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Notes and Comments

NOTES AND COMMENTS

Contracts: Legislation: Effect of clause against oral modification or discharge.—With the enactment of Section 33-C of the New York Personal Property Law[1] (and the identical Section 282 of the Real Property Law[2]), the problem of drafting an instrument to prevent its subsequent oral modification or discharge must be reconsidered in New York. This statute, effective September 1, 1941, provides:

> "**When written agreement or other instrument cannot be modified by oral executory agreement.** An executory agreement hereafter made shall be ineffective to change or modify, or to discharge in whole or in part, a written agreement or other written instrument hereafter executed which contains a provision to the effect that it cannot be changed orally, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification or discharge is sought."

Adopted pursuant to the recommendation of the New York Law Revision Commission,[3] this enactment is part of the legislation supplementing the abolition of the seal in New York.[4] Section 342 of the Civil Practice Act was amended to make the presence or absence of a seal on an instrument executed after September 1, 1941 "without legal effect."[5] Prior to this amendment, a modification or discharge of a sealed instrument, to the extent that it was executory,[6] was enforceable in New York only if embodied in an instrument executed with equal solemnity[7] or, after September 1, 1935, in a writing signed by the party to be charged with the change, modification or discharge.[8] Section 33-C is designed to serve the previous function of the seal in making it possible for a party to a contract to protect himself against the danger of false claims of an executory oral change.[9]

1L. 1941, c. 329, § 5.

2L. 1941, c. 329, § 4.

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4*Id.* at pp. 347-402. For a discussion of the previous history of the law of the seal in New York, see Notes (1935) 21 CORNELL L. Q. 177; (1941) 26 CORNELL L. Q. 692.

5L. 1941, c. 329, § 2.

6The validity of a modification or discharge attempted by a parole or simple written agreement which was wholly or partly executed (in the latter case, to the extent executed) was recognized in New York. McCreery v. Day, 119 N. Y. 1, 23 N. E. 198 (1890); McKenzie *et al.* v. Harrison *et al.*, 120 N. Y. 260, 24 N. E. 458 (1890); Imperator Realty Co. v. Tull, 228 N. Y. 447, 127 N. E. 263 (1920); Harris v. Shorall, 230 N. Y. 343, 130 N. E. 572 (1921); Cammach v. Slattery, 241 N. Y. 39, 148 N. E. 781 (1925).

7Harris v. Shoral, 230 N. Y. 343, 130 N. E. 572 (1921); Cammach v. Slattery, 241 N. Y. 39, 148 N. E. 781 (1925). For a general discussion relating to the modification or discharge of a sealed instrument, see 6 WILLISTON, CONTRACTS (Rev. ed., Williston and Thompson, 1936) § 1836.

8N. Y. CIV. PRAC. ACT § 342, added L. 1935, c. 708, and as amended L. 1936, c. 353. This provision has been repealed, *supra* note 5.

91941 REPORT, RECOMMENDATIONS AND STUDIES OF THE LAW REVISION COMMISSION [Legis. Doc. (1941) No. 65 (M)] pp. 359, 401-402.

The new statute changes the doctrine, laid down by Cardozo, J., in *Beatty v. Guggenheim Exploration Co.*,[10] denying legal effect to a provision in a written contract that it should only be modified or discharged in writing, the ground for which was that, "Whenever two men contract, no limitation self imposed can destroy their power to contract again."[11]

Since the provisions of Sections 33-C of the Personal Property Law and 342 of the Civil Practice Act are not retroactive, contracts under seal made before September 1, 1941, will continue to be governed by the previous law of New York. In other words, written contracts, even containing a provision against oral change, made before that date, may still be changed orally.

Besides abrogating the rule of the *Beatty* case, Section 33-C contains three significant provisions. (1) By its wording the statute is applicable both to an executory oral discharge or modification of this type of contract. In this it differs from similar statutes in other states, California,[12] Oklahoma,[13] Montana,[14] North Dakota,[15] South Dakota,[16] which prohibit the executory oral modification, but which, by interpretation, permit the oral discharge of *every* written contract.[17] (2) The statute applies only to executory modifications and discharges. As was true under the old law, any oral modification or discbarge will be given effect in so far as it has been executed.[18] (3) The statute requires the executory agreement modifying or discharging an original contract containing such a retroactive provision to be in writing and signed by the party "against whom enforcement of the change, modification or discharge is sought." This removes, by implication, the necessity for a sufficient consideration to support the modification or discharge, since these requisites also comply with the provisions of Section 33 (2) of the Personal Property Law, effective April 6, 1936, rendering enforceable without consideration the written executory modification or discharge of an existing contract.[19] It is still true, however, that every executory modifica-

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[10]Beatty v. Guggenheim Exploration Co. *et al.*, 225 N. Y. 380, 122 N. E. 378 (1919).

[11]*Id.* at 388, 122 N. E. at 380.

[12]CAL. CIV. CODE (Deering 1937) § 1698.

[13]OKLA. STAT. ANNO. (1937) Tit. 15, § 237.

[14]MONT. REV. CODE (1936) § 7569.

[15]N. D. COMP. L. ANNO. (1913) § 5938.

[16]S. D. CODE (1939) § 10.0807.

[17]Pearsall v. Henry, 153 Cal. 314, 95 Pac. 154 (1907); Producer's Fruit Co. of Cal. v. Goddard, 75 Cal. App. 737, 243 Pac. 686 (1925). An early Oklahoma case followed the rule laid down in California allowing the oral substitution of a new contract [Levin v. Hunt, 70 Okla. 63, 172 Pac. 940 (1918)] but this was not followed by later cases. Walker v. Johnson *et al.*, 102 Okla. 9, 227 Pac. 113 (1924); Wichita Flour Mills Co. v. Guymon Equity Exchange, 150 Okla. 245, 1 P. (2d) 657 (1931). For the cause of the California interpretation, see 6 WILLISTON, CONTRACTS (Rev. ed., Williston and Thompson, 1936) § 1828.

[18]This was the rule regarding the executed modification or discharge of a sealed instrument. See note 6 *supra*.

[19]N. Y. PERS. PROP. LAW § 33 (2) provides:

> "An agreement hereafter made to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration, provided that the agreement changing, modifying or discharging such contract, obligation, lease, mortgage or security interest, shall be in writing

tion or discharge not within the provisions of Section 33 (2) has to be supported by a sufficient consideration.[20] If consideration is present, even an oral executory modification is still enforceable.

Section 33-C does not alter the rules governing the modification or discharge of a contract within the Statute of Frauds. An oral agreement purporting to vary a written contract within the Statute of Frauds is unenforceable, except to the extent it is executed,[21] unless the oral modification is of itself a complete contract not within the statute.[22] But an oral discharge of a contract within the Statute of Frauds is enforceable, unless it would result in a retransfer of an interest in land or in chattels which must satisfy the statute.[23]

The recent case of *Zwirn v. Galento,* 288 N. Y. 428, 43 N. E. (2d) 474 (1942) suggests a possible question under this new legislation. Under a written contract made in New York, Joe Jacobs promised to obtain boxing matches for "Two-ton" Tony Galento in consideration of Galento's promise to render him exclusive services. It was expressly provided that the contract should be void unless approved by the New York State Athletic Commission, and unless Jacobs be duly licensed as a manager by that body. Jacobs procured a contract in New Jersey for a boxing exhibition between Galento and Max Baer to be held in that state. Galento participated in this bout although the conditions of the New York contract were not fulfilled. In a suit by Jacobs's administrator to recover the manager's share of the purse of the Galento-Baer contest, it was held that the complaint stated a cause of action. The court recognized the possibility of an election against, or a waiver of, the conditions precedent in a written contract.

