Y. 1917) (government cable); The Toledo, 242 Fed. 168 (D. N. J. 1917) (telegraph cable); Postal Telegraph Cable Co. v. P. Sanford Ross, Inc., 221 Fed. 105 (E. D. N. Y. 1915) (telegraph cable). The *New York Telephone Co. v. Cities Service Transportation Co.* case granted jurisdiction, although it was decided subsequent to the Nippon Yusen Kabushiki Kaisha v. Great Western Power Co., 17 F. (2d) 239 (C. C. A. 9th 1927), *cert. denied* 274 U. S. 745, 47 Sup. Ct. 591 (1927), where jurisdiction was denied in a libel against the ship for negligent injury to power cables. The New York court paid no heed to the disapproval expressed in that case of the prior decisions involving submarine cables.

In *The Toledo, supra,* at 170, the court said: ". . .the contention that the cable was lying on the bottom of the river or the sea, and the ends thereof ultimately reached the land, and therefore admiralty does not have jurisdiction, ought not prevail, when all the other elements necessary to constitute a maritime tort are present."

[12]Nippon Yusen Kabushiki Kaisha v. Great Western Power Co., 17 F. (2d) 239 (C. C. A. 9th 1927), *cert. denied* 274 U. S. 745, 47 Sup. Ct. 591 (1927).

[13]*Id.* at 241.

[14]274 U. S. 745, 47 Sup. Ct. 591 (1927). *See* United States v. Carver, 260 U. S. 482, 490, 43 Sup. Ct. 181, 182 (1923): "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."

Subsequent cases in other jurisdictions have distinguished power cables from telephone and telegraph cables, because the latter carry messages which may or do relate to maritime matters.[15] It seems that this distinction is tenuous, and since the opinions of the lower federal courts on the problem of jurisdiction in admiralty over damage to submarine cables are in conflict, the United States Supreme Court would do well to take one of the cases on appeal and settle the doubt for the benefit of the courts and the profession alike.

Pipe-lines, wharves, bridges, etc. Libels in admiralty against a ship for damage done to submerged pipe-lines have generally been dismissed.[16] It is obviously more difficult to connect underwater pipes with any exclusively maritime purpose, or characteristic, although the locality test by itself may be satisfied. Pipe-lines, part of a shore plant, or connected solely with land commerce and land objects, are outside the scope of admiralty jurisdiction. Similarly, dikes built out from the shore,[17] wharves,[18] bridges, and bridge piers,[19] although surrounded by navigable water, are outside maritime tort jurisdiction. Pilings, however, when surrounded by navigable water and used exclusively to aid navigation, have been held to fall within it.[20]

II

So far as the private litigant is concerned, whether a lien exists will depend upon whether the admiralty court will take jurisdiction, as discussed above.[21] The United States government, however, has given itself a better position. Under the Rivers and Harbors Act,[22] the United States may pro-

[15]See *supra* note 11.

[16]*In re* The Newtown Creek Towing Co., 1941 Am. Mar. Cas. 1610, 42 F. Supp. 904 (E. D. N. Y. 1941); The Poughkeepsie, 162 Fed. 494 (S. D. N. Y. 1908), *aff'd* 212 U. S. 558, 29 Sup. Ct. 687 (1908). *Cf.* Sound Marine and Machine Corp. v. Westchester County, 100 F. (2d) 360 (C. C. A. 2d 1938), *cert. denied* 306 U. S. 642, 59 Sup. Ct. 582 (1938), where admiralty retained jurisdiction of an action arising when respondent's sewer pipe was alleged to have diminished the depth of a channel used by plaintiff's yachts, and essential to plaintiff's business.

[17]The Panoil, 266 U. S. 433, 45 Sup. Ct. 164 (1925). *But cf.* The Barbara Cates, 17 F. Supp. 241 (E. D. Pa. 1936), a libel by the United States under the Rivers and Harbors Act, 1899, 30 STAT. 1152, 1153 (1899), 33 U. S. C. 408, 411, 412 (1899); and The Senator, 54 F. (2d) 420 (D. Del. 1931), where it was held that on the pleadings the facts were analogous to those of The Raithmoor, 241 U. S. 166, 36 Sup. Ct. 514 (1915), cited *supra* note 9.

[18]The Plymouth, 3 Wall. 20 (U. S. 1865).

[19]Cleveland Terminal and Valley R. R. Co. v. Cleveland Steamship Co., 208 U. S. 316, 28 Sup. Ct. 414 (1908); The Rock Island Bridge, 6 Wall. 213 (U. S. 1877); The Dixie, 39 F. Supp. 395 (S. D. Tex. 1941); The Kearney, 14 F. (2d) 949 (C. C. A. 3rd 1929). See also, Martin v. West, 222 U. S. 191, 197, 32 Sup. Ct. 42, 43 (1911).

[20]Doullut and Williams Co., Inc. v. The United States, 268 U. S. 33, 45 Sup. Ct. 411 (1925).

[21]These categories answer the question whether or not the injured object has the security of the injuring ship. If there is an admiralty tort there is a lien on the vessel. A denial of maritime character means that the owner of the injured structure is remitted merely to a personal claim against the ship's owner or operator.

[22]Act 1899, c. 425, § 14, 30 STAT. 1152 (1899), 33 U. S. C. 408 (1899): "It shall not be lawful for any person or persons to take possession of or make use of for any purpose, or build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto

ceed for a fine and damages against a vessel or other craft which injures a government-built dike, jetty, seawall, etc., erected to preserve or improve the navigable waters of the United States. The proceeding is "by way of libel in any district court of the United States."[23] The vessel libeled is treated as a guilty thing, jurisdiction being granted in any court of admiralty within whose district the ship may be found.[24] It is apparent, however, that unless the object damaged is mentioned specifically in the statute, or answers the jurisdictional tests set forth above, a court of admiralty will dismiss the libel. For example, in *The Dixie*,[25] the libel was dismissed when the United States claimed damages for injury to a bridge pier built by the Secretary of Agriculture. The court held that the libel in admiralty under the statute will lie only where the property injured is used for the "preservation or improvement of navigable waters."

The question has been raised whether a statute, such as the one which obtains in England granting admiralty jurisdiction for any tort by a ship, would be constitutional. Congress is said not to have legislative power over the admiralty except to provide procedural relief where the substantive right existed at the time of the adoption of the Constitution.[26] In *Panama R. R. Co.*

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or otherwise, or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, in whole or in part, for the preservation and improvement of any of its navigable waters. . . . "

Section 411 provides penalties for violations of the above section.

[23]Section 412 provides in part: " . . . And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions . . . shall be liable for the pecuniary penalties specified in section 411 of this title, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft . . . and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof." *Quare*, as to the priority the lien would have if it came into conflict with actual maritime liens on the government-libeled ship. As yet, the question does not seem to have been raised.

[24]The Scow 6 S, 250 U. S. 269, 39 Sup. Ct. 452 (1919). *Id.* at 272: The statute "treats the offending vessel as a guilty thing, upon the familiar principle of maritime law, and permits a proceeding against her in any court of admiralty 'having jurisdiction thereof'—meaning any court within whose jurisdiction she may be found."

[25]30 F. Supp. 215 (S. D. Tex. 1939); 39 F. Supp. 395 (S. D. Tex. 1941); note (1941) 16 TULANE L. REV. 139; *cf.* The Barbara Cates, 17 F. Supp. 241 (E. D. Pa. 1936), a proceeding against a vessel under the statute for damaging a dike, where the court said in a dictum that if the case had involved simply a maritime tort, there would have been no jurisdiction; and Aktieselskabet Dampskib Gansfjord v. The United States, 32 F. (2d) 236 (C. C. A. 5th 1929), *cert. denied* 280 U. S. 578, 50 Sup. Ct. 32 (1929), where respondent's exception to a libel for damage to a jetty under the statute was overruled on the *law side* of the court.

Where the tort occurs to a land object, and is thus non-maritime in character, a state-given lien on the ship is valid and enforceable by state process. Martin v. West, 222 U. S. 191, 32 Sup. Ct. 42 (1911), *aff'g* 51 Wash. 85 (1908).

[26]U. S. CONST. Art. III, § 2: "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction . . . ." Act of June 10, 1922, c. 216, § 1, 42 STAT. 634 (1922), 28 U. S. C. 41 (1922): "The district courts shall have original jurisdiction . . . : 3) Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it . . . ." See The St. Lawrence, 1 Black 522, 526, 527 (U. S. 1861); The Blackheath, 195 U. S. 361, 365, 25 Sup. Ct. 46, 49 (1904); The Belfast, 7 Wall. 624, 640 (U. S. 1868).

v. Johnson,[27] the view was expressed that admiralty jurisdiction could not be altered so as to exclude maritime objects or include non-maritime objects.[28] Yet even here, there is no certainty about what objects would have fallen within admiralty jurisdiction at the time the Constitution was adopted because of the vagueness of the powers of admiralty courts under general maritime law in 1789.[29] It seems clear that no judicial decision is likely to bring the English rule here. But in view of recent legislation which has been upheld by the Court, it is reasonable to infer that a legislative adoption of the English rule would be constitutional.[30]

Under the existing rules and from the cases available in the Supreme Court which deal with the problem of admiralty jurisdiction for a claim against a ship by a non-navigable, non-floating object, something more than a casual connection with maritime matters must be shown. To date, the Supreme Court has maintained that there must be an *aid to*, or a *connection exclusively with*, maritime commerce. This excludes pipe-lines and power cables; but it would appear also that telephone and telegraph cables, which are unquestionably parts of shore communication and connecting links between land stations, are so remotely connected with navigation that their injury by a ship should not be cognizable in admiralty.[31]

Reginald S. Oliver

Contracts: Arbitration: Effect of notice to arbitrate stamped on invoice.—A recent New York Court of Appeals case again emphasizes that lawyers and businessmen should be wary of printed or stamped provisions on bills, invoices, letters, and the like. Plaintiff, a domestic corporation, sold and

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[27]264 U. S. 375, 386, 44 Sup. Ct. 391 (1924).

[28]See The Barbara Cates, 17 F. Supp. 241 (E. D. Pa. 1936).

[29]The Supreme Court admitted that the test for tort jurisdiction and the question of what objects were within it had a vague history. The Blackheath, 195 U. S. 361, 365, 25 Sup. Ct. 46, 47 (1904).

[30]The Detroit Trust Co. v. The Thomas Barlum, 293 U. S. 21, 55 Sup. Ct. 31 (1934), upholding the Ship Mortgage Act (1920, 41 STAT. 1000-1006, 46 U. S. C. 911-984). Mr. Chief Justice Hughes wrote, concerning the grant of admiralty power in Art. III, § 2, of the Constitution: ". . . From the beginning the grant was regarded as implicitly investing legislative power in the United States to alter maritime law . . . ." (293 U. S. 21, at 43-44). *See also*, The Blackheath, 195 U. S. 361, 364, 25 Sup. Ct. 46, 47 (1904), where Mr. Justice Holmes wrote: ". . . it would be a strong thing to say that Congress has no constitutional power to give the admiralty here as broad a jurisdiction as it has in England."

Cf. Crowell v. Benson, 285 U. S. 22, 52 Sup. Ct. 285 (1931), where it was said that Congress can deal freely with procedural or remedial matters in the admiralty, but is limited by the Constitution in changing the substantive law.

For an excellent summary of the reasons for such a statute, and the arguments for its constitutionality, see Ernest Bruncken (Secretary of the Milwaukee Harbor Commission), *Tradition and Common Sense in Admiralty* (1929) 14 MARQ. L. REV. 16.

[31]The relation of a submarine cable to land is more apparent than the relation of a beacon, dike, piling, or other object located in navigable waters but used *exclusively* for maritime purposes. The latter, by a legal fiction, can be disconnected from their relation to the land, but a cable is entirely dependent upon land for its usefulness, and is primarily concerned with stations located on land.

delivered a quantity of textiles to the defendant on twenty-seven occasions. The transactions were conducted orally, either over the telephone or personally, and, as the president of the plaintiff corporation admitted, itemized invoices were not sent to the defendant until *after* the goods were delivered. On each invoice there was stamped: "All controversies arising from the sale of these goods are to be settled by arbitration." A controversy between the parties subsequently having arisen, the plaintiff demanded that it be arbitrated. Defendant, instead, commenced an action in the Supreme Court which found a contract to arbitrate and ordered the parties to proceed to arbitration. The Appellate Division, one justice dissenting, affirmed,[1] but the Court of Appeals unanimously reversed, on the ground that the statements on the invoices were separate offers to arbitration which were never accepted by the defendant, and that the defendant's silence did not operate as an assent by way of estoppel, since he was under no duty to speak. *Tanenbaum Textile Co. v. Schlanger, 287 N. Y. 400, 40 N. E. (2d) 225 (1942).*

Under the governing section of the New York Civil Practice Act[2] the validity of an order to arbitrate depends upon the existence of an arbitration contract. The criteria applied to ascertain the formation of a contract to arbitrate are the same as those applied to the formation of contracts generally.[3] The court's holding that here there was no valid implied-in-fact contract to arbitrate seems to be supported by the weight of authority. It is well established that silence does not operate as an assent to an offer to arbitrate unless the failure to speak is inconsistent with honest dealings and misleads another, or unless the party is under a duty to speak.[4]

Compare with the instant case, the decision reached by the same court only two years previously in *Davison v. Klaess.*[5] There the seller sent to the purchaser, after the sale and delivery of certain lumber, bills which contained the printed notice: "Terms: Cash—Accounts Overdue Subject to Interest." Plaintiff-seller conceded that no mention had been made of interest either during the formation or performance of the contract. The majority of the court found that by accepting, without objecting, the bills rendered, and by making payments on account, the defendant impliedly contracted to pay interest.[6]

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[1]262 App. Div. 739, 29 N. Y. S. (2d) 141 (1st Dep't 1941).

