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Notes and Comments

NOTES AND COMMENTS

Insurance: Indemnity for unlawful acts: Theory of protecting injured third parties.—In *New Amsterdam Casualty Co. v. Jones et al., 45 F. Supp. 887 (D. C. E. D. Mich. 1942),* the policy insured Jones against "bodily injuries or death suffered or alleged to have been suffered, as the result of any accident occurring while this Policy is in force, by any person or persons not employed by the Assured, by reason of the classified operations of the Assured's trade or business." Oscar Martin, "not employed by the Assured," was shot and injured by Jones himself as a result of a quarrel in the sale of oil by Jones, operator of a gasoline filling station. Selling oil was part of Jones' business. *Held,* this is an "accident" within the meaning of the policy and Martin is entitled to garnish the insurer for payment of a judgment obtained by Martin against Jones.

The reasoning proceeded thus: The Michigan courts uniformly permit an insured who suffers injury at the hands of another, whether intentional or not, to recover from his "own" insurance company on an accident policy—the theory being *that so far as he is concerned* the injury was an accident. This court, sitting in diversity, is bound by the Michigan decisions.[1] In Michigan liability insurance is for the protection of third parties.[2] This policy of insurance insured *customers* against *accidents.* Martin was a "customer." He seemingly did nothing to provoke or encourage Jones. He therefore suffered an "accident"—*so far as he was concerned.* He may recover from his "own" insurance company; he may also recover from Jones' insurance company.

The problem here springs from a conflict of interests in the field of insurance. Public policy early led the courts deciding property insurance problems to refuse to permit the insured to profit from his own wrongful act or to insure himself against liability for the consequences of his own wrongs when they were wilful in character. This rule of thumb worked well where the insured's interests alone were at stake, but where in liability coverages the interests of a third party entered, the court faced a new problem. Should it hold rigidly to the old rule of thumb and deny or grant recovery solely on the basis of the nature of the insured's act? Or should it protect the injured third party from financially irresponsible wrongdoers even when acting not merely negligently but wilfully. The trend has been toward the latter view. But such interpretations as in the principal case are arrived at only after many years of litigation, and it is to be noted that legislation is the basis of the present decision.

The initial opposition to liability insurance formed its roots in the contention that indemnifying the assured against even his own negligence would result in a relaxation of his vigilance toward the rights of others. Concern for the victim of the negligence overrode these considerations. The attitude

[1]Erie R. Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 114 A. L. R. 1487 (1938).
[2]MICH. STAT. ANN. (Henderson, 1937) tit. 24, § 296.

of the courts toward this argument is shown in the case of *Merchants Mutual Automobile Liability Insurance Co. v. Smart*,[3] wherein the court said:[4]

> "Having in mind the sense of immunity of the owner protected by the insurance and the possible danger of a less degree of care due to that immunity, it would seem to be a reasonable provision by the State in the interest of the public, whose lives and limbs are exposed, to require that the owner in the contract indemnifying him against any recovery from him should stipulate with the insurance company that the indemnity by which he saves himself should certainly inure to the benefit of the person who thereafter is injured."

Such negligence is clearly a violation of the general rule of conduct toward others, but the courts found little objection to insurance against its consequences.

In the field of automobile operation, where liability insurance has had its greatest development, the courts soon passed beyond the stage of allowing coverage for the mere general negligence of the insured tortfeasor. They held that not even the violation of statutes by the insured driver would void the policy. In *Pawlicki v. Hollenbeck*,[5] the court said, "It may well be doubtful whether an instance of negligent injury can be imagined in the operation of a motor vehicle on a highway which does not involve a violation of law." Another court then held that a policy which was broad enough to cover a loss sustained by the assured from an accident arising because of a violation of a speed ordinance by one of its automobile drivers was not void as against public policy.[6] In this case, the taxicab company was suing the insurance company upon its bond of indemnity. One of the defenses set up by the insurance company was that the insured's driver was exceeding the city speed limit when the accident occurred. The court said:[7]

> "As written, the contract is broad enough to cover a loss sustained by the assured from an accident arising because of a violation of a speed ordinance by one of its drivers. The only question that is open to the appellant, therefore, is whether such a contract is void as against public policy. Answering this question, we are clear that the contract is not so void."

So far we have not dealt with an insured's wilfulness in bringing about the injury to the particular victim. Whether or not the insured in such a case could still claim the protection of his policy was an inevitable question. But it was approached in a line of cases where negligence assumed such proportions that death resulted to the victim, and the tortfeasor thus became subject not merely to a civil action for damages which he called on his insurer

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[3]267 U. S. 126, 45 Sup. Ct. 320 (1925).
[4]*Id.* at 129, 45 Sup. Ct. at 321.
[5]250 Mich. 38, 44, 229 N. W. 626, 628 (1930).
[6]Taxicab Motor Co. v. Pacific Coast Casualty Co., 73 Wash. 631, 132 Pac. 393 (1913).
[7]*Id.* at 638-639, 132 Pac. at 396.

to defend, but to a criminal prosecution for homicide as well. The victim's case was as good as ever, but the insured was now asking protection from the civil results of his own criminal act. Here public policy was at once called upon both to deny, and also to validate, the insurance company's liability to pay. Although the validity of the insurance would permit the insured to profit by his own wrong, the policy was now nevertheless hailed as the protector of third persons. Thus one writer says:[8]

> "The fundamental question, from a social point of view, is not whether a policy to indemnify against a liability for killing is valid, but rather whether any judicial construction of such policy which does not give primarily the benefits of it to the injured person is defensible. Generally, the validity of the policy is conceded."

The cases in general bear this out. In *Jones v. British Gen. Ins. Co.*[9] recovery from the insurance company was permitted although the insured defendant was found guilty of manslaughter for driving while intoxicated and thereby causing the death of the judgment creditor. The *Jones* decision is generally considered commendable because it protects the public from injuries at the hands of financially irresponsible drivers.[10]

It is true that such holdings as these were implemented by provisions that the money which the insurer had to pay went to the victim of the accident. Nevertheless, the court was yielding to a definite trend toward liability insurance as a device for providing funds for the injured party rather than for the protection of the insured.[11]

In the case under discussion the court reached the ultimate question: Whether the insured's policy would be enforced against the insurer when the insured's act was one wilfully intended to injure the victim. If the policy had specifically provided a gangster, say, with such coverage, the court would have had a sharper problem. Yet the result it reached in reading the word "accidental" is the same. Other courts have refused to give the word so wide a meaning and so avoided the ultimate question. Some courts hold that the state of the will of the party inflicting the injury determines. Under this test, where the insured threw a porcelain vessel at a boy trespasser, fracturing his skull, and judgment was recovered against her, the court in the *Sontag* case refused to hold the insurer liable.[12] It said that it is the state of will of the person by whose act the injury was caused, rather than that

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[8]Laube, *The Social Vice of Accident Indemnity* (1931) 80 U. OF PA. L. REV. 189, 193.

[9]137 L. T. R. 156 (K. B. 1927), noted with approval, (1927) 37 YALE L. J. 265. *Cf.* Tinline v. Whitecross Ins. Assn., Ltd., [1921] 3 K. B. 327 (recovery allowed where insured's own gross negligence made him guilty of manslaughter); *contra,* O'Hearn v. Yorkshire Ins. Co., 67 D. L. R. 735 (Ont. 1921).

[10]See Note (1927) 37 YALE L. J. 265.

[11]McNeely, *Illegality as a Factor in Liability Insurance* (1941) 41 COL. L. REV. 26, 60.

[12]Sontag v. Galer, 279 Mass. 309, 181 N. E. 182 (1932). See also, Commonwealth Casualty Co. v. Readers, 118 Ohio St. 429, 161 N. E. 278 (1928); Rothman *et al.* v. Metropolitan Casualty Ins. Co., 134 Ohio St. 241, 16 N. E. (2d) 417, 117 A. L. R. 1169 (1938).

of the injured person, which determines whether the injury was "accidental." The court added that the insured would not claim indemnity for her own wilful act.

On the other side is *Robinson v. U. S. Fidelity & Guaranty Co.*[13] Here, as in the main case the plaintiff had a public liability policy insuring him against damages resulting from "accidents." One of his salesmen wilfully and wantonly assaulted one, Wells. The Mississippi court held that the assault was "accidental" from Wells' standpoint and allowed recovery. It could be said indeed that it was accidental from the insured employer's standpoint, and it is suggested that these cases may be reconciled by their difference in facts. The Massachusetts court meant that the insured could not recover for *her own,* personally wilful act. The Massachusetts decision is supported by an English decision, *Haseldine v. Hoskin.*[14] In that case, the wilful act was that of champerty. The English court held that this was not "neglect, omission or error" within the meaning of the policy and added that even if it were, it would be against public policy to allow insurance against a champerton's act. Another means of reconciliation is through the theory of protection followed by the courts. By holding that "accidental" depends upon the state of will of the one inflicting the injury, and by further denying recovery because it was the assured's own wilful act, the Massachusetts court emphasized the theory that insurance is for the protection of the insured, not the injured person. On the other hand, the Mississippi court is decidedly in favor of the injured third party rule. This distinction is made even more clear by an examination of the principal case and the *Sontag* case, *supra.*

In the *Sontag* case, the policy protected against liability for injuries "accidentally sustained by any person not in the employ of the insured," a landlady. In the principal case, Jones was similarly insured against similar injuries sustained by reason of the classified operations of his business. In both cases, a third party, other than an employee of the assured, is injured by the wilful act of the assured. Yet, the results reached are directly opposite. Thus, the distinction that the act in the *Robinson* case was not the assured's own wilful act would seem to have been rejected in the principal case. The Michigan court, in the principal case, on practically the same set of facts as in the *Sontag* case, chooses to follow the *Robinson* case in construing "accidental" from the standpoint of the injured party. But it expressly states that the insured cannot recover for his own wilful act—the true basis for the decision in the *Sontag* case. The court then adds—and this is the solution to our problem—that under Michigan law, liability insurance is for the protection of third parties. Carried to its ultimate this theory would make no distinction between a homicide which was manslaughter[15]

[13]159 Miss. 14, 131 So. 541 (1931).

[14][1933] 1 K. B. 822.

[15]James v. British Gen. Ins. Co., 137 L. T. R. 156 (K. B. 1927); Tinline v. Whitecross Ins. Ass'n., Ltd., [1921] 3 K. B. 327. See Note (1927) 37 YALE L. J. 265.

and one which was murder. Courts have, however, hesitated on the point.[16] For the insurer the way out might be to expressly except liability for the wilful or intentional wrongful acts of the insured who pays the minimum premium, and charge accordingly for the extended protection. The Michigan court in the principal case suggests that such a provision would probably be upheld. In *Wheeler v. O'Connell et al.*,[17] however, the court expressly said that, had the policy contained an exception against liability for injuries caused by the wilful conduct of the operator, such a policy would be in violation of the Massachusetts law as containing an exception or exclusion "as to specified accidents or injuries or causes thereof." Public policy, when it carries the argument in both directions, is a difficult steed to ride. The insurer is likely to be subject to the vagaries of the court.

