NOTES

LIABILITY OF NEWSPAPER FOR NEGLIGENT MISSTATEMENTS*

The gathering and dissemination of information by a modern newspaper is an extensive but rapid-fire process in which errors are bound to occur. Although these mistakes sometimes result in injury to readers, redress has rarely been sought except when it was thought that the misstatements could be classified as libelous. But in two recent suits against newspapers, attempts were made to impose liability for non-libelous misstatements. In one, plaintiff alleged she suffered severe injury through the use of a formula for dandruff remover, negligently recommended as a reliable remedy in a feature article written by one of the defendant's staff writers.1 In the other, plaintiff alleged that reading an Associated Press dispatch erroneously reporting the death of his father had caused nervous shock and physical injuries.2 Both complaints were dismissed for failure to state a cause of action.

Whether his complaint is framed in terms of negligent misrepresentation or deceit, a plaintiff who attempts to impose liability for misstatement upon a newspaper will encounter difficulty in stating a conventional cause of action. In the single action of this sort which had heretofore been brought the issue was not squarely presented.3 But strong precedent is furnished by a holding that a ticker service company is not liable to the general public for its erroneous news reports,4 that decision being based on the theory that the obligations of a ticker service to the public are the same as those of a newspaper.5 This paucity of direct precedent would seem to leave courts

4. Jaillet v. Cashman, 115 Misc. 383, 189 N. Y. Supp. 743 (Sup. Ct. 1921), aff'd, 235 N. Y. 511, 139 N. E. 714 (1923). Suit was brought by a customer who read the report over his broker's ticker. The court emphasized the absence of any contract between the customer and the ticker company, thereby indicating that a different result might have been reached had the broker himself suffered injury. Whatever basis there may be for this distinction in the case of a ticker service with a limited number of subscribers, it would seem highly superficial to make recovery against a newspaper depend on whether or not the reader had purchased the paper and so "contracted" with the publisher. Even if a contract were found, courts would probably be no more willing to say that a newspaper warranted that the material published was correct, or owed a duty to use due care, than they would be to find a duty in tort.
5. For other indications of a reluctance to impose liability, see Green, Note (1931) 21 Ill. L. Rev. 49, 51; Ultramares v. Touche, 255 N. Y. 170, 185, 174 N. E. 441, 446 (1931).
relatively unfettered in their disposition of these suits, for the doctrines
developed to govern the actionability in general of negligent misrepresenta-
tions furnish no guide to the treatment of the instant situation. The propo-
sition that negligent language is never actionable has been almost completely
undermined, but liability is still carefully restricted to those situations in
which the courts can, or will, elicit a "duty." No meaningful generalization
as to when this duty will be found can be drawn from the cases; the danger
of imposing a duty where reliance on the representation might prove un-
limited and the liability consequently overwhelming has assumed at least a
verbal importance, but so flexible a criterion invites manipulation. Indeed
the doctrinal basis for imposing liability in this field enables courts, if so
inclined, to impose liability for some types of newspaper misstatements but
not for others. Thus the court in the nervous shock case rested its refusal
to recognize a duty on the unforeseeability of unreasonable risk of harm to
a plaintiff injured through such an unusual sequence of events; it did not say
that a newspaper would never be under a duty to prevent misstate-
ments. And in many states this type of misstatement by a newspaper
would never give rise to liability, for injuries resulting through nervous


7. The concept of duty in these cases is that articulated by Justice Cardozo in Palsgraf v. Long Island R.R., 248 N. Y. 339, 162 N. E. 99 (1928).

8. A duty has been found in the relationship of the issuer of a certificate or abstract to any party to whom he directly delivers it and whom he specifically knows will rely upon it: Glanzer v. Shepard, 233 N. Y. 236, 135 N. E. 275 (1922); Anderson v. Spriestersbach, 69 Wash. 393, 125 Pac. 166 (1912); a prospective bailee to his bailor: International Prod. Co. v. Erie R. R., 244 N. Y. 331, 155 N. E. 662 (1927); a trustee to his cestui: Doyle v. Chatham & F. N. Bank, 253 N. Y. 369, 171 N. E. 574 (1930); a custodian of municipal records to purchasers of Realty: Mulroy v. Wright, 185 Minn. 84, 240 N. W. 116 (1931); cf. telegraph company to sendee: Comment (1937) 37 COLUM. L. REV. 980, n. 1. It has not been found in the relationship of the issuer of a certificate or abstract to anyone likely to rely on it: National Savings Bank v. Ward, 100 U. S. 195 (1879), National Steel and Iron Co. v. Hunt, 312 Ill. 245, 143 N. E. 833 (1924), Ultramares v. Touche, 255 N. Y. 170, 174 N. E. 441 (1931); the purchaser of a draft to the drawee: Courteen Seed Co. v. Hong Kong & S. B. Co., 245 N. Y. 377, 157 N. E. 272 (1927).


10. Curry v. Journal Pub. Co., 68 P. (2d) 168, 174 (N. M. 1937). The court stated that there was no appreciable risk that the death of a 70-year old father would so shock the son and particularly the daughter-in-law. See RESTATEMENT, TORTS (1934) §312, Comments b, c, §313. When a sendee of a telegram suffers mental anguish because he is erroneously led to believe a person dead, recovery is not allowed unless the company had notice of the sendee's interest. (1937) 46 YALE L. J. 170.

11. "The wrong, if any, was done to" the man whose death was erroneously reported. Curry v. Journal Pub. Co., 68 P. (2d) 168, 174 (N. M. 1937). The court in the MacKown case relied in part on cases holding that no action lies for injurious reliance on advice offered by friends and neighbors; but this doctrine is inept when advice is offered by an agency with the prestige and authority of a newspaper.
shock, particularly those caused by fear of harm to a third person, are not redressable.\textsuperscript{12} It might be easier to find a duty by framing the action in deceit, as the duty in deceit extends to all whom defendant might reasonably expect to rely on his representations.\textsuperscript{13} In such an action, however, it would be necessary to meet the additional requirement of scienter.\textsuperscript{14} While many courts have applied various scienter formulas which virtually imposed liability for proof merely of negligence,\textsuperscript{15} and a few have gone so far as to hold that the proof of negligence was sufficient,\textsuperscript{10} these developments have been confined entirely to commercial transactions where benefit to the misrepresentor is induced.\textsuperscript{27}

Even if these difficulties could be overcome, plaintiff, whatever the theory of his complaint, would still be required to show negligence. Since the newspaper is ordinarily under the exclusive control of the publisher and since knowledge of the circumstances causing the misstatement is beyond reach of the plaintiff, the doctrine of \textit{res ipsa loquitur} might be invoked. But that doctrine is said to apply only when the circumstances causing harm do not ordinarily occur unless someone was negligent.\textsuperscript{18} And the frequency of error

\begin{itemize}
  \item 13. 2 COOLEY, TORTS (4th ed. 1932) § 358; HARPER, TORTS (1933) § 218. That the duty in deceit is broader than the duty in actions based on negligence is clearly indicated in Ultramares v. Touche, 255 N. Y. 170, 174 N. E. 441 (1931). In that case public accountants who had certified a false balance sheet were held liable in deceit, but not in negligent misrepresentation, to creditors and investors to whom their employer exhibited the certificate.
  \item 14. HARPER, TORTS (1933) § 221.
  \item 16. Seale v. Baker, 70 Tex. 283, 7 S. W. 742 (1888); Giddings & Giddings v. Baker, 80 Tex. 308, 16 S. W. 33 (1891) (justified by abolition of forms of action). Negligence principles are evidently also applied in three states under statutes providing that an action for deceit will lie for "the assertion as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true." CAL. CIV. CODE (Deering, 1937) § 1710, Washington Lumber & M. Co. v. McGuire, 213 Cal. 13, 1 P. (2d) 437 (1931); MONT. REV. CODE (Anderson & McFarland, 1935) § 7575; N. D. COMP. LAWS ANN. (1913) § 5943. See Roper v. Noel, 32 S. D. 405, 143 N. W. 130 (1913).
  \item 17. See cases cited supra note 15.
  \item 18. HARPER, TORTS (1933) § 77.
\end{itemize}
in newspaper reports probably is the inevitable result of the speed and pressure necessary to the publication of a modern daily. Further difficulty in establishing negligence might be encountered when the misstatements are found in reproductions of press dispatches, since courts are likely to hold that the status of the news service agency is that of an independent contractor for whose mistakes the publisher would not be responsible. Responsibility for printing a false press dispatch might conceivably be founded, however, on negligence for failure to make an independent check.

The flexibility of doctrine in this field should leave the courts free to recognize more important policy considerations and, by adroit use of the duty concept, to impose different standards of liability for different types of misstatement. It would seem imprudent to extend liability for the publication of news stories beyond that already imposed for libel. While the risk of personal injury from misstatements is exceedingly remote in the case of ordinary news items, reliance upon such information as stock market quotations, shipping news, or even an important current event, may be so widespread that the fastening of legal responsibility would increase the risks and expenses of newspaper publishing to an extent entirely out of proportion to the benefits obtained; for time could not be taken to verify news stories without making rapid dissemination of up-to-date news impossible. But speed is not essential in the publication of the advice of various sorts which newspapers dispense, and stricter standards might well be set up for such matters. While faith cannot be placed in such balderdash as racing or market tips, it is reasonable for the reader to expect that no deleterious effects will result from the use of any preparations or remedies recommended in a newspaper article. The infliction of liability in such cases would force the newspaper either to extend to its own columns the elaborate voluntary censorship now frequently exercised over questionable advertisements, or to discontinue publication of such material.


21. The Associated Press is a cooperative organization whose membership consists not of the publishing company but of individuals who are the sole or part owners of newspapers or an executive officer of the publishing company. 1 LAW OF THE ASSOCIATED PRESS (1914) 694, By-Laws, Art. II, Sec. 1.

NOTES

SOME IMPLICATIONS OF THE AIR MAIL ACT OF 1934*

The transportation industry as a whole has proven to be extremely susceptible to the ravages of price wars. Heavy fixed charges occasioned by permanent investment in rights of way and stations, which may not be shifted to less competitive routes, and the impossibility of estimating the cost of carrying any particular item of freight have caused the carriers to transport marginal freight at rates that will produce any residue over and above out-of-pocket costs. The air transport industry would seem to be no exception, for almost half of its total capital is invested in land and permanent improvements. But in view of the fact that passenger and express revenues have constituted only a minor part of the industry's gross income, no ruinous rate wars as to those services have as yet developed. Certain provisions of the Air Mail Act of 1934, however, seem destined to introduce cut rate bidding for the mail contracts, which until recently supplied the major portion of the industry's revenues. This trend is clearly demonstrated by the recent experience of one of the larger lines.

In December of 1935, Transcontinental and Western Air, Incorporated, applied to the Interstate Commerce Commission for permission to institute passenger and express service between Albuquerque, New Mexico, and San Francisco, California, via Winslow, Arizona. The Commission decided that it had jurisdiction to entertain the application, but denied the desired permission on the ground that the contemplated expansion fell within the ban of Section 15 of the Act. This section provides that "no air-mail contractor shall be allowed to maintain passenger and express service off the line of his air-mail route which in any way competes with passenger or express service available upon another air-mail route." The proposed off-line service would have connected at Winslow with T. W. A.'s mail route from Los Angeles.