[2]N. Y. CIV. PRAC. ACT, § 1449.

[3]In Matter of Marchant v. Mead-Morrison, 252 N. Y. 284, 299, 169 N. E. 386, 112 A. L. R. 875 (1929) *appeal dismissed for want of a properly presented federal question,* 282 U. S. 808, 51 Sup. Ct. 104 (1930), Cardozo, J. says: "The question is one of intention, to be ascertained by the same tests that are applied to contracts generally." See also Matter of Lehman v. Ostrofsky, 264 N. Y. 130, 190 N. E. 208 (1934); B. Fernandez & Hnos. S. EnC. v. Rickert Rice Mills Inc., 119 F. (2d) 809 (C. C. A. 1st 1941).

[4]More v. New York Bowery Fire Ins. Co., 130 N. Y. 537, 29 N. E. 757 (1892) Troyer v. Fox, 162 Wash. 537, 298 Pac. 733, 77 A. L. R. 1132 (1931), and annotations 77 A. L. R. 1141 (1932); 1 WILLISTON, CONTRACTS (Rev. ed. Williston and Thompson, 1936) § 91; RESTATEMENT, CONTRACTS (1934) § 72.

[5]280 N. Y. 252, 20 N. E. (2d) 744 (1939). Noted and criticized: (1940) 25 CORNELL L. Q. 427; (1939) 53 HARV. L. REV. 330; (1939) 34 ILL. L. REV. 363; *cf.* (1940) 9 FORD. L. REV. 124.

[6]If a contract for the payment of interest had not been found, and interest was allowed

The *Davison* and *Tanenbaum* cases seem to be identical on the facts which concern the existence or non-existence of a contract. In both cases there was: (1) an oral sale completed by delivery, (2) an itemized bill rendered to the buyer after delivery, (3) a self-serving provision printed or stamped on the bill, standing alone and unrelated to the rest of the writing, and (4) no mention whatever of the printed or stamped provisions until the controversy arose.

A buyer who has bought and received goods and is later presented with an invoice reasonably cannot be expected to consider any new terms on it as part of the agreement.[7] An invoice issued after the goods have been delivered does not purport to be a part of the executed contract. It is a "mere detailed statement of the nature, quantity, and the cost or price of the thing invoiced."[8] If the notice in the invoice is not an offer to arbitrate, it is of no legal effect, for it is well settled that terms afterwards brought to a buyer's notice cannot alter or modify his contract,[9] unless he assents thereto and receives sufficient consideration, or its statutory equivalent, to make the modification enforceable.[10] In the *Tanenbaum* case, the delivery of the goods consummated the original bilateral contract of sale so that the notice to arbitrate was at best an offer to modify.[11] The offer to arbitrate did not mature into a contract, however, for there was not sufficient consideration,[11a] since delivery of the goods sold was merely past consideration, and no other new consideration was alleged. The defendant's silence in the face of the offer did not estop him from setting up this argument.[12] "A person is under no obligation to say anything concerning a proposition which he does not choose to accept."[13]

Even though the purchaser was aware of the offer in the form of the

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simply as damages, payment and acceptance of the principal would have discharged the duty to pay interest. 1 Williston, *op. cit. supra* note 4, § 127. For further discussion see (1940) 25 CORNELL L. Q. 427, 428 and n. 7 *et seq.*

[7]Columbia Melting Co. v. Clausen-Flanagen Corp., 3 F. (2d) 547; (C. C. A. 2d 1924); Baum's Estate, 274 Pa. St. 283, 117 Atl. 684, 77 A. L. R. 1147 (1922); Carnahan Mfg. Co. v. Beebe-Bowles Co., 80 Ore. 124, 156 Pac. 584, 77 A. L. R. 1147 (1916); 1 Williston, Contracts (Rev. ed. Williston and Thompson 1936) § 90D and cases cited, n. 1. *Cf.* Pierce Oil Co. v. Gilmer Oil Co., 230 S. W. 1116, 77 A. L. R. 1152 (Tex. Civ. App. 1921). ". . . The rest of the true interpretation of an offer or acceptance is not what the party making it thought it meant or intended it to mean, but what a reasonable person in the position of the parties would have thought it meant." 1 Williston, *op. cit. supra,* § 94.

[8]287 N. Y. 400, 403, 40 N. E. (2d) 225 (1942).

[9]Newhall Land & Farming Co. v. Hogue-Kellog, 56 Cal. App. 90, 204 Pac. 562 (1922); Kernan Co. v. Cook, 162 Md. 137, 143, 159 Atl. 256 (1932). "Terms brought to the acceptor's notice after the agreement is complete will not affect the agreement." 17 C. J. S. 378. See also *In re* Renfro-Wadenstein, 47 F. (2d) 238, 243 (W. D. N. D. 1931).

[10]See N. Y. PERS. PROP. LAW, § 33(3), as amended 1941, *infra* note 15.

[11]Wilson v. Crown Transfer & Storage Co., 201 Cal. 701, 258 Pac. 596 (1927); Dale v. See, 51 N. J. L. 378, 18 Atl. 306, 5 L. R. A. 583 (1889) (leading case); Altkrug v. Whitman, 185 App. Div. 744, 173 N. Y. Supp. 669 (1st Dep't 1919); 1 WILLISTON, CONTRACTS (Rev. ed. Williston and Thompson 1936) § 90C, and cases cited n. 8.

[11a]See *supra* note 11.

[12]See *supra* note 4.

[13]See New York State Bar Ass'n, Lawyer Service Letter, No. 67 (March 18, 1942) p. 274.

stamped arbitration clause and anticipated that it would be on the subsequent invoices, the contract could not be unilaterally modified without consideration.[14] Furthermore, the absence of the defendant's signature precluded a valid statutory modification, as provided for by recent New York legislation.[15] Ultimately, however, the decision turns upon the proposition that the defendant did not accept the offer to arbitrate. He was under no obligation to speak, and, therefore, his silence in receiving the invoices did not amount to an acceptance.[16] This was, in effect, the argument upon which Judge Lehman based his dissent in the *Davison* case.[17] The majority there found that when the bill was "rendered and accepted on the terms stated,"[18] there arose an implied-in-fact contract to pay interest.[19] The two old cases[20] upon which the court relied were ones in which bills containing terms of the agreement were delivered along with the goods. Such cases are distinguishable as involving offers to unilateral contracts of sale.[21] In neither the *Davison* case

[14]In Dale v. See, *supra* note 11 at 384, the court stated, in regard to bills containing notices of conditions not part of the already executed agreement: "A notice given after the goods . . . are delivered and received cannot amount . . . [to a contract]. The contract implied by law arises immediately when the bailment is accepted, and notice subsequently given would be inefficacious to establish a contract for the want of mutual assent and sufficient consideration. . . . And although the owner should accept the goods with knowledge of the terms proposed, no contract would arise therefrom. The transaction would lack the consideration necessary to support the contract." See also Altkrug v. Whitman, 185 App. Div. 744, 173 N. Y. Supp. 669 (1st Dep't 1919). "To make the doctrine of constructive knowledge of the offer and its terms effective, the document or letter must be accepted by the offeree at or prior to the formation of the contract." 1 Williston, Contracts *op. cit. supra* note 11, § 90C.

[15]N. Y. Pers. Prop. Law, § 33 (2): "An agreement hereafter made . . . to modify . . . shall not be invalid because of the absence of consideration, provided that the agreement . . . modifying . . . shall be in writing and signed by the party against whom it is sought to enforce the . . . modification . . ." Thus, in the *Tanenbaum* case, if the buyer-defendant had signed the invoice rendered, the offer to arbitrate contained therein would have been an enforceable modification of the already formed bilateral contract.

Similarly if the goods were delivered and the buyer-defendant signed the offer to arbitrate contained in a later invoice, under § 33 (3) of the Personal Property Law, the fact that the consideration for the resulting contract (the delivery of the goods) was past or executed would not render the agreement to arbitrate unenforceable. § 33 (3), as amended in 1941, reads: "A promise hereafter made in writing and signed by the promisor shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, *if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed.*" (Italics added).

[16]See *supra* note 4.

[17]Judge Lehman said: "They [plaintiffs] concede that at no time prior to October 1936 [when the controversy arose] was interest referred to in any conversation or in any written communication. . . . It is difficult to understand how an *agreement* to pay interest can be implied from a failure to object to an account rendered which correctly states the amount due and the incidental obligation imposed by law in case of failure to pay that amount." 280 N. Y. 252, 265, 20 N. E. (2d) 744 (1939).

[18]*Id.* at 258.

[19]That the modifying contract may be implied-in-fact, see 6 Williston, *op. cit. supra,* note 14, § 1826, n. 3.

[20]Braun v. Hess, 187 Ill. 283, 58 N. E. 371 (1900); Lambeth Rope Co. v. Brigham, 170 Mass. 518, 49 N. E. 1022 (1898).

[21]In such cases a court may well find a contract since there is present consideration

nor in the instant case was the delivery of the goods part of an offer to a unilateral contract. If the bills had been sent *with* the goods, the offer to arbitrate would have been an ineffectual added term, since a bilateral contract had been completed without mention of arbitration. The delivery was in performance of the already existent bilateral contract; it was not a counter-offer to a unilateral contract.[22] In the present case, the court wisely adheres to established principles, both of law and of the market place, in refusing to imply a contract for arbitration unless it can find both: (1) an acceptance by the offeree, and (2) a new, present consideration moving to the offeree-promisor.

To what extent the *Tanenbaum* decision affects the authority of the *Davison* case is somewhat speculative, since it is mentioned neither in the decision nor in the briefs of opposing counsel. Nevertheless, the later decision was by a unanimous court, and, as pointed out above, on a set of facts strikingly similar to those of the prior case. In the *Davison* case the court seems to have been led astray by a desire to make whole the unpaid sellers by compensating them for the buyer's long delay in the payment of his bill.[23] But, the sellers themselves might have guarded against such delay by a specific term in the contract. In both the *Davison* and the principal cases, the vital term was never referred to until the contract of sale had been completed. In the *Tanenbaum* case, the president of the plaintiff corporation naively testified that he never spoke to a customer about arbitration because it would be "bad policy."[24] Yet, he would have the court find that the defendant had agreed to arbitrate because he had accepted, subsequent to the delivery of the goods, an itemized account containing a printed notice to arbitrate. The principal case properly discourages such underhand business practices, and correctly applies elementary principles of the law of contracts.

John J. Roscia

Convicts: Civil death: Effect on marital status.—The ancient, and much criticized, doctrine of *civiliter mortuus*[1] was recently employed by the highest

and the silence of the offeree may operate as assent. 1 WILLISTON, CONTRACTS (Rev. ed. Williston and Thompson 1936) § 90D.

[22]Even if the added terms were intended to be part of an offer to a unilateral contract of sale, they would have been ineffectual unless expressedly referred to or clearly incorporated into the offer. Murray v. Cunard Steamship Co., 235 N. Y. 162, 139 N. E. 226, 26 A. L. R. 1371 (1923) (Cardozo, J., found "the condition wrought into the tissue" of the contract). Galowitz v. Magner, 208 App. Div. 6, 203 N. Y. Supp. 421 (2d Dep't 1924). It seems to be the general rule that unless qualifying conditions are referred to in the body of the letter or document or expressly brought to the recipient's attention, they are not terms of the contract, though the letter or document be accepted without objection. 1 WILLISTON, CONTRACTS (Rev. ed. Williston and Thompson 1936) § 90D.

[23]280 N. Y. 252, 263, 20 N. E. (2d) 744 (1939).

[24]287 N. Y. 400, 402, 40 N. E. (2d) 225 (1942).

[1]The doctrine of *civiliter mortuus* was first set forth in § 25 of the French Civil Code (section abolished in 1854). At early common law, both the doctrines of civil death and "corruption of the blood" as consequences of conviction for felony were convenient fictions

court of New York in deciding a question of marital and property rights. A convicted spouse, serving a life sentence, was "deemed civilly dead" and, therefore, not entitled to contest the probate of his wife's will under which he received a small legacy.[2] The court held that civil death *ipso facto* liberates the spouse of one sentenced, and the property of such spouse, from all the obligations and restrictions arising from the marital relation. *In re Lindewall's Will, 287 N. Y. 347, 39 N. E. (2d) 907 (1942).*

"A person sentenced to imprisonment for life is thereafter deemed civilly dead"—this is the form in which the doctrine is embalmed in the Penal Law of New York.[3] In the cases in which this apparently simple phrase has been construed, the problem has persistently been one of degree—how much of the convict is civilly dead and how much civilly alive?[4] It is not the purpose of this note to examine the effect of the doctrine on the personal, political, and contractual rights of life convicts,[5] but rather to examine the present effect of civil death on the marital status in New York.

The principal case clarifies the legal consequences of life imprisonment upon the marital relation theretofore existing between the one sentenced and his spouse. The decision, however, is unusual since it carries the effect of civil death on the marital relation beyond the strict common law.[6] Although the court recognized that at common law there was not a dissolution of the marriage for all purposes, the court concluded, after examining the New York statutes on marriage and civil death,[7] that the legislature intended to have civil

which readily found a place in the feudal pattern. Strict civil death, as compared with the modified version of the doctrine which obtains today, was coextensive with natural death in legal consequence, and was confined to three situations: (1) persons professed to a religious order, (2) persons abjured, and (3) persons banished from the realm. Blackstone, citing Lord Coke, tells of a man who named a monastery as devisee in his will. Subsequently, the testator entered the monastery, and upon becoming an abbot, he sued his own executor on the provision he had made in favor of the monastery. CHASE'S BLACKSTONE, I, 132.