George E. Schott

International Law: Sovereign Immunity: Comity: Right of nation at war with United States to claim immunity for property in this country.—In *Telkes v. Hungarian National Museum, 265 App. Div. 192, 38 N. Y. S. (2d) 419 (2d Dep't 1942)* suit was begun by service of a summons by publication after issuance of and levy under a warrant of attachment. Plaintiff alleges three causes of action stemming from a contract of employment as director of the Hungarian Reference Library. The Royal Consul General of Sweden appeared specially and moved to vacate the levy under the attachment. The defendant appeals from an order denying the motion of the Royal Consul,[1] who had been designated by the Swedish Minister to the United States to bring this proceeding. The Department of State had recognized the authority of the Swedish Minister to act as a representative of Hungarian interests in the United States, because of the existence of a state of war between the United States and Hungary. The State Department made no suggestion to the court concerning the claim of immunity involved herein.

[16]In the principal case, at page 890, the court said ". . . we are convinced that if Jones had gotten into his automobile and intentionally run over Martin, we doubt whether any insurance company would have questioned its liability."

But in Tinline v. Whitecross Ins. Ass'n, Ltd., [1921] 3 K. B. 327, 328, the court said, "I want it to be clearly understood that if this accident had been due to an intentional act on the part of the plaintiff, this policy could not possibly protect him, but then if a man driving a motor car at excessive speed intentionally runs into a man and kills him, the result is not manslaughter but murder, the reason being that manslaughter is the result of an accident and murder is not, and it is against accident only that this policy insures."

Yet, in Wheeler v. O'Connell, *et. al.*, 297 Mass. 549, 551, 9 N. E. (2d) 544, 546, the court said, ". . . if the purpose of the statute is to compensate the injured party rather than to save the operator of the vehicle from loss, it is difficult to see why an injured person's rights should be affected by the fact that the operator's conduct was wilful, wanton or reckless as distinguished from negligent."

[17]297 Mass. 549, 553, 9 N. E. (2d) 544, 547 (1937).

[1]178 Misc. 587, 34 N. Y. S. (2d) 565 (N. Y. Sup. Ct. 1942).

The Appellate Division of the First Department, Justice Callahan writing the opinion, held:

> "We conclude that, in such an action, brought *in personam* or *quasi in rem,* a sovereign may not be sued in our courts, or have his property attached here. Existence of a state of war would not seem to alter this rule."[2]

Aside from the question of the effect of war, it is well recognized as a basic principle of general application in the courts of this country that both our own government, and the governments of friendly foreign nations are immune from suit. The immunity of the domestic sovereign is based upon the historic principle that no power can command the King, and it may rest upon constitutional provisions which confer or deny the right to sue. The immunity of the foreign sovereign rests upon a somewhat different theory. It is founded upon the implied consent on the part of all sovereigns, as a matter of comity, to a relaxation of the complete jurisdiction which each naturally enjoys within his own territory.[3] Theoretically, therefore, the immunity of the domestic sovereign is a matter of right, while that of the foreign government is a matter of favor, granted voluntarily by the domestic government.[4] The immunity is not merely personal; the property of the sovereign is also immune.[5] Actually there has been considerable statutory waiver of immunity by the United States[6] but the immunity of the foreign sovereign, if properly claimed,[7] is unimpaired by any statutory refusals on our part to grant it. No objection to the method of claiming the immunity was raised in the case here discussed.

A state may have two kinds of sovereignty—internal and external. Internal sovereignty is that which she enjoys when dealing with matters in which her own territory and her own subjects are involved.[8] External

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[2]265 App. Div. at 197, 38 N. Y. S. (2d) at 424. Since, however, there was a sharply contested question of fact as to whether the defendant was an instrumentality of the Kingdom of Hungary or an autonomous foreign corporation organized under the laws of Hungary, the court directed a reference.

[3]The Schooner Exchange v. McFaddon, 7 Cranch 116, 3 L. ed. 287 (1812); Berizzi Bros. v. The Pesaro, 271 U. S. 562, 46 Sup. Ct. 611 (1926); Compania Espanola v. The Navemar, 303 U. S. 6, 58 Sup. Ct. 432 (1938).

[4]The Santissima Trinidad & The St. Andre, 7 Wheat. 283, 5 L. ed. 454 (1822); see Hayes, *Private Claims Against Foreign Sovereigns* (1925) 38 HARV. L. REV. 599; also Deak, *The Plea of Sovereign Immunity and the New York Court of Appeals* (1940) 40 COL. L. REV. 453, 455; also, 15 R. C. L. § 51.

[5]Weston, *Actions Against the Property of Sovereigns* (1919) 32 HARV. L. REV. 366.

[6]Public Vessels Act of March 3, 1925, c. 428, 43 STAT. 1112 (1925), 46 U. S. C. §§ 781 *et seq.* (1940). See also Act of March 9, 1920, c. 95, 41 STAT. 525 (1920), 46 U. S. C. §§ 741 *et seq.* (1940). For an analysis of both statutes and their application, see ROBINSON, ADMIRALTY (1939) §§ 33, 34. The latter statute is noted in (1930) 39 YALE L. J. 1189, "Responsibility of the United States on Maritime Claims Arising Out of the Operation of Government Owned Vessels."

[7]ROBINSON, ADMIRALTY (1939) § 32.

[8]1 OPPENHEIM, INTERNATIONAL LAW (5th ed. 1937) § 124. According to the rule, *quidquid est in territorio est etiam de territorio,* all individuals and poverty within the territory of a state are under its dominion and sway, and even foreign individuals and

sovereignty is that which she enjoys as a member of the family of nations, not as a matter of right, but as a matter of comity.[9] When a court declines to inquire into the validity of sovereign political acts within the territory of a foreign sovereign, this is not a denial of jurisdiction over the person or a grant of immunity on the grounds of comity. It is an assertion that no jural basis exists for the action. It rests upon the concept that law requires the sanction of a sovereign, and that such sanction is lacking against the supreme political power. Thus we frequently find confusion, the defense of sovereign immunity being offered when actually the proper defense is that the acts complained of do not constitute an actionable wrong.

In the *Telkes* case here noted, the court found "no controlling authority" on the precise question before it. It purported, however, to find an "analogous question" in the long series of cases in which the New York courts had dealt with the status of the Soviet Russian government while the latter actually controlled Russia in fact, while the United States recognized only the "Kerensky Government" which the Soviet had ousted.[10] In *Wulfsohn v. Russian Socialist Federal Soviet Republic*,[11] discussed by Justice Callahan in his opinion, the Court of Appeals vacated an attachment of property within New York, although the defendant claiming sovereign immunity was not recognized by the United States.[12] In *Nankivel v. Omsk-All Russian Government*,[13] likewise discussed in the opinion, the Court of Appeals held the unrecognized Omsk Government immune from suit for the recovery of the value of certain automobiles requisitioned by it, on the score of its sovereign character. Similarly in *The Denny*,[14] the court granted immunity to the then unrecognized Lithuanian government, stressing the fact that all the

property fall under the territorial supremacy of a state when they cross its borders. See also Hayes, *op. cit. supra* n. 4, at 600: "The principle of not inquiring into the acts within the territorial jurisdiction of a sovereign would not prevent suit where the acts complained of occurred upon the high seas or within the jurisdiction of a different sovereign." See HYDE, INTERNATIONAL LAW (1922) §§ 54, 55; see also Kawanokoka v. Polybank, 205 U. S. 349, 27 Sup. Ct. 526 (1907) (held, the Territory of Hawaii was entitled to sovereign immunity, "not because of any formal conception or obsolete theory, but upon the logical and practical ground that there can be no legal right as against the authority that makes the law upon which the right depends").

[9]The Schooner Exchange v. McFaddon, 7 Cranch 116, 3 L. ed. 287 (1812).

[10]See Borchard, *The Unrecognized Government in American Courts* (1932) 26 AM. J. INT. L. 261; Moore, *Fifty Years of International Law* (1937) 50 HARV. L. REV. 395, 434 *et seq.* The bibliography of the topic is large.

[11]234 N. Y. 372, 138 N. E. 24 (1923).

[12]Id. at 374, 138 N. E. at 25: "The litigation is not, therefore, with regard to title to property situated within the jurisdiction of our courts where the result depends on the effect to be given to the action of some foreign government. Under such circumstances it might be that the theory of the comity of nations would have a place. . . . Whenever an act done by a sovereign in his sovereign character is questioned, it becomes a matter of negotiation or of war." In the *Wulfsohn* case, the property was furs in Russia which were confiscated by the defendant government.

[13]237 N. Y. 150, 142 N. E. 569 (1923).

[14]127 F. (2d) 404 (D. C. N. J. 1941). The court leaves undecided the effect of the decrees of an unrecognized state if in suit with an American the plea of sovereign immunity were raised.

litigants were Lithuanians, and that the immunity granted was that accorded any government when sued by a citizen of the same government without its consent. These cases would seem to justify drawing the conclusion that the internal sovereignty of a state does not require the recognition by other states to confirm its internal sovereignty. In this respect, the *de facto* existence of the state is sufficient to establish its internal sovereignty *de jure*.[15] *A fortiori,* the acts of a recognized sovereign in exercise of its internal sovereignty will not be a proper subject for inquiry in the courts of a sister state.

If the sovereign is in fact recognized in the forum, it may even have no *de facto* control of its own territory and its acts still be recognized, as are the various governments-in-exile now existing.[16] In the recent case, *Anderson v. Transandine Handelmaatschappij,*[17] the New York Court of Appeals held that the decree of a recognized foreign government in exile (Netherlands) would be given effect if it did not offend the public policy of this state. In *Guaranty Trust Co. v. United States,*[18] it was held that the statute of limitations ran against the recognized Russian government in exile since recognition was sufficient to permit it to bring suit as a foreign sovereign. Other cases granting immunity to the recognized foreign sovereign hold that the grant is conditional upon there being no breach of municipal law,[19] upon there being no revocation of the implied license by the local sovereign,[20] and upon there being no violation of the law of nations or of those of the country where the act of sovereignty was performed.[21]

Yet, although the unrecognized state could be given immunity if sued, under New York decisions it could not itself sue. Writers have agreed that through recognition alone could a state become an "international person,"[22] and in *Russian Socialist Federated Soviet Republic v. Cibrario,*[23] the New York Court of Appeals held that the unrecognized foreign sovereign plain-

[15] 1 WHEATON, INTERNATIONAL LAW (6th ed. 1929) 43.