1. See Fenelon, Railway Economics (1932) c. 10; Locklin, Economics of Transportation (1935) c. 7.


3. As recently as 1932, 80% of the industry's total revenue came from government mail contracts, and only 20% from passenger and express services. Dodd, Financial Policies in the Aviation Industry (1933) 166.


Angeles to New York, thereby giving T. W. A. a transcontinental line from San Francisco to New York. For this reason the Commission decided that the proposed service would compete with passenger travel over United Airline's mail route from San Francisco to New York in spite of the fact that the terminal cities would be the only stops common to both lines. This interpretation of the clause "in any way competes," though warranted by the wording of the Act, will probably have an inhibitive effect upon the development of air transportation. As all of the major mail routes have at least one important city of call in common with nearby paralleling routes, little beneficial expansion in passenger service is possible which would not give the expanding concern two points of call in common with a mail route, thereby making the attempted expansion illegal under the Commission's decision in the instant case. It has been suggested that the result of the Commission's decision is to balk expansion by lines holding mail contracts to the benefit of possible non-mail carriers, which do not come under the restrictions of the Act. But this conclusion overlooks the probability that no air service can be operated properly and profitably on a large scale without the revenues obtained from government mail contracts. Consequently the Commission has placed a real obstacle in the path of air transport development.

These consequences might have been precluded by interpreting the clause "in any way competes" to apply strictly to the off-line service itself and not to the entire service of the carrier made available by the added route. Although this result would strain the meaning of the words, it might be justified in view of the industry's need for expansion to meet growing passenger traffic. Since the purposes of the Act seem to be to eliminate competition costly to the air transport business and to insure competition of a beneficial nature, it is arguable that "in any way competes" means "competes in any way detrimental to the interests of air transportation." Unwarranted duplication of service might amount to detrimental competition whereas development of a shorter, more scenic, or more convenient route might be advantageous both to the industry as a whole and to the public.

8. Id., at 168 (dissenting opinion).
9. See Willebrandt, Federal and State Control of Air Carriers by Certificates of Convenience and Necessity (1932) 3 J. Air L. 159.
10. The Federal Aviation Commission reported that a direct subsidy of sixteen cents a mile would be necessary if the air transportation industry is to meet its costs. That subsidy is now being paid through the mail contracts. SEN. Doc. No. 15, 74th Cong., 1st Sess. (1935) 68. See generally Bennett, Aviation, Its Commercial and Financial Aspects (1929) 37; David, Economics of Air Mail Transportation (1934) 179.
Denied one method of securing the desired terminal, T. W. A. awaited an opportunity to avail itself of the other method of expansion provided by the Act.\textsuperscript{15} On June 9, 1937 the Postmaster General advertised for bids for a contract to carry the mail from Winslow to San Francisco. Despite the fact that a reasonable return would seem to be about twenty-eight cents a mile for a three hundred pound load or fraction thereof,\textsuperscript{16} T. W. A. was so desirous of procuring an entry into San Francisco in order to tap the lucrative transcontinental passenger trade flowing from that city\textsuperscript{17} that it submitted a bid of one mill per mile. The contract was awarded to it as the lowest bidder.\textsuperscript{18} At the termination of the contract period, the service, if satisfactory, will be indefinitely continued on the basis of a reasonable return as determined by the Interstate Commerce Commission.\textsuperscript{19} But for the three year period of the contract T. W. A. must operate on the contract basis and shift the resulting loss to more profitable routes.\textsuperscript{20}

The Act itself provides little protection against unreasonable rate cutting. The Postmaster General is under a mandate to accept the lowest responsible bid,\textsuperscript{21} the final determination of responsibility being in the hands of the Comptroller General.\textsuperscript{22} The Postmaster General may submit any bid to examination by the Interstate Commerce Commission, but that body is limited expressly to deciding whether a bid is excessive.\textsuperscript{23} None of these agencies can apparently raise objections to bids which are far below the level of a reasonable return. However, under similar provisions in the Railroad Mail Act, the Postmaster General refused to accept a low bid which was less than one cent on the ground that it was not a legal bid, acceptance of which is mandatory.\textsuperscript{24} It was argued that the government could not perform its promise since there was no medium of legal tender small enough to pay

\textsuperscript{16} The present average of the rates paid mail contractors is 28 cents a mile. See News-Week, July 4, 1936, p. 24. T.W.A. will receive approximately 2½ cents a trip for carrying mail from which the government may receive up to $288. in postage per trip. News-Week, July 24, 1937, p. 24.
\textsuperscript{17} In 1932 up to fifty passengers a day moved transcontinentally by air from San Francisco while only from six to ten a day made the trip from Los Angeles. See Miller, Inland Transportation (1933) 708.
\textsuperscript{18} N. Y. Times, July 31, 1937, p. 13, col. 8.
\textsuperscript{20} Even when passenger revenues are figured in, it is inevitable that T.W.A. will lose money on the operation for the three year period of the contract. See Transcontinental & Western Air Mail Bid, 223 I.C.C. 281, 284 (1937).
\textsuperscript{22} Ibid.
\textsuperscript{23} 48 Stat. 934, 39 U.S.C. § 469a (e) (1934); Transcontinental & Western Air Mail Bid, 223 I.C.C. 281 (1937); Inter-Island Airways Air Mail Bid, 203 I.C.C. 772 (1934).
\textsuperscript{24} 14 Ops. Att'y Gen. 56 (1872).
that amount. But this contention is unpersuasive. The government is at liberty to provide the proper medium of payment by an act of Congress; and even if the position is maintainable, it would invalidate only bids so infinitesimally low that when multiplied by the base mileage for the contract period of payment, the result would be less than one cent. Bids of zero or even of an affirmative sum payable to the government would present no question of impossibility of performance nor of lack of consideration. A promise to grant the privilege of carrying the mails would seem to be sufficient consideration for a promise to carry the mails and pay a stipulated sum.25

Section 15 of the Act provides the only real possibility of checking rate cutting. By that Section the Interstate Commerce Commission is authorized, upon application by the Postmaster General or any interested air mail contractor, to order an air mail contractor to discontinue all unfair practices which adversely affect the general transport business and the receipts or expenses of another contractor. Doubtless the Commission could find that unreasonably low bids adversely affect the general transport business and the receipts of an interested contractor, but to term mere price cutting, in the absence of accompanying illegalities, an unfair trade practice would amount to a needed but novel extension of that phrase.26 Although the concept of unfair competition or unfair trade practices has broadened greatly in scope since its original application to the deceptive practice of palming off one's goods as those of a competitor,27 some element of fraud and deception,28 or at least an intent to injure competitors29 must generally be coupled with price cutting before that practice will be subject to judicial condemnation. The added element of local price discrimination present in this situation brings T. W. A.'s absurdly low bid close to the borderline of judicially recognized unfair trade practices since it involves an element of restraint of trade. Similar local price discrimination has specifically been denounced when used to exclude or eliminate local concerns in a program of monopoly building.30 But it is questionable whether the Commission

25. In cases of gratuitous agency, bailment, or trust, there is no technical difficulty in finding a consideration if the right to serve was really bargained for. Allowing another to act as a gratuitous agent, is a detriment which will support the agent's promise. 1 Williston, Contracts (2d ed. 1936) § 138.


27. For a discussion of this development, see Rogers, Predatory Price Cutting as Unfair Trade (1913) 27 Harv. L. Rev. 139.


30. United States v. Great Lakes Towing Co., 217 Fed. 656 (N. D. Ohio 1914); see Nims, op. cit. supra note 26, at § 301; (1934) 34 Col. L. Rev. 1566.
would apply the same rationale to the present situation in the absence of any intent to monopolize. Since the concept of unfair competition is recognized as being flexible, it is entirely possible that the recent legislative denunciations of price cutting will cause the judiciary to widen the concept to include that practice alone.

The consequences of the Commission's denial of off-line expansion in the principal case would seem to be two-fold. In the first place, this decision establishes the Postmaster General, through his discretionary power to let new mail contracts, as the ultimate authority over the development of mail carriers, for there is no apparent way to review his exercise of a purely discretionary power. And since a political appointee is more susceptible to the influences of political pressure than is a permanent administrative body such as the Interstate Commerce Commission, expansion under his guidance may follow the lines of political expediency and not economic need. Secondly, the Commission's decision encourages rate cutting among mail carriers. This practice may freeze out small competitors who are unable to meet unreasonably low bids by shifting the resulting loss to other routes. It will also cause a decrease in the revenues of an industry which at present is operating on a marginal basis, and consequently may necessitate a reduction of expenditures on safety devices and new equipment. Since judicial control of the situation seems impossible, the solution appears to be legislation basing the right to expand on an administrative determination of public convenience and necessity instead of competitive bidding for mail contracts.

33. For a general discussion of the difficulties attendant upon any attempted judicial review of an administrative body's purely discretionary act, see DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927) c. III, § 5; FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY (1928) §§ 44 et seq., 146.
35. The Post Office Department has often been charged with using the air mail, and consequently the air transport industry, as a "political football." See 81 Cong. Rec., Aug. 18, 1937, at 11787, 11806; id., Aug. 16, 1937, at 11501; id., July 2, 1937, at 8734; TIME, June 14, 1937, p. 61.
36. Though passenger mileage for the year ending in July, 1937, showed a 9.9% increase over the previous year, the air transport industry nevertheless showed a deficit. See NEWS-WEEK, Aug. 28, 1937, p. 29.
37. There are two bills now before Congress proposing different solutions to the problem of air transport regulation. One [S. 2, H. R. 7273] would give the Interstate Commerce Commission the same control over air transportation which it now exercises over railroads. The other [H. R. 8320] would place the industry under the regulation of the Postmaster General.
NEGOTIABILITY OF TRAVELERS CHECKS*

Although the travelers check has been in use for almost a half century, its precise legal characteristics are as yet largely undetermined.¹ This unique instrument has rarely been the subject of litigation because the issuers consistently have pursued a policy of insuring saleability and negotiability by sustaining losses upon doubtful checks.² This practice, together with extensive advertising of travelers checks,³ has resulted in a widespread acceptance of these instruments in lieu of currency so that the travelers check now boasts a ready negotiability throughout the world.⁴ A recent decision suggests that the custom surrounding travelers checks has ripened into law, and that innocent parties will receive legal protection in accepting them as a medium of exchange. Travelers checks, duly signed by an officer of the American Express Company but with the spaces for signature and countersignature unfilled and with no name inserted after the words, “to the order of,” were stolen from a bank acting as selling agent for the express company. Subsequently, one of the thieves signed and countersigned some of these checks with the same signature, and another bank acquired them in due course. The Supreme Court of Oklahoma, emphasizing the fact that travelers checks pass current as money, granted the cashing bank a recovery upon the checks against the American Express Company. Stating that the bank as a holder in due course could assert a conclusive presumption of a valid delivery under Section 16 of the Negotiable Instruments Law provided the travelers checks were complete instruments at time of theft, the court found that the checks were then complete since they had been signed by an officer of the issuer and nothing remained to be done by the issuer or its agent. Moreover, the rule that a bona fide holder of stolen currency has good title was held applicable on the score that travelers checks, signed and countersigned with the same signature, are functionally the same as currency.⁵


1. Little analysis has been made in the few decided cases. The courts have been satisfied merely to liken the travelers check to a cashier's check [Mellon Nat. Bank v. Citizens Bank & Trust Co. of Camden, Ark., 88 F. (2d) 128 (C. C. A. 8th, 1937)] or to currency [American Express Co. v. Anadarko Bank & Trust Co., 67 P. (2d) 55 (Okla. 1937)], or to find a contract relation between the issuer and the original purchaser [Sullivan v. Knauth, 220 N. Y. 216, 115 N. E. 460 (1917)].