If this contract had been made after September 1, 1941, the effective date of Section 33-C, and if it had contained provisions against oral modification and discharge, would the court have reached the same result? After the material or vital breach of a condition of a contract, the injured party has the right either to treat the contract as broken and refuse to continue performance, or to continue the contract despite the breach.[24] These rights are inconsistent with each other; the injured party cannot pursue both.[25]

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and signed by the party against whom it is sought to enforce the change, modification or discharge."

The identical provision is in N. Y. Real Prop. Law § 279 (1). See also N. Y. Debtor & Creditor Law § 243 making enforceable a lease in writing without seal or consideration.

[20]For an exposition of the law of New York on the consideration for a modification or discharge, see Schwartzreich v. Bauman-Basch, 231 N. Y. 196, 131 N. E. 887 (1921).

[21]Meyers v. Knights of Pythias, 194 App. Div. 405, 185 N. Y. Supp. 436 (1st Dep't 1920). For a general discussion of the modification or discharge of a contract within the Statute of Frauds, see 2 Williston, Contracts (Rev. ed., Williston and Thompson, 1936) §§ 592-594.

[22]Restatement, Contracts (1932) § 222. Hill v. Blake, 97 N. Y. 216 (1884); Davidson Coal Co. v. Weston, Dodson & Co., 209 App. Div. 314, 205 N. Y. Supp. 49 (1st Dep't 1929); Crocker v. Page, 210 App. Div. 735, 206 N. Y. Supp. 481 (1st Dep't 1924), *aff'd,* 240 N. Y. 636, 148 N. E. 738 (1925).

[23]Kieney v. Mason, 49 Barb. 254 (N. Y. 1867); Blumenthal v. Bloomingdale, 100 N. Y. 558, 3 N. E. 292 (1885); Clark v. Fey, 120 N. Y. 470, 24 N. E. 703 (1890).

[24]3 Williston, Contracts (Rev. ed., Williston and Thompson, 1936) § 683.

[25]Bierce v. Huchins, 205 U. S. 340, 27 Sup. Ct. 524 (1905).

If he repudiates the contract, no question arises under Section 33-C. If, however, he elects to continue performance, the same contract is in effect. The new statute, since it forbids only executory changes, would be inapplicable. There remains the possibility of an election against the conditions of a contract drawn to prevent oral variation or discharge in conformity with Section 33-C.

A waiver occurs when a party to a contract promises to perform a conditional duty although the other party fails to fulfill the conditions of the contract. The promise, which may be express or inferred from conduct, may be given either before or after the time the condition was to happen.[26] At common law, the seal prevented the parol modification of a contract, but there could be a parol waiver of a condition in a sealed instrument. This result could be supported on either of two grounds: (1) waiver is not the same as a modification of a contract;[27] or (2) waiver amounts, in effect, to an excuse of the condition. By analogy to the law of sealed instruments alone, the new statute would not apply to a waiver. On the other hand, the reason for the legislative protection against false claims of an oral change is as applicable to waiver in the form of an express parol promise as to modification. If a conceptual analysis should yield to a functional approach, as seems desirable, the courts should construe waiver to be within Section 33-C.

As Section 33-C is applicable only to contracts governed by New York law, the divergent rules controlling the variation or discharge of a written instrument in other jurisdictions should be surveyed in drafting an instrument which is not to be governed by New York law.[29] There seem to be at least three such rules. (1) In some states, there is no method for preventing an oral agreement supported by a sufficient consideration from modifying a written contract not within the Statute of Frauds.[30] (2) In a

[26]RESTATEMENT, CONTRACTS (1932) § 88: "(1) Except as stated in Subsection (2) and in § 93, a promise to perform all or part of an antecedent conditional duty in spite of the non-occurrence of the condition is binding, whether the promise is made before or after the time for the condition to occur, if performance of the condition is not a substantial part of what was to have been given in exchange for the performance of the antecedent duty, and if the uncertainty of the happening of the condition was not a substantial element in inducing the formation of the contract.

"(2) If a promise such as stated in Subsection (1) is made before the time for the occurrence of the condition has expired and the condition is some performance by the promisee or other beneficiary of the contract, the promisor can make his duty again subject to the condition by giving information of his intention so to do before there has been any substantial change of position by the promisee or beneficiary and while there is still reasonable time to perform the condition."

[27]Lamson & Goodnow Mfg. Co. v. Russel, 112 Mass. 387 (1873); Arbough v. Robinson *et al.*, 286 S. W. 339 (Tex. Civ. App. 1926). These cases hold that modification results in a substituted (new) contract while the same contract is in effect after a waiver.

[28]Fleming v. Gilbert, 3 Johns. 528 (N. Y. 1808) (parol promise before breach of condition); McCreery *et al.* v. Day *et al.*, 119 N. Y. 1, 23 N. E. 199 (1890) (dictum to the effect that the promise may be given after the failure to perform the condition); Dodsworth *et al.* v. Hercules Iron Works, 66 Fed. 483 (C. C. A. 6th, 1895) (promise inferred from conduct).

[29]It is not within the scope of this note to discuss what law will govern a contract. This depends on the applicable conflict of laws doctrine. See generally RESTATEMENT, CONFLICT OF LAWS (1934) §§ 311 *et seq.*

[30]This group of states includes:

decreasing number of states, the seal retains its common law effect and prevents any parol modification or discharge of a sealed contract except to the extent executed.[31] (3) Other states, as has been seen, have adopted statutes preventing the executory oral modification but permitting the oral discharge of any written contract.[32]

The new statute represents a decided advance in the law of New York. There is need for some method whereby a party to a written agreement not within the Statute of Frauds can protect himself against the danger of false claims of an executory oral modification or discharge.[33] The seal is not the most appropriate method of accomplishing this end as it does not bring to the attention of the parties the fact that they cannot subsequently modify or discharge their original contract.[34] The new statutory method, however, by requiring an express stipulation prohibiting the oral modification or discharge of the written contract, allows the contracting parties to achieve their purpose, and yet warns them definitely of the consequences of such a provision.[35] Section 33-C of the Personal Property Law is a desirable addition to the New York Law Revision Commission's program of modification of the law of contracts.

E. T. Brown, Jr.

Legislation: Adoption of Uniform Act Governing Secured Creditors' Dividends in Liquidation Proceedings: Change in New York Law.— Recent efforts of the Commissioners on Uniform State Laws to secure the adoption of uniform legislation with regard to payment of secured creditors' claims on liquidation proceedings have resulted in the enactment of Article 2-A of the New York Debtor and Creditor Law.[1] This article is substan-

1) Those states where the effect of the seal has been abolished by statute. Blagborne v. Hunger, 101 Mich. 375, 59 N. W. 657 (1894); Bowman v. Wright, 65 Neb. 661, 91 N. W. 580 (1902).

2) Those states where the effect of the seal has been changed by decision. Blakeslee v. Board of Water Comrs., 121 Conn. 164, 183 Atl. 887 (1936); Tashjian v. Karp, 277 Mass. 42, 177 N. E. 816 (1931).

[31]Masser v. Landon Operating Co., 106 Fla. 474, 145 So. 79 (1932); Wagner v. McClay, 306 Ill. 560, 138 N. E. 164 (1923); Sachs v. Owing, 121 Va. 162, 92 S. E. 997 (1917). RESTATEMENT, CONTRACTS (1932) § 407 takes a position contrary to these cases. Williston suggests that the law of the states still retaining the common law effect of the seal cannot be considered as settled unless there is a very recent case on the point. 6 WILLISTON, CONTRACTS (Rev. ed., Williston and Thompson, 1930) § 1836.

