RECENT CASES

CORPORATIONS—DISREGARDING THE CORPORATE ENTITY IN SUIT FOR CONFIRMATION OF FORECLOSURE SALE.—The defendant company, an obligor on a mortgage bond, opposed confirmation of foreclosure sale on the ground that the company lacked financial resources to protect itself at the sale and that the price was unconscionable. All of the defendant's stock was owned by a holding company which was not shown to be financially unable to take up the mortgage. Said holding company, in order to gain control of another subsidiary, substantially disenabled the defendant from raising funds with which to pay its debts. Held: that the corporate entity should be disregarded and the sale confirmed. *Rippel v. Kaplus,* 124 N.J. Eq. 303, (Ch. 1938).

The defendant based its claim for relief on the broad rule laid down in the *Lowenstein* case.[1] This rule was subsequently limited in its application when the court held that in order to entitle one to relief he must show affirmatively, (1) sale at a unconscionable figure, or (2) at a nominal bid plus absence of competitive bidding due to some fact beyond the control of the petitioner, and facts sufficient to invoke the equitable rule referred to, (3) the existence of an emergency because of which defendant was unable to protect himself by refinancing or otherwise, and (4) his own inability plus lack of financial resources to protect himself at the sale.[2] Further this modified rule may not be invoked by a mortgage debtor, able, but neglecting to protect himself at foreclosure sale because it is designed only for the relief of the distressed and helpless.[3] The question for decision in the present case was whether the

1. Federal Title and Mortgage Guaranty Co. v. Lowenstein, 113 N.J.Eq. 200, 166 Atl. 538 (Ch. 1933). Equity may compel a mortgagee to credit the fair market value of the mortgaged premises on the decree in a suit on a deficiency after foreclosure. The mortgagee will not be permitted to retain the estate which will become absolute in him upon confirmation of foreclosure sale, and also recover the debt which is the consideration of that estate by an action on the bond, except and until he credits upon that bond the fair value of the mortgaged premises so acquired by him.

2. Young v. Weber, 117 N.J.Eq. 242, 175 Atl. 273 (Ch. 1934).

3. Fidelity Union Trust Co. v. Appleby, 122 N.J.Eq. 59, 192 Atl. 363 (Ch. 1937).

court should look behind the corporate entity in determining the defendant's financial ability to protect itself at the sale.

The facts show that all the capital stock of the defendant company was entirely owned by a parent corporation which corporation was formed by a consolidation of three corporations. One of the three consolidated corporations owned all of defendant's capital stock in 1926, when, in order to raise funds to buy a large newspaper, it had issued notes secured by a pledge of the capital stock of its subsidiaries. As part of the transaction it agreed it would not permit the subsidiaries to mortgage or pledge any property, or create any funded debt except purchase money mortgages, or mortgages on account of improvements, and that it would not permit them to issue additional capital stock except to itself. This contract was still operative at the time of suit.

The general weight of authority is that, as to torts and contracts, a parent corporation is not liable for the acts of a subsidiary. However, the courts of New Jersey will disregard the corporate fiction and fix liability upon the parent corporation when it is used to circumvent the law,[4] to effect a monopoly and evade a statute,[5] or to effect a fraudulent conveyance.[6] That this is so, is not surprising in Chancery, because it is an application of the maxim "Equity looks at the substance, not merely the outward form". New Jersey follows the Federal rule[7] of looking through the form to the reality of the corporate relation where a corporation holds stock of another, not for the purpose of participating in the affairs of the other corporation, in the normal and usual manner, but for the purpose of control, so that the subsidiary company may be used as a mere agency or instrumentality for the stockholding company.[8] That such a doctrine is not novel can be seen from the words of Lord Mansfield, "It is a certain rule that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted. It must not be thought that courts

4. State v. Essex Club, 53 N.J.L. 99, 20 Atl. 769 (Sup. Ct. 1890). (Social club to evade excise tax on liquor.)

5. Stockton v. Central R.R., 50 N.J.Eq. 52, 24 Atl. 964 (Ch. 1892).

6. Havey v. Hoffman, 121 N.J.Eq. 523, 191 Atl. 756 (Ch. 1937).

7. United States v. Reading Co., 253 U.S. 26 (1919).

8. Ross v. Pennsylvania R.R. Co., 106 N.J.L. 536, 148 Atl. 741 (E. & A. 1929).

are powerless to strip off disguises that are designed to thwart the purposes of the law. Whenever such disguises are made apparent they can readily be disrobed. The difficulty is in showing the disguises, not in penetrating them when they appear".[9]

In the instant case the defendant pleaded that it was helpless to protect itself at the sale. The defendant was wholly owned and controlled as a mere agent or instrumentality by the parent corporation. In such a situation the court followed the general rule as expressed in *Ross v. Pennsylvania R. R.*[10] and disregarded the corporate entity. Here the defendant had been stripped of its power to raise money in order to pay the debt by a subsequent contract entered into by its parent. Such a means of avoiding its contract debt will not be permitted to be made a basis for the extraordinary relief provided under the *Lowenstein*[11] case and it will be denied in the absence of a showing that the parent company is distressed and helpless. A petition on these grounds is an appeal to the conscience of the Chancellor and seeks relief as a matter of grace and not of absolute right.[12] Here there was no showing that the parent corporation was financially unable to protect its subsidiary which by express contract it had rendered incapable of raising funds to meet the debts. If such a showing were made the result might well have been different. On the facts as stated, it is submitted that the case presented a situation in which a piercing of the corporate veil was justifiable and salutary. A mortgage debtor, able, but neglecting, to protect himself at foreclosure sale or by refinancing his mortgage pending foreclosure, may not invoke the equitable rule of the *Young* case as it is designed only for the relief of the distressed and helpless.[13]

The case of *Wilson v. American Palace Car Co.*[14] is distinguishable because there the court was dealing with a jurisdictional question and the general rule is that the fact that a subsidiary does business in New

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9. Johnson v. Smith, 2 Burr. 962.

10. *Supra*, note 8.

11. *Supra*, note 1.

12. Fidelity Union Trust Co. v. Appleby, 122 N.J.Eq. 59, 192 Atl. 363 (Ch. 1937).

13. *Supra*, note 2.

14. Wilson v. American Palace Car Co., 65 N.J.Eq. 730, 55 Atl. 997 (E. & A. 1903).

Jersey will not give the New Jersey courts jurisdiction over the parent corporation.[15]

The court in its opinion for the principal case cites Morawetz on Corporations Sec. 227, "The statement that a corporation is an artificial entity apart from its members is merely a description in figurative language of a corporation viewed as a collective body. A corporation is really an association of persons, and no judicial dictum or legislative enactment can alter this fact," as an added reason why the corporate entity should be disregarded in this case. However, the courts are not willing to accept this definition in its entirety, but rather look to the purpose behind the setting up of a corporate entity. The court refused to allow a corporation to take a deduction of the assessed value of real estate in computing its stock value for tax purposes, where such real estate was owned by another corporation which in turn was wholly owned by the parent corporation,[16] and in another case where a farmer had incorporated a company to hold title to his farm, in which he was the principal shareholder with two other nominal shareholders, the courts refused to disregard the corporate entity, and held the insurance company not liable on a fire insurance policy because there had been a change in ownership[17] Therefore it appears that Morawetz's definition will not be given meaning by the courts unless complete control making the subsidiary a mere agent is exercised in an illegal, evasive, or non-equitable manner.