3. The travelers check is represented as a substitute for currency, self-identifying and acceptable everywhere, but, unlike currency, it can be carried without danger of loss in case of theft or misplacement because of the protective device of signature and countersignature.

4. The American Express Company alone does a business of $200,000,000 per year. Communication to the YALE LAW JOURNAL from H. A. Smith, Vice-President and Treasurer, Dec. 3, 1937.

5. American Express Co. v. Anadarko Bank & Trust Co. of Anadarko, 67 P. (2d) 55 (Okla. 1937) (suit was brought by the Express Company to recover the proceeds of other checks issued by the Bank as its selling agent, and the issue was raised by way of counterclaim).
In discussing the question of completeness, the court tacitly assumed that the travelers check\(^6\) fell within the scope of Negotiable Instruments Law,\(^7\) and that it satisfied the prerequisites to negotiability of an instrument specified in Section 1 of the Act. But it is questionable whether a travelers check meets the requirements of that section. At the time of purchase it bears the signatures of an officer of the issuer and of the purchaser, and contains a promise\(^8\) of the issuer to pay "... from ... (its) ... balance ..." a specified sum to the order of an unspecified payee upon countersignature of the instrument. Section 1 of the Act provides that an instrument to be negotiable must contain an unconditional promise or order to pay a specified sum of money, and Section 3 further directs that a promise to pay out of a particular fund is not unconditional. Thus, upon delivery to the original purchaser, the travelers check might be considered non-negotiable, for it bears a promise to pay out of a specified fund conditional upon countersignature of the instrument. However, these arguments are rebuttable. Since it is possible to view the "balance" as being merely indicative of the particular fund from which reimbursement is to be made, the issuer's promise can be considered unconditional within the meaning of Section 3.\(^9\) Nor should the express requirement of a countersignature necessarily render the promise conditional. One authority has advanced the argument that a travelers check is incomplete and inoperative until the countersignature has been properly affixed, and that the promise of the issuer is then uncondi-

6. There are three general types of travelers checks, the A. B. A., the Mellon, and the American Express. For a discussion of the character of each, see WILLOSTON, NEGOTIABLE INSTRUMENTS (1931) 287 et seq.

This note is concerned only with the American Express Company's travelers check, whose form is essentially as follows:

```
U. S. Dollar Travelers Cheque
M 2,986,013
When countersigned below with this signature

AMERICAN EXPRESS COMPANY
(Affiliated with The Chase National Bank, New York)

Pay this cheque from our balance to the order of........................................ $10.00

GEORGE WESTON, Treasurer

Countersign here in presence of person cashing
```

7. See notes 33-35, infra.

8. The American Express Company is both drawer and drawee [see WILLSTON, op. cit. supra note 6, at 291] and therefore it is primarily liable as upon a promissory note. Grand Lodge Knights v. State Bank, 79 Fla. 471, 84 So. 528 (1920); see Daniel, NEGOTIABLE INSTRUMENTS (7th ed. 1933) § 1781.

9. Section 3 of the Negotiable Instruments Law provides that a promise can be unconditional although coupled with "... An indication of a particular fund out of which reimbursement is to be made. ..." It has been suggested that the balance is indicated merely as the source of reimbursement. WILLSTON, op. cit. supra note 6, at 292. Cf. Torpey v. Tebo, 184 Mass. 307, 68 N. E. 223 (1903).
10. WILLISTON, op. cit. supra note 6, at 292. In Sacred Heart Church Bldg. Committee v. Manson, 203 Ala. 255, 82 So. 498 (1919) it was held that negotiability must be determined at time of delivery. If a travelers check is regarded as a bearer instrument (see infra p. 474), the first delivery may be deemed to occur not upon transfer to the original purchaser but upon delivery by the purchaser after the countersignature; but if the purchaser is deemed the payee (see note 19, infra) transfer to him would constitute a delivery.

11. See WILLISTON, op. cit. supra note 6, at 290; TRAVELERS CHEQUES (publication of the American Express Company).


the issuer nor its agent was negligent in handling the instruments, the decision must turn upon the question of whether the instruments were complete at time of theft. The only previous ruling upon this issue is to the effect that although the absence of a date and the lack of a party after the words, "to the order of," might be overlooked because of the peculiar nature of the travelers check, a travelers check was incomplete until the purchaser affixed his signature. This decision seems to rest upon the premise that the original purchaser is the payee, a view apparently taken by a lower New York Court in the only case deciding the issuer's liability to the original purchaser for payment upon a forged countersignature. Acceptance of this premise necessarily frees the issuer from liability, for the absence of a payee at time of theft renders the instrument incomplete, and therefore, Section 15 becomes determinative.

15. It was argued that the selling agent and issuer were negligent [see Brief for Appellees, pp. 58-66, American Express Co. v. Anadarko Bank & Trust Co., 67 P. (2d) 55 (Okla. 1937)] but no such finding was made.

16. City Nat. Bank of Galveston v. American Express Co., 16 S. W. (2d) 273 (Tex. Comm. App. 1929), aff'd, American Express Co. v. Nat. Bank of Galveston, 7 S. W. (2d) 886 (Tex. Civ. App. 1928). For notes on the lower court decision, see (1928) 13 MINN. L. REV. 146; (1928) 7 TEX. L. REV. 174. In the principal case the court held the instruments complete because issuer and agent had nothing more to do after the signing by the issuer's officer. This reasoning seems incorrect in view of the fact that the drawer of an ordinary check, signed by himself but left blank in all other respects, and intended to be delivered in that form, would apparently not be liable to a holder in due course who obtained the instrument subsequent to a theft of it from the drawer. NEGOTIABLE INSTRUMENTS LAW § 15. That nothing more remained to be done by the drawer would not affect the result.

17. The court's express statement that the original purchaser's signature would render the instrument complete appears to preclude the analysis suggested by Williston [see supra note 10] under which both signature and countersignature are prerequisites to completeness.


19. The original purchaser might be considered the payee to whose order the check is drawn, for the words, "order" or "bearer", are not indispensable under Section 1(4) of the Act which requires an instrument to be payable to order or bearer. Nelson v. Citizens' Bank, 191 App. Div. 19, 180 N. Y. Supp. 747 (1st Dep't 1920); Felton v. Commercial Nat. Bank, 39 Ohio App. 24, 177 N. E. 52 (1930). His countersignature could then be considered an indorsement in blank within the meaning of Section 63. The blank space following the phrase, "to the order of," might be considered solely for the convenience of a party acquiring the check by negotiation who wishes to insert his name for purposes of protection in case of subsequent loss or theft, for the instructions of the American Express Company state that when a holder seeks to cash a check which has already been signed and countersigned, he is to indorse on the back of the instrument and to satisfy the presentee of his identity. See Brief for Appellants, pp. 7, 9, American Express Co. v. Anadarko Bank & Trust Co., 67 P. (2d) 55 (Okla. 1937).

If attention is focused upon the dual aspect of the travelers check, as comprising both a letter of credit and a draft, the instrument more readily can be regarded complete the moment it is signed by an officer of the issuer. Under this interpretation, the signature and countersignature are not acts necessary to complete the draft, but are associated with the letter of credit aspect, serving to establish the authority of the original purchaser to deliver the draft and thereby to give operative effect to the promise of the issuer. However, the absence of a payee upon the draft at the time of theft would render it incomplete unless reliance is placed upon the fact that the checks usually return to the issuer, and are honored by it with the space following the words, "to the order of," left blank, and thus seem to pass as bearer instruments. In other situations, the travelers check has been treated as a bearer instrument. A theft of blank travelers checks is a loss within the meaning of a blanket policy of insurance covering loss of bearer securities, and one who steals blank travelers checks obtains more than mere scraps of paper and can be convicted for embezzlement. The custom of leaving the space for the payee blank, together with these decisions, would seem to support the theory that there is a complete bearer draft when the officer of the issuer attaches his signature, and that a subsequent holder may claim that the draft is regular upon its face within Section 52 if the signature and countersignature correspond. If this is so, under Section 16 of the Act the absence of delivery would be immaterial, for the instrument would

21. Williston has suggested an analysis in reference to the Mellon type of travelers check by which the letter of credit aspect constitutes a promise in advance to accept drafts drawn against that letter of credit in the fashion indicated, namely, by countersigning the instrument. Williston, op. cit. supra note 6, at 290. Under this theory, since the purchaser is the drawer, the draft would necessarily be incomplete until his countersignature was affixed. However, this analysis would not seem as readily applicable to the American Express type of check which is in the form of an order upon itself to pay, thus constituting the company both drawer and drawee.


23. It is conservatively estimated that over 50% of the checks return in this form. Communication to the Yale Law Journal from the comptroller's office of the American Express Company, Dec. 27, 1937.


26. In American Express Company v. Nat. Bank of Galveston, 7 S.W. (2d) 886 (Tex. Civ. App. 1928), it was held that the absence of a payee after the phrase, "to the order of," would prevent the travelers check from being complete and regular on its face within § 52. The appellate court, in affirming this judgment, conceded, however, that the instrument would satisfy § 52 though it lacked a payee. City Nat. Bank of Galveston v. American Express Company, 16 S. W. (2d) 278 (Tex. Comm. Appeals 1929). However, under the bearer instrument theory, no reliance can be placed upon § 23 to cut off recovery against the issuer by a bona fide holder acquiring through a forged countersignature, and if the instrument is cleverly forged, it might be deemed complete and regular on its face within § 52. Hence the issuer might be subjected to a double liability, i.e., not only to the holder on the bearer draft but also to the original purchaser on the letter of credit contract.
be complete at time of theft. It is probably a departure from the provisions of the Negotiable Instruments Law to determine an instrument's characteristics by resort to the custom of treating it as a bearer instrument rather than by examination of the face of the instrument, but in other situations courts have not been reluctant to stretch the provisions of the Act in order to achieve a desired result.

A more realistic and less technical approach recognizes the fact that the travelers check has acquired its negotiable characteristics by established custom rather than by virtue of conformity with the provisions of the Negotiable Instruments Law. When the Act was drafted, the travelers check was in its infancy, and may well have been without the scope of the Act. Despite the sweeping language of Section 1, which would seem to deny negotiability to any instrument not complying with its requirements, bills of lading, warehouse receipts, and stock certificates—though not within the purview of the Act—have acquired certain features of negotiable instruments. Thus it is arguable that the Act is not all inclusive, and that Section 196 authorizes an application of the "law merchant" to the travelers check. The "law merchant", or custom, surrounding this unique instrument is to the effect that any party who cashes a check upon which there is an identity of signature.


29. The travelers check made its appearance in 1891, five years prior to the acceptance of the Negotiable Instruments Law by the National Conference of Commissioners on Uniform State Laws, but not until after the turn of the century was there circulation on a large scale. Travelers Cheques, supra note 11.