[32]See notes 12-17 *supra*.

[33]1941 REPORT, RECOMMENDATIONS AND STUDIES OF THE LAW REVISION COMMISSION [Legis. Doc. (1941) No. 65 (M)] 359.

[34]*Id.* at pp. 401-402.

[35]*Id.* at 359.

[1]The Act effective May 18, 1942, comprises Sections 30 through 38 of the N. Y. Debtor and Creditor Law:

§ 30. Definitions.

As used in this article, unless the context or subject matter requires otherwise:

(a) "Liquidation proceeding" includes all assignments for the benefit of creditors, whether voluntary or by operation of law; liquidations of insolvent banks; equity tially identical to the Uniform Act recommended by the Commissioners for

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receiverships where the subject under receivership is insolvent; and any other proceedings for distribution of assets of any insolvent debtor, whether a person, partnership, corporation or business association except proceedings under article sixteen of the insurance law.

(b) "Liquidator" means any person administering assets in any liquidation proceedings.

(c) "Insolvent debtor" means any insolvent person, partnership, corporation or business association involved in a liquidation proceeding.

(d) "Secured creditor" means a creditor who has either legal or equitable security for his debt upon any property of the insolvent debtor of a nature to be liquidated and distributed in a liquidation proceeding, or a creditor to whom is owed a debt for which such security is possessed by some endorser, surety, or other person secondarily liable.

(e) "Creditor's sale" includes any sale effected by the secured creditor by judicial process or otherwise under the terms of his contract or the applicable law for the purpose of realizing upon his security.

§ 31. **Secured creditor's claim to disclose security.**

In a liquidation proceeding every secured creditor's claim against the general assets shall disclose the nature of the security. When in an equity receivership it is determined that the subject under receivership is insolvent, secured creditors having claims on file which do not comply with this section shall make disclosure within a time to be fixed by the court.

§ 32. **Effect of concealment.**

Any secured creditor who with intent to evade the provisions of this article fails to disclose the existence of the security shall not be entitled to receive or retain dividends out of the general assets, unless he thereafter releases or surrenders to the liquidator the security which he has failed to disclose, or unless he procures such release or surrender if the security is in the possession of an indorser; surety, or other person secondarily liable for the insolvent debtor.

§ 33. **Value of security credited upon claims.**

Dividends paid to secured creditors shall be computed only upon the balance due after the value of all security not exempt from the claims of unsecured creditors and not released or surrendered to the liquidator, is determined and credited upon the claim secured by it.

§ 34. **Determination of value by secured creditor.**

The value of assets constituting the security may be determined by one of the following methods by the secured creditor:

(1) By collection. When the asset constituting the security is an obligation for the payment of money, the secured creditor may determine its value by collection or by exhausting his remedies thereon and then surrendering the obligation to the liquidator.

(2) By creditor's sale. When the asset constituting the security is something other than an obligation for the payment of money, the secured creditor may determine its value by creditor's sale.

> "§ 2. In all liquidation proceedings pending on the effective date hereof, the value of secured creditors' claims shall be determined in the manner provided by this article."

§ 35. **Alternative determination of value.**

Where valuation under the provisions of section thirty-four is impracticable or would cause undue delay, the court, upon petition by either the secured creditor or the liquidator, may order the value of the security determined by any of the following methods:

(1) By compromise, if the secured creditor and the liquidator agree upon a value. The liquidator may redeem such assets by payment of the agreed value, if authorized by the court.

(2) By litigation, through proceedings in the liquidation proceeding. The liquidator

nation-wide adoption in 1939.[2]

The desire for uniformity is more easily understood when viewed with reference to the present confusion in the law of various American jurisdictions. The problem is one of determining the extent to which a secured creditor may prove his claim against the assets of his insolvent debtor. Four divergent views exist:[3]

(1) The Bankruptcy rule[4]—Face of the claim less the value of the collateral.

(2) The Maryland rule[5]—Balance owing when each dividend is declared less only amounts actually realized from collateral.

(3) The Illinois rule[6]—Balance owing at the time the creditor presents his claim without deduction for collateral held by him.

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may redeem such assets by paying the value so determined, if authorized by the court.

(3) By liquidator's sale of the assets which, when completed and approved by the court, shall pass to the purchaser good title, free and clear of all liens of the secured creditor, such liens to be transferred to the proceeds of the sale. The order of the sale may be either

(a) Conditional, requiring the sale to be made by the liquidator only if the secured creditor does not complete a determination by collection or creditor's sale as set forth in section thirty-four of this article within a time fixed by the court; or

(b) Absolute, requiring the sale to be made by the liquidator within the time fixed by the court.

§ 36. **Exempt security not credited.**

When any creditor has legal or equitable security upon assets which are exempt from process for the satisfaction of unsecured debts and are duly claimed as exempt by the insolvent debtor, the value of such security shall not be credited upon the claim. Amounts realized by the creditor from such security after liquidation proceedings are begun shall be disregarded in computing dividends, unless the dividend so computed exceeds the sum actually owing upon the claim, in which event only the amount owing shall be paid.

§ 37. **Constitutionality.**

If any provision of this article or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications thereof which can be given effect without the invalid provision or application, and to this end the provisions of this article are declared to be severable.

§ 38. **Uniformity of interpretation.**

This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Noted (1943) 12 Fordham L. Rev. 77.

[2]Nat'l Conf. Commr's Uniform State Laws, Handbook (1939) 214.

[3]Actually, a fifth rule exists but is confined in operation to Kentucky. There a secured creditor is entitled to dividends along with unsecured creditors only after the latter have received a percentage of the dividends equal to that percentage of a secured creditor's claim covered by collateral. See Bank of Louisville v. Laughbridge, 92 Ky. 472, 18 S. W. 1 (1892).

[4]This rule was first pronounced in England in the case of Wright v. Simpson, 6 Ves. 714 (Ch. 1802). Thirty-five years later Mason v. Bogg, 2 Myl. & C. 443 (Ch. 1837) overruled the Wright case. The bankruptcy rule was reinstated in England by legislation applying it expressly to liquidations in Chancery. Supreme Court of Judicature Act 1873, 36 & 37 Vict., c. 66, § 25, as amended by Section 10 of the Supreme Court of Judicature Act, 1875, 38 & 39 Vict., c. 77. For the statement of the rule in America, see the National Bankruptcy Act § 57 (e), 11 U. S. C. § 93 (1938).

[5]Third National Bank v. Lanahan, 66 Md. 461, 7 Atl. 615 (1886).

[6]Bates v. Paddock, 118 Ill. 524, 9 N. E. 257 (1886).

(4) The Chancery rule[7]—Balance owing at the time of the declaration of insolvency without deduction for collateral.

The Illinois and Maryland rules still prevail in some jurisdictions.[8] The chancery rule, prior to legislation, had greater numerical support in America and is followed in the federal courts except in bankruptcy proceedings.[9] It has, however, been the subject of severe criticism and has been completely repudiated in England where it originated.[10] Recent trends in legislation favor the bankruptcy rule.[11]

The evolution of the chancery rule in New York and the gradual legislative encroachments upon its operation culminating in the adoption of the bankruptcy rule as expressed in Article 2-A are typical of a changing legislative and judicial concept. New York adopted the chancery rule in 1867 to govern assignments for the benefit of creditors.[12] It was subsequently extended to cover the distribution of receivership assets on corporate insolvency.[13] Other stages in its development were marked by decisions applying it to liquidation proceedings of an insolvent trust company[14] and insolvent decedents' estates,[15] and to the distribution of funds of a dairy company held by the Commissioner of Agriculture and Markets.[16]

While the judiciary was thus establishing the rule, the legislature was re-

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[7]The case of Mason v. Bogg, *supra* note 4, introduced the chancery rule into England. Its stay, however, was short-lived. English legislation abolishing the rule and substituting the bankruptcy rule as one of universal application has already been mentioned. It should be noted that Section 10 of the Judicature Act, 1875 has been replaced by the Administration of Estates Act, 1925, 15 GEO. V, c. 23, § 34. The federal courts adopted the chancery rule following a five to four decision in the celebrated case of Merrill v. National Bank of Jacksonville, 173 U. S. 131, 19 Sup. Ct. 360 (1899).