The Court of Chancery has inherent power to regulate and control sales in foreclosure to the end that Equity shall be done to all parties. In order to give effect to this principle, Equity gives relief under the *Lowenstein* case. This relief is given only as a matter of grace, therefore as it cannot be claimed as a matter of right, the present defendant has no standing to deny the right of the court to look behind the corporate set up and determine the true financial status of the debtor in order that Equity shall be done to all parties.

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15. Hoffman v. Carter, 117 N.J.L. 205, 187 Atl. 576 (Sup. Ct. 1936).

16. Hackensack Trust Co. v. Hackensack, 116 N.J.L. 343, 184 Atl. 408 (Sup. Ct. 1936).

17. White v. Evans, 117 N.J.Eq. 1, 174 Atl. 731 (E. & A. 1934).

CORPORATIONS — NEGOTIABILITY OF STOCK CERTIFICATES — UNIFORM STOCK TRANSFER ACT.—Murtland incorporated plaintiff holding company with himself and two "dummies" as shareholders and officers; and, in order to obtain a personal loan, pledged stock owned by the plaintiff company with defendant bank. Delivery was made with an assignment and irrevocable power of attorney, executed by Murtland and one of the dummy officers. Murtland became bankrupt, defendant sought to sell the collateral, and the plaintiff company brought suit to enjoin the sale on the ground that the board of directors had never authorized the transaction. *Held,* complaint dismissed. *Murtland Holding Company v. Egg Harbor Commercial Bank,* 123 N.J.Eq. 117, 196 Atl. 230 (Ch. 1938).

The decision is placed on the ground that the corporation, through the stockholders, is estopped from denying the execution of the assignment, and, the defendant, as a bona fide purchaser in good faith, acquired title under the Uniform Stock Transfer Act.[1]

Before the uniform act, *bona fide* purchasers, for reasons of commercial expediency, were protected by the doctrine of "quasi-negotiability,"[2] which supplanted the old common law rule that stock certificates were non-negotiable.[3] Quasi-negotiability was founded on the doctrine of estoppel, and not upon the law merchant with reference to negotiable paper negotiated before maturity.[4] The certificate of stock,

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1. The Uniform Stock Transfer Act provides, in section 1 thereof, Rev. St. 1937, 14:8-27, the manner in which title to a stock certificate may be effectually transferred, and section 5 of the Act, Rev. St. 1937, 14:8-31, provides: "The delivery of a certificate to transfer title in accordance with the provisions of section one is effectual, except as provided in section seven, though made by one having no right of possession and having no authority from the owner of the certificate or from the person purporting to transfer the title." Section 7, Rev. St. 1937, 14:8-33, provides that, if "the certificate has been transferred to a purchaser for value in good faith without notice of any facts making the transfer wrongful" that then title passes to the transferee, even though the certificate was procured by fraud or duress or without authority from the owner.

2. COOK, CORPORATIONS, sec. 413 (1923). See discussion in Millard v. Green, 94 Conn. 597, 110 Atl. 177, 9 A.L.R. 1610 (1920).

3. Millard v. Green, *supra,* note 2; *Accord,* Mitchell v. Beachy, 104 Kan. 445, 179 Pac. 365. *Cf.* Evans v. Cornett, 185 Ky. 351, 216 S.W. 58 (1919); Bankers Trust v. Rood, 211 Iowa 289, 233 N.W. 794 (1930).

4. Mount Holly Etc. Turnpike Co. v. Ferree, 17 N.J.Eq. 117 (Ch. 1864);

together with an irrevocable power of attorney, was considered *prima facie* evidence of equitable ownership in the holder, and when the party in whose hands the certificate was found, was shown to be a holder for value, and without notice of any intervening equities, his title as such owner could not be impeached.[5] He could fill up the letter of attorney, execute the power, and thus obtain legal title to the stock.[6] Such power was not limited to the person to whom it was first delivered, but enured to each *bona fide* holder into whose hands the certificate and power passed.[7] In other words, the original owner, by duly indorsing the certificate, together with the necessary power of attorney, and allowing it to come into the possession of another, empowering the latter to represent himself as the apparent owner, was estopped to assert his title against a bona fide purchaser for value.[8] Thus, in the absence of extrinsic facts on which to base an estoppel, a bona fide purchaser was bound to account to the owner.[9] Similarly, a diversity of opinion arose as to whether a purchaser of stock in satisfaction of a pre-existing debt, or a pledge of stock to secure an antecedent debt, was protected.[10] This circumstance arose solely from the fact that stock certificates were not regarded as embraced within the *lex mercatoria* and hence its transfers were protected only by the doctrine of estoppel.

The elements of negotiability lacking at the common law, have now been supplied by the Uniform Stock Transfer Act[11] and a stock certificate endorsed in blank passes freely and becomes a "courier with-

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Prall v. Tilt, 28 N.J.Eq. 479 (E. & A. 1877). See Millard v. Green, *supra*, note 2.

5. Mount Holly Etc. Turnpike Co. v. Ferree, *supra*, note 4.

6. Prall v. Tilt, *supra*, note 4.

7. Broadway Bank v. McElrath, 13 N.J.Eq. 24 (Ch. 1860); Hunterdon County Bank v. Nassau Bank, 17 N.J.Eq. 496 (E. & A. 1864); Mount Holly Etc. Turnpike Co. v. Ferree, *supra*, note 4.

8. See comment of principal case in (1939) 37 MICH. LAW REV. 480.

9. Russell v. American Bell Telephone Co., 180 Mass. 467, 62 N.E. 751 (1902); See BALLENTINE, PRIVATE CORPORATIONS, sec. 150 (1927). See also comment in (1914) 62 UNIV. PA. LAW REV. 635.

10. Edward Wright-Ginsberg Co. v. Carlisle Ribbon Mills, 105 N.J.Eq. 411, 148 Atl. 178 (Ch. 1929).

11. *Supra*, note 1. See Edward Wright-Ginsberg Co. v. Carlisle Ribbon Mills, *supra*, note 10; Sokoloff v. Wildwood Pier and Realty Co., 108 N.J.Eq. 362, 155 Atl. 125 (Ch. 1931), *aff'd* in 113 N.J.Eq. 159, 166 Atl. 218 (E. & A. 1933).

out luggage whose countenance is its passport."[12] The result in the principal case would have been the same before the uniform act, for the doctrine of estoppel would have worked against the plaintiff company. But the broad language used by the court indicates an acceptance of the modern view[13] that the act has made stock certificates negotiable.

But it is submitted that a distinction between stock certificates and negotiable instruments should be maintained. Negotiability is founded on commercial expediency and designed to aid in the free transfer of shares. However, in the process of assembling corporate funds, situations are cognizable where true negotiability would paralyze the market and hinder transferability. For example, it is a just rule to allow a bona fide holder of void stock, who has paid value for it and who has no knowledge of the facts creating the void issue, to have a direct action against the corporation and not be left to a precarious remedy against his transferor.[14] In such a situation, if the certificate was directly analogous to a negotiable instrument, the transferor alone would be liable to the defrauded transferee. That this is one of the few occasions, if not the only one, found at the present time, where the analogy breaks down does not preclude a future possibility of the presence of others.[15]

CREDITORS RIGHTS — RECOVERY OF PREMIUMS PAID ON LIFE INSURANCE POLICIES.—Suit was brought by creditors to recover premiums paid by an insolvent debtor on life insurance policies. The defense was set up that complainants had not reduced their claim to judgment. Claim to the premiums paid during insolvency was based on sections 38 and 39 of the Insurance Act.[1] *Held,* recovery allowed.