30. The intended inclusiveness of the Act can be ascertained only from its words, for the general discussion in committee and before the general council is not available. Steffen and Russell, supra note 28, at 800, n. 6.

31. Section 1 provides, "An instrument to be negotiable must conform to the following requirements . . . ."

32. Steffen and Russell, supra note 28, at 800; Comment (1925) 74 U. of Pa. L. Rev. 727, 730.


34. "In any case not provided for in this act the rules of [law and equity including] the law merchant shall govern." Cf. Commercial Savings Bank v. Schaffer, 190 Iowa 1088, 181 N. W. 492 (1921) (note which failed to meet "sum certain" requirement of the Iowa Act held negotiable under the law merchant). Section 196 has been utilized mainly in questions of suretyship. See, e.g., Lindsey v. Phillips, 120 Okla. 3, 249 Pac. 917 (1926); Clifford v. West Hartford Creamery Co., 103 Vt. 229, 153 Atl. 205 (1931). In England, any instrument recognized as negotiable by merchants is treated as such. Bechuanaland Co. v. London Bank [1898] 2 Q. B. 658; Edelstein v. Schuler [1902] 2 K. B. 144. But verbally, at least, the England Bills of Exchange Act differs from the Negotiable Instruments law. The former is expressly limited to bills, notes, and checks. 45 & 46 Vict., c. 61.
In spite of the reasonableness of this non-conceptual attack, however, it is generally conceded that an instrument bearing an executory promise to pay in money is governed by the Negotiable Instruments Law, and that an instrument which fails to conform to the requirements of Section 1 of the Act cannot become negotiable by the "law merchant" or business practice, irrespective of the policy arguments for a finding of negotiability.

In any event, the result achieved in the principal case seems desirable. Since the loss must fall upon one of two innocent parties, the issuer, who is the only party in a position to guard against theft, well might be made to shoulder it. To require a bona fide purchaser, acting upon the representation of the issuer, to ascertain not only that signature and countersignature are identical but also that the original signature was that of a proper purchaser in the first instance, would seem to throw the risk upon the party not in a position either to guard or to insure against the loss. Not only may the issuer take precautions against theft, but it also can contract with its selling agent for indemnification against any loss resulting from theft which occurs after the latter has obtained possession of the instrument. In turn, the selling agent can shift the risk upon an insurance company, for the usual blanket policy against loss occasioned by theft of bearer securities covers a theft of blank travelers checks. In the last analysis, the instant decision facilitates the development of the travelers check as a generally accepted medium of exchange and therefore would seem to redound to the benefit of the issuer.


38. In the principal case it was suggested that the issuer, through its selling agent, could attest to the signature of the original purchaser. American Express Co. v. Anadarko Bank & Trust Co., 67 P. (2d) 55, 58 (Okl. 1937). But the difficulty of educating the public to this new technique, the expense it would entail, and the possibility of duplicating the attestation, render this solution impracticable.


40. See note 24, supra.
NOTES

Power of Surrogate to Raise Objection to Administratrix' Claim*

In filing her account an administratrix submitted a personal claim against the estate. The sole proof offered was the itemized statement of the claim in the account and a verifying affidavit by the administratrix. Although the claim was not contested by any interested parties, it was disallowed by the surrogate. The dual position of the administratrix was held to necessitate a departure from the rule that testimony relating to personal transactions with the decedent, though inadmissible by statute, will be considered if not contested by any interested party. Since the administratrix failed to raise the objection against her own claim, the surrogate assumed the duty of doing so himself. Moreover, if the administratrix' oral testimony would be inadmissible, certainly her account and supporting affidavit were not only inadmissible but an inadequate proof of her claim.

Perhaps the most interesting question raised by the principal case is the extent of the power of the surrogate to act on his own motion. Within its statutory jurisdiction over all matters relating to the affairs of decedents, a New York surrogate's court apparently can exercise the same powers as a court of general jurisdiction. And one of the powers of a judge of a court of general jurisdiction is his power to act on his own motion under certain circumstances, provided his action does not unfairly prejudice any party. Thus, for the purpose of clarifying the evidence or supplying necessary facts omitted by the parties, he may interrogate witnesses, call new ones, or reopen the case and recall witnesses, even against the will of the parties; and although evidence received without objection must generally be considered, the judge may on his own motion exclude or strike out evidence which is clearly illegal and against public policy. Critics of the existing

1. Communications to the YALE LAW JOURNAL from Tanner, Silcocks & Friend, attorneys for the administratrix, Nov. 4 and Nov. 18, 1937.
2. N. Y. CIVIL PRACTICE ACT § 347.
4. N. Y. SURROGATE'S COURT ACT § 40.
5. N. Y. SURROGATE'S COURT ACT §§ 20(6) (11), 40, 69, 71; see Twyeffort, NEW YORK ESTATES AND SURROGATES (2d ed. 1924) 1312 et seq.
8. Laugharn v. Chamberlain, 139 Cal. App. 601, 34 P. (2d) 756 (1934); Monfort v. Kowland, 38 N. J. Eq. 181 (Ch. 1884) (survivor testimony); see WIGMORE, EVIDENCE (2d ed. 1923) § 18.
tendency to restrict the role of the judge to that of a passive umpire have advocated that he be allowed more freedom to function in this manner. This recommendation seems particularly appropriate in relation to a New York surrogate, who is viewed not merely as a presiding official but also as a third party to the proceeding, a guardian of the estate, and a supervisor of the conduct of executors and administrators. Since the proceedings before him are largely of an administrative as well as judicial nature, the surrogate should participate actively in the interests of a more efficient and flexible procedure.

The surrogate undoubtedly has the power to exclude the testimony of the administratrix in the principal case on the ground of statutory inadmissibility. But the dictum that he must so act, even in the absence of any objection, seems unnecessarily strong. The so-called "dead man statutes," based as they are upon an apprehension that the facts will be misrepresented by one interested party while the counterbalancing testimony of the other party to the transaction is unavailable because of his death, are to be criticized as contrary to the modern tendency to allow interest to affect the credibility but not the admissibility of testimony. Rather than use his power to exclude the inadmissible evidence, the surrogate might well exercise his discretion to admit and hear the evidence, if no objection is raised, and thereby take advantage of the latitude in admission of evidence allowed a judge as trier of facts. An honest claimant might then have the opportunity to correct his own errors of law, or where the jury has misunderstood its instructions or rendered a verdict defective or unresponsive to the issues. Ellis v. Ginsburg, 163 Mass. 143, 39 N. E. 800 (1895); see 2 Early, Thompson on Trials (2d ed. 1912) § 2711. Other instances of a court acting on its own motion: Pitt v. Abrams, 103 Fla. 1022, 139 So. 152 (1931) (directing verdict); People ex rel. Carr v. Murray, 357 Ill. 326, 192 N. E. 198 (1934) (statute declared unconstitutional—an unusual case).

The judge also has discretion to order a new trial of his own motion, in order to correct his own errors of law, or where the jury has misunderstood its instructions or rendered a verdict defective or unresponsive to the issues. Ellis v. Ginsburg, 163 Mass. 143, 39 N. E. 800 (1895); see 2 Early, Thompson on Trials (2d ed. 1912) § 2711. Other instances of a court acting on its own motion: Pitt v. Abrams, 103 Fla. 1022, 139 So. 152 (1931) (directing verdict); People ex rel. Carr v. Murray, 357 Ill. 326, 192 N. E. 198 (1934) (statute declared unconstitutional—an unusual case).


14. Since the rules of evidence were evolved for jury trials, there is not much point in applying them strictly to a non-jury tribunal. See Wigmore, Evidence (2d ed. 1923) § 4b. It has been argued that the judge must hear all the evidence anyway in deciding on its admissibility. See Comment (1928) 42 Harv. L. Rev. 258. This latitude in the admission of evidence is aided by the practice of appellate courts in presuming, in the
of establishing his claim by introducing corroborating evidence, the surrogate deciding on the credibility and sufficiency of the sum total of the evidence.\textsuperscript{15}

But the direct holding of the case seems sound. To establish his personal claim against the estate, an executor or administrator has the burden of proving it to the surrogate by clear and convincing proof.\textsuperscript{16} His unsupported testimony as to transactions with the decedent is insufficient to sustain this burden.\textsuperscript{17} An affidavit unsupported by corroboration testimony, therefore, is even more clearly insufficient proof,\textsuperscript{18} for it affords no opportunity to the surrogate to pass judgment upon the witness's credibility by observing his demeanor on the stand and by cross-questioning. The surrogate's vigilance against unfounded claims is particularly necessary in a situation of this sort, where no adversely interested parties appear and where there is a conflict between the administratrix' personal interests and her fiduciary duties.\textsuperscript{19}

absence of a clear showing to the contrary, that incompetent evidence was discounted by the trial judge, even though admitted, where there was other competent evidence to support the decision. Southern Pac. Co. v. Kalbaugh, 18 F. (2d) 837 (C. C. A. 9th, 1927); First Baptist Church v. Connor, 30 Ariz. 234, 245 Pac. 932 (1926).

15. In the following cases there was sufficient corroborating evidence to prove the claim: In Matter of Mower's Appeal, 48 Mich. 441 (1882); In re Brown's Estate, 60 Misc. 35, 112 N. Y. Supp. 599 (Surr. Ct. 1908); In re Knibbs' Estate, 103 App. Div. 134, 96 N. Y. Supp. 40 (3d Dep't 1905).

The claim in the principal case was allowed on a resubmission when corroborating evidence was produced. Communications to the Yale Law Journal from Tanner, Sillcocks & Friend, attorneys for the administratrix, Nov. 4 and Nov. 18, 1937.


18. Williams v. Purdy, 6 Paige 166 (N. Y. Ch. 1836); Underhill v. Newburger, 4 Redf. 499 (N. Y. Surr. Ct. 1881); Matter of Smith, 75 App. Div. 339, 78 N. Y. Supp. 130 (2d Dep't 1902). \textit{Contra:} Matter of Griffin, 210 App. Div. 564, 206 N. Y. Supp. 581 (3d Dep't 1924). Section 76 of the Surrogate's Court Act, to the effect that except as otherwise provided by law, a petition, affidavit, or account filed in a special proceeding shall be due proof of the facts therein stated, unless controverted by answer, objection, or other proof, must be interpreted in the light of Section 212, which requires that a personal representative prove to the surrogate his claim against the estate.

The same strictness should be, and usually is, extended to cases where the personal representative fails to raise adequate defense against the claim of a third party, either through favor or actual collusion.\textsuperscript{20}

\textbf{Relative Priorities of Insolvent Guaranty Company and Participation Certificate Holders*}

A mortgage guaranty company acquired a single bond and mortgage, retained a part interest for its own investment, and issued and guaranteed a series of participation certificates representing assignments of shares in the balance. When the company subsequently became insolvent, the proceeds of the mortgage security proved insufficient for full payment to the holders of the certificates. The liquidator of the mortgage company, as holder of the company's retained interest, claimed a right to share in the distribution of the proceeds \textit{pro rata} with the holders of the guaranteed certificates. The Court of Appeals, however, affirming the decision below,\textsuperscript{1} held that the certificate holders had a prior right to payment out of the proceeds of the mortgage.\textsuperscript{2} The Court found that the "special equities" arising from the guaranty by the assignor raised a presumption of intent to prefer the assignees and that, in the absence of an actual expression of intent to the contrary, the insolvency of the guarantor could not deprive the assignees of their priority. Moreover, this presumed intent was reinforced by a finding of actual intent implied in a clause of the certificate giving the company the right to retain out of the proceeds of the mortgage "so much as may remain \textit{after} paying to the holder"\textsuperscript{3} of the certificate whatever may be due him. Another clause of the certificate, providing that "the share assigned by this certificate shall be a \textit{coordinate lien} with all other certificates of said mortgage now or hereafter issued and \textit{any share retained by the company},"\textsuperscript{4} was held only to render "less clear" the inference that the parties contemplated preferred treatment to the certificate holders.