[8]First Nat. Bank v. Green, 221 Ala. 201, 128 So. 394 (1930); Re Butterman, 196 Iowa 633, 195 N. W. 188 (1923) (following the Maryland rule); State *ex rel* Rankin v. Yellowstone Bank and T. Co., 75 Mont. 43, 243 Pac. 813 (1925) (applying the Illinois rule). See Notes L. R. A. 1918B 1024; (1935) 94 A. L. R. 468 for a discussion of all four rules and a collection of cases applying them.

[9]GLENN, LIQUIDATION (1935) § 529.

[10]See dissenting opinion of Mr. Justice White in Merrill v. National Bank of Jacksonville, 173 U. S. 131, 147, 19 Sup. Ct. 360, 367 (1899); Clark, *Proof by Secured Creditors in Insolvency and Receivership Proceedings* (1920) 15 ILL. L. REV. 171; Hanson, *The Secured Creditor's Share of an Insolvent Estate* (1936) 34 MICH. L. REV. 309, 320; GLENN, LIQUIDATION (1935) § 530. See note 4 *supra*.

[11]Commissioners' Prefatory Note, 9 UNIFORM LAWS ANNOTATED 21.

[12]Midgeley v. Slocomb, 2 Abb. Pr. (N. S.) 275 (Sup. Ct. 1867); Jervis v. Smith, 7 Abb. Pr. (N. S.) 217 (Sup. Ct. 1869).

[13]People v. Remington, 121 N. Y. 328, 24 N. E. 793 (1890). After expressly recognizing the bankruptcy rule as operative in many jurisdictions, the court said at p. 333, 794:

> "To administer in cases of insolvency coming within the jurisdiction of courts of equity, by analogy with the modes of bankruptcy courts is not required, and such precedents are not to be deemed as affecting any change in the rules established by courts of equity, for the marshalling and distribution of assets."

Prudential Ins. Co. of America v. Land Estates, 110 F. (2d) 617, 619 (C. C. A. 2d, 1940).

[14]McGrath v. Carnegie Trust Co., 221 N. Y. 92, 116 N. E. 787 (1917).

[15]*In re* Vicinus' Estate, 159 Misc. 903, 290 N. Y. Supp. 20 (Surr. Ct. 1936); *In re* Cooke's Estate, 147 Misc. 528, 264 N. Y. Supp. 336 (Surr. Ct. 1933); Matter of Kearns, 139 Misc. 877, 249 N. Y. Supp. 340 (Surr. Ct. 1931).

[16]Andes Co-operative Dairy Co. v. Baldwin, 238 App. Div. 726. 266 N. Y. Supp. 18 (3d Dept. 1933), *aff'd without opinion*, 263 N. Y. 578, 189 N. E. 705 (1933).

stricting its application. In 1914, an amendment to the New York Debtor and Creditor Law substituted the bankruptcy rule in assignments for the benefit of creditors.[17] Again in 1932 the legislature made the bankruptcy rule applicable to liquidation proceedings of insolvent insurance companies.[18] This change was effected by the passage of Article 16 of the New York Insurance Law. Virtually all mortgage guaranty companies in New York are organized under the Insurance Law. The amendment, therefore, resulted in a widespread use of the bankruptcy rule of distribution in New York even prior to the adoption of the Uniform Act.[19]

In 1933, New York mortgage moratorium legislation was enacted recognizing the right of a debtor sued on a mortgage-secured debt to set off the fair market value of the mortgaged property.[20] This right of set-off reduces the creditor's claim by an amount equal to the value of the security held by him. This is exactly the result achieved under the bankruptcy rule.

In 1941, the bankruptcy rule of distribution was made applicable to funds of an insolvent decedent's estate.[21]

Section 33 is the heart of the new Act and restates the bankruptcy rule. It provides that:

> "Dividends to secured creditors shall be computed only upon the balance due after the value of all security not exempt from the claims of unsecured creditors and not released or surrendered to the liquidator is determined and credited upon the claim secured by it."

It is apparent from the broad statutory definition of "liquidation proceedings"[22] that the legislature has sought to make the rule applicable to all types of such proceedings and to eliminate the chancery rule in New York. It should be noted, however, that proceedings under Article 16 of the Insurance Law are expressly exempted from the operation of the new Act.[23] Legislation passed in 1932 had already enacted the bankruptcy rule of distribution to govern such proceedings.[24]

The express mention of insolvent decedents' estates which appears in the draft of the Uniform Commissioners has been omitted from the New York Act. Adoption of the bankruptcy rule in the field of insolvent decedents' estates at the 1941 session accounts for the failure of the legislature expressly

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[17]N. Y. Debtor and Creditor Law § 15(8), L. 1914, c. 360, Matter of Vietor, 101 Misc. 308, 166 N. Y. Supp. 1012 (Sup. Ct. 1917), *aff'd without opinion,* 183 App. Div. 883, 171 N. Y. Supp. 1102 (1st Dept. 1918), 224 N. Y. 707, 121 N. E. 896 (1918).

[18]N. Y. Insurance Law § 544(6), L. 1932, c. 191, adding § 425 to the Insurance Law of 1909.

[19]Hamberg v. Guaranteed Mortgage Co. of New York, 38 N. Y. S. (2d) 165 (Sup. Ct. 1942).

[20]N. Y. Civ Prac. Act § 1083-b, Prudential Ins. Co. v. Land Estates, 110 F. (2d) 617, 619 (C. C. A. 2d, 1940). The emergency period has been extended to July 1, 1943, L. 1941, c. 625.

[21]Surrogate's Court Act § 212 (4), L. 1941, c. 425, *In re* Bernard's Estate, 177 Misc. 712, 714, 31 N. Y. S. (2d) 777, 780 (Surr. Ct. 1941).

[22]N. Y. Debtor and Creditor Law § 30(a) (1942).

[23]*Ibid.*

[24]See note 18 *supra.*

to include this type of proceeding in the new Act.[25]

Sections 34 and 35 provide a statutory method for determining the value of a creditor's security. Where the security is an obligation to pay money, the creditor may collect it or exhaust his remedies thereon. Other types of security may be sold on creditor's sale. If these methods prove impracticable, the court upon petition of a secured creditor or liquidator may order a determination of value (1) by compromise between the secured creditor and the liquidator, or (2) by litigation ancillary to the liquidation proceedings, or (3) by compelling a liquidator's sale of the assets which, when approved by the court, passes clear title to the purchaser.

No similar provisions are to be found either in the Chandler Act[26] or in previous New York legislation enacting the bankruptcy rule in this state. The computation of the value of a secured creditor's collateral has not followed any fixed pattern.[27] The present act furnishes a simple and flexible formula for such a determination and should greatly facilitate distribution of assets on liquidation and guarantee to creditors, both secured and unsecured, an equitable participation in dividends.