[16] See Landheer, *The Legal Status of the Netherlands* (1943) 41 MICH. L. REV. 644.

[17] 289 N. Y. 9, 43 N. E. (2d) 502 (1942). "By comity of nations, rights based upon the law of a foreign state to intangible property, which has a situs in this state, are recognized and enforced by the courts of this state, unless such enforcement would offend the public policy of this state." See also United States v. Belmont, 85 F. (2d) 542 (C. C. A. 2d, 1936).

[18] 304 U. S. 126, 58 Sup. Ct. 785 (1938).

[19] Ervin v. Quintanilla, 99 F. (2d) 935 (C. C. A. 5th, 1938), *cert. den.,* 306 U. S. 635, 59 Sup. Ct. 485 (1939).

[20] The Santissima Trinidad & The St. Andre, 7 Wheat. 283, 5 L. ed. 454 (1822); The Schooner Exchange v. McFaddon, 7 Cranch. 116, 3 L. ed. 287 (1812).

[21] Fields v. Predionica i. Tkanica, 265 App. Div. 132, 37 N. Y. S. (2d) 874 (1st Dep't 1942).

[22] 1 OPPENHEIM, INTERNATIONAL LAW (4th ed. 1928) 145: ". . . in particular, it acquires (through recognition) immunity of jurisdiction, except by its consent, in the courts of those states." WHEATON, INTERNATIONAL LAW (6th ed. 1929) 45: "The external sovereignty of any state, on the other hand, may require recognition by other states in order to render it perfect and complete . . . and until such recognition becomes universal on the part of the other states, the new state becomes entitled to the exercise of its external sovereignty as to those states only by whom that sovereignty has been recognized."

[23] 235 N. Y. 255, 139 N. E. 259 (1923).

tiff could not maintain suit, saying: "We permit it (the recognized foreign sovereign) to appear and protect those interests as a body analogous to one possessing corporate rights, but solely because of comity. Comity may be defined as that reciprocal courtesy which one member of the family of nations owes to the others. It presupposes friendship. In the *Luther v. Sagor*[24] Scrutton, L. J., in granting immunity to the recently recognized Soviet government, described it thus: "This immunity follows from recognition as a sovereign state. Should there be any government which appropriates other persons' property without compensation, the remedy appears to be to refuse to recognize it as a sovereign state. Then the courts could investigate the title without infringing the comity of nations." Other English cases say that in the absence of recognition, there will be no immunity.[25] In the federal courts of the United States, the effects of non-recognition upon external sovereignty have included denial of the authority of an ambassador of an unrecognized sovereign to continue a suit commenced when the foreign sovereign was recognized,[26] a running of the statute of limitations against an unrecognized sovereign who could not sue during that period,[27] and a denial of immunity to a sovereign with whom diplomatic relations were suspended.[28] The conclusion would seem to follow that the existence of a foreign sovereign will not alone be sufficient to establish its external sovereignty. Recognition, friendship, and conformity with municipal law would seem to be prerequisites to an exercise of external sovereignty. Thus, as to the unrecognized sovereign government, we have considerable case law under which the unrecognized government, if it could not sue of its own motion, was not barred from appearing to defend itself and its property and from claiming immunity.

It was against this background that the court laid its present problem. Is there sufficient analogy between the status of the unrecognized foreign government and that of a belligerent foreign government? To this and without any special argument, the court answered "Yes."[29]

The only questions left were the questions of fact as to the connection of the Library with the Hungarian Government and the international status of the latter. Whether the entity involved is or is not a foreign sovereign,

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[24][1921] 3 K. B. 532.

[25]Fenton Textile Assn. v. Krassin, 38 T. L. R. 259, 261 (C. A. 1921); The Annette [1919] P. 105.

[26]Government of France v. Isbrandtaen-Moller Co., Inc., 48 F. Supp. 631, (S. D. N. Y. 1943).

[27]Union of Soviet Socialist Republics v. National City Bank of N. Y., 41 F. Supp. 353 (S. D. N. Y. 1941).

[28]The Gul Diemal, 296 Fed. 567 (S. D. N. Y. 1922), *aff'd on other grounds*, 264 U. S. 90, 44 Sup. Ct. 244 (1924).

[29]"From these cases it would appear that as viewed by the courts of this state, the rule forbidding suit against a foreign sovereign without his consent does not rest on comity, but is applied because such suits involve claims of a political nature which are not entrusted to the municipal courts. Based on the reasoning that immunity from suit is not a matter of comity, our courts hold that a lack of diplomatic recognition does not affect the immunity. We see no difference in principle between a case where recognition is lacking and a case where we are at war with a sovereign."

the courts of both the United States[30] and England[31] take judicial notice, and in case of doubt or uncertainty inform themselves through the executive. Indeed, since the step is one involving possibly serious political consequences, the courts will welcome and not infrequently solicit an expression from the political department, concerning the claim.[32]

In the instant case, there has been no suggestion by the State Department concerning the claim of immunity. In the *Pesaro,* Judge Mack regarded the failure of the State Department to act "not without significance"; however, he added that he did not mean to imply that immunity should be refused in a clear case simply because the executive failed to act.[33] Indeed, since *Lamont v. The Travelers' Ins. Co.,*[34] the weight to be given a sugges-

[30]In *Oetjen v. Central Leather Co.,* 246 U. S. 297, 38 Sup. Ct. 309 (1918), the court took judicial notice that our government recognized the government of Carranza. In *Russian Republic v. Cibrario,* 235 N. Y. 255, 139 N. E. 259 (1923), it was held that an allegation in a complaint that the plaintiff is a sovereign state is not conclusive, "where the truth is otherwise, as proved by public matters of which the court is bound to take judicial notice." In *Puente v. Spanish National State,* 116 F. (2d) 42 (C. C. A. 2d, 1940), the court took judicial notice that the defendant was a sovereign.

[31]In the English courts the principle has been more clearly enunciated. In *Yrisarri v. Clement,* 2 Car. & P. 223 (1825), at 225, it was held that, "if a foreign state is recognized in this country, it is not necessary to prove it is an existing state." In *Taylor v. Barclay,* 2 Sim. 213 (1828), where the allegation was that the foreign government was recognized, the court, in holding such allegation incorrect, said: ". . . it is the duty of the Judge in every Court to take notice of public matters which affect the Government of the Country. . . ." *Cf.* Mighell v. Sultan of Johore [1894] 1 Q. B. 149; Duff Development Co. Ltd. v. Gov't of Kelantan [1924] A. C. 797, 805, 823.

[32]*The New York cases:* Hassard v. Mexico, 29 Misc. 511, 61 N. Y. Supp. 939 (N. Y. Sup. Ct. 1899), *aff'd w. op.,* 173 N. Y. 645, 66 N. E. 1110 (1903); DeSimone v. Transportes Maritimos do Estado, 199 App. Div. 602, 191 N. Y. Supp. 864 (1st Dep't 1922); Galopin v. Winsor, 234 App. Div. 601, 251 N. Y. Supp. 448 (1st Dep't 1931); Ezra v. Lamont, 265 N. Y. 634, 193 N. E. 421 (1934), *cert. den.,* 295 U. S. 766, 55 Sup. Ct. 923 (1935); Hannes v. Roumania Monopolies Inst. 260 App. Div. 189, 20 N. Y. S. (2d) 825 (1st Dep't 1940); Lamont v. Travelers' Ins. Co., 281 N. Y. 362, 24 N. E. (2d) 81 (1939); Anderson v. Handelmaatschappij *et al.,* 289 N. Y. 9, 43 N. E. (2d) 502 (1941).

The federal cases: The Pesaro, 277 Fed. 473 (S. D. N. Y. 1921); *Ex parte* Muir, 254 U. S. 522, 41 Sup. Ct. 185 (1921); Oliver American Trading Co. v. Gov't of Mexico, 264 U. S. 440, 44 Sup. Ct. 390 (1924); Dexter & Carpenter, Inc. v. Kunlig Jarnvagsstyrelsen, 43 F. (2d) 705 (C. C. A. 2d, 1930), *cert. den.,* 282 U. S. 896, 51 Sup. Ct. 181 (1931); The Navemar, 303 U. S. 68, 58 Sup. Ct. 432 (1938), enlighteningly analyzed by Hyde, *Concerning the Navemar* (1939) 33 Am. J. Int. L. 531.

See also Deak, *Plea of Sovereign Immunity and the New York Court of Appeals* (1940) 40 Col. L. Rev. 453; Feller, *Procedure in Cases Involving Immunities of Foreign States in Courts of the United States* (1931) 25 Am. J. Int. L. 83; Sack, *Immunity of Instrumentalities of Foreign States* (1931) 26 Ill. L. Rev. 215; Note (1940) 50 Yale L. J. 1088.

[33]277 Fed. 473, 479 ((S. D. N. Y. 1921).

[34]281 N. Y. 362, 24 N. E. (2d) 81 (1939). The court said: ". . . The mere assertion by a foreign government, without proof that property which is the subject of controversy between parties here belongs to the government does not constrain the court to refuse jurisdiction of that property." This was the holding, although the district attorney appeared specially to present the suggestion at the request of the Secretary of State, following diplomatic representations. This procedure was approved in *The Navemar,* 303 U. S. 68, 58 Sup. Ct. 432 (1938).

tion by the Executive Department is uncertain—the presence of the suggestion is not conclusive of the merits of the claim. The absence or the presence of a suggestion, therefore, warrants neither a denial, nor a grant of the immunity, but merely an investigation. In the main case, the court would seem to have been correct in attaching no commanding significance to the absence of the suggestion.

In similar cases, courts have entertained the companion problem of whether the person asserting the claim to sovereign immunity is one authorized to do so. Inasmuch as a suggestion by the State Department embodies an implication, if not a statement, that the person asserting the claim is a duly authorized representative, the question of the capacity of the claimant is most frequently presented for the court's determination when a suggestion is lacking. In the *Anne*[35] Justice Story held a Spanish consul incompetent to assert a claim of sovereign immunity. In the *Sao Vincente*[36] a consul general was held incompetent to appear and claim immunity. In the *Gul Djemal*[37] the Supreme Court held that a master of a ship could not claim immunity, because he was not so authorized.[38] And in the recent case of *Ex Parte Colonna*[39] the Supreme Court held that the Italian Ambassador could not assert the Italian government's claim to sovereign immunity where a vessel of the Italian government (allegedly) was the subject of litigation. The reason given by the court was: war suspends the right of the enemy plaintiff to prosecute an action in our courts. The case is not directly determinative of the immunity of the ship from attachment, inasmuch as it decides merely the Ambassador's incapacity to assert the right.