[2]N. Y. Dec. Est. Law, § 83.

[3]§ 511. *Cf.* § 510, which merely "suspends the civil rights of a person sentenced to imprisonment for a term less than life." Although the consequences of § 510 are far less drastic than civil death, "its meaning today, as in earlier times, is by no means settled." Matter of Weber, 165 Misc. 815, 1 N. Y. S. 809 (Surr. Ct. 1938). For a note dealing with the problems of § 510, see: (1941) 27 CORNELL L. Q. 90.

[4]That this confusing question would arise was foreseen in the dissenting opinion of Earl, J. in the leading case of Avery v. Everett, 110 N. Y. 317, 18 N. E. 148, 6 Am. St. Rep. 368, 1 L. R. A. 264 (1888).

[5]In general, the courts have limited only those civil and personal rights of a life convict which are inconsistent with his imprisonment for an indefinite term. This is illustrated by the anomalous result in the principal case which upheld the bequest to a husband, although he was "too dead" to contest the probate of his wife's will. The doctrine is discussed generally in (1937) 50 HARV. L. REV. 968-77. Re contracts see Williston

[6]At common law, civil death of the husband merely restored the wife's powers to act as a *femme sole.* She could sue, and be sued; contract debts and acquire property; and, transfer property by deed or by will. See generally: Countess of Portland v. Prodgers, 2 Vern. 104 (1689); Osborne v. Nelson, 59 Barb. 375, 381 (N. Y. 1871). In the principal case, at 350, the court concluded that: "civil death was given the same effect as actual death at common law and in equity only so far as was required for the protection of wife or child."

[7]The second marriage of the spouse of a life convict is not bigamous. N. Y. DOM. REL. LAW, § 6(2); N. Y. PENAL LAW, § 341(4).

death *ipso facto* terminate all marital rights and duties, and in particular, liberate the property of the "surviving" spouse from all obligations and restrictions arising from the marriage. The court expressly rejected the theory proposed by the petitioner that the marriage should continue until the spouse who is at liberty should make an election.[8]

The fictional death of a person sentenced to life imprisonment is contradicted not only by the fact that natural life continues, but also by the fact that often the imprisonment is not for the life of the convict.[9] Life convicts do not regain their marital rights upon being pardoned or paroled;[10] upon their discharge from prison, they are, in a sense, reincarnated, but unmarried.

In the principal case, the convicted spouse was sentenced for life in Massachusetts, in which state the doctrine of civil death does not obtain. Since the marital *res* was located in New York, the application of the New York civil death statute seems justified because of a state's right to fix, dissolve, terminate, and regulate the marital relations of its citizens.[11] Unfortunately, the court did not rely solely upon this ground, but instead, cited with approval, *Jones v. Jones*,[12] a case in which both the sentenced spouse and the marital *res* were located outside of New York. The *Jones* case was distinguished and criticized by a federal district court sitting in New York which allowed a convict sentenced for life in Florida to sue a New York debtor.[13] The federal court correctly reasoned that to consider a life convict, sentenced in a state where the doctrine of civil death does not obtain, civilly dead in New York, is in effect to add a personal disability or disqualification beyond those which are imposed by the sentence.[14]

In dealing with this relatively simple problem, the Court of Appeals was compelled, by the civil death statute, to delve into the archives of ancient common law. Blackstone, Coke on Littleton, and even the effect of the Norman Conquest on the development of the ecclesiastical courts, were turned

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[8]The Appellate Division had accepted the theory of "election," and held that since the wife had not remarried, the marriage continued in full force and effect. 259 App. Div. 196, 18 N. Y. S. (2d) 281 (1st Dep't 1940).

[9]In Brookman v. Brookman, 161 Misc. 741, 292 N. Y. S. 918 (Sup. Ct. 1937), although the husband was given the *indefinite* sentence of 15 years to life, the wife was entitled to remarry. *Compare:* 48 St. Dep't Rep. 112 (N. Y. 1933), where the Attorney General decided that the husband or wife of one given the *definite* sentence of 50 years may not remarry.

[10]N. Y. DOM. REL. LAW, § 58.

[11]Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544 (1900); Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525 (1905); May v. May, 233 App. Div. 519, 253 N. Y. S. 606 (1st Dep't 1931).

[12]249 App. Div. 470, 292 N. Y. S. 705 (3d Dep't 1937), *aff'd without opinion*, 274 N. Y. 574, 10 N. E. (2d) 558 (1937). The court held that a wife of a Virginia marriage, whose husband had been sentenced to life imprisonment in North Carolina, was not "married" within the meaning of § 6(2) of the New York Domestic Relations Law, cited *supra* note 7.

[13]Panko v. Endicott Johnson Corporation, 24 F. Supp. 678 (N. D. N. Y., 1938).

[14]People v. Gutterson, 244 N. Y. 243, 155 N. E. 113 (1926); Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617 (1891). The District Court stated, at 682: "The Jones case seems to be out of harmony with . . . the line of cases . . . in which territorial limitations of state statutes is decided."

to for an understanding of this medieval relic in our law. No one will hail the principal case as the end of the confusion which has accompanied the doctrine of *civiliter mortuus*. The fiction of civil death should be eliminated, and legislation should be enacted making life imprisonment of one spouse a ground for divorce.

Douglas S. Moore

Crimes: Felony murder: Effect of jury's failure to agree on recommendation of life imprisonment under Section 1045-a of the Penal Law. In 1937, in his Annual Message to the New York legislature,[1] Governor Lehman made the following recommendation:

"While discussing the Anti-Crime program, I wish to bring once more to your attention . . . the necessity of changing the Penal Law on felony murder.

"Under our existing law, in the event that a murder occurs during the commission of any felony, all those involved are held equally responsible and if found guilty must be sentenced to death. The jury has absolutely no discretion. The verdict must either be acquittal or murder in the first degree for which the penalty is death. In other cases of murder, the jury has the right of bringing in verdicts of murder first degree, murder second degree or manslaughter. As a result of the limitation placed on the jury in felony murder cases, the jury is faced with the choice of condemning to death a man for whom it would like to show some clemency, or on the other hand, of letting him go completely unpunished.

"I believe that the sentence for felony murder should continue to be death, the same as for premeditated murder. However, I would empower a jury to accompany any verdict of guilty with a recommendation of executive clemency in which case the sentence shall not be death but imprisonment for life.

"My reasons for this recommendation are two-fold. The first is that it will make it easier for the jury to bring in verdicts of guilty in felony murder cases. In the second place it will permit the jury to fit its verdict to what it may consider to be the varying degrees of moral guilt of the persons involved in the same crime. I strongly recommend this change."

In response to this executive request, the legislature enacted Section 1045-a of the Penal Law. That section reads: "A jury finding a person guilty of murder in the first degree . . . may, as part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation the Court may sentence the defendant to imprisonment for the term of his natural life."

Although the Court of Appcals had held that the various degrees of homicide must be charged in a trial for felony murder where there is evidence sufficient to put in question the mental capacity of the defendant to form an intent to commit the felony,[2] still in the usual felony murder case, where

[1] NEW YORK STATE DEPARTMENT REPORTS, Vol. 56, p. 21-22 (1937).

[2] People v. Cummings, 274 N. Y. 336; 8 N. E. (2d) 882 (1937): "The degrees [of

the question of mental capacity is not raised, no such blanket charge is required.[3] The passage of Section 1045-a, therefore, tended to "make the punishment fit the crime" and, at the same time prevent criminals from going entirely unpunished. New York fell in line with the great majority of our states, each of which had already invested the jury with the discretion of choosing between life imprisonment and the death sentence where the defendant had been convicted of murder in the first degree.[4] The striking paradox, illustrated by most felony murder trials whereby the actual slayer received the right to have the jury charged concerning the lower degrees of homicide while the defendant who was merely an accomplice and "look-out" was denied this same right,[5] made the necessity of the enactment of Section 1045-a more obvious.

In *People v. Hicks*,[6] the Court of Appeals was faced with the problem of ascertaining the legislative policy underlying Section 1045-a. Two brothers, Edward and Miles Hicks, entered the store of the deceased intending to rob him. Edward struck the deceased over the head with a part of a steel axle, fracturing his skull, and then the brothers cut his throat lest the victim identify his assailants. The jury found both brothers guilty of murder in the first degree but recommended life imprisonment in the case of Miles. Edward appealed, basing his entire case on an alleged error in the trial judge's charge.

The controversial charge was, in effect, that if the jury agreed on the question of guilt, but could not agree in recommending life imprisonment under Section 1045-a, they nevertheless must report their verdict, which would then stand as a conviction of murder in the first degree without any recommendation. In a four-three decision, a majority of the court held this to be error, taking the view that "Until the jury has reached agreement upon every part of the verdict it has not agreed upon the verdict." Finch, Lewis, and Conway, JJ., dissented on the ground tbat the verdict of guilty must prevail unless the jury agrees to make a recommendation under Section 1045-a, the latter being only a permissive power, affecting punishment and not guilt, to be exercised or not as the jury sees fit.[7] Further, the minority points out,

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homicide] must be charged in those cases in which the evidence is so unsubstantial as to put in question the mental capacity of the defendant to form an intent to commit the felony . . . ." This situation generally arises where the evidence shows that the defendant was intoxicated or his mentality otherwise impaired.

[3]People v. Schleiman, 197 N. Y. 383, 90 N. E. 991 (1910); People v. Van Norman, 231 N. Y. 454, 132 N. E. 147 (1921); People v. Moran, 246 N. Y. 100, 158 N. E. 35 (1927); People v. Seiler, 246 N. Y. 262, 158 N. E. 872 (1927).

[4]*Cf.*, Commonwealth v. Parker, 294 Pa. St. 144, 143 Atl. 904 (1923). In some states, the jury's recommendation is mandatory and must be allowed by the trial court; in others, the recommendation is merely advisory. See Bye, *Recent History and Present Status of Capital Punishment in the United States*, (1926) 60 Am. Law Rev. 905, where all of the states granting discretion to the jury in capital cases are listed and tabulated according to the type of crime involved. See also Note (1926) 27 Harv. L. Rev. 169.

[5]For a full and excellent treatment of this point and of other problems involved in the felony murder doctrine, see Study Relating to Homicide, New York Law Revision Commission, Leg. Doc. 65-P (1937) 515.

[6]287 N. Y. 165, 38 N. E. (2d) 482 (1941).

the precise question had already been passed upon and settled by the court in *People v. Gati.*[8]

Close examination of the record in the *Gati* case reveals that the exact point of the principal ease was the sole point raised by defendant Gati on appeal. Gati's attorneys had requested the court to charge that unless the jury agreed on the recommendation as well as on the question of guilt, the jury would be held to have disagreed as to "the entire case."[9] The court declined so to charge.[10] Yet the trial court's refusal was unanimously affirmed by the Court of Appeals in a memorandum decision. Lehman, Loughran, Rippey, JJ., concurred under Section 542 of the Code of Criminal Procedure.[11]

The problem presented by the *Hicks* case cannot be answered easily or categorically. Cases on the point are sparse. In *Smith v. United States,*[12] the court held that: "In a criminal case, this unanimity extends to the question of guilt or innocence . . . and to the kind and character of punishment where that question is left to the determination of the jury." Also, in *People v. Hall,*[13] a California case, it was decided that unless the jury agrees on both the question of guilt and the penalty, the verdict is incomplete. Mississippi dispells any doubt by clearly providing by statute that where the jury certifies its disagreement as to the punishment, the court shall fix the penalty at life imprisonment.[14]

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[7]See also, People v. Ertel, 283 N. Y. 519, 525, 29 N. E. (2d) 70 (1940).

[8]279 N. Y. 631, 18 N. E. (2d) 35 (1939). Aside from the cases cited *infra* note 15, the *Gati* case, the *Hicks* case, and People v. Mardavich, 287 N. Y. 344, — N. E. — (1942)—all involving the same point—are the only cases that have arisen thus far under § 1045-a.

[9]People v. Gati, *record on appeal,* ff. 3563-3572.

[10]It is interesting to note that Mr. (now Justice) Samuel Liebowitz, as attorney for the defendant Gati, took exception to the ruling and charge of the court only to repeat the same charge several years later in the trial of the instant case, perhaps on the authority of the *Gati* decision.

[11]In *People v. Hicks,* 287 N. Y. 165, 178, 38 N. E. (2d) 482 (1941) Chief Judge Lehman states that though the point of the *Hicks* case was raised in the briefs of the *Gati* case, it was not properly presented there by the record, since the questioned charge was cured by subsequent instructions and did not prejudice the defendant Gati.

But the majority of the court in the *Gati* case affirmed the trial court on the ground that its refusal to charge was not error. Only three out of the seven judges felt that the charge was erroneous, but had been corrected under § 542 of the Code of Criminal Procedure; the majority declined to base its decision on § 542 (non-prejudicial error). It seems clear, therefore, that the decision in *People v. Hicks* directly overrules the conclusion reached by the majority of the court in *People v. Gati.*

[12]47 F. (2d) 518, 519 (C. C. A. 9th 1931).

[13]199 Cal. 451, 249 P. 859 (1926). This decision appears to overrule previous California cases. *Cf.,* People v. Welch, 49 Cal. 174 (1874); People v. French, 69 Cal. 169, 10 P. 378 (1886).

[14]MISS. CODE ANN. (1930) § 1293 reads: "In any case in which the penalty prescribed by law upon the conviction of the accused is death, except in cases otherwise provided, the jury finding a verdict of guilty may fix the punishment at imprisonment for the natural life of the party; and thereupon the court shall sentence him accordingly; but if the jury shall not thus prescribe the punishment the court shall sentence the party found guilty to suffer death, unless the jury by its verdict certify that it was unable to agree upon the punishment in which case the court shall sentence the accused to imprisonment in the penitentiary for life."