But it is questionable whether the provisions for valuation of a creditor's security may be extended to include distribution of assets of an insolvent decedent's estate, even assuming that the present Act *does* include such distribution within its compass. Such an extension would involve an obvious conflict with the Surrogate's Court Act. Section 35(3) of the new Act provides that the value of a creditor's security may be determined by a liquidator's sale of the assets. The difficulty arises where the creditor holds a mortgage on real estate owned by the decedent. Section 234 of the Surrogate's Court Act provides that real property of the decedent may be sold:

> "For the payment of debts of the decedent . . . *excepting mortgage liens* existing thereon at the time of his death."[28] (Italics added)

This section expressly denies to the surrogate the power to authorize an executor or administrator to sell real property for the purpose of paying debts when the security consists of a mortgage.[29] There is no reason why this same restriction should not apply to a sale by the liquidator. In the distribution of an insolvent decedent's estate, the duties of a liquidator as defined by Article 2-A are identical to those performed by an executor or administrator.[30] Yet, the new Act authorizes the court to *compel* the liquidator to sell the security. Such a result, it is submitted, is antagonistic to the clear prohibition against sale contained in Section 234 of the Surrogate's Court Act.

The exclusion from the operation of Article 2-A of proceedings under Section 16 of the Insurance Law is likewise unfortunate. These proceedings in-

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[25]See note 20 *supra*.

[26]MATTHEW BENDER AND CO., CHANDLER ACT 1938, ANALYSIS OF CHANGES (1938).

[27]Matter of Vietor, 101 Misc. 308, 319, 166 N. Y. Supp. 1012, 1019 (1917) (decision under Debtor and Creditor Law § 15(8); Matter of New York Title and Mortgage Co., 277 N. Y .66, 13 N. E. (2d) 41 (1938).

[28]SURROGATE'S COURT ACT § 234(1), Matter of Perkins, 122 Misc. 593, 204 N. Y. Supp. 667 (Surr. Ct. 1924). Noted in (1940) 124 A. L. R. 793.

[29]Matter of Perkins, 122 Misc. 594, 596, 204 N. Y. Supp. 667, 670 (Surr. Ct. 1924).

[30]N. Y. DEBTOR AND CREDITOR LAW § 30(b).

clude liquidation of insurance companies and mortgage guaranty companies. The application of the statutory formula for security evaluation set out in Article 2-A is particularly desirable in such proceedings.[31] Excepting these proceedings from the operation of Article 2-A will decrease substantially the effectiveness of the enactment. An amendment incorporating into the Insurance Law the procedure with regard to secured claims and the rights, remedies, and duties of secured creditors as set forth in Article 2-A seems desirable.

Finally, it is suggested that subdivision 8 of Section 15 of the Debtor and Creditor Law dealing with assignments for the benefit of creditors be stricken out and the court be given express power:

> "To apply the provisions of Article 2-A of this Act governing secured creditors' dividends in liquidating proceedings."[32]

The new Act subjects the secured creditor to the duty of disclosing his security; the penalty for failure to do so prohibits the creditor from receiving or retaining dividends out of the general assets.[33] This provision likewise has no counterpart in the Chandler Act or in other state legislation enacting the bankruptcy rule.

Section 36 provides that:

> "When any creditor has legal or equitable security upon assets which are exempt from process for the satisfaction of unsecured debts and are duly claimed as exempt by the insolvent debtor, the value of such security shall not be credited upon the claim. Amounts realized by the creditor from such security after liquidation proceedings are begun shall be disregarded in computing dividends, unless the dividend so computed exceeds the sum actually owing upon the claim, in which event only the amount owing shall be paid."

This provision is a statutory recognition of the well-established doctrine that a secured creditor has a valid lien on the assets of his debtor to the extent of his security. To disregard amounts realized from collateral, when computing dividends due the secured creditor, does not prejudice the position of unsecured creditors, since by the very wording of the section, the secured creditor cannot receive dividends in excess of the sum actually owing on his claim.[34]

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[31]It is only necessary that the reader take a casual glance at the annotations to § 544(6) of the N. Y. Insurance Law (McKinney's). The litigation under this section is abundant and security evaluation is an ever-present item.

[32]There is no doubt that the provisions of the new act *do* govern assignments for the benefit of creditors but substitution of this paragraph for the present subdivision 8 of Section 15 would be a step toward clarification.

[33]N. Y. Debtor and Creditor Law §§ 31, 32.

[34]To date, four other states have adopted the Uniform Act. They are: (1) Indiana—Ind. Stat. Ann. (Supp. 1942) tit. 31 §§ 201-210, L. 1941, c. 50; Legis. (1941) 17 Ind. L. J. 165; (2) New Jersey—N. J. S. A. § 2:61 A-1 to 2:61 A-11, L. 1941, c. 80; (3) South Dakota—L. 1941, c. 162; (4) Wisconsin—Wis. Stat. 1941 § 128.25. In Wisconsin and Indiana the liquidator is prohibited from selling security on real estate of an insolvent decedent's estate.

Limitation of Actions: Effect of oral promise not to plead the statute of limitations.— An oral promise not to plead the statute of limitations is generally construed as a new promise to pay the debt.[1] Many states have statutes providing that no acknowledgment or new promise shall be sufficient evidence of a new or continuing contract to extend the statute of limitations unless it is in writing and signed by the party to be charged.[2] Application of these statutes is difficult where a debtor induces a pressing creditor to forbear by promising orally that he will not plead the statute of limitations. Should the requirement of writing be applied in every case, or should oral evidence be admitted where the circumstances are extenuating?

The New York decisions represent the minority view which clings to a literal interpretation and rejects evidence of an oral promise not to plead the statute of limitations.[3] They consider such a rule a legislative device to insure the operation of the statute of limitations as a statute of repose. Prior to this statute, the most casual reference to a debt was construed to be an acknowledgment or new promise sufficient to toll the statute. Ingenious methods were employed to trick unwary debtors out of their statutory defense. To protect the debtor against unscrupulous creditors and to assist the courts in sifting out *mala fide* litigants, the statute was enacted requiring evidence of the new promise to be in writing.[4] The foremost New York decision, *Shapley v. Abbott*,[5] was based on this historical argument. There, the court rejected

[1]RESTATEMENT, CONTRACTS (1932) § 86 (2) (c).

[2]Forty states have adopted statutes to this effect. *See:* ALA. CODE ANN. (Michie, 1940)) tit. 7, § 40; ARIZ. CODE ANN. (1940) § 29-303; ARK. DIG. STAT. (Buck, 1937) § 8943; CAL. CODE CIV. PRO. (Deering, 1937) § 360; COLO. STAT. ANN. (Michie, 1935) c. 102, § 26; CONN. GEN. STAT. (1930) § 5611; D. C. CODE (1940) § 12-305; FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) § 4650; GA. CODE ANN. (Skillman, 1936) § 3-901; IDAHO CODE ANN. (1932) § 5-238; IND. STAT. ANN. (Burns, 1933) § 2-610; IOWA CODE (1939) § 11018; KAN. GEN. STAT. ANN. (1935) § 60-312; ME. REV. STAT. (1930) c. 95, § 104; MASS. ANN. LAWS (Michie, 1933) v. 9, c. 260, § 13; MICH. STAT. ANN. (Henderson, 1938) § 27-613; MINN. STAT. (Mason, 1927) § 9204; MISS. CODE ANN. (1930) § 2318; MO. REV. STAT. (1939) § 1035; MONT. REV. CODE ANN. (Anderson and McFarland, 1935) § 9062; NEB. COMP. STAT. (Kyle, Supp. 1941) § 20-216; NEV. COMP. LAWS (Hillyer, 1929) § 8542; N. J. STAT. ANN. (1939) § 2:24-9; N. M. STAT. ANN. (1941) § 27-115; N. C. CODE ANN. (Michie, 1939) § 416; N. D. COMP. LAWS (1913) § 7394; N. Y. CIV. PRAC. ACT (Gilbert-Bliss, 1942) § 59; OHIO GEN. CODE ANN. (Page, 1938) § 11223; OKA. STAT. ANN. (1937) tit. 12, § 101; ORE. COMP. LAWS ANN. (1939) § 1-222; S. C. CODE (1942) § 368; S. D. CODE (1939) § 33.0213; TEX. CIV. STAT. ANN. (Vernon. 1941) art. 5539; UTAH REV. STAT. ANN. (1933) § 104-2-45; VT. PUB. LAWS (1934) § 1666; VA. CODE ANN. (Michie, 1942) § 5821; WASH. REV. STAT. ANN. (Remington, 1932) § 176; W. VA. CODE ANN. Michie, 1937) § 5400; WIS. STAT. (1941) § 330.42; WYO. REV. STAT. ANN. (Courtright, 1931) § 89-421. With the exception of the Connecticut statute which applies only to representatives of deceased persons, these statutes contain substantially the same provisions.