In the principal case, the court has before it the Royal Consul General of Sweden as claimant of the immunity. He was designated to bring this proceeding by the Swedish Minister to the United States, who has been recognized by the State Department as the representative of Hungarian interests in the United States.[40] Dicta in recent cases would tend to indicate

[35]3 Wheat. 435, 445 (U. S. 1818); see also The Secundus, 13 F. (2d) 469 (E. D. N. Y. 1926).

[36]260 U. S. 151, 43 Sup. Ct. 15 (1922).

[37]264 U. S. 90, 44 Sup. Ct. 244 (1924), *aff'g* 296 Fed. 567 (1922).

[38]For a fuller discussion of the procedural aspects of the plea of sovereign immunity, see articles cited *supra* note 32. In addition, see Note (1941) 50 YALE L. J. 1088.

[39]314 U. S. 510, 62 Sup. Ct. 373 (1942).

[40]It has been the practice in recent wars, for various belligerent governments, upon the rupture of diplomatic relations, to entrust the care of their interests in enemy countries to the embassies of friendly neutral powers. See 1 GARNER, INTERNATIONAL LAW AND THE WORLD WAR (1920) § 39, for examples. For an exposition of the status of the neutral's representatives in reference to the belligerent's property, see *Instructions to Diplomatic and Consular Officers of the United States (so entrusted)* (1915) 9 AM. J. INT. L. (Supp.) 118; 4 HACKWORTH, DIGEST OF INTERNATIONAL LAW (1942) § 397. Excerpts from the State Department Instructions: ". . . the arrangement contemplates the exercise of no official function on your part, but only the use of unofficial good offices. You are not officers of the unrepresented government. . . . The State of War existing between the country to which you are accredited and the country for which you are acting is inconsistent with the continuance of diplomatic intercourse between them. . . . Any interference on the part of private persons or officials with such property should be the subject of an unofficial representation or protest to the

that the Swedish Consul General was not, merely as consul general, a proper claimant.[41] The court, however, has accepted him on the facts of the case. It would seem further that it has judicially recognized the sovereign status of the Kingdom of Hungary and has added to the procedures approved in the *Navemar*[42] the procedure in this case, namely, the special appearance of a consul authorized by the minister of a government mutually friendly to the two belligerents to assert an immunity which a similarly authorized official of a belligerent government would be unable to assert. The reasoning which establishes the procedures in the *Navemar* would hardly seem to support such an extension.

Whether the Kingdom of Hungary, thus judicially recognized as a sovereign, is actually exercising its external sovereignty, in the instant case, gave rise to a hotly-contested question of fact for the determination of which the court quite properly directed a reference.[43] Whether the defendant is an instrumentality of the Kingdom of Hungary or merely a Hungarian corporation is determinative of the propriety of the claim of sovereign immunity. The decision of the court at this point seems to have been that if the defendant were an autonomous corporation organized under the laws of Hungary, the plea of sovereign immunity would not attach; while if the defendant were proven to be a public instrumentality of the Kingdom of Hungary, that the plea would be upheld.[44]

The court seems to indicate that the grant of immunity would follow once the exercise of external sovereignty was established. But it does not follow that the sovereign may claim immunity for all its external activities regardless of their character. The trend of modern decisions has been away from such an automatic settlement of the problems. They attempt to distinguish the "sovereign" activities of a state and the "non-sovereign" activities, "act of sovereignty" versus "act of management," sovereign acting in his public and in his private capacity.[45] Other courts have invoked the

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authorities of the government which is, by the rules of international law, charged with the security of diplomatic and consular premises and archiver of foreign governments."

[41]But where the party before the court as claimant or as defendant is neither the sovereign nor his ambassador, it is now the established rule that the claim will not be allowed, unless by diplomatic intervention. Puente v. Spanish National State, 116 F. (2d) 43 (C. C. A. 2d, 1940); also Kunglig Jarnvagsstyrelsen v. Dexter J. Carpenter, Inc., 300 Fed. 891, 893, 32 F. (2d) 195 (C. C. A. 2d, 1929), *cert. den.*, 280 U. S. 579, 50 Sup. Ct. 32 (1929); Oliver American Trading Co. v. Gov't of Mexico, 5 F. (2d) 659 (C. C. A. 2d, 1924) *cert. den.*, 267 U. S. 596, 45 Sup. Ct. 352 (1924).

[42]303 U. S. 68, 58 Sup. Ct. 432 (1938).

[43]Hannes v. Kingdom of Roumania Monopolies Institute, 260 App. Div. 189, 20 N. Y. S. (2d) 825 (1st Dep't 1940).

[44]See Coale v. Societe Coöperative Suisse Des Charbons, Basle, 21 F. (2d) 180 (S. D. N. Y. 1927), where immunity was denied a foreign government's publicly owned corporation. For a grant of sovereign immunity, see Compania Mercantil Argentina v. United States Shipping Board, 93 L. J. R. 816 (K. B. 1924). See ROBINSON, ADMIRALTY (1939) § 34.

[45]FOX, *Competence of Courts in regard to the Non-Sovereign Acts of Foreign States* (1941) 35 AM. J. INT. L. 632.

doctrine of implied consent to the jurisdiction.[46] The federal courts have declared that where a corporation is attempting to assert the claim, government ownership of all or a majority of the capital did not make the government the real party in interest.[47] These and other criteria are highly artificial and generally unworkable. There have been many attempts by international jurists to specify the exceptions to the rule of sovereign immunity.[48] These attempts culminated in the drafting of a Convention regarding the *Competence of Courts in Regard to Foreign States* by the Harvard Research in International Law in 1932.[49] In none of these articles has the effect of war upon the sovereign defendant's right to immunity been discussed.[50] There is, however, a noticeable tendency to limit the confines of the immunity even in times of peace.[51]

[46]*Competence of Courts in regard to Foreign States,* 26 AM. J. INT. L. (Supp.) 451 (1932); ALLEN, THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS (1933) 22.

[47]Coale v. Societe Coöperative Suisse des Charbons, 21 F. (2d) 180 (S. D. N. Y. 1927); United States v. Deutsches Kalisyndikat Gesellschaft, 31 F. (2d) 199 (S. D. N. Y. 1929); Amtorg Trading Corp. v. United States, 71 F. (2d) 524 (Ct. of Customs & Pat. App. 1934). These cases would seem to indicate that, in the main case, mere ownership of the defendant by Hungary would be insufficient to justify the plea.

[48]ROBINSON, ADMIRALTY (1939) 276; Hervey, *The Immunity of Foreign States When Engaged in Commercial Enterprises* (1929) 27 MICH. L. REV. 751; Fitzmaurice (1933) 14 BRIT. YR. BK. OF INT. L. 101; Fox, *Competence of Courts in Regard to Non-Sovereign Acts of Foreign States* (1941) 35 AM. J. INT. L. 632. See also: Dickinson, *Waiver of State Immunity* (1925) 19 AM. J. INT. L. 555, 558; *Report of the Committee of Experts on Legal Status of Government Ships Employed in Commerce* (1926) 20 AM. J. INT. L. (Spec. Supp.) 260; Fairman, *Some Disputed Applications of the Principle of Sovereign Immunity* (1928) 22 AM. J. INT. L. 5665.

The latter author lists as shadow zones: (1) where state is sued as owner of real property; (2) inheritance; (3) where state has acted as a private person; (4) state railroads; (5) state merchant ships; (6) other state enterprises and monopolies; (7) external state loans. See *Report of the Committee of Experts of the League of Nations* (1928) 22 AM. J. INT. L. (Spec. Supp.) 117, for a substantial restatement of the above, adding to the list, however, actions for a tort or quasi-tort committed in local territory.

[49]See *Competence of Courts in Regard to Foreign States* (1932) 26 AM. J. INT. L. (Supp.) 451.

[50]The text of Article 3 of the Draft Convention, p. 455, reads: "A state may refuse to permit another state to investigate or continue a proceeding in its courts if it does not recognize that state, or if diplomatic relations are not maintained between the two states." In the Comment on Article 3, the writers say: [Where the state of the forum was at war with the state desiring to institute the proceeding] ". . . it seems clear that no duty could be laid upon the state of the forum to permit the institution of the proceeding." It would not seem to be an illogical extension of the doctrine to abrogate in time of war not only the lesser privilege of bringing suit but also the greater privilege of freedom from suit.

[51]See ALLEN, THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS (1933) ch. II; also the language of Sir Robert Phillimore in the *Charkieh,* 4 Admr. and Ecc. 59 (1873), to the effect that the exemption does not apply to immovable property; *cf.* Sharp's Rifle Mfg. Co. v. Rowan, 34 Conn. 329 (1867), where conveyance of real property, title to which stood in the name of an agent of the British government, could be compelled; see also Walton, *State Immunity in the Laws of England, France, Italy, and Belgium* (1920) 2 J. COMP. LEG. & INT. L. 252. The writer summarizes the resolutions of the Institute of International Law at the meeting in Hamburg in 1891. At page 255 he says: [an action may be permitted against a foreign state when

There can be no question that the United States is at war with Hungary.[52] It is now well established that war does not in and of itself work a confiscation of private enemy property within the local sovereign's territory;[53] however, it is not so well established that this rule extends to the protection of public enemy property.[54] It would seem that the rule has been extended to include public property when we consider the various local Trading with the Enemy Acts.[55] The Trading with the Enemy Acts serve, as the titles indicate, to prevent intercourse with the enemy, rather than to confiscate enemy property. The acts substitute the Alien Property Custodian for the enemy in the enjoyment of the privileges of ownership.[56] He is empowered to seize any property in the United States owned by an enemy country.[57] The property once seized is subject to attachment for the payment of the debts of the alien enemy.[58] The court, in the main case, concedes that the plaintiff could have enforced his rights against the Alien Property Custodian, had the property been seized by the latter.[59] Undoubtedly, such seizure would have been a revocation of the implied consent whereof the defendant derives his sovereign immunity. However, in the present case the consent had not been revoked by acts of seizure; therefore, the court considered the immunity still claimable. This is, however, a debatable point, for the immunity may have been revoked by our acts short of seizure.

Since immunity in a case such as this arises from the local sovereign's consent, it would seem that the existence of a state of war between the two sovereigns would operate impliedly to revoke that consent. Immunity for acts performed in the exercise of external sovereignty would seem to be the child of comity. If non-recognition operates to deny certain extra-

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it is an] ". . . 5. Action founded on contracts made in that country by express proviso, or because of the nature of the action."