The established rule has been that if there are any contractual provisions in the certificate bearing on the relative priorities of the claims of the mortgage company, as assignor of part interests in a mortgage bond, and of the

\begin{itemize}
\item \textsuperscript{20} In \textit{re} O'Rourke, 12 Misc. 248, 34 N. Y. Supp. 45 (Surr. Ct. 1895); In \textit{re} Gellis' Estate, 141 Misc. 432, 252 N. Y. Supp. 725 (Surr. Ct. 1931).
\item \textsuperscript{*}In \textit{re} Title and Mortgage Guaranty Co. of Sullivan County, 275 N. Y. 347, 9 N. E. (2d) 957 (1937).
\item In \textit{re} Title and Mortgage Guaranty Co. of Sullivan County, 249 App. Div. 484, 293 N. Y. Supp. 4 (3d Dep't 1937).
\item In \textit{re} Title and Mortgage Guaranty Co. of Sullivan County, 275 N. Y. 347, 9 N. E. (2d) 957 (1937).
\item Italics supplied by the Court in quoting from the certificate.
\item Italics supplied by the Court in quoting from the certificate.
\end{itemize}
certificate holders, as assignees, they are controlling. Whatever determination of the actual intent of the parties is to be gathered from the terms of the certificate involved in the principal case would seem to be in favor of pro rata distribution. The New York Supreme Court, interpreting the provisions of a similar certificate, had earlier held that the clause comparable to the one relied on by the Court in the instant case "was not intended to cover the rights of the company as owner of certificates, but merely its rights irrespective of its ownership of any certificates." It would seem that this so-called "residuum clause" was intended to protect the rights of the company in the event that it pursued the customary practice of paying interest and principal due the guaranteed certificate holders before receiving payment from the mortgagor. This provision, therefore, should have no bearing upon the question of priorities upon insolvency of the company. The "coordinate lien" clause should control that issue, for unless this clause is construed to place the company's share of the bond and mortgage on a parity with all others, it is rendered "superfluous and meaningless".

If the terms of the certificate do not provide a clear and unambiguous solution of the problem, as is implied by the Court's inquiry into presumed intent, a pro rata distribution of the proceeds of insufficient security would seem the most equitable procedure. Since the assignor has power to issue other certificates of coordinate lien up to the amount of the principal sum secured by the mortgage, the assignee cannot reasonably expect to be secured


6. Matter of Lawyers Mortgage Co. (Simon Borg), 151 Misc. 744, 272 N. Y. Supp. 390 (Sup. Ct. 1934); aff'd without opinion, 242 App. Div. 617, 271 N. Y. Supp. 1074 (1934), leave to appeal denied, 265 N. Y. 508, 193 N. E. 294 (1934). Under the terms of the certificate the company had the right to retain any excess of interest above the guaranteed rate and likewise "the right to retain out of the proceeds of the collection of said bond and mortgage so much as may remain after paying whatever may be due to the assured on principal and interest on this certificate." 151 Misc. 744, at 745, 272 N. Y. Supp. 390, at 391.


by the underlying mortgage beyond the amount of his *pro rata* share of the proceeds.\(^{10}\) When the assignment is not accompanied by the assignor's guaranty, the assignor and assignees share *pro rata*.\(^{11}\) The addition of a guaranty should alter the situation only to the extent that it gives the certificate holders a right to file a claim against the guarantor on a parity with the unsecured creditors.\(^{12}\) When the assignor-guarantor is solvent, however, the assignees may be accorded priority to avoid circuity of action.\(^{13}\) This follows from the fact that if a *pro rata* share of the mortgage proceeds is insufficient to pay the assignee in full, the guaranty requires the guarantor to make up the deficiency, and this—by hypothesis—he is in a position to do. Priority of distribution to the assignee in this situation is simply a procedural device for enforcing the obligation of the solvent guarantor without the inconveniences of a separate suit. But where the assignor is insolvent, so that the question becomes one of substantive rights, granting to the assignee a priority for which he has not contracted has an undesirable impact upon two interested groups. First, it gives the assignee a preference at the expense of the unsecured creditors. Secondly, and more important, since the amount of unsecured creditors' claims is usually comparatively small,\(^{14}\) the ruling has the effect of preferring the holders of certificates in a single bond and mortgage in which the mortgage company happened to hold a large share at the time of liquidation over the holders of certificates in other bonds and

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10. An equitable assignment of a *pro rata* share of the mortgage is held to follow the assignment of part of the bond or notes. See Domeyer v. O'Connell, 364 Ill. 467, 477, 4 N. E. (2d) 830, 835 (1936); Title Guarantee and Trust Co. v. Mortgage Commission, 273 N. Y. 415, 422, 7 N. E. (2d) 841, 844 (1937). The assignees of part interests in the bond or notes secured by a single mortgage, as between themselves, share *pro rata* in the proceeds. Conway v. Yadon, 132 Okla. 36, 269 Pac. 309 (1928), (1928) 77 U. of PA. L. Rev. 266.


12. For purposes of computing claims to be allowed in liquidation of a mortgage guaranty company, a holder of participation certificates based upon a single mortgage has been treated not as an owner of a part interest in the underlying mortgage asserting a claim against the company as guarantor, but as a secured creditor of the company; and, as such, has been required to deduct the value of his security, i.e., his interest in the mortgage. In re New York Title and Mortgage Co., 160 Misc. 67, 80, 289 N. Y. Supp. 771, 786 (Sup. Ct. 1936), aff'd, 251 App. Div. 415, 297 N. Y. Supp. 52 (1st Dep't 1937). But cf. Kelly v. Middlesex Title Guarantee and Trust Co., 115 N. J. Eq. 592, 600, 171 Atl. 823, 827 (Ch. 1934), aff'd, 116 N. J. Eq. 574, 174 Atl. 706 (1934).


mortgages in which the company held a smaller share. Since the purchasers of guaranteed mortgage participation certificates relied not so much on the worth of the mortgage security as on the credit standing of the company, and since a substantial part of the company's assets consisted of retained or reacquired shares, the certificate holders should have equal rights of satisfaction from all the assets of the insolvent company for their deficiency claims remaining after receipt of their pro rata shares of the mortgage securities.

INTRA-UNION DISPUTES CONCERNING UNION FUNDS*

ALTHOUGH conflicts within the labor movement have presented problems of increasing public importance during the last few years, courts have been reluctant to take jurisdiction over intra-union disputes. Members are required to exhaust their administrative remedies within the union before applying to the courts unless pursuit of these remedies would be clearly futile. The applicant for relief also must show that his property rights have been affected, but since the term "property right" may comprise any of the numerous rights and privileges incidental to membership in a union, this requirement can seldom be invoked to bar resort to the courts. Once jurisdiction of the issues has been established, courts commonly regard constitution, charter, and by-law provisions as a contract which defines the legal relations of members and officials. Thus, action authorized under union rules will generally be enforced, but courts do not feel bound by the terms of clearly unreasonable constitutional provisions. Such constitutional mandates...

15. Section 173 of the N. Y. INSURANCE LAW requires a "guaranty fund" equal to two-thirds of the company's capital stock, in which the guaranty holders are given priority over other creditors. Section 173, as amended by N. Y. LAWS 1933, c. 318, allowed the company to invest this "guaranty fund" in retained shares of mortgage bonds. As to the retained shares included in such a "guaranty fund", in which the general creditors would not be likely to have an interest because of the vast amount of outstanding guarantees, the decision in the instant case emphasizes the inequalities between certificate holders. But since the companies did not segregate the "guaranty fund" from the rest of their assets [ALGER, MORTGAGE COMPANIES INVESTIGATION REPORT (1934) 18 et seq., 131], it is doubtful whether the courts will allow the guaranty holders a preference over the unsecured creditors.


17. Retained or repurchased shares evidently made up a large part of the companies' assets, which consisted mainly of mortgage bonds and real estate. See Alger, op. cit. supra note 15, at 15 et seq.

*Low v. Harris, 90 F. (2d) 783 (C. C. A. 7th, 1937).


2. For a thorough treatment of the principles controlling judicial review of intra-union disputes discussed in the text, see Comment (1936) 45 YALE L. J. 1248, 1260 et seq.
will either be disregarded entirely, or concepts of due process and natural justice will be implied. Since union regulations rarely provide for every dispute which may arise, and since even those rules which do apply may on occasion be ignored, the result is that courts exercise a considerable discretion in their determination of members' rights and ordinarily decide individual cases according to the particular equities involved.

Illustrative of this judicial discretion are the cases involving allocation of the funds of a local union which dissolves or otherwise severs connections with the parent body. Resort to the courts may always be had in these cases, since property interests are clearly involved, but difficulties are often encountered in determining what factors should control the ultimate disposition of the fund. Thus, in a recent case, members present at a special meeting of a United Mine Workers local voted unanimously to sever relations with the U. M. W. and affiliate with a rival union, the Progressive Miners. Shortly thereafter fifteen members who had not attended the meeting regained the charter and reorganized the local. Constitution, charter, and by-law provisions directed that on disbandment or revocation of a local's charter its property should be taken over by the parent, that funds should in no case be divided among the members or donated to an unauthorized cause, and that seven members should constitute a quorum. The Circuit Court of Appeals for the Seventh Circuit affirmed a decree awarding the funds to the reorganized U. M. W. local, on the grounds that the U. M. W. local had not been dissolved and that no valid transfer or distribution of the local funds was possible under the union constitution and by-laws and in view of the general nature of the union organization. 3

Union constitutions typically provide that the property of a local must be forfeited to the parent in case of dissolution, suspension, or secession of the local. 4 Such provisions have generally been recognized as valid and in proper cases will be enforced, 5 but the courts have been ingenious in devising methods of avoiding their effect. Like other forfeiture provisions, they are