This Mississippi statute replaced a former enactment of 1882 which had read substan-

It should be observed, however, that the statutes involved in the above cases made the jury's recommendation, if any, mandatory upon the court, whereas in New York the court need not follow the jury's recommendation.[15] It would seem that a verdict of guilty should not be nullified where some of the jurors disagree as to the recommendation when, under the present law, the trial judge apparently may disregard their unanimous recommendation if he sees fit, and may let the verdict of guilty stand.[16]

The opinions in the principal case state opposing interpretations of legislative intention. The majority argues that since the jury may, in the wording of Section 1045-a, *as part of its verdict,* recommend life imprisonment, a recommendation (when it is considered by the jury) is as much a part of the verdict as the finding of guilt; therefore, if the jury disagrees as to the recommendation, it has disagreed upon its "verdict." The minority opinion stresses the point that since the legislature has provided through Section 1045 of the Penal Code[17] that murder in the first degree is punishable by death, *unless* the jury recommends life imprisonment, the question of guilt must first be decided after which the jury has the permissive power to recommend leniency. Failure to agree on a recommendation is simply an expression of unwillinguess to elect the power, under Section 1045-a to modify the punishment for first degree murder.

It is submitted that the minority approach to Section 1045-a appears sounder in view of the clear intention of the legislature to make convictions in felony murder cases more certain by virtue of that enactment.[18] Clearly, there is more difficulty in reaching unanimity—and therefore conviction—where a

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tially like § 1045-a. In two decisions interpreting the 1882 statute, the Mississippi Supreme Court had sustained a charge to the effect that if they agreed on the defendant's guilt, but disagreed as to the punishment, the jury should return a verdict of guilty. Green v. State, 55 Miss. 454 (1877); Fleming v. State, 60 Miss. 434 (1882). The enactment of present § 1293, of course, nullified these decisions.

[15]In holding that the recommendation of the jury under § 1045-a is not binding on the court, People v. Ertel, *supra* note 7 at 523, seems to have resolved a conflict that existed in the lower courts. *Cf.*, People v. De Renna, 166 Misc. 582, 2 N. Y. S. (2d) 694 (County Ct. 1938); People v. Smith, 163 Misc. 469, 297 N. Y. S. 489 (Sup. Ct. 1937); People v. Roy, 172 Misc. 1007, 16 N. Y. S. (2d) 224 (County Ct. 1940). The holding was, however, dictum.

The *Hicks* case, on the other hand, seems to indicate that the recommendation of the jury is mandatory, for the majority opinion states at 171: "Each juror should now know that the finding of guilt does not carry that mandatory penalty [i.e., death] unless the jury fails to make a recommendation of life imprisonment a part of the verdict." It remains for a future decision to clarify the exact nature of a jury's recommendation, whether it is mandatory or permissive.

[16]From a defendant's point of view, however, the trial judge's action is reviewable on appeal, whereas the jury's disagreement is not. Under the minority view of the instant case, the defendant gets the electric chair if the jury disagrees only upon the recommendation; under the majority view he gets his freedom or a new trial. Therefore, though the jury's recommendation may actually be merely advisory, a failure to recommend or a disagreement thereon can mean all the difference in the world to the defendant.

[17]Section 1045 provides: "Murder in the first degree is punishable by death unless the jury recommends life imprisonment as provided by section ten hundred forty-five-a."

[18]See the Governor's Annual Message to the Legislature (1937), set forth above and cited *supra* note 1.

jury must agree upon both guilt and the recommendation of leniency, than where the jury is given the choice of agreeing only upon guilt.

Under the majority view, a sole juror, by holding out for a recommendation, can upset a unanimous finding of guilt and give the defendant his freedom or a new trial. Under the minority interpretation, a single juror, by refusing to assent to a recommendation, is given the power to choose life or death for the defendant. Neither result, however, invests a single juror with extraordinary or unwarranted power for it is a well established principle of our criminal procedure that in a criminal case one juror, no matter what his grounds, by refusing to vote along with the other eleven members, can upset either a conviction or an acquittal and cause a dismissal of the jury for failure to agree.

It is submitted that a more satisfactory solution of this problem can be reached by an enactment clearly defining the policy and intent of the legislature. The Mississippi statute already mentioned[19] illustrates that clarification of intention can easily be achieved.

Louis Pollack

Personal Property: Decedent estates: Husband and wife: Attempts to defeat a statutory distributive share by the creation of joint bank accounts. —In *Inda v. Inda, 32 N. Y. S. (2d) 1001 (Sup. Ct. 1941)*,[1] a husband opened and maintained for several years two deposit accounts, one in a commercial bank and the other in a savings bank, in the joint names of himself and his son. He maintained a third account in a savings bank in the joint names of himself and his daughter-in-law. Each account contained the direction, "pay either or survivor." The husband kept possession of all of the bank books and received the interest. Neither the son nor the daughter-in-law ever made any withdrawals.

Upon the death of the husband, his widow claimed that the balances in these accounts were part of his estate, to a share in which she was entitled under Sections 18[2] and 83[3] of the New York Decedent Estate Law. The

[19] See *supra* note 14.

[1] *Aff'd without opinion*, 263 App. Div. 925, 32 N. Y. S. (2d) 1008 (4th Dep't 1942), two justices dissenting. The portion of the judgment appealed from by the widow awarded the son and the daughter-in-law the amounts deposited in the two savings banks. The report (at 925, 1008) merely states: "Judgment so far as appealed from affirmed, without costs of this appeal to any party. All [three justices] concur, except Crosby, P.J., and Dowling, J., who dissent and vote for reversal and for granting judgment as demanded in the complaint." To grant "judgment as demanded in the complaint" would presuppose under well-established New York law a finding that the transfers *in toto*—the creation of two joint accounts in savings banks—were "illusory."

[2] The New York statute [N. Y. DEC. EST. LAW (1929) § 18] provides that a surviving spouse shall have a "personal right of election," subject to certain limitations and restrictions, to take against a testamentary provision "his or her share [not more than one-half] of the estate as in intestacy."

[3] This "intestate share" is defined in § 83 of the Decedent Estate Law [N. Y. DEC. EST. LAW (1929) § 83] as a certain part—from one-third and up depending upon the existence

son and the daughter-in-law asserted, on the other hand, that the accounts were theirs by survivorship. The court held for the widow as to the commercial bank account and for the son and daughter-in-law as to the savings bank accounts. The creation of the account in the commercial bank was denominated an "illusory" transfer, while the savings bank accounts were upheld as being the result of "real" transfers.

In re *Lorch's Estate, 33 N. Y. S. (2d) 157 (Surr. Ct. 1941),* involved an account created in a commercial bank by a husband in the joint names of himself and daughter with the direction that "at the death of either, the survivor shall take." Though the husband seems to have kept possession of the passbook, the court held that a "real" transfer had been made, that the account thus was not part of the husband's estate, and that the daughter took the account by survivorship.[4]

Statutes designed to increase the shares of surviving spouses in the estates of their decedent husbands or wives have been enacted in many jurisdictions.[5] It is clear that such statutes prevent one spouse from disinheriting the other by a testamentary disposition of his or her property. If a testator or testatrix fails to provide adequately in his or her will for the surviving spouse, the latter has a personal right to take her or his share of the estate as an intestacy. As to the effect of a disposition, technically *inter vivos* but testamentary in resemblance, such statutes and related sections are silent.[6] Very frequently, a married person tries to deal with his or her property so that he or she will have the substantial enjoyment of it during life, but that the surviving spouse will receive no share of it after his or her death. It was with such attempts by the decedent to defeat the surviving spouse's right of election by antemortem

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of other closely-related survivors—of the "real property of a deceased person, . . . not devised, . . . and the surplus of his or her personal property, after payment of debts and legacies, . . . not bequeathed." Vexing the courts in jurisdictions which have such statutory provisions has been the question: What "property" is to be considered as part of the decedent's net estate for the purpose of computing the surviving spouse's intestate share? Once the value of the net estate is fixed, the value of the intestate share can readily be arithmetically determined.

[4]For a discussion of the two principal cases insofar as they came to different conclusions with regard to the creation of a joint bank account in a commercial bank, see *infra* note 24.

[5]Provisions for the benefit of the widow, similar in substance to the New York statute, exist [as of 1935] in Alabama, Arkansas, Colorado, Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, Wyoming, District of Columbia, and Hawaii. The right to take a distributive share of the personal property is not extended to the widower in Alabama, Arkansas, Florida, Michigan, North Carolina, and Wisconsin. See 3 VERNIER, AMERICAN FAMILY LAWS (1935) 355-371, 448-464, 532-553, for tabular summaries of statutory modifications of the law of dower and curtesy in American jurisdictions.

[6]"The Decedent Estate Law . . . regulates the testamentary disposition and the descent and distribution of the real and personal property of decedents. It does not limit or affect disposition of property *inter vivos.* In terms and in intent it applies only to decedent's *estates.* Property which did not belong to a decedent at his death and which does not become part of his estate does not come within its scope." Judge Lehman in Newman v. Dore, 275 N. Y. 371, 374, 9 N. E. (2d) 966 (1937).

transfers of property that the courts, in the two principal cases, were concerned. In New York and in the majority of jurisdictions in which such legislation is in force, the effectiveness of attempts to cut off the surviving spouse's expectancy,[7] is made to depend upon whether the antemortem transfers of property made by the spouse owning it are "real" or "illusory."[8] If an intention by the decedent to divest himself[9] during his lifetime of his property[10] can be found or presumed, the transfer is "real." Otherwise, the transfer is "illusory," or no transfer, and the property remains the property of the transferor to become part of his estate from which, after the deduction of certain expenses, the widow is entitled to her intestate share.

Although the courts speak of "intention," the actual test is not the subjective intention[11] of the decedent but the intention as manifested by the substantiality of the transfer of the incidents of ownership. In short, the focus is on the transfer as judged by its substance and not by its form. When the husband sets out to evade such a statute as Section 18 of the New York

[7]Although all, including the courts, recognize that the legislature intended to confer on the surviving spouse an "enlarged property right," the courts have defined the interest as "only an expectant interest dependent upon the contingency that the property to which the interest attaches becomes part of a decedent's estate." *id.* at 376, 9 N. E. (2d) at 967.

[8]In a few American jurisdictions, an intent to defeat the surviving spouse's claim is sufficient to defeat the transfer. Proof of such a *mala fide* intention—perhaps motive is a more proper term—makes out, in such jurisdictions, a case of fraud upon the statute. If a spouse executes gifts constituting the principal part of his estate and without his spouse's knowledge, "a presumption of fraud arises, and it rests upon the beneficiaries to explain away that presumption; . . . The presumption of fraud may be overcome by showing that the provision made by the husband for his children by a former marriage was reasonable, and no more in amount than a father in his pecuniary position might naturally be expected to give to his children by way of advancement." Payne v. Tatem, 236 Ky. 306, 308, 33 S. W. (2d) 2, 3 (1930); *accord,* Thayer v. Thayer, 14 Vt. 107, 39 Am. Dec. 211 (1842). *Cf.,* Evans v. Evans, 78 N. H. 352, 100 Atl. 671 (1917). "The great weight of authority is that the intent to defeat a claim which otherwise a wife might have is not enough to defeat" the transfer. Leonard v. Leonard, 181 Mass. 458, 462, 63 N. E. 1068, 1069 (1902), *quoted in* Newman v. Dore, 275 N. Y. 371, 379, 9 N. E. (2d) 966, 968 (1937).

[9]It apparently is assumed in the two principal cases that the testator's intention to vest title in the survivor is equivalent to an actual divestiture by him, during his lifetime, of the incidents of ownership. It need hardly be pointed out that the depositor himself may be the survivor.

[10]In the majority of jurisdictions, "the test applied is essentially the test of whether the husband has in good faith divested himself of ownership of his property or has made an illusory transfer. 'The good faith required of the donor or settlor in making a valid disposition of his property during life does not refer to the purpose to affect his wife but to the *intent to divest himself of the ownership of the property.*'" (Italics added). Newman v. Dore, 275 N. Y. 371, 379, 9 N. E. (2d) 966, 969 (1937) [quotation from Benkart v. Commonwealth Trust Co., 269 Pa. 257, 259, 112 Atl. 62, 63 (1920)].

[11]If subjective intention were the criterion, it would be difficult not to discover such an intention since in most of these cases, the husband is frankly attempting to defeat the wife's statutory distributive share. The only way he can defeat it is by making a "real" transfer, *i.e.,* by intending to divest himself of his property. The difficulty of proof of subjective intention is recognized in most fields of the law. The subjective intention of a deceased person can be discovered only by examination of its manifestations during his lifetime. The intention as objectified in one way or another must thus control. In most jurisdictions, a fraudulent motive, *i.e.,* a motive to deprive the wife, does not make the intention fraudulent.

Decedent Estate Law, his intention usually has two aspects: (1) To leave at his death little or no estate from which his wife can elect to take an intestate share; (2) To enjoy as much of a life interest in the property as is possible without defeating the first and primary aspect of the intention. Thus the problem is reduced to one question: How many of the incidents of property may the husband reserve during his lifetime and still not own property at the time of his death?