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12. The quotation is from Peckinpaugh v. Noble Co., 238 Mich. 464 at 470, 213 N.W. 859 (1927) and is used in the comment of the principal case in (1939) 37 MICH. LAW REV. 480.

13. See Turnbull v. Longacre Bank, 249 N.Y. 159, 163 N.E. 135 (1928).

14. Evans v. Cornett, 185 Ky. 351, 216 S.W. 58 (1919).

15. For a criticism of the principles of exclusion in legal reasoning, see PROF. CHAFEE in 34 HARVARD LAW REV. 391.

1. Rev. St. 1937, 17:34-38 and 17:34-39 (formerly 2 C.S. 1910, p. 2850):

Sections of the Act construed as giving *all* creditors a lien on the proceeds to the extent of premiums paid in fraud of creditors. *Goren v. Loeb,* 124 N.J.Eq. 335, 1 Atl. (2nd) 861 (Ch. 1938).

At the common law, such payment of premiums by a debtor upon a policy of life insurance on his own life for the benefit of his wife and children, were essentially gifts to them and conclusively fraudulent, and void as against creditors at the time of payment.[2] In the absence of statutory intervention, the whole of the insurance would be subjected to the debts of the insured.[3]

Provisions of the Insurance Act[4] allow the named beneficiary to recover the proceeds of the policy if the obligation imposed on the beneficiary is discharged by payment of the debts in the amount of the premiums paid in fraud of creditors.[5] The statute has been extended in its application to include creditors subsequent to the payments, if any creditors be shown to have existed at the time of the fraudulent act.[6]

Under section 9 of the Uniform Fraudulent Conveyance Act,[7] a creditor, whose claim has matured, is entitled to a bill to set aside a conveyance fraudulent against him. However, in a suit by a creditor whose claim had not been reduced to judgment, it was held that the statute was unconstitutional to the extent that it attempted to give the court of chancery authority to hear and determine actions for debt, a power inherently with the jurisdiction of the law courts.[8] The con-

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"The amount of any premiums for said insurance paid in fraud of creditors with interest thereon shall inure to their benefit from the proceeds of the policy."

2. Merchants & Miners Trans. Co. v. Borland, 53 N.J.Eq. 282, 31 Atl. 272 (Ch. 1895); Lanning v. Parker, 84 N.J.Eq. 429, 94 Atl. 64 (Ch. 1915). *Contra* Bank of Washington v. Hume, 128 U.S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370 (1888).

3. Fearne v. Ward, 80 Ala. 555, 2 So. 114 (1887).

4. *Supra,* note 1.

5. Farmer's Coal & Supply Co. v. Albright, 90 N.J.Eq. 132, 106 Atl. 545 (Ch. 1919).

6. Borg v. McCloskey, 120 N.J.Eq. 80, 184 Atl. 187 (Ch. 1936).

7. P. L. 1919, p. 502.

8. Gross v. Penn. Mtge. and Loan Co., 104 N.J.Eq. 439, 146 Atl. 328 (E.&A. 1929). The defect was subsequently remedied by P. L. 1934, ch. 222, par. 1, p. 521; now Rev. St. 1937, 25:2-15. For grounds on which such a statute is held unconstitutional, see American Surety Co. v. Connor, 251 N.Y. 1, 166 N.E. 783 (1929).

stitutional question was not considered by the court in the decision in the principal case.

The court of chancery is the only tribunal vested with power to set aside a conveyance made in fraud of creditors,[9] but it has no jurisdiction to determine actions for debt and for damages arising out of a breach of contract.[10] It is a well established rule of equity jurisprudence that a creditor is not entitled to the aid of a court of equity for the enforcement of a judgment, until he has exhausted his remedy at law.[11] Equity will not grant its aid to enforce legal process.[12] When a creditor comes into equity to reach the equitable interest of his debtor on land, he must show a judgment which would be a legal lien, and an execution returned unsatisfied. This will show that his remedy at law is exhausted.[13]

In view of the strong language of the previous decisions it would seem that the establishment of the debt by a law court is a constitutional condition precedent to the foundation of equitable jurisdiction.

DIVORCE—ALIMONY—EFFECT OF SUBSEQUENT MISCONDUCT.—In an action based upon a petition declaring defendant in contempt for failure to pay permanent alimony awarded after a decree of absolute divorce the defendant countered with a petition alleging subsequent misconduct of petitioner. *Held*: Post-marital unchastity of a former wife does not bar her right to alimony after a decree for absolute divorce, nor is such misconduct ground for vacating the alimony as granted in her decree for absolute divorce; but in a proper case, such misconduct may be material to the *quantum* of award.[1] *Suozzo v. Suozzo,* 16 N.J.Misc. Rep. 475, 1 Atl. (2nd Ed.) 930 (Ch. 1938).

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9. Gross v. Penn. Mtge. & Loan Co., *supra,* note 8; United Stores Realty Corp. v. Asea, 102 N.J.Eq. 600, 142 Atl. 38 (E. & A. 1928).

10. Gross v. Penn. Mtge & Loan Co., *supra,* note 8; Haggerty v. Nixon, 26 N.J.Eq. 42 (Ch. 1875); Dunham v. Cox, 10 N.J.Eq. 437, 64 Am. Dec. 460 (E. & A. 1855); Edgar v. Clevenger, 2 N.J.Eq. 258 (Ch. 1839).

11. Wales v. Lawrence, 36 N.J.Eq. 207 (Ch. 1882).

12. Robert v. Hodges, 16 N.J.Eq. 299 (Ch. 1863).

13. Bigelow Blue Stone Co. v. Magee, 27 N.J.Eq. 392 (Ch. 1876).

1. Much of the opinion and pleadings have been omitted as the subsequent misconduct of the wife is the issue under discussion. It was decided that one in

The obligation incumbent upon a husband to supply suitable support for his spouse, finds its origin in the common law. It arises out of the status of marriage,[2] and is of such importance to the public generally, that a duty is imposed by the State to safeguard this obligation.[3] It is imposed, fixed and absolute in character and therefore may not be dissolved by the consent of the wife.[4]

Alimony is based on this common law duty[5] under which the husband may be compelled to pay to his wife an allowance for her maintenance, while she is living apart from him or has been divorced.[6] The general rule relieves a husband of this obligation when the divorce was granted for misconduct of the wife,[7] but a strict application of this rule often caused great hardship. In order to prevent too harsh a result, England and the United States have enacted statutes allowing the courts to divide community property. This allowance is not based on the terminated obligation to support,[8] nor is it given as a matter of course,[9] but rather it is allowed to the discretion of the Court to deal justly with the property under the circumstances.[10] Most courts, however, despite the presence of statutes allowing a division of community property, deny to a wife, who has been living in promiscuous

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contempt for non payment of alimony could not be heard until the contempt was purged, but this rule will not be invoked to bar a good defense nor to effect any other inequitable result. Defendant alleged remarriage of the petitioner, the allegation failing for lack of sufficient proof. Defendant's reliance upon the "clean hands" doctrine was not allowed as the proven misconduct must be directly related to the subject matter upon which relief is being sought. The wife's subsequent misconduct has no direct bearing upon the issue of alimony nor its continuance.