4. In the following cases typical forfeiture provisions were involved, applicable to various types of situations, as indicated: Scott v. Donahue, 93 Cal. App. 126, 269 Pac. 455 (1928) (voluntary surrender of charter, or reclamation by president of parent association); McCarty v. Cavanaugh, 224 Mass. 521, 113 N. E. 271 (1916) (disbandment); Tiffany v. Mooney, 263 Mass. 264, 160 N. E. 808 (1928) (dissolution or forfeiture of charter); Donovan v. Danielson, 271 Mass. 267, 171 N. E. 823 (1930) (secession). Many of the cases involving disposition of local funds have concerned voluntary, or unincorporated non-profit associations, but the same legal concepts are applicable to these associations and to labor unions. See Wrightington, UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS (2d ed. 1923) 288; Chaee, The Internal Affairs of Associations Not For Profit (1930) 43 Harv. L. Rev. 993, 1001, 1016, 1021.
always strictly construed, and they have been held not to apply when the courts regard them as unreasonable *per se* or as operating unfairly.\(^6\) Thus, the forfeiture provisions were not enforced when the funds were collected for a purely local purpose,\(^7\) where the procedure for suspension was not properly followed,\(^8\) where a specified contingency had not arisen,\(^9\) and where the local had seceded unanimously and continued its existence as an entity.\(^10\) Moreover, courts sometimes imply terms requiring notice, a hearing, and the right to appeal before a local can be suspended by the parent, and hold ineffective a suspension which has not complied with these terms.\(^11\)

When a constitution contains no forfeiture provision or where the provision has been declared inapplicable, the courts are left entirely to the expediencies of the particular case. In these instances, several factors seem to be of controlling importance. Perhaps the most significant of these is the purpose for which the funds were contributed to the local body. If they were collected for general association purposes or for the purposes of a local as affiliated with the parent, they will usually be awarded to the parent or to the loyal remnant of the local, and the majority of the local membership will not be allowed to withdraw them or transfer them to a rival organization.\(^12\) But if the funds are considered as a trust for the beneficial or charitable use of the local organization, they will ordinarily be awarded to whichever party — parent, loyal minority, or withdrawing group — can best apply them to the purposes for which they were designed.\(^13\) A second factor is

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6. Swaine v. Miller, 72 Mo. App. 446 (1897) (by-law allowing suspension and interference with property rights of local without notice or hearing); Donovan v. Danielson, 271 Mass. 267, 171 N. E. 823 (1930); Grand Court v. Court Germania, 192 Mich. 380, 158 N. W. 832 (1916). In these cases the forfeiture would have diverted purely local funds from their purpose. Some courts have refused to admit the validity of forfeiture provisions and have refused to enforce them as against public policy. Goodman v. Jedidjah Lodge, 67 Md. 117, 9 Atl. 13 (1887); Vicksburg Lodge v. Grand Lodge, 116 Miss. 214, 76 So. 572 (1917); Austin v. Searing, 16 N. Y. 112 (1857).


13. Donovan v. Danielson, 271 Mass. 267, 171 N. E. 823 (1930) (to seceding group); Schubert Lodge v. Schubert Verein, 56 N. J. Eq. 78, 38 Atl. 347 (Ch. 1897) (to loyal minority); Shipwrights', Joiners' & Calkers' Ass'n, Local No. 2 v. Mitchell, 60 Wash. 529, 111 Pac. 780 (1910) (to seceding local). Where the funds are awarded
the nature of the severance between the parent and the withdrawing group. When a majority of the local secedes, the funds are generally given to the minority continuing the former branch. But when secession is unanimous, or where the local is suspended by act of the parent, the funds are often awarded to the seceding group, and, a fortiori, this is true when the action of the parent was arbitrary. A valid dissolution of the local is an infrequent occurrence, since it usually requires a unanimous vote of the members present upon due notice of the meeting, and can be blocked by a constitutional quorum, whether present or not; when it occurs, however, the funds cannot be distributed among the members, but must be held in trust by the parent organization which can best effectuate the intent of the parties by whom they were contributed. A third consideration is the purpose of the secession. If the local joins a rival union, the property may be retained by the parent or by the minority continuing the local. But if there is a split in the parent organization and the local adheres to one faction, it will probably be permitted to retain its property as against the claim of the other faction. A final factor is the character of the local branch. If the branch is clearly autonomous and continues its existence as an independent entity, it can take the funds; if a true subordinate branch, it often may not.

The forfeiture provision was inapplicable in the instant case, since a valid dissolution was effectively blocked by the prompt action of a minority larger than the minimum constitutional quorum, and all that occurred was a majority withdrawal to which the forfeiture provision was not intended to apply. But the result may be sustained on the basis of the tests enumerated above.

to the parent, a forfeiture provision in the parent constitution and a trust for the original purposes are usually made concurrent grounds for the decision. Tiffany v. Mooney, 263 Mass. 264, 160 N. E. 808 (1928); Grand Lodge v. Wieland Lodge, 93 N. J. Eq. 129, 115 Atl. 205 (Ch. 1921).


15. See cases cited note 10, supra.


17. See cases cited notes 8 and 11, supra.


20. Schubert Lodge v. Schubert Verein, 56 N. J. Eq. 78, 38 Atl. 347 (Ch. 1897); Grand Court v. Hodel, 74 Wash. 314, 133 Pac. 438 (1913).


The funds were clearly contributed for general union purposes, since they were the source of substantial taxes and assessments by the parent organization. Nor was there any arbitrary action on the part of the parent in forcing the secession of the recalcitrant branch, for this branch voluntarily left the parent body in order to join a rival union. Lastly, the local was a true subordinate member of a closely knit hierarchy and could not be considered an autonomous unit holding absolute title to its funds. This result appears desirable for other reasons. The growth of unionism is largely dependant upon well disciplined local organizations and financially responsible parent bodies. But the effect of permitting local unions to withdraw and take their funds might well encourage random rebellions and further inter- and intra-union strife; and the withdrawal of funds by groups of members would seriously impair the financial structure of existing parent organizations which must rely entirely upon the dues collected from their affiliated local unions.

WITHDRAWAL OF RENUNCIATIONS BY TESTAMENTARY BENEFICIARIES *

A recent case relaxes the usual rule that election to accept or reject a specific bequest by a beneficiary under a will is final and irrevocable if made with knowledge of the facts and without fraud or duress. Testator failed to provide in his will for his children but left virtually his entire estate to his sister. After protests and threats of contest by the children, the sister filed a renunciation of the testamentary gift in the probate court. She subsequently moved to withdraw her disclaimer. The court held that she might withdraw unless it appeared upon trial that she had contracted not to claim under the will or that third parties had changed their positions in reliance upon her renunciation.

In determining the legal interests of persons designated as beneficiaries in a will, the courts have commonly relied upon two principal theories. Some

23. See U. M. W. Constitution, art. XIV, §§ 2, 4, 5, 6, 7; By-laws of Local 1421, art. VII, § 2 (Appellate record in the principal case) p. 100; Report of International Sec.-Treas., U. M. W., for Dec. 1, 1925—June 1, 1926, and for June 1, 1926—Dec. 1, 1926; Auditor’s Report, U. M. W., for Dec. 1, 1923—June 1, 1924, and for June 1, 1924—Dec. 1, 1924.

24. The equities in the principal case may arouse sympathy for the seceding group. The secession was a part of a general rank and file rebellion in Illinois in 1932-1934 against the union leadership after the latter had signed a wage contract with the operators which was so unpopular with the men that they voted it down in a referendum. See 135 Nation 155 (Aug. 1932).


1. Craven v. Craven, 181 Ky. 428, 205 S. W. 406 (1918); In re Bailey’s Estate, 285 Pa. 408, 132 Atl. 343 (1926); Bradford v. Leake, 124 Tenn. 312, 137 S. W. 96 (1911); see Atkinson, Wills (1937) 725.

speak in terms of the vesting of title to the property bequeathed, holding
that title vests in the legatee or devisee immediately upon the death of the
testator, subject to divestment by the donee's disclaimer of the gift. But
the harshness of the implications of this rationale has led to its modification
in certain situations. Thus, when attempts have been made to levy a transfer
tax upon the passage of title to a disclaiming donee, the courts have generally
declared that the tax could not be levied on the ground that renunciation
"related back" to the death of the testator and prevented title from vesting. In
like fashion, when creditors have sought to attach the donee's interest and
have claimed that the donee could not then renounce because renunciation
would amount to a gratuitous transfer in fraud of creditors, the courts have
been reluctant to limit the donee's power of disavowal, and have usually
employed the "relating back" fiction to evade the logical result of their rationale.
The other analysis commonly employed by the courts describes a bequest
as an "offer" capable of being accepted or rejected by the donee. But this
consensual analogy is not an apt one, for a testamentary transfer is not con-
tractual in the ordinary commercial sense. Not only does the "contract" lack
consideration or an equivalent therefor, but the "offer" is not terminated
by the offeror's death and can be "accepted" by an incompetent. Whichever
of these two theories the court may happen to accept, the result is to deprive
the beneficiary of any chance to reconsider his renunciation of a bequest.
Under the "vesting" theory, renunciation operates to deprive the donee of
title which he cannot later reassert; under the contract analogy, rejection of

Lass, 146 Wis. 202, 131 N. W. 357 (1911); see 4 Schouler, Wills, Executors, and
Administrators (6th ed. 1923) § 3155. But see Robertson v. Schard, 142 Iowa 500, 503,
119 N. W. 529, 531 (1909).

4. People v. Flanagin, 331 Ill. 203, 162 N. E. 848 (1928); Tax Commission of
Ohio v. Glass, 119 Ohio St. 389, 164 N. E. 425 (1928). Nor is such a renunciation
a gift made in contemplation of death. Brown v. Routzahn, 63 F. (2d) 914 (C. C. A.
6th, 1933).

5. Schoonover v. Osborne, 193 Iowa 474, 187 N. W. 20 (1922); Bradford v. Cal-
houn, 120 Tenn. 53, 109 S. W. 502 (1908). Contra: Kearley v. Crawford, 112 Fla. 43,
151 So. 293, (1933) 43 Yale L. J. 1030. Similarly, a renunciation by a cestui que trust
has been held to relate back to the declaration of the trust and to deprive claimants
against the cestui of any rights in the trust property. Stoehr v. Miller, 296 Fed. 414
(C. C. A. 2d, 1923), (1923) 33 Yale L. J. 789.

6. Arnold v. Livingston, 157 Iowa 677, 139 N. W. 927 (1913); Albany Hospital
(1915); see Root, Wills (2d ed. 1926) § 757b; (1932) 31 Mich. L. Rev. 443.

7. Cf. Harriman, Contracts (2d ed. 1901) § 83; 2 Tiffany, Real Property
(2d ed. 1920) § 463.

8. Indeed, there is no "offer" until the death of the testator, for, at any time prior
thereto, he may revoke the will and thus withdraw the "offer".

9. Inter vivos transfers to incompetents are effective despite their inability to ac-
cept. Campbell v. Kuhn, 45 Mich. 513 (1881); see 2 Tiffany, Real Property (2d ed.
1920) § 463. A fortiori testamentary transfers to incompetents would seem to be ef-
fective.

10. In re Mahlstedt's Will, 140 Misc. 245, 250 N. Y. Supp. 628 (Surr. Ct., 1931);
an offer terminates forever the power to accept. The only discretion remaining to the court is the determination that the renunciation was made with full knowledge of the facts and that no fraud or duress was involved.

The general rule that elections of testamentary beneficiaries are final does not rest solely upon the basis of these conceptualistic analogies. Underlying judicial declarations of finality is the desire to make titles to decedents' property more secure and thereby end litigation. Important as this policy may be, however, it does not seem to justify a rigidly applied rule which prevents reconsideration of elections irrespective of the equities of the particular case. Renunciations are often made without due consideration of the consequences and are likely to be influenced by emotional circumstances surrounding the testator's death. Moreover, strict enforcement of renunciations is hardly calculated to execute the purpose of the testator, who normally intends that the testamentary beneficiary shall receive his property. By disregarding conceptual notions and by emphasizing factual considerations, the court in the principal case suggests a more flexible standard by which the elections of testamentary beneficiaries may be judged. Nor does the decision appear to endanger the security of titles or encourage the protraction of litigation, for, if any third person should rely upon the renunciation of a bequest, the beneficiary will be denied the right to change his mind.