The criterion applied by the courts in answer to this question has been the "real"-"illusory" test. Such a test is more the characterization of a result than a guide to decision. The metaphysical line between a "real" transfer and an "illusory" transfer has nowhere been drawn. As antemortem attempts[12] to defeat the surviving spouse's statutory share come before the courts, the two categories are being continually defined by the familiar but cumbersome judicial process of inclusion and exclusion.[13] Part of this process are the two principal cases, insofar as they classified the creation of a joint tenancy in a bank account among the "real" transfers. The two lower courts sanctioned such a deposit as a device for evading Section 18 with its presently-applied test. The principal cases lay down the proposition that if a joint tenancy in a bank account can be made out, the surviving depositor is given preference over the surviving spouse. In determining whether a joint tenancy has been created in such an account, the courts are aided by certain statutory presumptions as to the intention of a depositor creating an account in the statutory form. The conclusiveness of the presumption differs, depending upon whether the depositary of the account is a "savings bank," or a "bank" [other than a savings bank] or "trust company." Such a difference, leading in some cases to opposite results—as witness the first of the principal cases—is based on a long-established distinction in New York between the two types of institutions.[14] Section 134(3) of the New York Banking Law,[15] which applies to "banks [other than savings banks] and trust companies," *i.e.*, organizations incorporated under Section 90 of the Banking Law,[16] provides that a

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[12]The cases involving § 18 of the Decedent Estate Law are generally of two types: (1) Those in which the transfer of property is alleged to be in disappointment of representations, by words or conduct, made by the decedent to a prospective spouse; (2) Those in which there are no representations and the transfer is alleged to be colorable or illusory, *i.e.*, in fraud of the statute granting the interests to the surviving spouse. This note is concerned only with the cases of the second type. For a review of the cases of the first type, see Note (1935) 20 CORNELL L. Q. 381; of the latter, Note (1938) 23 CORNELL L. Q. 457, Note (1940) 25 CORNELL L. Q. 294.

[13]The Courts have refused "to formulate any general test of how far a settlor [or donor] must divest himself of his interest [in his property] . . . to render the conveyance more than illusory." Newman v. Dore, 275 N. Y. 371, 381, 9 N. E. (2d) 966, 969 (1937).

[14]The distinction is clearly drawn in New York by the statutory differentiation between the two types of institutions. Among the definitions in § 2 of the Banking Law are definitions of (1) "Bank," (2) "Trust Company," and (3) "Savings bank." Article 3 (§§ 90-139) applies to "Banks and Trust Companies"; Article 6 (§§ 230-291) to "Savings Banks."

[15]N. Y. BANKING LAW (1937) § 134(3), *formerly* (1914) §§ 148 ("banks"), 198 ("trust companies").

[16]N. Y. BANKING LAW (1937) § 90.

deposit made by a person in the name of himself and another and in form to be paid to either or the survivor becomes the property of such persons as joint tenants and any payments by the bank or trust company to either or the survivor, before the receipt of a written order to the contrary signed by either, releases the bank or trust company from any liability for such payments. Section 239(3),[17] which applies to "savings banks," *i.e.*, organizations incorporated under Section 230 of the Banking Law,[18] contains similar provisions with the addition of a statement that the "making of the deposit in such form shall, in the absence of fraud or undue influence,[19] be conclusive evidence, in any action or proceeding to which either the savings bank or the surviving depositor is a party, of the intention of both depositors to vest title to such deposit and the additions thereto in such survivor." The conclusion that this additional provision is more than verbal surplusage and that it causes Section 249(3) to differ from Section 134(3), insofar as the protection of the surviving depositor is concerned, has been generally followed since the adoption of the statutes.[20] The effect is to affix to a savings bank account, when opened in the form prescribed, a presumption that the interests of the depositors is that of joint tenants, and such presumption becomes conclusive on the death of one of the depositors as to any moneys left in the account.[21] It further suggests that the creation of a similar account in a bank or trust company always must remain something less than conclusive evidence—at best, a rebuttable presumption of the intention of the depositor to vest title in the survivor.[22] Thus the husband must be careful whether he deposits his account in the bank with the brass doors or in the bank with the bronze doors.[23] If the bank he chooses was incorporated as a savings bank under

[17]N. Y. BANKING LAW (1938) § 239(3), *formerly* (1914) § 249(3), (1909) § 144, (1907) § 114.

[18]N. Y. BANKING LAW (1938) § 230.

[19]The "fraud or undue influence" must be practiced on the person opening the joint bank account. Matter of Glen, 247 App. Div. 518, 288 N. Y. Supp. 24 (1st Dep't 1936), *aff'd without opinion*, 272 N. Y. 530, 4 N. E. (2d) 433 (1936).

[20]Havens v. Havens, 126 Misc. 155, 213 N. Y. Supp. 230 (Sup. Ct. 1925) *aff'd without opinion*, 215 App. Div. 756, 213 N. Y. Supp. 818 (4th Dep't 1925), cited as an "excellent summary" of the New York Banking Law sections here under discussion; OPS. ATTY. GEN. 309 (1931); Note (1923) 9 CORNELL L. Q. 248; Note (1926) 11 CORNELL L. Q. 525 (Summary of the New York law as to joint bank accounts); Note (1929) 15 CORNELL L. Q. 96.

[21]Moskowitz v. Marrow, 251 N. Y. 380, 167 N. E. 506 (1929); Marrow v. Moskowitz, 255 N. Y. 219, 174 N. E. 460 (1931); *In re* Juedel's Will, 280 N. Y. 37, 19 N. E. (2d) 67 (1939).

[22]Note (1926) 11 CORNELL L. Q. 525, and cases cited therein.

[23]There are, of course, savings and loan associations and national banks, as well as state commercial banks, trust companies, and savings banks. The provisions as to "savings banks" are applicable to savings and loan associations. *In re* Garlock's Estate, 157 Misc. 571, 285 N. Y. Supp. 52 (Surr. Ct. 1935).

As to deposits in national banks there is, at best, a rebuttable presumption. *In re* Hickmott's Estate, 256 App. Div. 1057, 10 N. Y. S. (2d) 918 (4th Dep't 1939); *In re* Riley's Estate, 261 App. Div. 690, 27 N. Y. S. (2d) 176 (3d Dep't 1941). *Contra: In re* Kelly's Estate, 259 App. Div. 1024, 20 N. Y. S. (2d) 689 (2d Dep't 1940), *modified on other grounds*, 285 N. Y. 139, 33 N. E. (2d) 62 (1941); Note (1929) 15 CORNELL L. Q. 96; Note (1926) 11 CORNELL L. Q. 525, 528.

Section 230 of the Banking Law, the additional provision as to conclusive evidence in Section 239(3) makes out for him a joint tenancy in a bank account and a case of successful evasion of Section 18 of the Decedent Estate Law. If the bank he chooses was incorporated as a bank or trust company under Section 90 of the Banking Law, there is no provisions for such a conclusive presumption as that set forth in Section 239(3) to keep out of evidence certain material facts which might threaten to rebut a presumption not conclusive.[24]

An account in joint tenancy in a savings bank, at first glance, seems almost to have been made to order for husbands who would disinherit their wives or for wives who would disinherit their husbands. The depositor, by keeping the passbook, controls the account and his control is hindered only by a rebuttable presumption that he does not intend to control the account—a presumption, however, which is rebuttable to the extent of the amount withdrawn every time he makes a withdrawal. Upon his death, the statute provides a conclusive presumption that the survivor owns the balance in the account. The husband enjoys all the incidents of property during his lifetime; evidence which becomes conclusive on his death prevents him from owning the property after his death.

Assuming the existence of a joint tenancy, were the results in the principal cases proper? Whether a transfer is "real" or "illusory" would seem to depend on whether it more closely resembles past transfers, judicially categorized as "real," or those stigmatized by the courts as "illusory."

In *Newman v. Dore*,[25] the decedent retained the income for life, power to revoke the trust, and the right to control the trustees. The court assumed, "without deciding," that except for the provisions of Section 18 of the Decedent Estate Law the trust would have been valid,[26] and held that judged

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[24]Reconciliation of the holdings in the two principal cases [insofar as they achieved opposite results under the same statute, § 134(3) of the Banking Law] would seem to depend on whether the fact of the non-delivery of the passbook be deemed "material" or "immaterial." Although it is not the purpose of this note to discuss the evidence which can rebut the statutory presumption of § 134(3), it may be noticed that the passbook is not only an indicium of ownership but also a *sine qua non* to effective control of the account. Delivery of the passbook has been considered a requisite for a valid gift. Hurley v. Molloy, 261 App. Div. 813, 25 N. Y. S. (2d) 782 (1st Dep't 1941) (savings bank account during lifetime of both depositors). If the fact of possession of the passbook is immaterial, as it was held to be in In re *Lorch's Estate*, the second of the principal cases, it would be difficult to find a fact sufficiently material to rebut the presumption. The practical results of possession of the passbook, as far as control of the account is concerned, might well have been recognized in In re *Lorch's Estate*, as they were in *Inda v. Inda*, the first of the principal cases. Otherwise, the distinction between conclusive evidence and rebuttable presumption would be ignored. For the only difference between categorizing a certain act as conclusive evidence of the depositor's intention and stating that it creates a rebuttable presumption is a difference between labeling evidence of all of the facts surrounding the act immaterial and calling them material.

[25]275 N. Y. 371, 9 N. E. (2d) 966 (1937).

[26]It is a "difficult and anomalous conception that a single conveyance may, at the same instant, be both illusory and real; non-existent as to the widow, but existent and valid as to the trustees. This concept . . . is a logical impossibility. A conveyance that is real as between the parties thereto must, *a fortiori*, be real as to all third parties irre-

"by the substance, not by the form," the testator's conveyance was "illusory, intended only as a mask for the effective retention by the settlor of the property which in form he had conveyed."[27]

In *Krause v. Krause*,[28] the decedent deeded realty to his two sons reserving for life "the use, the rents, and the profits," and opened a bank account in trust for his married daughter. The conveyance of a fee subject to a life estate was held to be a "real" transfer,[29] whereas the creation of the "Totten trust,"[30] in which the settlor reserved the power during his lifetime to deal with the deposit in any way he should choose, was set aside as an "illusory" transfer.

From these cases, certain requisites of a "real" transfer can be deduced. A decedent may retain the income and use of the property and a considerable measure of control over it for life. But his *inter vivos* disposition of it must be more than tentative; if the transfer is revocable at the will of the donor, it is, in New York at least, "illusory."[31]

Upon the creation of a joint tenancy, each of two joint tenants owns an undivided one-half which he has the power to alienate during his lifetime and thus sever the joint tenancy.[32] In other words, each depositor during their joint lives has a vested right to one-half.[33] In each of the principal cases, the decedent had the power and privilege of severing the joint tenancy and of withdrawing for his own use his equal share of the deposit.[34] His

spective of any other grounds that may exist at law or in equity for its avoidance." Note (1938) 23 CORNELL L. Q. 457, 458.

[27]Newman v. Dore, 275 N. Y. 371, 381, 9 N. E. (2d) 966, 969 (1937).

[28]285 N. Y. 27, 32 N. E. (2d) 779 (1941).

[29]*Accord,* Leonard v. Leonard, 181 Mass. 458, 63 N. E. 1068 (1902).

[30]A "Totten trust," or a savings bank trust, arises when one person deposits his money in trust for another. The legal effect of such a deposit has been summarized: "A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the passbook or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor." Matter of Totten, 179 N. Y. 112, 125, 71 N. E. 748, 752 (1904). The creation of such a trust had been held to be a "real" transfer by lower courts in New York. Matter of Schurer, 157 Misc. 573, 289 N. Y. Supp. 818 (Surr. Ct. 1935); Matter of Clarke, 149 Misc. 374, 268 N. Y. Supp. 253 (Surr. Ct. 1932). Such transfers are still "real" in Pennsylvania. Beirne v. Continental-Equitable Title and Trust Co., 307 Pa. 570, 161 Atl. 721 (1932).

[31]Pennsylvania courts, in carrying the "real"-"illusory" principle to a logical extreme, have held that the fact that the deceased had power to revoke the transfer is immaterial where he has died without revoking it. Lines v. Lines, 142 Pa. 149, 21 Atl. 809 (1891); Potter Title and Trust Co. v. Braum, 294 Pa. 482, 144 Atl. 401 (1928).

[32]*In re* Weissbach's Estate, 111 Misc. 501, 183 N. Y. Supp. 771 (Surr. Ct. 1920); 5 ZOLLMANN, BANKS AND BANKING (1936) § 3225.

[33]*In re* Hoffman's Estate, 175 Misc. 607, 25 N. Y. S. (2d) 339 (Surr. Ct. 1940). In the language of the common law, each depositor is "seized *per my et per tout.*"

[34]"Nothing in the Banking Law prevents one joint owner from destroying the joint ownership in the entire deposit to the extent of his withdrawals of no more than his equal share for his own use." Matter of Suter, 258 N. Y. 104, 106, 179 N. E. 310, (1932).

ownership of a moiety continued until death. He retained the same rights to use his moiety and control its disposition as he previously had possessed except the right to will it away.

Granting that as to half the account, the transfer is "real" because irrevocable either before or after death, the arguments based on the creation of a joint tenancy do not successfully meet the contention that with respect to the other half of the account, at least, the transfer was, like the transfer creating a "Totten trust," but tentative[35] and "illusory."

Winnowed of its technicalities, the basic question has been and is: "Does the statute [Section 18 of the Decedent Estate Law] intend that such a transfer shall be available as a means of defeating the contingent expectant estate of a spouse?"[36] Considering the legislative policies[37] behind the adoption of the statute, a negative answer suggests itself. The "real"—"illusory" test, as applied by the courts in the two principal cases, resulted in a conclusion—erroneous as regards half of the account, it is submitted—that the creation of a joint tenancy in a bank account was a "real" transfer. But it has been seen that such a test is actually no test at all. In one case,[38] three courts applied the test and came to three different conclusions. If substance and not form is to control in New York—and all admit that it should—the more realistic rule applied by Official Referee Taylor in *Krause v. Krause*,[39] might serve as a more direct statement of principle than the "real"-"illusory" test. It, at least, avoids the illogical holding that the same transfer may be both "real" as between the parties to it, and "illusory" as regards the surviving spouse: ". . . a husband in his lifetime may lawfully dispose of his property, real or personal, by sale, transfer, trust agreement or gift—with or without an intent to deprive his wife of property rights after his death—if the husband's interest in the property which is transferred be transferred *inter vivos, eo instante* and fully. If, however, the transfer be accompanied by reservations so material that the transfer is clearly a subterfuge, or if the transfer includes reservations of conditions such that its completion is postponed until the death of the transferor—*i.e.*, if the transfer be testamentary —the widow may find protection in section 18 of the Decedent Estate Law."