2. Sobel v. Sobel, 99 N.J.Eq. 376, 132 Atl. 603 (E. & A. 1926); Rich v. Rich, 12 Misc. Rep. 310, 171 Atl. 515, Juvenile and Domestic Relations Court 1934.

3. Willits v. Willits, 76 Neb. 228, 107 N.W. 379 (1906).

4. White v. White, 87 N.J.Eq. 354, 100 Atl. 235 (E. & A. 1917).

5. Wetmore v. Markoe, 196 U.S. 68 (1904); 60 Am. Dec. 665 Note.

6. 1 R.C.L. 864.

7. 60 Am. Dec. 670 (note).

8. Wilkins v. Wilkins, 84 Neb. 206, 120 N.W. 907 (1909).

9. Davis v. Davis, 134 Ga. 804, 68 S.E. 594 (1910).

10. Pryor v. Pryor, 88 Ark. 302, 114 S.W. 700 (1908); Heath v. Heath, 103 Fla. 1071, 138 So. 796 (1932); Vigil v. Vigil, 49 Col. 156, 111 Pac. 833 (1910).

sin, the benefits of the statute.[11] Adultery, therefore, of the wife without collusion or connivance of the husband, would seem to relieve the husband of his common law duty to support.[12] It would logically follow that the obligation to support is conditional and exists only so long as the wife remains faithful.[13] Where, however, a divorce is granted for the misconduct of the husband, his spouse is entitled to support, as equity preserves this singular duty after banishing the remaining marital obligations by the divorce action.[14] It is conceded that chastity, as a duty to the husband, ceases upon termination of the marital state, but it is submitted that chastity as a condition to the obligation of support before dissolution is carried along with the obligation after dissolution in its original tenor. The Court, by severing the bonds of matrimony and allowing the obligation of support to continue into the post marital period, does not thereby change the original condi-

11. 17 AM. JUR. 478. Spaulding v. Spaulding, 133 Ind. 122, 32 N.E. 224 (1892).

12. Piper v. Piper, 13 N.J.Misc. 68, 176 Atl. 345 (Ch. 1934).

13. At what period the obligation of support ceases has caused much discrepancy in New Jersey. Many courts have held that a commission of adultery does not relieve the husband of his duty until he secures a divorce. Tompkins v. Thompkins in Miller v. Miller, 1 N.J.Eq. 386 (Ch. 1831). Also where the wife denies the commission under oath the court will allow alimony *pendente lite*. Bray v. Bray, 6 N.J.Eq. 27 (Ch. 1846). She is presumed innocent until final hearing. Warwick v. Warwick, 76 N.J.Eq. 474, 75 Atl. 164 (Ch. 1910). The common law duty of support is a continuing obligation and exists throughout the marital relationship and during the interval between the commission of the offense and adjudication. Irvine v. Irvine, 81 N.J.Eq. 20, 88 Atl. 377 (Ch. 1912) *contra*. The duty to support under R.S. 2:50-39 has not been enforced by the Court of Chancery on the ground that the offence is justifiable ground for an abandonment by the husband. In Piper v. Piper, 13 N.J.Misc. 68, 176 Atl. 345 (Ch. 1934), there is a strong criticism of the cases holding a husband liable for support where the wife is the offending party. The Court relieves the husband of his duty to divorce his wife in order to free himself of the obligation to support if he prefers not to sue for divorce but merely to defend himself in a suit for separate maintenance. However, where the matrimonial offence is committed with the connivance or consent of the husband, it is not a justifiable cause excusing him from his duty to support. White v. White, 87 N.J.Eq. 354, 100 Atl. 235 (E. & A. 1917).

14. McGuiness v. McGuiness, 72 N.J.Eq. 381, 68 Atl. 768 (E. & A. 1908). Lynde v. Lynde, 54 N.J.Eq. 473, 35 Atl. 641 (E. & A. 1897).

tional character of the obligation to that of an unconditional one. The condition travels with the obligation. After a decree *a vinculo,* the former wife may not be technically guilty of adultery it is true, yet the allowance is understood to be granted on the condition that she comport herself as becomes good morals.[15] Where a divorce is effectuated, therefore, because of the husband's marital misconduct, and an alimony decree is granted to the wife, who subsequently conducts herself in an immoral fashion, it is submitted that her right to support should be qualified by the accompanying condition.

The result accomplished would have the effect of a *dum casta* clause being employed in the alimony decree. It is not adverse to logical legal reasoning that a *dum casta* clause be inserted where the circumstances of the case warrant such an insertion.[16] In England the general rule seems to be that where a divorce is granted because of the husband's misconduct, the *dum casta* clause will not be employed,[17] but where the marriage is dissolved for a breach by the wife, and the husband is correspondingly innocent, the clause will be inserted.[18] In one reported case, the Court, having within its jurisdiction a situation in which a divorce was granted because of the husband's misconduct, inserted the *dum casta* clause and allowed her future maintenance to be dependent upon her subsequent chastity.[19] The court, within its opinion, stated that had the couple been divorced *a mensa et thoro* and thereafter the wife be guilty of adultery, she would automatically lose her allowance; similarly, if she is unchaste after an *a vinculo* divorce, it is unreasonable for the husband to be held under a duty of support. It was also determined by an English Court that where a wife endeavors to secure a divorce on the grounds of adultery, she having been previously adjudged an adulteress, the *dum casta* clause would be inserted despite the fact that in the present action she is free from guilt.[20]

It is not without significance that in 1937 a bill was introduced

15. BIDDLE'S NEW JERSEY DIVORCE PRACTICE, p. 155.
16. *Ibidem.*
17. Morris v. Morris, 31 L. J. Prob. (n.s.) 33.
18. Squire v. Squire, 74 L. J. Prob. (n.s.) 1; 92 L. T. (n.s.) 472 (1905).
19. Fisher v. Fisher, 31 L. J. Prob. (n.s.) 1; 2 Swabey & T. 410.
20. Kettlewell v. Kettlewell, 68 L. J. Prob. (n.s.) 16 (1898).

in the New Jersey Legislature which deprived a former wife of alimony on proof of subsequent misconduct.[21] The bill failed, thereby leaving the subject matter to the treatment by the courts under the common law. As is stated by the present Court, the matter of subsequent misconduct has been limitedly treated in New Jersey, and a reliance upon various state decisions was necessary to justify the holding. The cited cases do not permit subsequent unchastity to bar alimony, constructing their conclusions on the premise that a divorce severs the marital duties and, therefore, a former wife is under no obligation to her husband to lead an exemplary life.[22] The question, however, presents itself as to whether the present Court is justified in relying upon these cases as authority for allowing the lesser remedy of *modification* of the alimony decree. *Dicta* in the cases allow the modification, but on closer examination there seems to be an additional fact, such as the reservation of the right to modify within the decree, or the modification being effected during the same term of the Court,[23] or the express power of modification given under statute,[24] which swayed the Court in its determination.[25] The citations under the opinion, therefore, forbid subsequent unchastity to act as a bar to alimony,[26] as well as allowing the modification only when a further empowering agent is present.[27]

The present decision which permits subsequent misconduct to

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21. Assembly Bill 401 introduced March 1, 1937. HERR, MARRIAGE, DIVORCE, SEPARATION.