[3]Shapley v. Abbott, 42 N. Y. 443 (1870); Miller v. McKnight, 263 App. Div. 1024, 33 N. Y. S. (2d) 449 (3d Dep't 1942); Wakulaw v. State Bank, 214 App. Div. 673, 212 N. Y. Supp. 733 (1st Dep't 1925).

[4]The statutes in question were derived from Lord Tenterden's Act. 9 GEO. IV, c. 14 (1828). For an historical discussion of these statutes, see, Albachten v. Bradley, 212 Minn. 359, 3 N. W. (2d) 783 (1942); Olson v. Dahl, 99 Minn. 433, 109 N. W. 1001 (1906); Van Keuren v. Parmelee, 2 N. Y. 523 (1849); 1 WILLISTON, CONTRACTS (Williston and Thompson, Rev. ed., 1936) § 164.

[5]42 N. Y. 443 (1870). This decision amounted to a reversal of the original New York

each of the plaintiff's four theories of recovery: (1) As an acknowledgment of the debt, the defendant's promise was unenforceable because not in writing; (2) As a completely new contract, it was invalid for lack of consideration; (3) Nor, could it be a waiver because the defense had not accrued to the defendant at the time it was made, and as a promise to waive, it was unenforceable without consideration; and (4) There was no estoppel in the absence of misrepresentation of past or present fact. The court declared that a promise of future action could not constitute an estoppel where the facts were fully known to both parties.[6] To allow an estoppel in such cases would controvert the historical purpose of the statute.

The supreme court of Minnesota reached the opposite conclusion in the recent case of *Albachten v. Bradley*.[7] The plaintiff, payee of a note made by the defendant, demanded payment shortly before the expiration of the period of limitations. The defendant assured the plaintiff that he would lose nothing by waiting until Thanksgiving, three months after the period expired.[8] When the plaintiff sought payment after the agreed time, the defendant's answer was "try and collect." In his action brought more than seven years after the maturity of the note, the plaintiff sought to avoid the bar of the statute of limitations by showing his oral agreement to extend the time of payment. The court admitted the evidence. After considering and rejecting the New York decisions, the Minnesota court applied the doctrine of promissory estoppel.[9] The court reasoned that the debtor by his promise intentionally induced his creditor to forbear his action, and the creditor relied on the promise to his detriment. The debtor, therefore, was estopped to invoke as a defense the oral nature of his promise.

The disparity of opinion demonstrated in these decisions is the result of differing ideas as to the function of the statute. Admitting, as did the New York decisions, that the policy of the statutes is one of repose, the Minnesota court refused to allow that consideration to override basic principles of equity by permitting a party to found a claim on his own wrong. It viewed the statute essentially as a Statute of Frauds to alter the character of proof required for a new promise, and not as changing the substance of the common law.[10] By taking this approach, the court was not enforcing an oral contract in complete disregard of the statute, but in effect, was construing the statute as inapplicable to this case. An English court confronted by a similar problem

view, as expressed in *Utica Ins. Co. v. Bloodgood,* 4 Wend. 652 (N. Y. 1830) and *Gaylord v. Van Loon,* 15 Wend. 308 (N. Y. 1836).

[6]Quincey & Co., Arbitrage v. Cities Service Co., 156 Misc. 83, 282 N. Y. Supp. 294 (Sup. Ct. 1935), *aff'd without opinion,* 253 App. Div. 719, 1 N. Y. S. (2d) 654 (1st Dep't 1937); *In re* Watson, 177 Misc. 308, 30 N. Y. S. (2d) 577 (Surr. Ct. 1941); Parsons v. Lipe, *et al.,* 158 Misc. 32, 286 N. Y. Supp. 60 (Sup. Ct. 1933); Pratt v. Ano, 7 App. Div. 494, 40 N. Y. Supp. 229 (4th Dep't 1896).

[7]The Minnesota court interpreted the defendant's assurance as a promise not to plead the statute of limitations, which was equivalent to a new promise to pay. *Accord:* RESTATEMENT, CONTRACTS (1932) § 86(2)(c).

[8]212 Minn. 359, 3 N. W. (2d) 783 (1942).

[9]WILLISTON, CONTRACTS § 139; RESTATEMENT, CONTRACTS § 90; Note (1941) 36 ILL. L. REV. 187.

[10]McLearn v. Hill, 276 Mass. 519, 177 N. E. 617 (1931); R. H. Stearns Co. v. United States, 291 U. S. 54, 54 Sup. Ct. 325 (1933).

reached the same result upon the analysis that "the matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded."[11] After measuring these equities, which included the unenforceable oral promise, the Minnesota court concluded that the refuge of a statute to prevent fraud must be denied to one who sought to gain its protection by deceitful acts.

Recent developments in New York law tend to undermine the rationale of the *Shapley v. Abbott* decision. Its collapse may be imminent. In the first place, oral contracts within the statute of frauds have been enforced where one party relied thereon to his detriment.[12] Such a statute is also a statute of repose but it is not an "asylum of escape"[13] for the wrongdoer. The instant statute requiring written evidence closely resembles, in its operative effect, a Statute of Frauds. The same reasoning should apply to it. The second principal support of the *Shapley* decision, *viz.*, that estoppel can be predicated only on misrepresentation of *past or present fact*, has been weakened by partial recognition of the doctrine of promissory estoppel.[14] New York courts have limited this doctrine to charitable subscription cases—with justifiable caution, where the ticklish problem of substituted consideration is involved.[15] But the problem arising from oral promises to extend the statute of limitations is not so perplexing. The creditor does not allege that his reliance and detriment are consideration for the defendant's promise. The common law has long recognized that additional consideration is not necessary to support a promise to extend the statute of limitations.[16] The plaintiff invokes the doctrine of promissory estoppel to extend to this fact situation the elementary principles of estoppel which prevent a party from denying words spoken intentionally to induce another to act to his harm.

Notwithstanding the admitted reluctance of the New York courts to extend the doctrine of promissory estoppel, they could find considerable support for overruling the *Shapley* decision in the older doctrine of estoppel *in pais*. Paralleling the cases under the aegis of *Shapley v. Abbott*, which traditionally insist on misrepresentation of fact, there is a line of New York decisions which find an estoppel *in the absence of misrepresentation of past or present fact*.[17]

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[11]Maddison v. Alderson, 8 App. Cas. 467, 476 (1883).