Appeals by the State in Criminal Proceedings*

An appeal by the state in a criminal proceeding is a comparatively novel development in Anglo-American law. In England, prior to the American Revolution, neither the accused nor the crown had the right to appeal from

11. See Matter of Lansing's Estate, 182 N. Y. 238, 245, 74 N. E. 882, 884 (1905); In re Johnston's Will, 293 N. Y. Supp. 957, 960 (Surr. Ct., 1937); Rodd, WILLS (2d ed. 1926) 729. But a rejection of an offer is not effective until it is received by the offeror. *Restatement, Contracts (1932) §39. Since "testator-offerors" cannot receive "rejections", even a court unreservedly applying the "offer" rationale might permit withdrawal of "rejections" until there had been some action in reliance thereon. 12. Thus, a misconception of the rights and interests conferred by the will has been described as a "misconception of fact." Waggoner v. Waggoner, 111 Va. 325, 63 S. E. 990 (1910); see Tolley v. Poteet, 62 W. V. 231, 246, 57 S. E. 811, 818 (1907). The doctrine seems to rest upon the idea that there can be no real election where there is a misconception of the results of the choice. In re McFarlin, 9 Del. Ch. 430, 75 Atl. 281 (Orphan's Ct., 1910); Hanson v. Clark, 246 Ill. App. 496 (1927). 13. Craven v. Craven, 181 Ky. 428, 203 S. W. 405 (1918); State ex re Burns v. Romjue, 136 Mo. App. 650, 118 S. W. 1188 (1909); In re Bailey's Estate, 285 Pa. 403, 132 A. 343 (1926). 14. See In re Dunphy's Estate, 147 Cal. 95, 105, 81 Pac. 315, 319 (1905); Williams v. Williams, 161 Ky. 55, 60, 170 S. W. 490, 491 (1914); Owens v. Andrews, 17 N. M. 597, 609, 131 Pac. 1004, 1006 (1913).

a conviction or an acquittal of a felony.\textsuperscript{1} The only remedy originally available to the convicted felon was resort to the king's pardoning power, which was employed first as a gratuity to favorites and later as a corrective of injustices and irregularities of trial.\textsuperscript{2} Pardons subsequently developed into writs of error obtainable from the Attorney General, but since the issuance of these writs was purely discretionary, they could not be obtained by the accused as a matter of right.\textsuperscript{3} Indeed, the granting of such a writ was tantamount to an acquittal of the crime, for the crown would never require a second trial, when of its own volition it had nullified conviction in the first.\textsuperscript{4} Unlike felons, persons convicted of misdemeanors became entitled to a writ of error as of right by the beginning of the eighteenth century.\textsuperscript{5} In these cases, however, a reversal on appeal was sometimes followed by a second trial of the accused, who might otherwise be freed because of a merely technical error in the original proceedings.\textsuperscript{6} When the plea of \emph{autre fois convict and acquit}—predecessor of our constitutional guaranties against double jeopardy\textsuperscript{7}—

\begin{enumerate}
\item The Rioters' Case, 1 Vern. 175 (Ch. 1683); see Rex v. Wilkes, 4 Burr. 2527, 2550 (K. B. 1770); King v. Mawbey, 6 T. R. 619, 638 (K. B. 1796); cf. Crawle v. Crawle, 1 Vern. 170 (Ch. 1683). See SIBLEY, CRIMINAL APPEAL AND EVIDENCE (1908) 66.
\item See Proceedings in Parliament against Sir John Fenwick, 13 How. St. Tr. 538, 662 (House of Commons 1696); Rex v. Wilkes, 4 Burr. 2527, 2550 (K. B. 1770); GRAHAM, NEW TRIALS (1834) 505.
\item Mrs. Gargraves' Case, 1 Rolle 175 (K. B. 1616); The Rioters' Case, 1 Vern. 175 (Ch. 1683); Domina Regina v. Paty et al., 2 Salk, 504 (Q. B. 1705); see Rex v. Wilkes, 4 Burr. 2527, 2550 (K. B. 1770); 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1905) 479 et seq.
\item Domina Regina v. Paty et al., 2 Salk, 504 (Q. B. 1705) (this case established the accused's right to a writ of error in misdemeanors); see King v. Mawbey, 6 T. R. 619, 636 (K. B. 1796); cf. King v. Inhabitants of Burbon, 5 M. & S. 391 (K. B. 1816).
\item Prior to the eighteenth century, writs of error were discretionary in the case of misdemeanors as well as felonies. Mrs. Gargraves' Case, 1 Rolle 175 (K. B. 1616); Crawle v. Crawle, 1 Vern. 170 (Ch. 1683); cf. Marquis of Winchester's Case, Cro. Car. 504 (K. B. 1639); Rex v. Wilkes, 4 Burr. 2527, 2550 (K. B. 1770).
\item The Queen v. Drury and others, 3 Cox C. C. 544 (Q. B. 1849); cf. Rex v. Wilkes, 4 Burr. 2527, 2550 (K. B. 1770). There is authority to the effect that neither the common law pleas nor the constitutional guaranty of double jeopardy were originally available in misdemeanors. See People v. Goodwin, 18 Johns. 187, 201 (N. Y. 1820); cf. Marquis of Winchester's Case, Cro. Car. 504 (K. B. 1639); King v. Inhabitants of Wandsworth, 1 B. & A. 63 (K. B. 1817); Birmingham v. Williams, 229 Ala. 101, 155 So. 877 (1934), (1934) 12 N. Y. U. L. Q. REV. 308; Commonwealth v. Prall, 146 Ky. 109, 142 S. W. 202 (1912). See GRAHAM, NEW TRIALS (1834) 505; WILLIS, CONSTITUTIONAL LAW (1936) 521.
\item 2 HALE, PLEAS OF THE CROWN (1st Am. ed. 1847) 240; JACOB, COMMON LAW COMMON-PLACED (1726) 7; WHARTON, CRIMINAL PLEADING & PRACTICE (9th ed. 1889) 354. At common law, jeopardy did not attach until verdict was rendered. 2 HALE, supra, at 243. Cf. Jackson et al. v. Superior Ct., 67 P. (2d) 384 (Cal. App. 1937).
was raised in bar of this second trial, the courts usually held that by exercising his right of appeal the defendant had waived all immunity to further prosecution for his crime.\(^8\)

In America, persons convicted of either misdemeanors or felonies have always been allowed to appeal.\(^9\) When an appeal results in a reversal of a previous conviction, the waiver theory is generally invoked to permit a second trial.\(^10\) Some courts, however, have refused to apply this theory where an accused has been convicted of a lesser crime than that contained in the indictment and have limited the effect of the implied waiver to the lesser offense, thus barring subsequent conviction under the greater charge.\(^11\) Moreover, the whole theory of waiver has at times been criticized on the ground that it entails the relinquishment of a fundamental constitutional guaranty.\(^12\) Although the right of appeal in criminal proceedings is generally limited to defendants,\(^13\) Connecticut\(^14\) and Vermont\(^15\) have passed statutes which allow appeals by the state. Neither of these states has a double jeopardy clause in its constitution, but the validity of both statutes has been contested on the ground that an accused is protected from second jeopardy on retrial by due process of law. The courts of both states have upheld the statutes, however, but not on the theory of waiver, which was clearly inapplicable. Vermont has held that protection against double jeopardy is not so fundamental a right as to warrant application of either the "law of the land" clause of the Vermont Constitution or the due process clause of the Fourteenth Amendment.\(^16\) Connecticut, on the other hand, has held that no question of double jeopardy was involved because the entire prosecution, from the beginning of the first trial to the final unreversed conviction, constituted one proceeding.\(^17\) The constitutionality of the Connecticut statute has recently been passed upon by the United States Supreme Court for the first time. The accused was charged with murder in the first degree but was convicted of murder in the second degree. On appeal by the state, the court

8. See cases cited note 6, supra.
10. Trono v. United States, 199 U. S. 521 (1905); In re Keenan, 7 Wis. 695 (1859).
   Although logically the waiver should extend to appeals by the state from a judgment of an intermediate court reversing conviction, the usual holding is otherwise. Ohio v. Kondak, 46 Ohio App. 422 (1933).
12. This theory seems to run counter to the principle that one cannot be forced to waive a constitutional guaranty to gain a statutory privilege. See the dissenting opinion by Justice Holmes in Kepner v. United States, 195 U. S. 100, 135 (1904). See, also, Comley, Former Jeopardy (1926) 35 YALE L. J. 674.
15. VT. PUB. LAWS (1933) § 2425.
reversed the conviction and remanded the case for a new trial. At the second trial the accused was found guilty of murder in the first degree and was sentenced to death. The conviction was affirmed by the Connecticut Supreme Court of Errors, and the defendant appealed to the United States Supreme Court. The court, however, refused to sustain his contention that the second trial constituted a deprivation of due process of law under the Fourteenth Amendment, upheld the statute and sustained the conviction.\(^\text{18}\)

In determining the constitutionality of the statute in the principal case, the Supreme Court might have predicated its decision on either one of two rationales. It could have considered the original trial, reversal, and retrial as one proceeding and hence obviated all question of double jeopardy, or it could have held that the procedure provided by the statute was not such an unreasonable deprivation of the rights of the accused as to be prohibited by the Fourteenth Amendment. Although no logical objection can be found to the "one proceeding" argument, the court refused to uphold the statute on this ground largely because of a previous decision in which a similar trial had been recognized as a separate proceeding.\(^\text{19}\) By basing its decision on the second rationale, the court necessarily held that the constitutional guaranty against double jeopardy in the Fifth Amendment\(^\text{20}\) is not included in the protection afforded by the Fourteenth. In relying upon a somewhat tenuous distinction between those guaranties of the Bill of Rights which are essential to the preservation of society and hence are to be protected under the Fourteenth Amendment, and those which are not so essential, the court refused to include double jeopardy in the former class.\(^\text{21}\)

Nor does the Fourteenth Amendment itself, aside from any question of the incorporation of the guaranties of the Bill of Rights, necessarily preclude the possibility of a retrial. Among the various factors which have been considered influential in determining whether a statute meets the requirements of due process of law is the status of the right involved at the time of the adoption of the Constitution.\(^\text{22}\) Since second trials of an accused after reversal on appeal were unknown at that time, at least in the case of felonies, there would seem to be little historical justification for holding that a plea of double jeopardy would have prevented such a trial.\(^\text{23}\) More pertinent to any consideration of the validity of a statute, however, is the reasonableness of its application to the facts of the particular case. There would seem to be no strong doubts concerning the constitutionality of the instant statute on this score. As pointed out in the opinion, the statute does not require successive trials of a person validly acquitted of a crime; all the state demands is that it be entitled to one proceeding free from error and not reversible on

\(\text{\textsuperscript{18}}\) Palko v. Connecticut, 58 Sup. Ct. 149 (1937).
\(\text{\textsuperscript{19}}\) Kepner v. United States, 195 U. S. 100 (1904).
\(\text{\textsuperscript{20}}\) The double jeopardy clause of the Fifth Amendment limits only the federal government. 1 Cooley's Constitutional Limitations (8th ed. 1927) 66; Willis, Constitutional Law (1936) 642.
\(\text{\textsuperscript{21}}\) Cf. 2 Cooley's Constitutional Limitations (8th ed., 1927) 736.
\(\text{\textsuperscript{22}}\) See e.g., Hurtado v. California, 110 U. S. 516, 521 (1884); Tumey v. Ohio, 273 U. S. 510, 524 (1927); Powell v. Alabama, 287 U. S. 45, 60 (1932).
\(\text{\textsuperscript{23}}\) See note 4, supra.
appeal. When the statute is so limited it is difficult to argue that the accused is being deprived of any fundamental right, a the abridgement of which would be shocking to our accepted standards of liberty and justice.