22. Cole v. Cole, 142 Ill. 19, 31 N.E. 109 (1892); Hayes v. Hayes, 220 N.Y. 596, 115 N.E. 109 (1917).

23. Weber v. Weber, 153 Wis. 132, 140 N.W. 1052 (1913); 45 L.R.A. 875 (n.s.) note.

24. Cole v. Cole, *supra* note 22.

25. A decree in an *a vincula* proceeding becomes more severe and conclusive than in an *a mensa et thoro* situation, in that control over the latter may be generally exercised, whereas in the former, the control is limited. The reason for the different degrees of control is not apparent as a divorce adjudicates the lone right to have the marriage dissolved. There is no right of property involved. Because the parties become strangers in one case, while in the other they remain husband and wife, is immaterial when the question is a collateral one of future maintenance for the wife. Alexander v. Alexander, 13 App. D. C. 334 (1898).

26. Cariens v. Cariens, 52 W. Va. 113, 40 S.E. 335 (1901).

27. Spain v. Spain, 177 Ia. 249, 158 N.W. 529 (1916); Mayer v. Mayer, 154 Mich. 386, 117 N.W. 890 (1908).

affect the amount of the award may be justified, not by authority, but by circumstance, in that New Jersey has enacted a statute allowing modification.[28] Our statute does not include subsequent misconduct as a ground for modification and, therefore, one of the proper prerequisites under the statute must be present before it is possible to allow subsequent misconduct to be an effective collateral element in the determination. Such an interpretation must necessarily follow from the language employed by the Court in stating that "subsequent misconduct may be material to the quantum of award in a proper case."

If we permit, as advocated by the present Court, subsequent unchastity to act, not as a bar, but under the *proper case,* as a measuring stick in determining the quantum of the award, the proper circumstances or case and not the subsequent misconduct seems to be the paramount issue. In determination of the application for reduction of the decree the Court is undoubtedly swayed by the ability of the former wife to maintain herself, and the inability of the former husband to earn sufficient to accomplish the provisions of the decree; but this is not conclusive.[29] If, therefore, a former wife takes up a life of sin and thereby is able to maintain herself in an ample fashion, and the husband, due to financial reverses, is incapable to provide, the Court in determining the application will be primarily concerned with her financial status, and only secondarily with her degraded morals and conduct in gaining such status.

In conclusion it is submitted that subsequent immorality of a former wife should not act merely as a collateral factor in modification of the decree, but should act as a complete bar, except where the state would be forced to care for a destitute individual. When evidence of lewdness and a subsequent life of shame is offered, the Courts should not permit such conduct to go unchallenged.[30]

A remarriage of a former wife in New Jersey, after her decree for divorse, *ipso facto,* terminates her right to further payments under the existing order;[31] but if a former wife becomes the mistress of another

28. R.S. 2:50-37.

29. Nipper v. Nipper, 133 Ga. 216, 65 S.E. 405 (1909).

30. SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS, Vol. 2.

31. R.S. 2:50-38.

she is still entitled to her right of support. It is to her ultimate interest to remain unmarried and to continue to be involved in a life of sin and immorality, which is decidedly repugnant to public policy.[32]

MUNICIPAL CORPORATIONS — VALIDITY OF ACTS OF DE FACTO OFFICERS.—Appellants held various positions under the Hudson County Boulevard Commission. By legislative enactment, the powers of the above board were vested in a new County Park Commission. The new commissioners obtained a judgment of ouster against the old commissioners. This judgment was reversed in the Court of Errors and Appeals, and the act under which the new commissioners were appointed and qualified was declared invalid. The new commissioners, between the time the judgment of ouster was entered and before its reversal, discharged appellants. After the decision of the Court of Errors and Appeals, the appellants were returned to their positions, and the present action was prosecuted to recover salaries unpaid during the period appellants were out of work. *Held,* appellants' claims for salaries denied. The acts of a *de facto* public officer, pursuant to a statute antecedent to a judicial declaration that the same is unconstitutional, are valid so far as they involve the interests of the public and of third persons. *Byrne v. Boulevard Commissioners, Hudson County,* 121 N.J.L. 497 (E. & A. 1939).

For a complete discussion of the problems involved in this case, see HARRIS, *Validity of Acts of Officers Occupying Offices Created Under Laws Declared Unconstitutional* (1938), III UNIV. OF NEWARK LAW REVIEW 125.

NEGOTIABLE INSTRUMENTS—LIABILITY OF BANK TO DEPOSITORS ON FORGED CHECKS.—Defendant bank paid out of plaintiff Board of Education's account money for checks duly and properly signed by

32. Adultery is a bar to a suit for separate maintenance, but is no bar to a suit to enforce payments under a separation agreement containing no *dum casta* clause. It follows therefore that a husband may bind himself further by such an agreement than if there were no agreement. HERR, MARRIAGE, DIVORCE, SEPARATION, Vol. 1.

officers of the board but made out by the clerk to persons to whom the bank was not indebted. The clerk forged endorsements of fictitious payees, endorsed his own name, and cashed or credited the checks to his personal account. This activity continued for more than two years, when a demand was made upon the defendant to reimburse for funds so paid out. Upon a refusal, action was brought and a verdict returned for the plaintiff for the value of the checks plus interest from the dates of disbursement. *Board of Education of Jefferson Township v. Union National Bank of Dover,* 16 N.J.Misc. 50, 196 Atl. 352 (Circ. Ct. 1938). On appeal, *held,* unanimously affirmed, 121 N.J.L. 177, 1 Atl. (2nd) 383 (E. & A. 1938).

The case is an interesting one, involving as it does, considerations of negotiable instrument law, the relationship between a bank and depositor, the imputability of fraud and negligence to a principal and to a principal which is a municipal corporation, and the interpretation of the statute of limitations on a bank's liability on forged instruments.

The first consideration involves the application of the section of the Negotiable Instruments Law dealing with instruments made payable to bearer and to fictitious payees.[1] The defendant's contention that the checks in question passed title upon delivery because of their nature as "bearer" paper, within the statute, was unsound. The statute, itself, makes it clear that the maker of the check must have knowledge of the fictitious nature of the payee.[2] This is true whether the payee named had actual existence or not.[3] This raises no difficulty when the maker acts for himself, but a serious question is raised when an agent is assigned the duty of making the checks for his principal. Basic agency law, charges the principal with such knowledge of the agent as is acquired by him under authority and in pursuit of the principal's interests.[4] The rule does not cover a tort committed by the agent without

1. Rev. St. 1937, 7:2-9: "The instrument is payable to bearer when * * * it is payable to the order of a fictitious payee and such fact was known to the person making it so payable."

2. Montgomery Garage Co. v. Mfgrs. Liability Ins. Co., 94 N.J.L. 152, 109 Atl. 296 (E. & A. 1919).

3. Ocean A. & G. Corp. v. Lincoln Nat. Bank, 112 N.J.L. 550, 172 Atl. 45 (E. & A. 1934).

4. Camden Safe Deposit & Trust Co. v. Lord, 67 N.J.Eq. 489, 58 Atl. 607 (Ch. 1904).

authority,[5] especially when the tort is independent and detrimental to the principal.[6] In the principal case, the clerk and the President of the Board, who was also a party to the fraud,[7] had knowledge of the wrong, but well founded legal principles do not charge the principal with constructive notice thereof.