[52]See the Proclamations of a State of War Between the United States and Hungary, Exec. Proc. 2563, July 17, 1942, 7 FED. REG. 5535, 50 U. S. C. Appendix (1942). For the Declaration of War, see 56 STAT. 307 (1942).

[53]2 OPPENHEIM, INTERNATIONAL LAW (5th ed. 1937) 270; 2 WHEATON, INTERNATIONAL LAW (6th ed. 1929) 643; Brown v. United States, 8 Cranch 110; 3 L. Ed. 504 (1814) (held, the declaration of war did not authorize the confiscation of enemy property. It vested only the right to confiscation, the assertion of which depended upon the will of the sovereign).

[54]2 OPPENHEIM, INTERNATIONAL LAW (5th ed. 1937) 271.

[55]British Trading With the Enemy Act, 1914, 4 & 5 GEO. V. c. 87; Trading With the Enemy Act of 1917, 50 U. S. C. Appendix (1940).

[56]Pflueger v. United States, 121 F. (2d) 732 (App. D. C. 1941), *cert. den.*, 314 U. S. 617, 62 Sup. Ct. 98 (1942). The dominant purpose is to give to citizens and their friends an adequate remedy against the invasion of their rights in the exercise of war powers by the government. See also Brown v. J. P. Morgan & Co., 177 Misc. 763, 31 N. Y. S. (2d) 815 (1941), *denying mot.*, 177 Misc. 626, 31 N. Y. S. (2d) 323.

[57]Exec. Order No. 9095, March 11, 1942, 7 FED. REG. 1971, establishing the office of the Alien Property Custodian. See Dulles, *The Vesting Powers of the Alien Property Custodian* (1943) 28 CORNELL L. Q. 245.

[58]The Trading With the Enemy Act of 1917, § 9, 40 STAT. 415, 50 U. S. C. Appendix § 9 (1940).

[59]Telkes v. Hungarian Nat'l Museum, 265 App. Div. 192, 197, 38 N. Y. S. (2d) 419, 424 (2d Dep't 1942).

territorial privileges of the unrecognized sovereign, such as the right to maintain suit in the courts of the local sovereign,[60] enmity should carry with it the greater penalty of a denial of immunity from suit. In only one case that the writer has been able to find has the claim to sovereign immunity been granted by one belligerent to another.[61] The decision, however, is not necessarily conclusive of the present case. In this, a German case, the Armistice of 1918 was ten months old, hostilities had ceased, negotiations for peace were pending, and Germany and the United States were only nominally at war, although the war did not end legally until 1921.[62]

In Ex Parte Colonna[63] an effect of war was a denial of the right of an ambassador of an enemy sovereign to present the claim of sovereign immunity. It did not appear in that case that the property had been seized by the Alien Property Custodian; yet, quite effectively, the property was held subject to litigation, and immunity denied. In the present case, it would seem that the presentation of the claim by a representative of a different sovereign could endow the enemy property with greater sanctity than a presentation by the representative of the owner. It would not appear to violate any established rule of International Law to hold that the existence of a state of war impliedly revokes the sovereign immunity of an enemy sovereign for acts performed in the exercise of external sovereignty. The burden would then be cast upon the Executive Department either to destroy the implication by enunciating a policy or to confirm it by tacitly approving the revocation. In this way, the orderly administration of justice in local courts could go on as usual, and the rights of private litigants would not be prejudiced unfairly by a possibly frivolous claim of immunity. In the present case, the plaintiff is a citizen of the United States employed by the Hungarian National Museum whose salary is unpaid by his employer. By the decision, he is deprived of ordinary processes for the collection of his claim by the extension of favor to a government with which the United States is actually at war.

John E. Cullinan, Jr.

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[60]Russian Socialist Federated Soviet Republic v. Cibrario, 235 N. Y. 255, 139 N. E. 259 (1923).

[61]The Ice King, Entscheidungen des Reichsgerichtes in Zivilsachen, CIII (1922) 274. The suit was for damages arising out of a collision with the Jonas Sell in Dutch waters in Aug. 1919. The United States Shipping Board claimed sovereign immunity and the Imperial Court affirmed a decision of the Oberlandesgericht granting the immunity and dismissing the claim for damages. However, the German court emphasized that the doctrine might be different when the property involved was not a ship, but an immovable within the jurisdiction. The case was severely criticized by Dr. Gothard Brandis in *Hanseatische Gerichtsezeitung* (1921) com. pt. 87; *Revue Internationale du Droit Maritime*, XXXIII, (1922) (1) 871; for discussion, see ALLEN, THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS (1933) 87.

[62]See Hudson, *The Duration of the War Between the United States and Germany* (1926) 39 HARV. L. REV. 1020, 1029.

[63]314 U. S. 510, 62 Sup. Ct. 373 (1942).

Quasi-contract: Gifts: Effect of New York anti-heart balm statute.—The plaintiff gave an engagement ring to his fiancee, the defendant. Subsequently the agreement to marry was abandoned by mutual consent. Plaintiff brought this action to recover the ring. The defendant moved for judgment on the pleadings under Civil Practice Rule 112 on the ground that the action was barred by Section 61-b of the Civil Practice Act which abolishes "rights of action heretofore existing to recover sums of money as damages for . . . breach of contract to marry." The motion was denied. The court held that an action to recover jewelry given in connection with a contract of marriage, subsequently rescinded by mutual consent, is not an action to recover damages for breach of the contract, and hence is not within the statutory prohibition. *Unger v. Hirsch, 39 N. Y. S. (2d) 965 (N. Y. City Ct. 1943).*

Ordinarily, a gift completed by delivery is irrevocable.[1] But gifts which are intimately connected with a proposed marriage are an exception to this rule. When the reason for the gift ceases to exist because the engagement has been cancelled, it would be unjust to allow the donee to retain it.[2] It has been generally held that an engagement ring belongs to this class of gifts.[3]

Under some circumstances the courts regard gifts to a betrothed as absolute and irrevocable. Recovery is denied where a gift was a Christmas present,[4] or where it was made before the engagement for the purpose of introducing the donor to the donee or of stimulating the donee's affections.[5] Where recovery of a gift of this type is allowed, it is based on elements of fraud or undue influence appearing in the transaction, not merely on the disappointed expectations of the donor.[6] Gifts made in contemplation of marriage, on the other hand, may in a proper case be recovered without proof of such additional facts.

In determining whether recovery of a gift made in contemplation of mar-

[1]Kelso v. Kelso, 96 N. J. Eq. 354, 124 Atl. 763 (1924); Rosenberg v. Lewis, 210 App. Div. 690, 206 N. Y. Supp. 353 (1st Dep't 1924); Williamson v. Johnson, 62 Vt. 378, 20 Atl. 279 (1890); BROWN, PERSONAL PROPERTY (1936) 84; 2 WILLISTON, CONTRACTS (rev. ed., Williston & Thompson, 1936) § 439.

[2]Recovery of gifts made in contemplation of marriage other than engagement rings was allowed in Rockafellow v. Newcomb, 57 Ill. 186 (1870); Walker v. Hester, 178 Ky. 342, 198 S. W. 912 (1917); Lumsden v. Arbaugh, 207 Mo. App. 561, 227 S. W. 868 (1921); Antaramian v. Ourakian, 118 Misc. 558, 194 N. Y. Supp. 100 (App. Term, 1922); Williamson v. Johnson, 62 Vt. 378, 20 Atl. 279 (1890); Burke v. Nutter, 79 W. Va. 743, 91 S. E. 812 (1917); Lambert v. Lambert, 66 W. Va. 520, 66 S. E. 689 (1909).

[3]Sloin v. Lavine, 11 N. J. Misc. 899, 168 Atl. 849 (Sup. Ct. 1933); Hutchinson v. Kernitzky, 23 N. Y. S. (2d) 650 (App. Term, 1940); Wilson v. Riggs, 243 App. Div. 33, 276 N. Y. Supp. 232 (1st Dep't 1934), *aff'd without opinion* 267 N. Y. 570, 196 N. E. 584 (1935); Beck v. Cohen, 237 App. Div. 729, 262 N. Y. Supp. 716 (1st Dep't 1933); Benedict v. Flannery, 115 Misc. 627, 189 N. Y. Supp. 104 (App. Term, 1921); Ruehling v. Hornung, 98 Pa. Super. 535 (1929).

[4]Richmond v. Nye, 126 Mich. 602, 85 N. W. 1120 (1901); Ruehling v. Hornung, 98 Pa. Super. 535 (1929). *See also* Seiler v. Funk, 32 Ont. 99 (1914); Fortier v. Brault, 10 West. Week. Rep. 807, 808 (County Ct., Man. 1916).

[5]Walter v. Moore, 198 Ky. 744, 249 S. W. 1041 (1923); Robinson v. Cumming, 2 Atk. 409, 26 Eng. Repr. 646 (1742); RESTATEMENT, RESTITUTION (1937) § 58, illustration 4.

[6]See Notes (1939) 52 HARV. L. REV. 529; (1924) 33 A. L. R. 590.

riage should be granted, three situations are to be distinguished: (1) Where the engagement was broken due to the fault of the donor, recovery is denied.[7] (2) Where the engagement was broken by the donee without cause, recovery is permitted.[8] (3) Where the engagement was terminated by mutual consent, recovery is allowed.[9]

The authorities are generally agreed upon the result to be reached in a case which falls within any of these three classes. However, there is no unanimity as to the theory which should be employed to reach that result. In the principal case, the court adopts the view that the abandonment of the engagement was equivalent to the rescission of a contract by mutual assent. After rescission, to prevent unjust enrichment, the parties should be restored to the positions which they occupied before the contract was made, which necessarily required the return of the ring.[10]

This theory may be criticised on the ground that in most cases it is highly improbable that the ring or other gift was intended by the parties as consideration for the recipient's promise to marry. Although there are cases where the transfer of valuable property is the actual inducement which leads the transferee to assent to the marriage,[11] a different interpretation is required where the gift is an engagement ring. However, the rescission theory is not

[7]Schultz v. Duitz, 253 Ky. 135, 69 S. W. (2d) 27 (1934); Beer v. Hart, 153 Misc. 277, 274 N. Y. Supp. 671 (Mun. Ct. 1934); Cohen v. Sellar [1926] 1 K. B. 536. *See also* Beck v. Cohen, 237 App. Div. 729, 733, 262 N. Y. Supp. 716, 721 (1st Dep't 1933). *Cf.* Ruehling v. Hornung, 98 Pa. Super. 535 (1929); Seiler v. Funk, 32 Ont. 99 (1914).