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[35]While such a transfer may not technically be testamentary, from a practical viewpoint it approximates a testamentary transaction. In estate taxation, the law recognizes that the surviving joint tenant takes something by transfer on the death of the other joint tenant. Tyler v. United States, 281 U. S. 497, 50 Sup. Ct. 356 (1930) (tenancy by the entirety); N. Y. TAX LAW (1916) § 220(5). Note (1930) 16 CORNELL L. Q. 114; Note (1932) 18 CORNELL L. Q. 121.

[36]Newman v. Dore, 275 N. Y. 371, 378, 9 N. E. (2d) 966, 968 (1937).

[37]COMBINED REPORTS OF THE COMMISSION TO INVESTIGATE DEFECTS IN THE LAWS OF ESTATES (1935).

[38]Krause v. Krause, 171 Misc. 355, 13 N. Y. S. (2d) 812 (Sup. Ct. 1939) (both transfers held to be "illusory"); 259 App. Div. 1057, 21 N. Y. S. (2d) 341 (4th Dep't 1940) (both transfers held to be "real"); 285 N. Y. 27, 32 N. E. (2d) 779 (1941) (transfer of fee subject to life estate held to be "real"; creation of "Totten trust" held to be "illusory").

[39]171 Misc. 355, 358, 13 N. Y. S. (2d) 812, 814 (Sup. Ct. 1939).

Physicians and Surgeons: Negligence in the use of or failure to use the X-ray: Res ipsa loquitur:—In *Christie v. Callahan, 124 F. (2d) 825 (App. D. C., 1941)*, plaintiff suffered from a pilonidal cyst and received X-ray treatments from defendant, a Roentgenologist. Extreme necrosis and destruction of tissue developed in the infected area and plaintiff was forced to use drugs constantly to ease the pain. Some time after the treatments other doctors gave plaintiff certain injections at one side of this area and defendant insists that these injections, not the X-ray treatments, were the cause of the injury. The testimony offered at the trial on this, as well as other points, was contradictory. Surgeons who had examined and treated plaintiff subsequent to the X-ray treatments testified to the necrosis and sloughing of tissue even before the injections were given, but admitted their lack of knowledge concerning the use of the X-ray. Defendant introduced his office records of the treatments and then called expert Roentgenologists who testified that: (1) such treatments were proper and would not cause the injury to the plaintiff; (2) if it were an X-ray burn, the entire area hit by the rays, not just the infected area, would have been burned; and (3) if this were an X-ray ulcer of such severity the sore itself would never have healed. Judgment was granted to the plaintiff, and, on appeal from the District Court, this court found sufficient evidence of causation and negligence to send the case to the jury. The majority opinion avoided the application of *res ipsa loquitur* in so many words, but presented an argument that comes very close to that doctrine, particularly in the light of the testimony as set forth in the dissenting opinion. Judge Edgerton dissented on the grounds that the necrosis and sloughing might have been a natural development even if X-ray treatment had not been given, but that even if the X-ray was the cause, it would not in itself be evidence of negligence—in short, that the evidence as to causation and negligence was overwhelmingly in favor of the defendant and warranted a directed verdict.

The duty of exercising ordinary and reasonable skill and care, imposed upon physicians and surgeons generally, has been properly applied to those using the X-ray.[1] Many cases have qualified this rule by limiting the requisite skill and care to the standard of the particular locality.[2] That is, a distinction is drawn between rural and urban communities on the theory that higher standards of practice and better physicians are found in the urban communities.[3] One frequently-cited case, however, has recommended the discarding of such a distinction and the adoption of a standard of care based, not on the locality, but on that practiced by the average user of the X-ray.[4] In light of the rapid increase in the scope of X-ray investigation and the intricacy of

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[1]48 CORPUS JURIS 1121, note 14 and cases cited therein; Pike v. Honsinger, 155 N. Y. 201, 49 N. E. 760 (1898).

[2]Sweeney v. Erving, 35 App. D. C. 57 (1910), *aff'd*, 228 U. S. 233, 33 Sup. Ct. 416 (1913); Pike v. Honsinger, 155 N. Y. 201, 49 N. E. 760 (1898); Kalloch v. Hoagland, 239 Fed. 252 (C. C. A. 1917); *but see* Napier v. Greenzweig, 256 Fed. 196 (C. C. A. 1919).

[3]21 R. C. L. 384.

[4]Evans v. Clapp, 231 S. W. (Mo.) 79 (1921).

the apparatus and its application, the latter rule seems best.[5]

Cases involving negligence and the X-ray fall into three general categories:[6] (1) those involving negligence in the use of the X-ray for treatment,[7] (2) those involving negligence in the use of the X-ray for diagnosis,[8] (3) cases involving negligence in failing to use the X-ray as an aid to diagnosis.[9]

(1) *Negligence in the use of the X-ray for treatment*—There are many factors that must be considered in the application of the X-ray, a complicated and still relatively new apparatus. The distance of the tube from the point of exposure, the frequency of the application, the length of each treatment, and the strength of the current must all be taken into consideration.[10] Naturally, therefore, a high degree of competence and care should be required in the use of such a complex instrumentality. But on the other hand, there is the element of the patient's reaction to consider. Radio-dermatitis may not appear until two weeks after the treatment,[11] and in cases where extensive irradiation has been employed, the skin may appear perfectly normal for several years and suddenly, from something as trivial as a pin scratch, ulcerate and appear no different from acute necrosis.[12] Then, too, even though a true case of hypersensitivity of the skin is extremely rare,[13] there are individual and regional differences in skin sensitivity[14] which can only be determined accurately by radiation itself.[15] Further, a patient often comes to a Roentgenologist for treatment without informing him that he has received prior treatment elsewhere.[16] In view of so many variable and unpredictable elements, the court's reluctance to call every X-ray burn or injury negligence is understandable.

There has been much discussion as to whether the doctrine of *res ipsa loquitur* should be applied to injuries resulting from the use of the X-ray. A Texas court applied *res ipsa loquitur* in a case where the burn was ex-

[5]HARRISON, TEXTBOOK OF ROENTGENOLOGY, p. xxi (1936).

[6]This classification was adopted by Professor Lyman P. Wilson of the Cornell Law School in an article entitled *"The X-Ray in Court"* (1922) 7 CORNELL L. Q. 202, 334.

[7]McCog v. Buck, 87 Ind. App. 433, 157 N. E. 456 (1927); Casenburg v. Lewis, 163 Tenn. 163, 40 S. W. (2d) 1038 (1931).

[8]Moore v. Steen, 102 Cal. App. 723, 283 Pac. 833 (1930); King v. Ditto, 142 Ore. 207, 19 Pac. (2d) 1100 (1933); Stemons v. Turner, 274 Pac. 228, 117 Atl. 922 (1922).

[9]James v. Grigsby, 114 Kan. 627, 220 Pac. 267 (1923); Fortner v. Koch, 272 Mich. 273, 261 N. W. 762 (1935); Kuhn v. Banker, 133 Oh. St. 304, 13 N. E. (2d) 242 (1938); Howell v. Jackson, 16 S. E. (2d) 45 (Ga. App. 1942) [based on GA. CODE ANN. (Michie, Supp. 1930) § 84-924].

[10]Coombs v. King, 107 Me. 376, 379, 78 Atl. 468 (1910); HARRISON, TEXTBOOK OF ROENTGENOLOGY, p. xxi (1936).

[11]HARRISON, *op. cit. supra* at 752.

[12]*Ibid.* at 19.

[13]*Id.* at 750: MACKEE, X-RAYS AND RADIUM IN THE TREATMENT OF DISEASES OF THE SKIN, 370 (1938).

[14]HARRISON, TEXTBOOK OF ROENTGENOLOGY, 750 (1936). The susceptibility to the rays varies with age, texture of hair and skin, pigmentation, and with the presence of certain diseases such as syphilis and diabetes. Antowill v. Freedman, 197 App. Div. 230, 188 N. Y. Supp. 777 (1921); Hamilton v. Harris, 223 S. W. 533 (Tex. Civ. App. 1920) (putting the burden of proof of extreme sensitivity on the defendant).

[15]HARRISON, TEXTBOOK OF ROENTGENOLOGY, 14 (1936).

[16]*Ibid.* at 15.

tremely severe but later refused to apply it in a case where the injury was not so acute.[17] In the principal case there was some question whether the harm suffered by the plaintiff developed from natural causes, was caused by the X-ray, or resulted from the injection; therefore, it would seem erroneous to apply *res ipsa loquitur* here. But assuming that an excessive burn is satisfactorily proved, should it make out a *prima facie* case of negligence against the defendant and shift to him the burden of proving due care? The sharp difference of opinion on this question is evidenced by the two opinions in the principal case.

In general, the courts have shown a reluctance to apply *res ipsa loquitur* to cases involving negligence in treatment,[18] although there are cases which do so apply the doctrine.[19] A possible reason for this reluctance may be as indicated in the following discussion.

(2) *Negligence in the use of the X-ray for diagnosis*—Here apparently there is more reason for applying *res ipsa loquitur* than there is in the treatment cases, and a California case went to great lengths in drawing just such a distinction.[20] In the use of the X-ray for diagnosis the treatment is practically standard. Since the only purpose is to get a "picture", the application is quite constant from one patient to the next, and when there is an excessive burn there is a sounder basis for inferring negligence. This should be contrasted with cases of negligence in treatment where the dosage and length of application vary with each patient, and where, in fact, it is often a necessary part of the treatment to give a certain degree of burn.[21] Thus, there is a much broader play of the physician's discretion and when the results are not always as desired, there is good reason to attribute it to a mere error of judgment, and not to negligence.

(3) *Negligence in failing to use the X-ray as an aid to diagnosis*—Some cases in this grouping naturally refused to find negligence in a failure to use the X-ray when there was no apparatus available to the physician.[22] But the rapid expansion of the use of the X-ray and the resulting availability of X-ray machines in most communities, rural as well as urban, have tended to overcome this defense. This expansion may also account for the fact that cases are becoming more numerous in this classification.

The cases in this group say that to fail to use the X-ray as an aid to diag-

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[17]Compare Martin v. Eschelman, 335 S. W. (2d) 827 (Tex. Civ. App. 1931) with Hess v. Millsop, 725 S. W. (2d) 923 (Tex. Civ. App. 1934).

[18]Butler v. Rule, 33 Ariz. 460, 265 Pac. 757 (1928); Berg v. Wallett, 212 Iowa 1109, 232 N. W. 821 (1931); Ballance v. Dunnington, 241 Mich. 383, 217 N. W. 329 (1928); Lett v. Smith, 6 La. App. 248 (1928); Kuehnemann v. Boyd, 193 Wis. 588, 214 N. W. 326 (1927).

[19]Casenburg v. Lewis, 163 Tenn. 163, 40 S. W. (2d) 1038 (1931); compare Martin v. Eschelman, 33 S. W. (2d) 827 (Tex. Civ. App. 1931) with Hess v. Millsop, 725 S. W. (2d) 923 (Tex. Civ. App. 1934).

[20]Moore v. Stein, 102 Cal. App. 723, 283 Pac. 833 (1929); *citing* Ragin v. Zimmerman, 206 Cal. App. 723, 276 Pac. 107 (1929) and Evans v. Clapp, 231 S. W. 79 (Mo. 1921).

[21]This was the situation in the principal case.

[22]Trash v. Dunnigan, 299 S. W. 116 (Mo. App. 1927); Wright v. Conway, 34 Wyo. 1, 241 Pac. 369 (1925).

nosis (*e.g.*, to aid in setting a broken bone) is not negligence *per se*.[23] Whether it will ever be considered such is conjectural, but it should be noted that an increasing number of physicians and surgeons are taking X-rays of their patients before undertaking any treatment.[24]

It is evident, then, that in applying negligence to injuries resulting from the use of the X-ray, there are meritorious arguments to be advanced pro and con. When trying to determine liability on behalf of the physician-defendant we find such factors as the complex nature of the instrumentality, the delayed appearance of harmful effects, the cumulative injury, and individual differences in skin sensitivity. On the other hand, the patient-plaintiff is faced with the problem of trying to prove negligence with regard to an apparatus about which he knows very little and over which he has no control. It is the inevitable problem which has always faced the plaintiff in a malpractice action —the difficulty of proving negligence accentuated by the reluctance of medical men to testify against each other.[25]

Obviously, no definite conclusion as to liability can be reached without prejudicing one group or the other. The science of the X-ray, in spite of its rapid and continued expansion, is still in its infancy.[26] The least, then, that can be said is that an extremely high standard of care should be set for those who use the X-ray.

Jerome S. Affron

Surrogate Court Practice: Constitutional law: Juries: Right to trial by jury under Section 206-a of the Surrogate's Court Act.—In 1934, the legislature provided in Section 206-a of the Surrogate's Court Act for a proceeding to compel delivery by an executor or administrator of specific personal property, or the proceeds or value thereof, to a third person having an unqualified claim thereto.[1] To date, the New York Court of Appeals has not satisfactorily settled the problem of the petitioner's right to a jury trial in an action brought under this section. In *Matter of Leary, 285 N. Y. 693, 34 N. E. (2d) 383 (1941)*, it affirmed, without opinion, a Surrogate's Court decision which denied this right.