It having been found that the checks were not payable to bearer but to order,[8] a consideration of the effect thereon of Section 23 of the Negotiable Instrument Law is imperative.[9] Since the defendant bank is a holder under a forged signature, it is clear from the language of the statute that it can find no relief from its liability, except in some act of the plaintiff working an estoppel from asserting an otherwise legitimate defense. The defendants character as a bank adds complexity to a situation which in its simplest form presents difficulties. It necessitates discussion of the relationship of bank and depositor, of debtor and creditor, and the privileges and obligations inherent in and consequent upon its presence. The relationship of bank and depositor is held to be founded in contract, generally implied.[10] Under this implied contract, the bank is bound to pay checks as directed and only as directed by the depositor. The obligation being contractual is absolute; it places upon the bank the duty to determine, at its peril, the genuineness of endorsements.[11] The liability remains absolute in the absence of conduct by the depositor spelling an estoppel.[12] That this

5. Holler v. Ross, 68 N.J.L. 324, 53 Atl. 472 (E. & A. 1902).

6. The knowledge of the agent is not imputable to the principal when the agent is committing an independent fraud. The presumption of constructive notice is destroyed if concealment is essential to the working of the fraud. Camden Etc. v. Lord, *supra*, note 4.

7. Both were later convicted: the clerk of forgery, the president of conspiracy to defraud.

8. Rev. St. 1937, 7:2-8.

9. Where a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom such right is sought to be enforced is precluded from setting up the forgery or want of authority. Rev. Stat. 1937, 7:2-23. See cases collected in 9 Corpus Juris, sec. 340.

11. See cases collected in 9 Corpus Juris, sec. 356, p. 734.

12. Rev. St. 1937, 7:2-3. See *supra*, note 9.

is the law of New Jersey is undoubted.[13] The doctrine is sound in reason and commercial expediency. With the principle there is no difficulty, but a real problem is presented by its qualification, limiting liability in case of negligence by the depositor The general exception is easily stated: negligence by the depositor frees the bank, if the bank has exercised diligence. The burden is upon the bank to show facts which will shift the loss to the depositor.[14] It is difficult to establish any set rule as to what constitutes negligence or conduct estopping the depositor from asserting the defense of forgery. It is generally conceded that the depositor owes the bank a duty of care in the examination of vouchers returned by the bank. Failure to exercise this duty constitutes an account stated and precludes any complaint by the depositor.[15] This obligation, however, is discharged by the use of reasonable diligence in the examination.[16] The requirement of due care is fulfilled if a reasonably diligent examination would lead to no discovery of forgery because the depositor neither knew nor could be held to know the signature of the payee whose endorsement was forged.[17] When it is an agent who commits the fraud, the case is a more difficult one, *a fortiori* when it is the same agent who has the duty of examining the returned vouchers. Ordinary care is still the rule—ordinary care in the selection of a reasonably honest and intelligent agent, and in the supervision of his activity.[18] If the agent committing the forgery also has the duty of examining returned vouchers, there is strong ground for holding the principal.[19] In the principal case, the custodian of funds was free of any negligence; she neither knew

13. Passaic-Bergen Lumber Co. v. U. S. Trust Co., 110 N.J.L. 315, 164 Atl. 580 (E. & A. 1932); Singer Sewing Machine Co. v. Citizens Nat. Bank, 111 N.J.L. 199, 168 Atl. 32 (Sup. Ct. 1933); Harter v. Mechanics Nat. Bank, 63 N.J.L. 578, 44 Atl. 715 (E. & A. 1899); Pratt v. Union Nat. Bank, 79 N.J.L. 117, 75 Atl. 313 (Sup. Ct. 1909); Pannoma B. & L. Ass'n v. West Side Trust Co., 93 N.J.L. 377, 108 Atl. 240 (E. & A. 1919).

14. Ocean A. & G. Corp. v. Lincoln Nat. Bank, *supra*, note 3.

15. Pannoma B. & L. Ass'n v. West Side Trust Co., *supra*, note 13.

16. Harter v. Bank, *supra*, note 13; Pratt v. Bank, *supra*, note 13.

17. *Ibidem.*

18. Pannoma B. & L. Ass'n v. West Side Trust Co., *supra*, note 13, wherein the depositor was held liable for the negligence of its treasurer.

19. *Ibidem.*

nor was expected to know the signatures of all payees of the board. The court also upheld the finding of non-negligence as to the other board members. This finding was reasonable and in accord with the facts presented by the record. There being no negligence and no imputation of the agent's negligence, it appears as an uncontestable conclusion that the bank is liable for the value of the checks disbursed, under the implied duty to make reasonable inquiry. An additional fact in support of liability is evidence that the bank should have been put on notice by the clerk's endorsement on every check and his apparent diversion of funds.

Having failed to assert a successful defense on the merits, the defendant strongly relied on the statute of limitations[20] restricting the bank's liability on the payment of forged or raised checks to a period of one year following the return to the depositor of the vouchers of payment and the passbook. Failure of the depositor to notify of the fraud within the designated period relieves the bank of the duty to reimburse. The court construed the statute as applicable only to checks on which the maker's signature had been forged, or where the signature so forged was known to the maker. In holding the statute inapplicable to forged endorsements, with which the depositor is not and should not be familiar and regarding which he had no knowledge within the prescribed period, the court followed no judicial precedent squarely in point, but, rather, logical *dicta* in previous cases.[21] The trial judge, in an earlier case,[22] held the statute so limited, declaring that, in the absence of express legislative intent to the contrary, there could be little doubt that the forgery contemplated by the enactment was one which the depositor could detect by a reasonably careful examination of the instrument; and since the maker cannot be held to a knowledge of the signature of the payee generally, the statute must refer to a forgery of the maker's signature—which he knows—and not to the signature of a payee—which he may not know. Affirmance by the upper court

20. REV. ST. 1937, 7:4-7: "No bank shall be liable to a depositor for the payment by it of a forged or raised check, unless within one year of the return to the depositor of the voucher of such payment, such depositor shall notify the bank that the check so paid was forged or raised.

21. Pratt v. Bank, *supra*, note 13; Pannomia Etc. v. Trust Co., *supra*, note 13.

22. Pratt v. Bank, *supra*, note 13.

proceeded on other grounds, the admission by it of the trial court's logic was mere *dicta.* The principal case is the first instance of such an interpretation forming the basis of decision, although no argument is added to the earlier *dicta.*

STATUTORY CONSTRUCTION—REVISED STATUTES, 1937—ADMINISTRATION OF ESTATES—RIGHT OF SURVIVING SPOUSE TO ADMINISTRATION.—Decedent's widow made application for administration of her husband's estate. Decedent's daughter by a former marriage filed a *caveat* to prevent the granting of administration. The interests of the widow and daughter were antagonistic and hostile.[1] *Held,* under Revised Statutes, 1937, 3:7-6, that a competent, impartial administrator be appointed. The right of a surviving spouse to administration is a preferential but not exclusive right. *In re Messler's Estate,* 16 N.J. Misc. 434, 1 Atl. (2nd) 322 (Orph. Ct. 1938).