[8]Rockafellow v. Newcomb, 57 Ill. 186 (1870); Walker v. Hester, 178 Ky. 342, 198 S. W. 912 (1917); Lumsden v. Arbaugh, 207 Mo. App. 561, 227 S. W. 868 (1921); Sloin v. Lavine, 11 N. J. Misc. 899, 168 Atl. 849 (Sup. Ct. 1933); Hutchinson v. Kernitzky, 23 N. Y. S. (2d) 650 (App. Term, 1940); Antaramian v. Ourakian, 118 Misc. 558, 194 N. Y. Supp. 100 (App. Term, 1922); Benedict v. Flannery, 115 Misc. 627, 189 N. Y. Supp. 104 (App. Term, 1921); Williamson v. Johnson, 62 Vt. 378, 20 Atl. 297 (1890); Burke v. Nutter, 79 W. Va. 743, 91 S. E. 812 (1917); Lambert v. Lambert, 66 W. Va. 520, 66 S. E. 689 (1909). *See also* Urbanus v. Burns, 300 Ill. App. 207, 211, 20 N. E. (2d) 869, 870 (1939); Cohen v. Sellar [1926] 1 K. B. 536, 547. *Cf.* Stromberg v. Rubenstein, 19 Misc. 647, 44 N. Y. Supp. 405 (Sup. Ct. 1897); Yubas v. Witaskis, 95 Pa. Super. 296 (1928) (in both cases, recovery denied on ground of defendant's infancy.)

[9]Hutchinson v. Kernitzky, 23 N. Y. S. (2d) 650 (App. Term, 1940); Wilson v. Riggs, 243 App. Div. 33, 276 N. Y. Supp. 232 (1st Dep't 1934), *aff'd without opinion*, 267 N. Y. 570, 196 N. E. 584 (1935). *See also* Cohen v. Sellar [1926] 1 K. B. 536, which also contains a dictum to the effect that recovery should be allowed if the marriage does not take place either through the death of, or through a disability recognized by law on the part of, the donor. *Cf.* Urbanus v. Burns, 300 Ill. App. 207, 20 N. E. (2d) 869 (1939), noted (1939) 38 MICH. L. REV. 248 (projected marriage failed to occur because of the death of the donee; recovery denied); Richmond v. Nye, 126 Mich. 602, 85 N. W. 1120 (1901) (engagement terminated by mutual consent; recovery denied). Both cases are distinguishable on the ground that there was evidence tending to show that the gifts were intended as Christmas presents.

[10]Other cases where the language used indicates that the court is thinking in terms of contract law are: Schultz v. Duitz, 253 Ky. 135, 69 S. W. (2d) 27 (1934); Rockafellow v. Newcomb, 57 Ill. 186 (1870); Yubas v. Witaskis, 95 Pa. Super. 296 (1928); Lambert v. Lambert, 66 W .Va. 520, 66 S. E. 689 (1909).

[11]Walker v. Hester, 178 Ky. 342, 198 S. W. 912 (1917); Lambert v. Lambert, 66 W. Va. 520, 66 S. E. 689 (1909).

untenable as a basis for the recovery of the ring or its value. Although the performance for which restitution is sought in the typical rescission case is a performance rendered under the contract as part of an agreed exchange, restitution may also be given where the performance was rendered in reliance on the defendant's promise yet not in consideration of a bargain made by him.[12]

Other cases have adopted the view that the ring is a conditional gift.[13] While there is authority for the proposition that a gift on condition precedent is unknown to the law,[14] the reasoning employed is inapplicable to the gift on condition subsequent,[15] for which adequate support can be found.[16]

The courts adopting the conditional gift theory have not been realistic about the nature of the condition with which they were dealing. It ought to be obvious that an engagement ring will seldom be presented upon the express condition that it is to be returned if the marriage fails to occur.[17] The condition implied in fact, like the express condition, is based upon the manifested assent of the parties.[18] In finding implied conditions, the courts do not examine closely the conduct of the parties to discover the state of their minds, but frequently indulge in the loose presumption that the gift was intended to be upon condition.[19] In most cases, therefore, the condition is actually constructive; it is imposed by law. Some inconsistencies in the decided cases can easily be explained on the basis that the courts have regarded the imposition of the condition as a discretionary matter, to be denied where it is not needed to do justice between the parties.[20]

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[12]RESTATEMENT, CONTRACTS (1932) § 348, comment *b*.

[13]Sloin v. Lavine, 11 N. J. Misc. 899, 168 Atl. 849 (Sup. Ct. 1933); Wilson v. Riggs, 243 App. Div. 33, 276 N. Y. Supp. 232 (1st Dep't 1934), *aff'd without opinion*, 267 N. Y. 570, 196 N. E. 584 (1935); Ruehling v. Hornung, 98 Pa. Super. 535 (1929); Williamson v. Johnson, 62 Vt. 378, 20 Atl. 279 (1890).

[14]Doty v. Wilson, 47 N. Y. 580 (1872); Irish v. Nutting, 47 Barb. 370 (N .Y. 1867); Balling v. Manhattan Sav. Bank, 110 Tenn. 288, 75 S. W. 1051 (1903).

[15]BROWN, PERSONAL PROPERTY (1936) § 49.

[16]*Supra* note 13.

[17]Beck v. Cohen, 237 App. Div. 729, 262 N. Y. Supp. 716 (1st Dep't 1933); Cohen v. Sellar [1926] 1 K. B. 536; Jacobs v. Davis [1917] 2 K. B. 532. *But see* Yubas v. Witaskis, 95 Pa. Super. 296 (1928), where the chancellor found that the ring "was given to the defendant upon the express condition, assented to by her, that if she broke the engagement she should and would return it to the plaintiff."

[18]3 WILLISTON, CONTRACTS (rev. ed., Williston & Thompson, 1936) § 668.

[19]See Sloin v. Lavine, 11 N. J. Misc. 899, 168 Atl. 849 (Sup. Ct. 1933); Wilson v. Riggs, 243 App. Div. 33, 276 N. Y. Supp. 232 (1st Dep't 1934), *aff'd without opinion*, 267 N. Y. 570, 196 N. E. 584 (1935); Beck v. Cohen, 237 App. Div. 729, 262 N. Y. Supp. 716 (1st Dep't 1933); Fortier v. Brault, 10 West. Week. Rep. 807 (County Ct., Man. 1916).

[20]See Note (1939) 38 MICH. L. REV. 248. Where the action is brought to recover an engagement ring, for example, the courts have been more willing to impose the condition than in cases where other gifts were involved. In Rosenberg v. Lewis, 210 App. Div. 690, 206 N. Y. Supp. 353 (1st Dep't 1924) recovery of certain articles of jewelry given to the defendant in anticipation of marriage was denied. The court found no express or implied condition and refused to impose a constructive condition. The *Rosenberg* case was distinguished in Beck v. Cohen, 237 App. Div. 729, 731, 262 N. Y. Supp. 716, 718 (1st Dep't 1933), the court pointing out that in the *Rosenberg* case "the

In the last analysis, recovery of an engagement ring or other property transferred in contemplation of marriage rests upon a quasi-contractual basis,[21] even though the court chooses to rationalize its holding in terms of conditional gift or of rescission of the contract to marry.[22] Restitution is granted where it is necessary to prevent the unjust enrichment of the transferee; it is denied where equitable considerations do not require a return of the property to the transferor, *i.e.*, where the engagment was broken by his own fault.

In the principal case the court concluded that the donor's right to recover the ring upon the termination of the engagement by the mutual assent of the parties was not barred by Article 2-A of the Civil Practice Act.[23] In *Andie v. Kaplan*[24] the complaint stated a cause of action to recover money and jewelry delivered by the plaintiff to the defendant in connection with mutual promises of marriage between the parties. The court dismissed the complaint because it was within the prohibition of Sections 61-a, 61-b and 61-d of the C. P. A. The decision in the principal case distinguishes *Andie v. Kaplan* on the ground that there the agreement to marry was not abandoned by mutual consent but was repudiated by the defendant. The law of New York, as declared in *Andie v. Kaplan* and *Unger v. Hirsch,* seems to be that a donee must return a gift made in contemplation of marriage if the agreement was terminated by mutual consent, but may keep the gift if the marriage agreement was broken

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property involved was not an engagement ring." This distinction has been ignored and the condition has been imposed in other cases concerning property other than rings. Zawadzki v. Vandetti, 255 App. Div. 932, 9 N. Y. S. (2d) 219 (4th Dep't 1938); Cushing v. Hughes, 119 Misc. 39, 195 N. Y. Supp. 200 (Sup. Ct. 1922); Antaramian v. Ourakian, 118 Misc. 558, 194 N. Y. Supp. 100 (App. Term, 1922).

[21]Zawadzki v. Vandetti, 255 App. Div. 932, 9 N. Y. S. (2d) 219 (4th Dep't 1938) is the only case in which the existence of a valid cause of action based upon quasi-contract has been expressly recognized. But there are other cases from which the conclusion is inescapable that the court is resting its decision upon an obligation imposed by law. Thus, in Williamson v. Johnson, 62 Vt. 378, 381, 20 Atl. 279, 280 (1890), it is stated that "the court below found the facts that the plaintiff let the defendant Caroline have both sums of money without any expectation that they would be refunded"; nevertheless, the holding of the case is that the gifts were not absolute but conditional, and recovery was granted upon that basis. See also Antaramian v. Ourakian, 118 Misc. 558, 194 N. Y. Supp. 100 (App. Term, 1922), and note 19 *supra.*

[22]5 WILLISTON, CONTRACTS (rev. ed., Williston & Thompson, 1936) § 1454.

[23]The principal case is supported by Zawadzki v. Vandetti, 255 App. Div. 932, 9 N. Y. S. (2d) 219 (4th Dep't 1938) and Hutchinson v. Kernitzky, 23 N. Y. S. (2d) 650 (App. Term, 1940). The *Zawadzki* case was an action brought to declare void a bill of sale of an automobile and to recover money claimed to have been given to defendant in reliance on an alleged promise to marry. The court recognized in the complaint a valid cause of action based upon quasi-contract, with only one justice voting to dismiss the complaint on the ground that the action was barred by C. P. A. Art. 2-A. The abbreviated statement of facts in the *Zawadzki* case does not reveal which party was at fault in terminating the engagement.

In the *Hutchinson* case recovery of an engagement ring was allowed where it appeared "without dispute that the engagement was either cancelled by mutual consent or was broken by the defendant." Article 2-A of the C. P. A. was not mentioned.

[24]263 App. Div. 884, 32 N. Y. S. (2d) 429 (2d Dep't 1942), *aff'd without opinion,* 288 N. Y. 685, 43 N. E. (2d) 82 (1942).

solely because of the donee's fault. This rule appears undesirable. It is not only contrary to the general common-law rule,[25] but it clearly enriches the wrongdoer unjustly.