While it has been said that Section 206-a is entirely different from the proceeding permitted under Sections 205-206 of the same act,[2] comparison of the right to a jury trial under those sections will be profitable. The proceeding provided for in the latter sections is a "discovery proceeding" by an executor or administrator against a third person alleged to hold property belonging to the estate. Under the sections, however, the right to the property

[23]Snearly v. McCarthy, 180 Iowa 81, 161 N. W. 108 (1917); Dunbar v. Adams, 283 Mich. 48, 276 N. W. 895 (1938).

[24]This development is to be noted especially in the field of dentistry.

[25]See p. 827 of the opinion in the principal case.

[26]HARRISON, TEXTBOOK OF ROENTGENOLOGY, p. xxi (1936).

[1]SURR. CT. ACT, § 206-a (added by L. 1934, c. 539, in effect Sept. 1, 1934).

[2]Hilliard's Estate, 172 Misc. 273, 275, 15 N. Y. S. (2d) 96, 98 (Surr. Ct. 1939).

may be finally determined in the single action in the Surrogate's Court.[3] While an early case denied the right to a jury trial in this proceeding,[4] it is now well settled that there is a constitutional right to such trial when an issue of title arises.[5] The leading case of *Matter of Nutrizio*[6] points out the dual nature of the proceeding under Sections 205-206: First, an inquisitorial discovery to elicit information as to the whereabouts of the property; and second, a replevin action during which the right to possession of the chattels is tried.[7] It is in the latter phase that the right to trial by jury is recognized. It would seem that proceedings under Section 206-a are identical with proceedings under the prior sections, with the reversal of parties the sole difference; and, therefore, the analysis of the *Nutrizio* case should be equally applicable.

In denying the right to a jury trial in a proceeding under Section 206-a, Surrogate Delehanty, in the *Leary* case, denied the analogy to a proceeding under Sections 205-206.[8] The learned Surrogate took the position that this type of proceeding was known to the Surrogate's Court prior to the enactment of the statute, and was merely an exercise of the Surrogate's power to control and direct the conduct of executors and administrators. He stated further, however, that the proceeding was equitable in its nature.[9] That the Surrogate, without a jury, has always had the power to control the conduct, to settle the accounts of executors and administrators, and to order distribution and payment over of the estate is not open to argument.[10] Since the right to jury trial is constitutionally protected only as it has been "heretofore" guaranteed,[11] in an action within the general powers of the Surrogate's Court there is no constitutional right to trial by jury.[12] It may well be argued,

[3]At first it had been held that no trial of title could be had in the Surrogate's Court, but the amendments to the acts of 1903 and 1914 permit the action to continue in that forum. Matter of Heinze, 224 N. Y. 1, 120 N. E. 63 (1918).

[4]Matter of Callahan, 95 Misc. 438, 159 N. Y. Supp. 352 (Surr. Ct. 1916). *But see* Matter of Silverman, 87 Misc. 571, 151 N. Y. Supp. 382 (Surr. Ct. 1914), decided by the same Surrogate as the *Callahan* case.

[5]Matter of Wilson, 252 N. Y. 155, 169 N. E. 122 (1930); Matter of Comfort, 234 App. Div. 19, 253 N. Y. Supp. 796 (2d Dep't 1931); Matter of Pritchard, 227 App. Div. 105, 237 N. Y. Supp. 156 (4th Dep't 1929); Matter of Nutrizio, 211 App. Div. 8, 206 N. Y. Supp. 706 (1st Dep't 1924); Matter of Hilliard, 172 Misc. 273, 15 N. Y. S. (2d) 96 (Surr. Ct. 1939).

[6]211 App. Div. 8, 206 N. Y. Supp. 706 (1st Dep't 1924).

[7]*Id.* at 13; Matter of Hilliard, 172 Misc. 273, 274, 15 N. Y. S. (2d) 96, 97 (Surr. Ct. 1939).

[8]175 Misc. 254, 255, 23 N. Y. S. (2d) 13, 14 (Surr. Ct. 1941).

[9]Matter of Leary, 175 Misc. 254, 255, 23 N. Y. S. (2d) 13, 14 (Surr. Ct. 1941).

[10]Matter of Enright's Estate, 149 Misc. 353, 267 N. Y. Supp. 483 (Surr. Ct. 1933); Matter of Mathesen's Estate, 161 Misc. 367, 292 N. Y. Supp. 147 (Surr. Ct. 1936); Matter of Kenney's Estate, 171 Misc. 87, 11 N. Y. S. (2d) 685 (Surr. Ct. 1939); Matter of Klein, 170 Misc. 859, 11 N. Y. S. (2d) 339 (Surr. Ct. 1939).

[11]N. Y. CONST. Art I, § 2.

[12]These powers are now codified in the SURROGATE'S COURT ACT § 40. For a history of the development of the Surrogate's Courts and their powers, indicating that this right of control has always been present, see: 1 SMITH, COMMON PLEAS REPORTS, Prefix; Matter of Brick, 15 Abb. Pr. 12 (Surr. Ct. 1862); Matter of Morris, 134 Misc. 374, 235 N. Y. Supp. 461 (Surr. Ct. 1929); Seymour v. Seymour, 4 Johns. Ch. 409 (N. Y. 1820); Foster v. Wilber, 1 Paige 537 (N. Y. 1829).

however, that proceedings under Section 206-a are not a part of this general power. All of the decisions[12a] stating that the section is but a restatement of previously existing law are based on *Matter of Enright*,[13] decided in 1933. This case allowed what was "in effect"[14] a replevin action against an executor in the Surrogate's Court. This case, decided by Surrogate Wingate, cites no historical authority. It was never appealed; and the writer has been unable to find a prior case sustaining a similar action in the Surrogate's Court. Furthermore, in explanation of the enactment of Section 206-a, the same learned Surrogate pointed out that at a meeting of the executive committee of the New York Surrogates, when the *Enright* case came up for discussion, "whereas all present agreed with the soundness and propriety of the *result* attained, some felt that express authority for its attainment should be incorporated into the law in statutory form."[15] (Italics added). It would seem, then, that while the Surrogates felt that replevin for specific articles against an executor or administrator *should* be allowed in the Surrogate's Court, they were not satisfied that it was a part of their general power. With this interpretation of the section, it can be said that it made enforceable before the Surrogate what was heretofore enforceable only at law. Since there has always been a constitutional right to trial by jury in a replevin action at law, the same right should exist when the action is brought in the Surrogate's Court.[16]

In *Matter of Abend*,[17] it was held that while the *Leary* case denied a petitioner, under Section 206-a, a right to trial by jury, the instant action was in the nature of replevin and by bringing it in the Surrogate's Court the petitioner could not deprive the administratrix of *her* constitutional right to a jury trial of the issues. This court felt that the basis of the denial of the jury in *Matter of Leary* was the rule that a party—may lose this right by his choice of forum in which he raises the issue. It is well settled that when a party raises an issue to which there is a right to trial by jury, in a forum where there is no such right, he waives it.[18] Since a petitioner chooses to come into the Surrogate's Court, he waives the right to a jury trial which he would have if he brought his action in replevin at law. *Matter of Abend* does not indicate that the court was exercising merely its historic control over the administratrix—it ordered a jury trial on her motion. The only written opinion in *Matter of Leary* seems categorically to deny the right to a jury trial in any case under this section. The decision there does, however, declare

[12a]Matter of Boyle, 242 N. Y. 342, 151 N. E. 821 (1926); Matter of White, 100 Misc. 56, 166 N. Y. Supp. 158 (Surr. Ct. 1917).

[13]149 Misc. 353, 267 N. Y. Supp. 483 (Surr. Ct. 1933).

[14]*Id.* at 355.

[15]Matter of Mathesen, 161 Misc. 367, 369, 292 N. Y. Supp. 147, 151 (Surr. Ct. 1936).

[16]SURR. CT. ACT § 68; N. Y. CONST. Art. I, § 2. Section 68 of the Act provides in part: "In any proceeding in which any controverted question of fact arises, of which any party has a constitutional right of trial by jury, and in any proceeding for the probate of a will, in which any controverted question of fact arises, the surrogate must make an order directing the trial by jury of such controverted question of fact, if any party appearing in such proceeding seasonably demands the same. . . ."

[17]176 Misc. 717, 29 N. Y. S. (2d) 13 (Surr. Ct. 1941).

[18]Di Menna v. Cooper and Evans Co., 220 N. Y. 391, 396, 115 N. E. 993, 996 (1917).

the action to be "equitable" in its nature.[19] On appeal in the *Leary* case, in addition to the main argument of the Surrogate, counsel for the executors argued that there was no right to a jury trial in this particular case because: (a) the particular cause of action was in its nature equitable; and, (b) plaintiff had demanded a jury trial only as to a *part* of the cause of action.[20] In affirming without opinion, the Court of Appeals merely affirmed the *result* below. The profession does not know upon what ground the court affirmed, nor can it be sure whether there is a right to a jury trial under Section 206-a of the Surrogate's Court Act.

It would be profitable if, at its next opportunity, the Court of Appeals would attempt to dispel this confusion. A distinction should be made between cases in which an equitable cause of action is alleged under Section 206-a (*e.g.* when petitioner claims the property had been held in trust for him), and cases in which a simple replevin action is alleged. In the latter type it would seem that the action is not within the general equity powers of the Surrogate's Court and that it should be treated as analogous to procedures under Sections 205-206. Let there be a dual procedure: first, a discovery action; second, a replevin action in which the right of trial by jury would be recognized.

Jack L. Ratzkin

Unincorporated Associations: Right of unincorporated labor union to sue in the name of its president for libel. In *Kirkman v. Westchester Newspapers Inc., 287 N. Y. 373, 39 N. E. (2d) 919 (1941)*, the plaintiff, individually and as president of Local No. 3 of the International Brotherhood of Electrical Workers, brought an action against the defendants for an alleged libel printed in their newspapers. The article charged wrongdoing on the part of the officers of the labor union in the performance of the work of the union, which it was claimed reflected upon the union as a whole. The issue was raised by the defendants whether the president of an unincorporated association may bring an action in behalf of that association for an alleged libel against the union. The action was brought under Section 12 of the New York General Associations Law:

> "An action or special proceeding may be maintained by the president or treasurer of an unincorporated association to recover any property, or upon any cause of action for or upon which all the associates may maintain such an action or special proceeding by reason of their interest or ownership therein, either jointly or in common."

The defendants moved for a dismissal of the complaint on the ground that

[19]Matter of Leary, 175 Misc. 254, 255, 23 N. Y. S. (2d) 13, 14 (Surr. Ct. 1941).

[20]Although it does not appear in the opinion of Surrogate Delehanty, the plaintiff had asked for a jury trial as to the issue of fact concerning title to the personalty, which was one of thirteen other issues raised by the defendant in the case. Defendants rightly argued on appeal that there is either a right to a jury trial on an entire action, or there is no right. Special issues are triable by a jury only in certain instances (*e.g.*, issue of adultery in divorce cases, or issue of public necessity in condemnation cases).

the plaintiff could not sue under Section 12 because the union was not a legal entity but merely a plurality of persons, and a plurality of persons can never have a common interest in libel. The New York Court of Appeals, with one judge dissenting, affirmed an order of the Appellate Division denying the defendants' motion. In finding for the plaintiff, the court holds that this union is an entity to the extent necessary to allow it to possess a reputation separate and apart from that of its members;[1a] that this reputation is the common property of all the members; and that although the libel does not reflect upon or tend to injure the reputation of the individual members, it does tend to discredit the organization in which they have a common interest.

In opposing the plaintiff's right to maintain this action, Judge Conway, in his dissenting opinion, draws support from the numerous cases both in New York and elsewhere which uphold an old common law doctrine that an unincorporated association is not a legal entity, in the absence of statutory enactment, and has no existence separate and distinct from its members.[1] He points out that Section 12 of the General Associations Law enables the president to sue only when all the members could have sued individually and, therefore, it does not change the common law rule.[2] It is submitted that the good name of labor unions should be protected. The majority opinion, although not supported by the weight of previous decisions, is in accord with the ever increasing tendency to treat such associations as entities in specific instances in order to avoid injustice.

[1a]Riesman, *Democracy and Defamation: Control of Group Libel* (1942) 42 COL. L. REV. 727, 756 *et seq.* discusses the problems which face the courts in suits for group libel. It is stated at 767:

". . . we find two related sources of difficulty which have prevented them [the courts] from permitting group libel suits. One is the feeling that no particular plaintiff can be hurt, or, if hurt, can show anything but the most speculative damages. The other is the variety of procedural obstacles which are involved in actions by amorphous groups."

However, where the courts can find that the libel caused commercial loss, recovery will be allowed.

Kirkman v. Westchester Newspapers Inc. allows recovery on the ground that the libel hurt the business credit of the union, thus hanging the case on a commercial peg.

[1]Ostrom v. Greene, 161 N. Y. 353, 55 N. E. 919 (1899); United States v. Local 807 of International Brotherhood of Teamsters, Chauffeurs, etc., 118 F. (2d) 684 (C. C. A. 2d 1941); Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753 (1906); Kargo Furniture Co. v. Amalgamated Woodworkers Local Union, 165 Ind. 421, 75 N. E. 877 (1905). For a later development in the law of Indiana, see Note (1941) 16 IND. L. J. 575. The Indiana statute governing unincorporated associations is similar to § 12 of the New York General Associations Law.