The granting of administration is controlled by an appropriate statute,[2] which prior to the revision had been construed as giving the court discretionary power in the appointment, with a preference accorded the surviving spouse.[3] The wording of the statute as orig-

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1. The testimony discloses that the widow had been married to decedent less than a year. Decedent was the administrator of the estate of his former wife, but had never filed an accounting. The estate remained unsettled, and the caveator in the principal case had not received her share in the estate. Under Revised Statutes, 1937, 3:10-9, the present legal representative must account for decedent's administration of his first wife's estate. It further appeared that the widow displayed little business acumen and was unfamiliar with modern business practices. Improvidence had been shown in previous dealings and this was thought to be a serious detriment to the proper administration of the present estate which involved complicated accounts on decedent's business.

2. Prior to the revision, the statute read as follows: "If any person dies intestate * * * then administration * * * shall be committed or granted to the husband or widow, as the case may be, or to the next of kin * * * "

3. Cramer v. Sharpe, 49 N.J.Eq. 558, 24 Atl. 962 (Prerog. 1892); Potts v. Smith, 3 Rawle 361, 24 Am. Dec 359 (1832); *In re* Hill's Estate, 55 N.J.Eq. 15, 37 Atl. 952 (Prerog. 1897); Estate of Runyon, 12 N.J.L.J. 15. See KOCHER, N. J. PROBATE LAW, p. 264. This is also the recognized rule in other jurisdictions. See *In re* Boytor's Estate, 198 Atl. 484 (Penn. 1938) wherein the court stated that while there was a " * * * priority of right to a surviving spouse to

inally enacted was changed by the Revised Statutes of 1937, which provided that in case of intestacy, administration shall be granted to the surviving spouse, but if not accepted or if there be no surviving spouse, then to the next of kin.[4]

It was contended in the principal case that either death or refusal to act was a condition precedent to granting administration to the next of kin, and that under the revision it was mandatory upon the court to appoint the surviving spouse.

In resolving the effect of the change in phraseology, the court was called upon to interpret two key statutes: the *creating act* which enjoined the Revision Commission from changing any statute which by judicial decision had an established construction,[5] and the *adopting act* which accepted the new revision as the public laws of New Jersey.[6] By settled rules of statutory construction, the intent of the legislature in adopting the revision must control. The intent to modify must be clearly manifest, and the history behind the statute must be considered in discovering a sound ground to support such an intent.[7] As the func-

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administer the estate of his deceased wife, such right is not an absolute one. Other things being equal, the surviving spouse is entitled to be preferred, but those otherwise entitled to administer may be rejected on account of the inexpediency of committing the trust to them."

4. "If any person dies intestate, administration of the personal estate of such intestate shall be granted to the surviving spouse of such intestate, if he or she will accept the same, and if there be no such person, then to the next of kin of such intestate * * * " REV. ST. 1937, 3:7-6.

5. P. L. 1925, ch. 73, sec. 2. REV. ST. 1937, vol. I, p. ix, par. 2, provides, *inter alia* "that no changes shall be made in the phraseology or distribution of the sections of any statute that has been made the subject of judicial decision by which the construction thereof, as established by such decisions, shall or can be impaired or affected."

6. "The Revision, Consolidation and Compilation, prepared under the direction of the legislature by the Revision Commission * * * is hereby adopted as all the public statute law of the State of New Jersey of a general nature." P. L. 1937, ch. 188; REV. ST. 1937, title I, p. 1.

7. Leonard v. Leonia Heights Land Co., 81 N.J.Eq. 489, 87 Atl. 645 (E. & A. 1913); Newark v. Tunis, 81 N.J.L. 45, 78 Atl. 1066 (Sup. Ct. 1911), *aff'd*, 82 N.J.L. 461, 81 Atl. 722 (E. & A. 1911). King v. Smith, 91 N.J.L. 648, 103 Atl. 191 (E. & A. 1917). "The intent of the legislature is to be ascertained from the context, the effects and consequences, and the reason and spirit of the law." *In re* Murphy, 23 N.J.L. 180 (Sup. Ct. 1851).

tion of a revision is not to enact substantive law, a change cannot be *presumed.* A revision is a procedural undertaking, involving a reorganization or collation of the law, and its ultimate objective is to make the law more accessible.[8] Where different language is employed and no inconsistency exists, no change in the original meaning is accomplished, for the legislature has expressly provided that the established rule is to be continued with its previous meaning.[9]

In the principal case, after a consideration of all the rules by which the standard of intent is measured, the court failed to discover a clear meaning on the part of the legislature to uproot and abandon the previous practice, and held that the widow was entitled to a preferential but not an exclusive right to administer her husband's estate.

The reasoning of the case is subjective. An objective approach, guided by a manifest intent to work a change, might have led to a contrary result. It can be argued that the legislature is presumed to be conversant with the existing law, and where an inconsistency or an incongruity exists, an actual intent to change is so manifest.[10] Likewise, there is a rule of construction embodied in the revision to the effect that provisions thereof, not inconsistent with those of prior laws, are to be construed as a continuation of such laws. It would seem to follow, that in a situation such as presented by the principal case, where there *is* an incongruity in the revision and the pre-existing law, that the actual and apparent intent of the legislature was to effectuate a change and the revision should be so construed. The burden should be upon the one seeking to avoid a change.

As the alteration in the principal case involved a rule of operation which the court was inclined to continue, it is only with reservation that the decision can be viewed as a precedent creating a standard of

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8. REV. ST. 1937, 1:1-5: "The classification and arrangement of the several sections of the Revised Statutes have been made for the purpose and convenience, reference and orderly arrangement, and therefore no implication or presumption of a legislative construction is to be drawn therefrom."

9. REV. ST. 1937, 1:1-4: "The provisions of the Revised Statutes not inconsistent with those of prior laws, shall be construed as a continuation of such laws."

10. Application of Passaic City Clerk, 94 N.J.L. 384, 116 Atl. 695 (Sup. Ct. 1920): "Thus it has been held where in a subsequent statute on the same subject as a former one, the legislature uses different language in the same connection, the courts must presume that a change of the law was intended.

construction for other inconsistencies and changes contained in the revision.

TAXATION — JURISDICTION TO TAX — TRANSFER TAX ON REVOCABLE TRUST CREATED AND ADMINISTERED ELSEWHERE. — Decedent while a resident of New York created a trust by written instrument under which he transferred cash and securities to a New York bank and to himself, in trust, with the provision that the income be paid to *B* and upon B's death to himself for the benefit of *C*, the remainder to himself if living and, if deceased to *D*, a charitable institution. Power to alter, amend, or revoke was expressly reserved in the settlor. Subsequently, decedent became a resident of New Jersey and so remained until his death. The power to revoke was never exercised, but on two different occasions the terms of the trust were amended. On decedent's death, New Jersey attempted to tax the transfer under the trust. On *certiorari* to review Prerogative Court decree setting aside the tax assessed, *held,* reversed. *Kings County Trust Co. v. Martin,* 121 N.J.L. 290, 2 Atl. (2nd) 187 (Sup. Ct. 1938).