Furthermore, it is a result which is not required by the statute. Section 61-b of the C. P. A. provides that "the rights of action heretofore existing to recover sums of money *as damage* for . . . . breach of contract to marry are hereby abolished." Section 61-d provides that "no contract to marry, hereafter made or entered into in this state shall operate to give rise, either within or without this state, to any cause or right of action *for the breach thereof.*"[26] An action to recover an engagement ring or other gift made in contemplation of marriage is not an action for the breach of a contract of marriage. The action is quasi-contractual in nature. It is not based upon the contract, but upon an obligation imposed by law to prevent the unjust enrichment of the defendant. The damages for the breach of a contract to marry would normally be measured, not by the value of the engagement ring, but by the value of the promised advantage of which the plaintiff has been deprived by reason of defendant's breach.[27] Clearly these are the damages which are within the condemnation of the statute.

That the cause of action for the return of a gift made in contemplation of marriage does not arise from the breach of contract is made even clearer by reference to cases like *Grossman v. Greenstein.*[28] There the gift was made by the father of the donee's fiancee. The marriage having failed to occur, the donor was allowed to recover the gift. Obviously, recovery upon a breach of contract theory is impossible in this situation, since the donor is a stranger to the marriage agreement; but he is nevertheless entitled to a return of his gift, since the donee, if allowed to retain it, would be unjustly enriched. Why should a different theory prevail where the donor is a party to the marriage agreement?

It seems clear that the legislative purpose in enacting Article 2-A of the C. P. A. did not extend to the abolition of the right of action for recovery of gifts made in contemplation of marriage. The intent of the legislature, as expressed in Section 61-a of the C. P. A., was to do away with the "heart-balm" action, which had come into disrepute as a "remedy . . . exercised by unscrupulous persons for their unjust enrichment."[29] The action to recover a gift made in contemplation of marriage does not fall within this description. Where recovery is allowed, the action does not result in the unjust enrichment of the plaintiff-donor, but prevents the unjust enrichment of the defendant-donee.[30]

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[25] *Supra* note 8.

[26] Italics added.

[27] 5 WILLISTON, CONTRACTS (rev. ed., Williston & Thompson, 1936) § 1338.

[28] 161 Md. 71, 155 Atl. 190 (1931).

[29] For a review of the abuses which led to the enactment of legislation of this type, see Feinsinger, *Legislative Attack on "Heart Balm"* (1935) 33 MICH. L. REV. 979.

[30] The New Jersey Court of Errors and Appeals, interpreting a statute substantially identical with C. P. A. §§ 61-b and 61-d [N. J. REV. STAT. (1937) tit. 2, §§ 39 A-1, 39 A-4], has held that an action, brought after defendant's alleged breach of promise to marry plaintiff, to recover a sum of money as compensation for services rendered to

The instant case appears correctly decided. However, so long as the decision of the Court of Appeals in *Andie v. Kaplan* is followed, New York will deny a just recovery in a situation where it is generally granted by the law of other jurisdictions.

Robert William Gribben

Taxation: Charitable deductions: Tax-saving techniques in drawing testamentary trusts for both a private and a charitable use. — Congress has endeavored to encourage posthumous philanthropy by reducing the tax burden on estates which are devoted to religious, charitable, scientific, literary or educational purposes. Often the testator will wish to set up a trust to carry out his philanthropic purposes, but will wish to dilute his charity to the extent of conferring the usufruct of the trust upon a private person for a limited period. In this situation and in others, the attorney must mold the trust with care if the benefits of tax deductions are not to be discarded.

In the case of the estate tax, the test of deductibility is whether the devise or bequest to the charity has a "presently ascertainable" value at the time of death.[1] In the case of the tax on the income of a trust, the test is whether the income has been paid to or "permanently set aside" for the charitable use pursuant to the terms of the deed or will.[2] While the phraseology of the two tests is different, the technique in applying them is similar, and considerations governing the allowance of deductions in the one case are usually pertinent in determining the allowance of deductions in the other.[3] Thus if a trust is set up by will whereby the income is to be paid to a non-exempt person or organization for life or for a term of years with the corpus to be paid to an exempt organization (such as a charity) upon the termination of the private interest, the value of the remainder interest is "presently ascertainable" and deductible from the gross estate.[4] If capital gains or any other part of the gross income are allocable to corpus so that they are "permanently set aside" for the exempt use, they will be deductible from the gross income.[5]

But suppose that the will instead of simply granting the income to the private beneficiary allows invasion of the corpus in which the exempt remainderman has an interest. Treasury Regulation 105, Section 81.44 provides:

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defendant over a period of more than three years, during which time plaintiff refrained from collecting the salary due her because of her expectation that the defendant would marry her, is not barred by the statute. Glazer v. Klughaupt, 116 N. J. L. 507, 185 Atl. 8 (1936).

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[1] INT. REV. CODE § 812 (d) (1939); U. S. Treas. Reg. 105 § 81.44.

[2] INT. REV. CODE § 162 (a) (1939); U. S. Treas. Reg. 111 § 29.162-1.

[3] Merchants National Bank of Boston v. Commissioner, 132 F. (2d) 483, 485 (C. C. A. 1st, 1942), *aff'd*, 320 U. S. 256, 64 Sup. Ct. 108 (1943); Commissioner v. F. G. Bonfils Trust Co. *et al.*, 115 F. (2d) 788 (C. C. A. 10th, 1943); Note (1941) 41 COL. L. REV. 754.

[4] U. S. Treas. Reg. 105 § 81.44.

[5] Ithaca Trust Co. v. United States, 279 U. S. 151, 49 Sup. Ct. 291 (1929) (by implication).

> "If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only in so far as such interest is presently ascertainable, and hence severable from the interest in favor of the private use."

Section 81.46 states that

> "if the . . . trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that is subject to such power, not deductible had it been directly so bequeathed, . . . deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power."

Since in the hypothetical case the corpus may be diverted to the private use, it would seem from a literal reading of these sections that the entire corpus would be subject to the estate tax. Such is not invariably the result.

Generally, deductions will be allowed if it can be shown with reasonable certainty by mathematical calculation that the fact situation which would justify the exercise of a power to invade the corpus will never arise.[6] Deduction will be allowed where the trust instrument provides for fixed annuities to be paid to private beneficiaries and to be a charge first against income and then against corpus if it is apparent that the income of the trust will be adequate to pay the annuities.[7] If an invasion of the corpus for payment of the annuity is not improbable, a deduction ordinarily will not be allowed.[8]

In the leading case of *Ithaca Trust Co. v. United States*,[9] the trustees were authorized to invade the corpus in which certain charities had remainder interests for the purpose of maintaining the widow "in as much comfort as she now enjoys." It was shown that the widow's separate income plus the income from the trust was ample to maintain her according to her custom. Mr. Justice Holmes construed the trust agreement to mean that invasion was permissible only to maintain the widow in her "station in life." The cost of such maintenance would be estimated by reference to expenditures in previous years. Since invasion for the purpose of supporting the widow was not probable, the present value of the charitable remainder interests[10] was deductible in computing the gross estate and capital gains allocable to corpus were deductible from the gross income. "The standard was fixed in fact and capable of being stated in definite terms of money. . . . There was no un-

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[6] *Ibid.*

[7] Commissioner v. Bank of America Nat. Trust and Savings Ass'n, 133 F. (2d) 753 (C. C. A. 9th, 1943); Commissioner v. F. G. Bonfils Trust Co. *et al.*, 115 F. (2d) 788 (C. C. A. 10th, 1940).

[8] Old Colony Trust Co., 33 B. T. A. 311 (n. a. 1935), *mod. on other grounds*, 87 F. (2d) 131 (C. C. A. 1st, 1936), *rev'd on other grounds*, 301 U. S. 379, 57 Sup. Ct. 813 (1937); Lewis Baer, T. C. Memo, 1943 Prentice Hall Fed. Tax. Serv. ¶ 64577.

[9] 279 U. S. 151, 49 Sup. Ct. 291 (1929).

[10] *Id.* at 155, 49 Sup. Ct. at 292: "But the value of property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money that it would bring in the market," [citing International Harvester Co. v. Kentucky, 234 U. S. 215, 34 Sup. Ct. 853 (1914)]

certainty greater than that which attends all human affairs."[11]

The lower courts have applied the "station in life" test with liberality. Powers to invade for the "comfortable maintenance and support,"[12] for "comfort, maintenance, and support,"[13] or for "proper support and comfort,"[14] were construed to allow invasion only for the purpose of maintaining the private beneficiary according to his "station in life." Since the income in each of these cases was more than adequate for the purpose, impairment of the interest of the charity was improbable and deductions were allowed. Ordinarily, if impairment is not improbable deductions will be disallowed.[15]

The burden is on the tax-payer to show the amount of the deduction to which he is entitled.[16] The life expectancy of the private beneficiary, the amount of his separate income, the amount of the income from the trust property, the expenditures of the private beneficiary in previous years may variously be resorted to in sustaining the burden.[17] If the present value of the remainder is not ascertainable by computations based on legally acceptable data (such as actuarial tables), the courts will refuse to make a guess even though it is certain that the remainder interest will not be wholly defeated.[18] For example, suppose that the will creates a trust of $300,000, income for life to a private person, remainder to a charity, except that on the death of the private beneficiary the trustee shall pay $5,000 to each of the living daughters of the testator's two nephews and two nieces. The court could be quite certain that not all of the fund would be diverted from the charitable use, but since there is no way of determining the value of the charitable interest save by guessing, no deduction will be allowed.[19]

As another illustration, suppose that the trustee is given the authority to credit any receipts, or charge any disbursements, to either capital or income at his discretion. No deduction will be allowed because such a provision obliterates the dividing line between corpus and income, thus making the remainderman's interest unascertainable.[20]

Likewise, where the right to invade depends solely on subjective considerations, deduction will not be allowed because unmeasurable factors are involved. In *Gammons* et al. *v. Hassett, Collector,*[21] where excursions into the

[11] *Id.* at 165, 49 Sup. Ct. at 291 (1929).

[12] Hartford-Connecticut Trust Co. v. Eaton, Collector, 36 F. (2d) 710 (C. C. A. 2d, 1929).

[13] Lucas, Commissioner v. Mercantile Trust Co., 43 F. (2d) 39 (C. C. A. 8th, 1930).

[14] First National Bank of Birmingham v. Snead, Collector, 24 F. (2d) 186 (C. C. A. 5th, 1928).

[15] Helvering v. Union Trust Co., 125 F. (2d) 401 (C. C. A. —, 1942), *cert. den.,* 316 U. S. 696, 62 Sup. Ct. 1292 (1942).