[2]Saxer v. Democratic County Committee of Erie County, 161 Misc. 35, 291 N. Y. Supp. 18 (Sup. Ct. 1936) holds that §§ 12 and 13 of the General Associations Law are the same as former § 1919 of the Code of Civil Procedure, and that cases decided prior to the enactment of the General Associations Law are authorities for the construction and interpretation of §§ 12 and 13.

Cases under § 1919 of the New York Code of Civil Procedure apply this section only to actions which could have been brought by joining all the members. Corning v. Greene, 23 Barb. 33 (1856); Tibbets v. Blood, 21 Barb. 650 (N. Y. 1856); Ostrom v. Greene, 161 N. Y. 353, 55 N. E. 919 (1899). A further discussion of §§ 12 and 13 may be found in Witmer, *Trade Union Liability: The Problem of the Unincorporated Corporation* (1941) 51 YALE L. J. 40, 46.

As unincorporated associations grew in size, it became advantageous to them that they could not be sued as units for torts committed in their collective capacities.[3] This resulted in injustice to those harmed.[4] When the legislature failed to provide a remedy, the equity courts permitted representative suits in which a few could be served as representatives of all.[5] After two hundred years of such treatment by equity, the English law courts revolted against the unfair and highly technical common law idea that an unincorporated association, not being a legal entity, could not be sued as a unit, and, in *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* [1901] A. C. 426, the House of Lords upheld a suit against an unincorporated labor union in its own name.[6] In *United Mine Workers of America v. Coronado Coal Co.*,[7] the Supreme Court of the United States, with little authority to support its decision, laid down the principle[8] that a labor union could be sued as an entity under the Sherman Anti-Trust Act. A great dispute arose as to whether the principle thus announced was based entirely on the federal statute or whether it overruled the old common law doctrine and treated the labor union as an entity for the purposes of suit.[9] The later deci-

[3]Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants, [1901] A. C. 426; United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344, 385, 42 Sup. Ct. 570, 574 (1921); STORY, EQUITY PLEADINGS (7th ed. 1865) § 77; STORY, EQUITY JURISRUDENCE (9th ed. 1866) §§ 679-680.

[4]See Note (1928) 6 CAN. B. REV. 16 for a discussion of the problem. As an example of the unfairness of this situation, note two cases cited therein. *Barrett v. Harris*, [1921] 51 Ont. L. R. 484, was an action in tort against an unincorporated association of Toronto businessmen. The plaintiff ran his car against a rope which was stretched across the street for an association parade. The radiator cap was caught and thrown in the plaintiff's eye, causing blindness. The plaintiff was denied recovery against the association either in its own name or by a representative suit. *Bloom v. National Federation of Disabled Soldiers*, [1918] 53 L. J. 372, involved an action in contract wherein the plaintiff was denied recovery of a claim against the association for work done.

[5]For over two hundred years, equity has allowed unincorporated associations to sue and be sued in representative actions. Meux v. Maltby, 2 Swans. 277, 36 Eng. Rep. 621 (1818); Cole v. Reynolds, 18 N. Y. 74 (1858); United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344, 42 Sup. Ct. 570 (1921); STORY, EQUITY PLEADINGS (7th ed. 1865) § 77; Note (1917) 30 HARV. L. REV. 683.

[6]This decision was swept away five years later by statute, 6 Edw. VII, c. 47, § 4 (1). Vacher and Sons Ltd. v. London Society of Compositors, [1913] A. C. 107.

For an interpretation and effect of this case, see Note (1928) 6 CAN. B. REV. 16, 22 *et seq.*; Note (1901) 15 HARV. L. REV. 310; WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION (1929) 684 *et seq.* These authorities limit the *Taff Vale* case to societies which are statutory quasi-corporations, since the society in question had by registration received from Parliament statutory recognition and the specific power to own property in the name of trustees.

This case was not followed in the United States until the *Coronado Coal* case. The authority in this country against the *Taff Vale* case is collected in: (1906) 3 ANN. CAS. 695; (1907) 6 ANN. CAS. 829; (1906) 2 L. R. A. (N. S.) 788; 5 C. J. 1369; 7 C. J. S. 88.

[7]259 U. S. 344, 52 Sup. Ct. 570 (1921).

[8]This principle was more than a dictum, although it was not essential to the decision, which turned completely on the interstate commerce point. It was a holding in that the court took jurisdiction of the case and decided the other questions.

[9]The two conflicting views are best outlined in Dodd, *Dogma and Practice in the Law of Associations* (1929) 42 HARV. L. REV. 977 and WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION (1929) 652 *et seq.* A note in (1922) 95 CENT. L. J. 22,

sions of the United States federal courts have interpreted this principle as overruling the common law. Today a voluntary association is a distinct entity which may sue and be sued in a federal court.[10] In spite of the broad language found in these opinions, some federal courts, as a prerequisite to jurisdiction of the case in the absence of a meritorious federal question, still require complete diversity of citizenship of all the members of the association from all the other parties to the action.[11]

Turning from suits by and against unincorporated associations to the field of contracts, we find examples where the courts treat these associations as entities in certain instances. Although it is universally held that an association can not contract in its own capacity, nevertheless, when one party has rendered either total or partial performance, courts have prohibited the other party from attacking the validity of the contract by claiming that the association had no legal capacity.[12] In *Nissen v. International Brotherhood*[13] the Supreme Court of Iowa said:

> "Just because an association can not sue or be sued in its own name alone, it does not mean its rights and duties are not subject to judicial examination. . . . Such a society has its rights, obligations, and responsibilities. . . . The union by entering into a contract as an entity is estopped to urge its nonentity."

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interprets the *Coronado* case as placing labor unions outside the class of other associations; a note in (1921) 10 CALIF. L. REV. 506, criticizes the decision as unsupported by authority and against public well-being. *Cf.*, Note (1922) 32 YALE L. J. 59. The note in (1922) 9 VA. L. REV. 52 restricts the *Coronado* case to suability under the Sherman Anti-Trust Act. (1922) 22 COL. L. REV. 684, upholds the decision as well reasoned, though not supported by the weight of authority. It treats the question as merely a procedural one.

[10]Hansel v. Purnell, 1 F. (2d) 266 (C. C. A. 6th 1924); *cert. denied*, 266 U. S. 617, 45 Sup. Ct. 98 (1924); Gaunt v. Lloyds America of San Antonio, 11 F. Supp. 787 (W. D. Tex. 1935); State Farm Mutual Auto. Ins. Co. v. Mackechnie, 114 F. (2d) 728 (C. C. A. 8th 1940); Barthing v. C. I. O., 40 F. Supp. 366 (S. D. Mich. 1941).

For cases in which states have allowed unincorporated associations to sue, see: Law v. Crist, 41 Cal. App. (2d) 862, 107 P. (2d) 953 (1940); Labonite v. Cannery Workers' and Farm Laborers' Union, 197 Wash. 595, 86 P. (2d) 189 (1938). The state decisions are all based on state statutes.

[11]Bartling v. C. I. O., 40 F. Supp. 366 (S. D. Mich. 1941); Russell v. Central Labor Union, 1 F. (2d) 412 (E. D. Ill. 1924); Levering and Garrigues Co. v. Morrin, 61 F. (2d) 115 (C. C. A. 2d 1932).

[12]"The court will not permit the plaintiff to recognize the lease as long as it serves his purpose, and after that renounce and declare it void, and oust the association or its associates from the premises. . . .

"There are scores of unincorporated associations . . . whose business requires the use of rooms, halls, and offices which are rented and occupied by them. It would astonish the profession to learn that leases in the name of the association . . . are utterly void and that the associates and their representatives may be turned out . . . at the will of the landlord." Reding v. Anderson, 72 Iowa 498, 500, 34 N. W. 300, 301 (1887). Lamm v. Stoen, 266 Iowa 622, 284 N. W. 465 (1939); State Farm Mutual Auto. Ins. Co. v. Mackechnie, 114 F. (2d) 728 (C. C. A. 8th 1940); Detroit Light Guard Band v. First Michigan Independent Infantry, 134 Mich. 598, 96 N. W. 934 (1903); Cleland v. Anderson, 66 Neb. 252, 92 N. W. 306 (1902); Petty v. Brunswick and W. Ry. Co., 109 Ga. 666, 35 S. E. 82 (1900); Eckman v. Railroad Co., 169 Ill. 312, 48 N. E. 496 (1897). *Contra*, Zane v. International Hod Carriers Bldg. Union, — Kan. —, 122 P. (2d) 715 (1942).

A number of decisions now treat these associations as entities and enforce their contracts once consideration has passed.[14]

A similar, though less complex, situation is found in the field of partnership. *Coles v. Reynolds*[15] involved a suit between two partnerships having one member in common. Although normally a man cannot be both plaintiff and defendant in the same suit, in order to sustain the action the New York Court of Appeals considered both of these partnerships as distinct entities, separate and apart from their members. In so doing they expressly upheld the equity doctrine which treats associations as entities whenever it is necessary to accomplish justice.[16] Numerous instances are found where the courts, although recognizing the common law doctrine that an unincorporated association is not a legal entity, have made exceptions to this doctrine where its applieation offended their sense of justice.

There is also good authority and logic for according judicial protection to the reputations of incorporated associations. A recent New York ease, *Bradley v. Conners*,[17] held that the credit and good name of a trade union may be protected from libel whether it be incorporated or not. The statutes of most states, including New York, protect the so-called union label and the union name against pirating and deceptive use.[18] In New York and elsewhere the property of the association—its funds, books, and papers—receives judicial protection on the ground that no member owns any proportionate share or has any separate right or fixed individual interest in the property—his right to its enjoyment is an incident of membership and ordinarily terminates with his membership.[19] The analogy between the reputation of an un-

[13]229 Iowa 1028, 295 N. W. 858 (1941).

[14]Estoppel is also invoked where an unincorporated association does not plead its non-entity in the trial court, but attempts to raise the issue on appeal. Iron Molders' Union v. Allis-Chalmers Co., 166 Fed. 45 (C. C. A. 7th 1908); Barnes v. Typographical Union, 232 Ill. 402, 83 N. E. 932 (1908).

[15]18 N. Y. 74 (1858).

[16]See *supra* note 5.

[17]169 Misc. 442, 7 N. Y. S. (2d) 294 (Sup. Ct. 1938). This case was cited by Justice Martin in the dissenting opinion of the Appellate Division in *Kirkman v. Westchester Newspapers Inc.*, 261 App. Div. 181, 186, 26 N. Y. S. (2d) 315 (1st Dep't 1941). Justice Martin points out that the legal status of the union was not even considered by the court. In *Gardner v. Jonas*, 97 N. Y. L. J. 1558 (Sup. Ct. 1937), the Special Term of the Supreme Court of New York County interpreted *Stone v. Textile Examiners and Shrinkers Employers' Association*, 137 App. Div. 655, 122 N. Y. Supp. 460 (1st Dep't 1910), as authority for sustaining a complaint of the union which alleged injury to its business or credit.

[18]See United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344, 386, 52 Sup. Ct. 570, 574 (1921), for a collection of state statutes. See also N. Y. LABOR LAW, §§ 208, 209, 701. Law v. Crist, 41 Cal. App. (2d) 862, 107 P. (2d) 953 (1938).

[19]Ostrom v. Greene, 161 N. Y. 353, 55 N. E. 919 (1899). Members expelled from an unincorporated association have no right to share in its assets. Community Volunteer Fire Co. v. City National Bank of Binghamton, 171 Misc. 1027, 14 N. Y. S. (2d) 306 (Sup. Ct. 1939); Lamm v. Stoen, 266 Iowa 622, 284 N. W. 465, 121 A. L. R. 627, 631 (1939). In *Lloyd v. Loaring*, 6 Ves. 773, 31 Eng. Rep. 1302 (1802), the association held certain property. One of the members refused to deliver up the books belonging to the lodge to its chief officer in accordance with the rules of the society. The court said at 779: "The society must some way or another be permitted to sue."

incorporated association and its tangible property, which the courts do protect, seems clear. The association name designates the individuals who compose it;[20] each member shares in the good name and credit of the association as an incident of his membership. There seems to be no practical or logical argument against judicial protection of the reputations of these associations, once it is recognized that such associations possess a reputation separate and distinct from that of its members.

In its decision in *Kirkman v. Westchester Newspapers Inc.*, the New York Court of Appeals has indicated that, although in general the common law doctrine that an unincorporated association is not a legal entity will prevail, the court will not hesitate to create an exception to avoid great injustice, and that suits in behalf of an unincorporated labor union for unjustifiable attacks upon its credit and good name will be upheld. In view of this liberal decision of the New York Court of Appeals, it seems likely that the exception will be extended further whenever necessary, until legislative enactments covering this field shall have been made.[21]

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[20]Byman v. Bickford, 140 Mass. 31, 2 N. E. 687 (1885).

[21]For a list of the fields into which this exception may be extended see: Witmer, *Trade Union Liability: The Problem of the Unincorporated Corporation* (1941) 51 YALE L. J. 40, 63. Most authorities agree that justice can best be accomplished when collective rights and responsibilities accompany collective activity. The disagreement among the cases and text writers arises from the method of solving the problem. The majority believe it should be done only by the legislature. The modern tendency is in the direction of judicial legislation when necessary to accomplish justice. WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION (1929) 469, 841-846; Dicey, *The Combination Law and Opinion* (1904) 17 HARV. L. REV. 511; Dodd, *Dogma and Practice in the Law of Associations* (1929) 42 HARV. L. REV. 977, 1005; POUND, READINGS ON THE HISTORY AND SYSTEM OF COMMON LAW (2d ed. 1913) 448; United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344, 42 Sup. Ct. 570 (1921); Taff Vale Ry Co. v. Amalgamated Society of Railway Servants [1901] A. C. 426.