The power to amend, alter or revoke distinguishes the case from a prior decision by the Court of Errors and Appeals holding that New Jersey was not authorized to levy a transfer tax on a gift given by deed of trust executed in another state of which the donor was then resident, when the *corpus* was in the possession of the other state, although the donor died a resident of New Jersey.[1]

It is doubtful whether such a distinction should be controlling.[2] A transfer tax is not a tax upon property but is a premium or privilege upon the succession to title.[3] To justify the imposition of the tax, the state must have jurisdiction over the thing taxed.[4] This would seem

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1. MacClurkan v. Bugbee, 106 N.J.L. 192, 150 Atl. 443 (E. & A. 1930).

2. Matter of Brown, 274 N.Y. 10, 8 N.E. (2nd) 42 (1937) and comment in (1937) 51 HARVARD LAW REV. 174.

3. Nelson v. Russell, 76 N.J.L. 27, 69 Atl. 426 (Sup. Ct. 1908); Eastwood v. Russell, 81 N.J.L. 672, 81 Atl. 108 (E. & A. 1911); Parrott v. Rogers, 86 N.J.Eq. 311, 98 Atl. 638 (E. & A. 1914).

4. See Frick v. Pennsylvania, 268 U.S. 473, 45 Sup. Ct. 603, 42 A.L.R. 316 (1925). See LOWNDES, *Basis of Jurisdiction in State Taxation of Inheritances,*

to necessitate a finding in the principal case that the property passed because of the donor's *failure* to exercise his power of revocation, for in no other way can New Jersey law operate on the transfer or contribute toward the act of transfer. It being a fact that there was no revocation, the only alternative to a finding that the property passed by reason of the failure is that it passed because the donor made a gift in the first place. This having taken place in New York and while the donor was domiciled there, New York would be justified in imposing a tax.[5] New York's claim is strengthened by the fact that the trust is to be administered there, for strong cases hold that only the state wherein the trust is administered may tax its intangible *corpus*.[6] A finding that the mere failure to revoke conferred jurisdiction on New Jersey would seem to be contrary to the approach of the United States Supreme Court in a case holding that the domiciliary state of the donee of a general testamentary power of appointment conferred by a trust created and administered elsewhere has not jurisdiction to impose a death tax upon the trust property.[7]

The possibility of double taxation in the principal case is rendered

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(1931) 29 MICH. LAW REV. 850, and ROTTSCHAEFER, *State Jurisdiction to Impose Taxes*, (1933) 42 YALE L. J. 305. See also Dixon v. Russell, 79 N.J.L. 490, 76 Atl. 982 (E. & A. 1910).

5. Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204, 50 Sup. Ct. 98 (1930); Baldwin v. Missouri, 281 U.S. 586, 50 Sup. Ct. 436 (1930); Beidler v. South Carolina, 282 U.S. 1, 51 Sup. Ct. 54 (1930); First National Bank v. Maine, 284 U.S. 312, 52 Sup. Ct. 27 (1932).

6. Safe Deposit & Trust Co. v. Virginia, 280 U.S. 83, 50 Sup. Ct. 59 (1929), noted in (1930) 30 COLUMBIA LAW REV. 539, 543; (1930) 43 HARVARD LAW REV. 668; (1930) 28 MICH. LAW REV. 776; (1930) 16 VA. LAW REV. 521. See also, Mayor and City Council of Baltimore v. Gibbs, 166 Md. 364, 171 Atl. 37 (1934), *cert. denied*, 293 U.S. 559, 55 Sup. 71 (1934). See comment in (1934) 47 HARV. LAW REV. at 1224. *Cf.* Commonwealth v. Safe Deposit & Trust Co., 155 Va. 452, 155 S.E. 895 (1930), noted in (1931) 37 W. VA. LAW Q. 319.

7. Wachovia Bank and Trust Co. v. Doughton, 272 U.S. 567, 47 Sup. Ct. 202 (1926), noted in (1927) 40 HARVARD LAW REV. 652; (1927) 12 CORNELL LAW Q. 379; (1927) 25 MICH. LAW REV. 372. See (1937) 51 HARVARD LAW 371; (1926) 75 UNIV. OF PA. LAW REV. 372. See also (1937) 51 HARVARD LAW REV. 174, relying on this case to support its approval of Matter of Brown, 274 N.Y. 10, 8 N.E. (2nd) 42 (1937) wherein a result contrary to that of the principal case was reached. The *Wachovia Bank* case apparently overruled Bullen v. Wisconsin, 240 U.S. 625 (1916) wherein deceased, a resident of Wisconsin,

acute by the fact that the main portion of the trust consists of securities. The New York courts would have support in finding that the intangibles had acquired a "business situs."[8] A rule analogous to the one that forbids taxation of tangible personal property other than in the state where it is permanently located, regardless of the domicile of the owner[9] has developed in connection with intangible property by reason of the creation of choses in action in the conduct by an owner of his business in a state different from that of his domicile.[10] This approach, however, seems unrealistic as applied to the usual gift in the form of a trust.[11] And however undesirable "double taxation" may be, a peg on which to hang a justification eliminates true legal objection.

It is submitted, therefore, that in the principal case, as the trust was created and is to be administered in New York, that state has a sound basis for assessing a transfer tax; and as New Jersey's only justification, the failure to revoke the trust, is barred by the analogy

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had transferred stocks and bonds to an Illinois trust company to hold in trust, retaining a power of revocation, and the right to direct and control the disposition of both principal and income. In fact, he received the whole income for life. *Held*: Wisconsin may impose a transfer tax, although Illinois also had done so. See the language of Mr. Justice Holmes concurring in the *Wachovia Bank* case and doubting that the decision could be reconciled with the *Bullen* case. *Cf.* Guaranty Trust Co. v. Blodgett, 287 U.S. 509 (1933).

8. New Orleans v. Stempel, 175 U.S. 309, 20 Sup. Ct. 110 (1899); State Board v. Compton Nat. D'Escompte, 191 U.S. 388 (1903); Metro. Life Ins. Co. v. New Orleans, 205 U.S. 395, 27 Sup. Ct. 499 (1906); Liverpool and London and Globe Ins. Co. v. Board of Assessors, 221 U.S. 346 (1911). *Cf.* Newark Fire Ins. Co. v. State Board, 118 N.J.L. 525, 193 Atl. 912 (Sup. Ct. 1937), *aff'd* 120 N.J.L. 224, 198 Atl. 837 (E. & A. 1938), appeal now pending in United States Supreme Court; Commercial Etc. Ins. Co. v. State Board, 119 N.J.L. 94, 194 Atl. 390 (Sup. Ct. 1930), *aff'd* 120 N.J.L. 186, 198 Atl. 847 (E. & A. 1938). But see *contra* Hackett v. Bankers Trust Co., 122 Conn. 107, 187 Atl. 653 (1936) rejecting the business situs theory.

9. Frick v. Pennsylvania, 268 U.S. 473, 45 Sup. Ct. 603 (1925). See SEEFURTH, *Recent Limitations on the Power to Impose Inheritance and Estate Taxes*, (1925) 25 COLUMBIA LAW REV. 870.

10. See cases cited *supra*, note 8.

11. See comment of Hackett v. Bankers Trust Co., 122 Conn. 107, 187 Atl. 653 in (1937) 37 COLUMBIA LAW REV. 497, at 500. *Cf.* (1935) 48 HARVARD LAW REV. 859.

to general testamentary powers of appointment the imposition of a tax was error and the Vice-Ordinary's decree setting aside the assessment should have been affirmed.