[16] Burnet v. Houston, 283 U. S. 223, 51 Sup. Ct. 413 (1931); Bank of America Trust & Savings Ass'n v. Commissioner, 126 F. (2d) 48 (C. C. A. 9th, 1942); Pennsylvania Co. for Insurances on Lives, 6 F. Supp. 582 (E. D. Pa. 1933), *aff'd per curiam,* 70 F. (2d) 269 (C. C. A. 3rd, 1934).

[17] Ithaca Trust Co. v. United States, 279 U. S. 151, 49 Sup. Ct. 291 (1929).

[18] Pennsylvania Co. for Insurance on Lives v. Commissioner, 6 F. Supp. 582 (E. D. Pa. 1933). *Cf.* Herbert A. Wilder, 20 B. T. A. 1159 (n. a. 1930).

[19] Pennsylvania Co. v. Commissioner, 6 F. Supp. 582 (E. D. Pa. 1933).

[20] Colt *et al.* v. Duggan *et al.,* 25 F. Supp. 268 (S. D. N. Y. 1938).

[21] 121 F. (2d) 229 (C. C. A. 1st, 1941).

corpus were to be allowed according to the "need or desire" of the widow, no deduction was allowed although the widow was 93 years old, had been bed-ridden for years, was of frugal habits and was receiving an ample income from her private estate and from the income of the trust. "When the testator gave his wife the power to invade the principal as she 'may *** desire,' he meant what he said. He intended to give her a broad power of invasion of the principal, not restricted to a mere use of the corpus for the purpose of satisfying her needs."[22]

But where the will provided that the trustee should invade the corpus for the benefit of the widow upon receiving the widow's written statement that she required the money for her "comfort, maintenance ,and support," a deduction seemingly was improperly allowed.[23] The court thought that this provision did not amount to an unrestricted power to invade. "If a trustee, upon a mere written notice of the widow that she needed the entire corpus of the estate for her comfort, maintenance, and support, should turn over the same to her, it would, in our judgment, be guilty of a dereliction of duty."[24] The court thought that invasion would be permissible only to maintain the widow according to her "station in life." If the interpretation of the provision is correct, the result is not open to question, but it would seem that the intention of the testator was to leave the wife and the trustee free from molestation by the charitable remaindermen and, in particular, to relieve the trustee from liability for excursions into the corpus which would be unjustified under the "station in life" doctrine.[25]

The doctrine of the *Gammons* case was recently approved in *Merchants National Bank of Boston v. Commissioner, 320 U. S. 256, 64 Sup. Ct. 108 (1943)*. The trustee was empowered to invade the corpus at his sole discretion for the "comfort, suppport, maintenance and/or *happiness*"[26] of the testator's widow, his discretion to be exercised with liberality to the widow so as to prefer her comfort and happiness to the claims of charitable remaindermen. No deductions were allowed in computing gross estate for estate tax purposes, nor were capital gains deductible in computing the estate's income tax. Said Mr. Justice Rutledge:

> "Only where the conditions on which the extent of invasion of the corpus depends are fixed by reference to some readily ascertainable and reliably predictable facts do the amount which will be diverted from the charity and the present value of the bequest become adequately measurable. . . ."[27]

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[22]*Id.* at 232.

[23]Lucas, Commissioner v. Mercantile Trust Co., 43 F. (2d) 39 (C. C. A. 8th, 1930).

[24]*Id.* at 43.

[25]*Cf.* Colt *et al.* v. Duggan *et al.*, 25 F. Supp. 268, 272 (S. D. N. Y. 1938); 6 BOGERT, TRUSTS AND TRUSTEES, (1935) 3610, Form No. 4:

"The Trustee shall pay the net income from the trust fund to the wife of the Settlor as long as she shall live. In addition thereto, the Trustee shall pay to her such sum or sums from the principal of the trust fund as she shall from time to time in writing direct during her lifetime."

[26]Italics added.

[27]Merchants National Bank v. Commissioner, 320 U. S. 256, 261, 64 Sup. Ct. 108, 111 (1943).

"Under this will the extent to which the principal might be used was not restricted by a fixed standard based on the widow's prior way of life. . . . Introducing the element of the widow's happiness and instructing the trustee to exercise his discretion with liberality to make her wishes prior to the claims of residuary beneficiaries brought into the calculation elements of speculation too large to be overcome, notwithstanding the widow's previous mode of life was modest and her own resources substantial. . . ."[28]

Mr. Justice Douglas and Mr. Justice Jackson dissented[29] on the strength of the *Ithaca Trust Co.* case,[30] arguing that whether the gift was "presently ascertainable" or the capital gains "permanently set aside" were questions for the trier of the facts.[31]

In drawing testamentary trusts wherein the interests are to be divided between private and charitable beneficiaries, the testator's desire to create a flexible mechanism which will be responsive to the needs or wishes of the private beneficiary must be balanced against the heavier tax burden which such flexibility is apt to entail. To summarize, deductions will probably be denied[32] (1) where invasion is permitted at the desire[33] or for the happiness[34] of the private beneficiary, whatever the size of the estate or its probable income; (2) where annuities to private beneficiaries are made a charge first against income and then against corpus and it is not clear that resort to the corpus will be unnecessary;[35] (3) where invasion for proper support and maintenance is allowed and it is not clear that the income will be adequate for such support of the private beneficiary;[36] (4) where the trustee is authorized to determine whether property received by him shall be treated as income or capital and whether payments or disbursements should be made from income or capital;[37] (5) where the charitable bequest is conditioned upon the happening or non-happening of some event and it is not improbable that the gift will thereby be defeated.[38]

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[28]*Id.* at 262, 64 Sup. Ct. at 112 (1943).

[29]320 U. S. 256, 263, 64 Sup. Ct. 108, 112 (1943).

[30]See text at note 9 *supra.*

[31]Wilmington Trust Co. v. Helvering, 316 U. S. 164, 168, 63 Sup. Ct. 984, 986 (1942): "It is the function of the Board, not the Circuit Court of Appeals, to weigh the evidence, to draw inferences from the facts, and to choose between conflicting inferences."

[32]This enumeration is not intended to be exhaustive.

[33]Gammons *et al.* v. Hassett, Collector, 121 F. (2d) 229 (C. C. A. 1st, 1941).

[34]Merchants National Bank v. Commissioner, 320 U. S. 156, 64 Sup. Ct. 108 (1943).

[35]See note 8 *supra.*

[36]See note 15 *supra.*

[37]See note 20 *supra.*

[38]It is not the purpose of this note to deal generally with the problem of contingent charitable gifts. The general rule is stated in MONTGOMERY, FEDERAL TAXES ON ESTATES, TRUSTS, AND GIFTS (1943) 541: "Where divestiture of a charitable bequest is subject to the happening of future events, the test of whether deduction is allowable is the degree of likelihood that the conditions imposed will prevent the ultimate possession and enjoyment of the gift. Thus, a bequest, after the death of the life tenant of a testamentary trust, to charity conditioned on the continued existence and operation of the charity within a specified locality is deductible. [E. T. 13, C. B. 1939-2, 326]". In Wood v. United States, 20 F. Supp. 197 (W. D. Ark. 1937), the testator created a trust for a nephew seventeen years old, the nephew to receive the income until his twenty-ninth birthday at which time he was to receive the corpus; but if he should die before receiving

A power to invade for the private use will not prevent the allowance of deductions if, in all probability, the power will never be exercised.[39] Does it necessarily follow that no deduction on account of the charitable gift may be secured where the power of invasion is likely to be exercised?[40] It has been stated that: "In cases where there was some degree of likelihood that *part* of the fund would be invaded, but none that the *balance* would be used, the courts have held that the whole is non-deductible."[41] This statement is too broad, for in the cases cited to support it[42] the part of the fund which would be diverted, and hence the balance which would remain, could be fixed only by an arbitrary guess. These cases stand merely for the proposition that the tax-payer must sustain the burden of proving not only that he is entitled to a deduction, but the amount which he is entitled to deduct. Where it is clear from the terms of the trust instrument that an ascertainable minimum amount will pass to the charity, a deduction of that amount should not be denied simply on the ground that the charity may receive a larger amount. In order to enable the tax-payer to prove the minimum amount, one of the following provisions might be placed in the trust instrument: (1) that the corpus shall not be reduced, through the exercise of the power of invasion, below a certain figure; (2) that invasion shall be limited to a certain sum *in toto* or to a certain percentage of the fund; or (3) that invasion be limited to a certain sum or percentage in each year where it appears that when the value of the private interest in the corpus is deducted, an ascertainable sum will remain to the charity.[43] Under these provisions, determination of the amount of the deduction would not be arbitrary. It would be ascertained by reference to the terms of the trust instrument.

Edward M. Smallwood

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the corpus, it was to go to a public school. No deduction was allowed. See also U. S. Treas. Reg. 105 § 81.46.

[39]See notes 7, 12, 13, and 14 *supra*.

[40]Income being accumulated to be paid over to charity some time in the future ordinarily will be "permanently set aside" and deductible from gross income. S. M. 4613, V-1 CUM. BULL. 71 (1926). A problem similar to the one referred to in the text arises where a part of the income is to be used for a private purpose and part accumulated for the charitable use. The value of the charitable interest must be ascertainable if a deduction is to be allowed, and a deduction has been allowed where the value of the charitable interest could be ascertained by applying the "station in life" doctrine to limit the private interest. Herron *et al.* v. Heiner, Collector, 24 F. (2d) 756 (W. D. Pa. 1927). Deduction will be allowed where charges for non-exempt uses are against current income alone, since in such a case the accumulated income is not subject to diversion to the private use. Commissioner v. Upjohn, 124 F. (2d) 73 (C. C. A. 6th, 1941).

[41]Note (1941) 41 COL. L. REV. 754, 756.

[42]Boston Safe Deposit & Trust Co. v. Commissioner, 30 B. T. A. 679 (1934); Pennsylvania Co. for Insurance on Lives v. Brown, 6 F. Supp. 582 (E. D. Pa. 1933), *aff'd per curiam*, 70 F. (2d) 269 (C. C. A. 3d, 1934).

[43]Where the trustee was empowered to invade the corpus up to 10% annually for the welfare of the private beneficiary, deductions were allowed to the extent of the charitable remainder reduced by 10% for each year of life expectancy of the beneficiary. Ben F. Sternheim, T. C. Memo., June 24, 1943, 1944 Prentice-Hall Fed. Tax Serv. ¶ 23,414. This case illustrates the use of the third provision suggested in the text. No cases have been found in which the first two types of provisions have been used, but since the third has been successfully utilized to obtain a deduction, it follows *a fortiori* that the first two would also have that effect.