[12]Imperator Realty Co. v. Tull, 228 N. Y. 447, 127 N. E. 263 (1920); Holden v. Efficient Craftsmen Corp., 234 N. Y. 437, 138 N. E. 85 (1923); Harris v. Shorall, 230 N. Y. 343, 130 N. E. 572 (1921); Thompson v. Poor, 147 N. Y. 402, 42 N. E. 13 (1895).

[13]Cardozo, C.J., in Imperator Realty Co. v. Tull, *supra* note 12.

[14]Allegheny College v. National Chautauqua County Bank, 246 N. Y. 369, 159 N. E. 173 (1927); I. & I. Holding Corp. v. Gainsburg, 251 App. Div. 550, 296 N. Y. Supp. 757 (1st Dep't 1937), *aff'd*, 276 N. Y. 427, 12 N. E. (2d) 532 (1938).

[15]Quincey Co., Arbitrage Corp. v. Cities Service Co., 156 Misc. 83, 282 N. Y. Supp. 294 (Sup. Ct. 1935), *aff'd without opinion*, 253 App. Div. 719, 1 N. Y. S. (2d) 654 (1st Dep't 1937); Comfort v. McCorkle, 149 Misc. 826, 268 N. Y. Supp. 192 (Sup. Ct. 1933); Harvey v. Morgan & Co., 166 Misc. 455, 2 N. Y. S. (2d) 520 (N. Y. C. Ct. 1937), *rev'd per curiam on other grounds*, 25 N. Y. S. (2d) 636 (App. Term 1938), *aff'd mem.*, 260 App. Div. 873, 23 N. Y. S. (2d) 844 (2d Dep't 1940).

[16]1 WILLISTON, CONTRACTS §§ 184, 162, 143; Note (1938) 23 CORNELL L. Q. 607.

[17]Witherell v. Kelly, 195 App. Div. 227, 187 N. Y. Supp. 43 (2d Dep't 1921); The Continental National Bank v. The National Bank of the Commonwealth, 50 N. Y. 575 (1872); *In re* Tuozzolo's Will, 145 Misc. 485, 259 N. Y. Supp. 542 (Surr. Ct. 1932);

The rationale of these cases is as just as it is simple. "The doctrine of estoppel is applied with respect to representations of a party, to prevent their operating as a fraud upon one who has been led to rely upon them."[18] No distinction is drawn between factual and promissory misrepresentation.[19] The scoundrel who misleads innocent parties by promises deserves no greater immunity than the one who deceives them with misrepresentations. Recognition of this elementary proposition would be justified in New York, in view of the general disapproval of the *Shapley* decision,[20] and the disintegration of its principal arguments.[21]

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Torts: Liability of municipality for injuries occurring in public parks.—In *Clark v. City of Buffalo, 288 N. Y. 62, 41 N. E. (2d) 459 (1942),* an action was brought against the City of Buffalo for the injury of a child caused by a piece of glass picked up and thrown by another child without warning or cause in a public park. The city was alleged to have been negligent in that it, having permitted a concessionaire to sell within the park drinks in bottles which, when emptied, were thrown upon the ground and broken, neglected to remove the broken glass and failed properly to supervise children playing in the park. The trial court allowed a recovery which the Appellate Division unanimously affirmed. The Court of Appeals permitted an appeal and reversed, holding: First, that a city is not an insurer of the safety of persons using its park facilities, but that it *is* under a duty to exercise reasonable care in the maintenance of its parks and in the supervision of their use by the public; and, second, that the city was not negligent, as it had provided adequate supervision, but that the sole cause of the injury was the sudden, impulsive, and unpredictable act of another child, who made use of a handy missile which was not inherently dangerous.

That municipal liability in tort depends upon the nature of the function involved is well established. If the function is corporate, the municipal

Firestone v. Miroth Const. Co., Inc., 215 App. Div. 564, 214 N. Y. Supp. 239 (1st Dep't 1926); Vandeweghe v. City of New York, 150 Misc. 815, 270 N. Y. Supp. 570 (Sup. Ct. 1934); Town of Brookhaven v. Smith, 118 N. Y. 634, 23 N. E. 1002 (1890); Hartford Accident and Indemnity Co. v. Oles, 152 Misc. 876, 274 N. Y. Supp. 349 (Sup. Ct. 1934).

[18]Insurance Co. v. Mowry, 96 U. S. 544, 547 (1877). These words were adopted by the New York court in *Witherell v. Kelly,* 195 App. Div. 227, 231, 187 N. Y. Supp. 43, 46 (2d Dep't 1921).

[19]A federal court interpreting the Virginia statute, which expressly authorized an estoppel whenever the new promise "would operate as a fraud," found that an act of bad faith was "fraud" within the meaning of the statute, although all the elements of technical fraud were not present. Tucker v. Owen, 94 F. (2d) 49 (C. C. A. 4th, 1938); Note (1938) 23 CORNELL L. Q. 607.

[20]Albachten v. Bradley, 212 Minn. 359, 3 N. W. (2d) 783 (1942); Tucker v. Owen, 94 F. (2d) 49 (C. C. A. 4th, 1938); Holman v. Omaha & C. B. Ry. & Bridge Co., 117 Iowa 268, 90 N. W. 833 (1902); Schroeder v. Young, 161 U. S. 334, 16 Sup. Ct. 512 (1896); Cecil v. Henderson, 121 N. C. 244, 28 S. E. 481 (1897); State Trust Co. v, Sheldon, 68 Vt. 259, 35 Atl. 178 (1896); Little v. Phoenix Insurance Co., 123 Mass. 380 (1877); Quick v. Corlies, 39 N. J. L. 11 (1876).

[21]See notes 12 and 13 *supra.*

corporation may be held liable; if the function is governmental, immunity from liability follows as of course.[1] When an attempt is made to characterize some particular function as either governmental or corporate, the difficulties in the application of the rule become apparent. Most jurisdictions, when dealing with cases involving municipal liability for torts occurring at public parks, playgrounds, bathing places, zoos, and the like, have found these functions to be governmental and thus exempted the municipality from liability.[2] A strong minority,[3] however, including New York,[4] has found that only a corporate function is involved. In the principal case, the trial court ruled at the beginning of the trial that the question of governmental function was not involved—so clear is the rule in New York. The majority rule is riddled with exceptions. Even under it, the courts have been able to work out several theories of municipal liability: (1) Nuisance;[5] (2) Maintenance for profit;[6] (3) Some other ground of municipal liability (*e.g.*, injury resulting from a defect in a park street or sidewalk);[7] and, in the case of property damage alone, (4) The broad legal principle that no one is permitted to use his own property so as to invade the property rights of another.[8] It seems to be generally conceded by the courts that the municipality should not escape liability when actually at fault. Under the minority rule, proper results are achieved through the application of ordinary rules of negligence. Under the majority rule, the courts have created exceptions to accomplish substantial justice. Legal writers have consistently urged that liability be imposed for all tort injuries which are the fault of the municipality.[9] The courts have never gone that far, probably because they felt

[1]Bailey *et al.* v. The Mayor &c. of New York, 3 Hill 531, 38 Am. Dec. 669 (N. Y. 1842).

[2]Kellar v. City of Los Angeles, 179 Cal. 605, 178 Pac. 505 (1919); Hannon v. The City of Waterbury, 106 Conn. 13, 136 Atl. 876 (1926); Gebhardt v. The Village of LaGrange Park, 354 Ill. 234, 188 N. E. 372 (1933); Bolster v. City of Lawrence, 225 Mass. 387, 114 N. E. 722 (1917); St. John v. City of St. Paul, 179 Minn. 12, 228 N. W. 170 1929); Kuchler v. N. J. and N. Y. R. Co., 104 N. J. L. 333, 140 Atl. 329 (1928); City of Mingo Junction v. Sheline, 130 Ohio St. 34, 196 N. E. 897 (1935); Virovatz v. City of Cudahy, 211 Wis. 357, 247 N. W. 341 (1933).