Since the decision is restricted so closely to the facts of the instant case, it could not be considered controlling in another case presenting a similar statute passed under varied circumstances. For instance, the court's assumption that a retrial constitutes a second jeopardy within the meaning of the Fifth Amendment would not necessarily prevent a state which had a double jeopardy clause in its Constitution from passing a statute permitting both sides to appeal. The validity of such a statute would necessarily depend upon the state court's construction of its own Constitution, which might well follow the "one proceeding" rationalization adopted in Connecticut. Nor does the decision require the conclusion that the Fourteenth Amendment can never be invoked to prevent successive jeopardies of an accused, and should a statute attempt to sanction a second trial where no error had been found in the original proceeding, the Amendment would undoubtedly be held to apply. As the decision is limited, however, it would seem to facilitate a much needed reform in criminal law. Because of the one sided right of appeal that normally exists in a criminal trial, counsel for defense are notoriously unrestricted in their conduct before the court. By making the right of appeal mutual, the state is enabled to obtain correction of errors which cannot otherwise be curbed. It is well recognized that the so-called moot appeal — the only method by which the state may now secure the correction of an error of law — is generally unsatisfactory, since the mere correction of an error without the possibility of a second trial does not afford the prosecution sufficient incentive to take the appeal. Although statutes permitting appeals by the state are subject to abuse in the form of possible frivolous appeals and resultant hardship on the accused, practical considerations centering around the cost of taking the appeal and the prosecutor's desire to avoid reversal would seem to nullify whatever objections might be raised on this score.

25. Several states having a double jeopardy clause in their constitution have passed statutes which have been construed as permitting the state to appeal in certain specified cases. These statutes have generally been held unconstitutional. See State v. Felch, 92 Vt. 477, 482, 105 Atl. 23, 25 (1919).
26. See Miller, Appeals by the State in Criminal Cases (1926) 36 Yale L. J. 485, 496.
27. Moot appeals may be permitted: (a) as a means of determining the constitutionality of a statute; (b) for the purpose of securing determinations of questions of law for use as precedents; or (c) to secure a better or more uniform administration of the criminal law. Such appeals, however, have no effect upon the judgment appealed from. See Miller, supra note 26, at 488. For an evaluation of this method of appeal, see Hicks, Moot Appeals by the State in Criminal Cases (1928) 7 Ore. L. Rev. 218.
28. See Miller, supra note 26, at 497-500.
A recent case raises once again the problem of the deductibility of charitable pledges in computing the federal estate tax. Decedent promised to transfer $2,000,000 to a university to establish a memorial fund for the teaching of the humanities, and meanwhile to pay the university annually amounts equal to interest on the fund at the current rate. During the year which elapsed between her pledge and her death she made the interest payments. Thereafter her estate continued the payments. She also promised sums to other institutions for the employment of two musicians by a symphony orchestra, for the employment of a director by a museum, and for the increase of a teacher's salary, all of which would have been impossible had the money not been given. Her estate continued these payments as well. Although the recipients admittedly had enforceable claims against the estate, the court refused to allow deductions for the pledges in calculating the federal estate tax, either under Section 303(a)(1) of the Revenue Act, which provides for the deduction of "claims against the estate" contracted "bona fide and for a full and adequate consideration in money or money's worth," or under Section 303(a)(3), which allows the deduction of transfers to charitable or educational institutions. Deductions were allowed, however, for certain pledges made to charities "in consideration of the gifts of others" contingent on the pledges of others equaling or exceeding the amount pledged, on the ground that there was adequate consideration within Section 303(a)(1).

Since Congress has always encouraged gifts to charities by allowing the deduction of inter vivos gifts from the gross income and testamentary gifts from the gross estate of the donor in calculating the net amount taxable, the absence of a specific statutory allowance for the deduction of executory pledges to charities from the gross estate is somewhat difficult to understand. Although the omission might be explained on the ground that taxation of charitable gifts unexecuted at the donor's death has less tendency to discourage gifts to charities than taxation of inter vivos or testamentary gifts of that character, the history of Section 303(a)(1) indicates no inten-
tion to include charitable claims within its scope. The progressive changes in the wording of that section reveal only an apparent objective of Congress to achieve a formula which would allow deductions for the claims of private parties for which they have given full value, and on the other hand prevent the deduction of claims representing private gifts and testamentary dispositions; claims asserted by charitable organizations seem not to have been within its compass. In order to prevent the deduction of enforceable claims resulting from transactions whose purpose was to avoid taxation, the definition of "deductible claims" was narrowed in successive revenue acts from "claims against the estate . . . allowed by the laws of the jurisdiction . . . under which the estate is being administered . . ." to claims "injured or contracted bona fide and for a fair consideration in money or money's worth." When "fair" was subsequently construed to mean only "reasonable" and not necessarily "full and adequate" consideration, the clause was again modified to include only claims contracted "bona fide and for a full and adequate consideration in money or money's worth." To render it certain that tax-avoiding or gift transactions did not escape taxa-

9. Rev. Act of 1921, § 403(a) (1), 42 Stat. 278 (1921). Under this statute the face amount of notes representing private gifts was held deductible because the notes were enforceable under state law. In re Atkins Estate, 30 F. (2d) 761 (C. C. A. 5th, 1929). Under the later acts the validity of the contract alone will not support a deduction. Porter v. Comm'r, 60 F. (2d) 673 (C. C. A. 2d, 1932), aff'd on other grounds, 288 U. S. 436 (1933); Boston Safe Deposit and Trust Co., 30 B. T. A. 679 (1934); Charles B. Bretzfelder, 32 B. T. A. 146 (1935); see Smith v. United States, 16 F. Supp. 397, 402 (D. Mass. 1936).
12. Ferguson v. Dickson, 300 Fed. 961 (C. C. A. 3d, 1924), cert. denied, 266 U. S. 628 (1924). This case held that a claim for an amount accepted in lieu of dower was deductible. Later such claims were held not deductible, because the wife took under the will and therefore had no claim against the estate. Jacobs v. Comm'r, 34 F. (2d) 233 (C. C. A. 8th, 1929) cert. denied, 280 U. S. 603 (1929), (1930) 39 Yale L. J. 436, (1930) 30 Col. L. Rev. 132, (1930) 4 Tul. L. Rev. 313; Schuette v. Bowers, 40 F. (2d) 208 (C. C. A. 2d, 1930), (1930) 30 Col. L. Rev. 1072. Section 804 of the Revenue Act of 1932, 47 Stat. 280 (1932), 26 U. S. C. § 412(b) (1934), provides that the relinquishment of marital rights is not sufficient consideration to support a deduction.
tion, some courts have interpreted the statute to mean that the consideration for a deductible claim must either augment the estate of the decedent, grant him a privilege or right not previously possessed by him, or operate to discharge an existing claim against him. Others, construing the Act more narrowly, have held that the claim must arise from a business transaction.

When a claim for the amount of an unpaid pledge to a charitable institution has been in issue, these holdings on non-charitable claims have sometimes been abandoned. In those cases in which the promise is given to the charity "in consideration of the gifts of others," a deduction has been allowed on the theory that the "gifts of others" constitute adequate consideration in money. This formula is accepted despite the fact that no consideration passes either from the promisee or to the promisor and that the promisor knows neither the person whose pledge makes his binding nor the amount of that pledge. In England "gifts of others" are considered not even sufficient consideration to support a promise, and American jurisdictions hold them to be sufficient consideration only because of the policy favoring charitable institutions. In view of the attenuated interpretation necessary to sustain this result, the court's refusal to permit a deduction for the other pledges in the instant case, including the $2,000,000 one, seems inconsistent. Whether the pledge is independent or in consideration of the gifts of others, it accords no financial benefit to the decedent's estate. In either case, the value of the estate is diminished by the same amount. Consequently, some rationale of broader applicability should be advanced to support the deduction of all charitable claims. One suggestion, rejected in the instant case, has been that "money's worth" need not be something material, but may consist of the satisfaction afforded to and motivating donors to religious, charitable

15. Porter v. Comm'r, 60 F. (2d) 673 (C. C. A. 2d, 1932), supra note 9; see Carney v. Benz, 90 F. (2d) 747, 749 (C. C. A. 1st, 1937). It was also early ruled that the consideration must move to the decedent. U. S. Treas. Reg. 70 (1929 ed) Art. 36; see Latty v. Comm'r, 62 F. (2d) 952, 954 (C. C. A. 6th, 1933), (1933) 21 Geo. W. L. Rev. 508. This was, however, held error [Comm'r v. Kelly's Estate, 84 F. (2d) 958 (C. C. A. 7th, 1936), cert. denied, 299 U. S. 603 (1936); see cases cited note 16, infra], and the requirement was stricken from the Regulations. T. D. 4322, 31 T. D. Int. Rev. 86 (1931).
17. 1 WILLISTON, CONTRACTS (2d ed. 1936) § 116.
18. Ibid.
or educational institutions. A more acceptable theory would be that the implied or express promise of the pledgee to use the money for the specified purposes is "full and adequate consideration."

Some courts, construing Section 303(a)(1) to preclude the deduction of unexecuted charitable pledges as claims in the absence of the "gifts of others" phrase, have turned to Section 303(a)(3) and held the amount deductible as a "constructive transfer" to a charitable institution. Under this theory it is arguable that the $2,000,000 pledge was deductible in the instant case: the establishment of the Memorial Fund and the payment of interest on the principal sum would be equivalent to a transfer of the full amount, as though the principal had been in the university's possession and had been invested in a loan back to the promisor at the current rate of interest. However, the constructive transfer theory has been confined to cases in which a partial transfer has taken place before the death of the promisor, and was rejected entirely in the instant case.

Under the present wording of the statute, the courts must distort the letter to fit the spirit of the law either by invoking the strained constructive transfer theory or by adopting a different standard in determining what is a "full and adequate consideration" from that used in deciding upon the deductibility of non-charitable claims. The more satisfactory solution would seem to be amendment of the statute.


20. It has also been suggested that the contracting of debts by the charity in reliance on the subscriptions should be considered full and adequate consideration. Comm'r v. Bryn Mawr Trust Co., 87 F. (2d) 607, 609 (C. C. A. 3d, 1936). However, action in reliance has been rejected as consideration. Porter v. Comm'r, 60 F. (2d) 673 (C. C. A. 2d, 1932), supra note 9.