[3]City of Kokomo v. Loy, 185 Ind. 18, 112 N. E. 994 (1916); Honoman v. City of Philadelphia, 322 Pa. 535, 185 Atl. 750 (1936).

[4]In Augustine v. Town of Brant, 249 N. Y. 198, 163 N. E. 732 (1928), the court in referring to the unreported opinion in Edinger v. City of Buffalo, 213 N. Y. 674, 107 N. E. 1076 (1914), said: "The establishment of town parks is not a public duty imposed upon the town and the town does not act as an agent of the state when it avails itself of the privilege of maintaining them. . . . When the town assumes the authority to own and maintain parks, it goes outside the political power of a local subdivision of the State to engage in a *quasi* private undertaking. No substantial difference exists between towns and cities as to the theory of corporate liability for negligence in this regard. . . . The modern tendency is against the rule of nonliability. . . . The establishment of a town park may incidentally benefit the public health, but that fact does not make the acts of the town in maintaining the park the exercise of a governmental function."

[5]Hoffman v. City of Bristol, 113 Conn. 386, 155 Atl. 499 (1931).

[6]Rome v. London & L. Indem. Co., 181 La. 630, 160 So. 121 (1935).

[7]Ackeret v. Minneapolis, 129 Minn. 190, 151 N. W. 976 (1915).

[8]Boise Development Co. v. Boise City, 30 Idaho 675, 167 Pac. 1032 (1917).

[9]Borchard, *Government Liability in Tort* (1924) 34 YALE L. J. 1, 129, 229, (1926) 36 YALE L. J. 1; *Symposium on Municipal Tort Liability* (1940) 5 LEGAL NOTES ON LOCAL GOVERNMENT 351.

that the imposition of such a general liability is properly a legislative function.[10] The courts have continued to maintain at least the shell of the old distinction between governmental and corporate functions, and, while it is not likely that this distinction will be openly abandoned in the immediate future, yet there can be little doubt that ultimately, either by decision or statute, municipalities will be liable for their negligence.[11]

The New York law in this field is well settled. New York has long regarded the maintenance of parks, beaches, playgrounds, zoos, and the like, as a corporate function.[12] No statute defines the extent of municipal liability. It makes no difference whether these facilities are either created or maintained under a statute or not; if the municipality extends such facilities to the public, it is liable for its negligence.[13] The rules of negligence and contributory negligence apply.[14] A participant in, or spectator of, a game assumes all the risks of that game, and the municipality cannot be held.[15]

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[10]Scibilia v. City of Philadelphia, 279 Pa. 549, 124 Atl. 273 (1924).

[11]6 McQuillin, The Law of Municipal Corporations (2d ed. rev. 1936) § 2850: "In view of the tendency of late decisions and the development of the law on this subject, the rule will ultimately prevail that in maintaining parks, playgrounds and like recreations, the city is performing a local function for its people and it should be held liable on the same basis as a private person or corporation."

[12]See note 4 *supra*. See also Curcio v. City of New York, 275 N. Y. 20, 9 N. E. (2d) 760 (1937); Peterson v. City of New York, 267 N. Y. 204, 196 N. E. 27 (1935); VanDyke v. City of Utica, 203 App. Div. 26, 196 N. Y. Supp. 277 (4th Dep't 1922); Minchin v. City of Utica, 259 App. Div. 477, 20 N. Y. S. (2d) 335 (4th Dep't 1940).

Two cases warrant special consideration. In *Willcox v. County of Erie,* 252 App. Div. 20, 297 N. Y. Supp. 287 (4th Dep't 1937) the Appellate Division found non-liability on the basis of governmental function. The Court of Appeals affirmed [277 N. Y. 604, 14 N. E. (2d) 184 (1938)] solely on the ground that there was no evidence of negligence. It is probably safe to disregard the decision of the Appellate Division. The other case is *Whittaker v. Village of Franklinville,* 265 N. Y. 11, 191 N. E. 716 (1934). In this case, a toy cannon, being fired by private individuals on the Fourth of July in a public park, exploded and injured the plaintiff, who was walking down an adjoining street. The court held that a municipal corporation is not bound to take affirmative action to prevent acts of persons in a park, maintained by it for the use of the public and not for profit, wherefrom people on an adjoining street may be injured. It also held that passive acquiescence in a nuisance outside of a street which caused injury to one using the street was not sufficient to impose liability upon the municipality. This is a very puzzling case. The court's reasoning is hazy. McQuillin cites the case for the proposition that maintenance of a park is a governmental function, 6 McQuillin, The Law of Municipal Corporations (2d ed. rev. 1936) § 2850, n. 71. The case can probably be best explained on the ground of non-liability for passively allowing nuisances created by others to continue on land adjoining public streets, rather than on the ground of municipal liability for negligence in the maintenance of parks. In view of the numerous decisions since this case reaffirming the traditional New York rule, it seems safe to say that this case in no way changed the law.

[13]Augustine v. Town of Brant, 249 N. Y. 198, 163 N. E. 732 (1928).

[14]Fritz v. City of Buffalo, 277 N. Y. 710, 14 N. E. (2d) 815 (1938); Collentine v. City of New York, 279 N. Y. 119, 17 N. E. (2d) 792 (1938); Cambas v. City of New York, 285 N. Y. 781, 35 N. E. (2d) 187 (1941).

In *Minchin v. City of Utica,* 259 App. Div. 477, 20 N. Y. S. (2d) 335 (4th Dep't 1940), a special rule was laid down. In that case, a bear in the zoo bit off an infant's finger. It was held that the city was not absolutely liable because it was harboring a wild animal, but was liable only if negligent.

[15]Lutzker v. Bd. of Education of City of New York, 262 App. Div. 881, 28 N. Y. S. (2d) 496 (4th Dep't 1941), *aff'd without opinion,* 287 N. Y. 278, 41 N. E. (2d) 97 (1942).

If the municipality is negligent in allowing some condition to exist within a park which causes an injury outside the park, it is liable.[16] It is possible that the municipality may be held to have been negligent even though the person who actually did the act which caused the injury was not at all negligent. In other words, the liability of the municipality and the liability of the actor are distinct.[17] If torts are committed by the agents of the municipality, the doctrine of *respondeat superior* applies.[18] Even though the agent is acting outside the scope of his employment, notice and protest to the municipality will cause it to become liable for subsequent injuries.[19]

Under the New York rule, the liability of municipalities is little different from ordinary tort liability. This rule has, at least, the merit of simplicity and comparative certainty. It has the approval of nearly all of the writers on municipal tort liability.

*Harold J. Stiles, Jr.**

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[16]Lamm v. City of Buffalo, 225 App. Div. 599, 233 N. Y. Supp. 516 (4th Dep't 1929); Lane v. City of Buffalo, 232 App. Div. 334, 250 N. Y. Supp. 579 (4th Dep't 1931). *But cf.* Whittaker v. Village of Franklinville, *supra* note 12.

[17]Schneider v. Village of Lake George, 280 N. Y. 507, 19 N. E. (2d) 918 (1939).

[18]Bailey et al. v. The Mayor &c. of New York, *supra* note 1; Silverman v. City of New York, 114 N. Y. Supp. 59 (App. Term 1909).

[19]Rafsky v. City of New York, 257 App. Div. 855, 12 N. Y. S. (2d) 560 (2d Dep't 1939).

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