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Note and Comment

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NOTE AND COMMENT.

A PARTNERSHIP AS A FARMER IN BANKRUPTCY.—After much uncertainty and difference of opinion among the courts as to the position of partnerships under the Bankruptcy Act certain phases of the problem were set at rest by the Supreme Court in *Francis* v. *McNeal*, 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029. By that case it seems to have been authoritatively settled (1) that in determining the solvency or insolvency of a partnership the individual estates available for payment of firm debts are to be considered, and (2) that an adjudication of the firm as such draws into the proceeding the administration of the estates of members though they have not been adjudicated bankrupts as individuals. In considering the theretofore much mooted question as to partnerships being entities for purposes of bankruptcy, Mr. Justice HOLMES, speaking for the court said: "No doubt these clauses [§1, §5a, §14a] taken together recognize the firm as an entity for certain purposes, the most important of which after all, is the old rule as to the prior claims of partnership assets and that of individual debts upon the individual estate." For purposes of proceedings in bankruptcy it seems that partnerships are deemed to have a suable existence as firms separate and apart from the members, for a petition in bankruptcy may well be filed against "A & Co." It is not neces-

sary that the petition be against "A, B & C, trading as A & Co."; and the firm as such may be adjudicated a bankrupt without affecting the individuals or their estates, except as above noted.

In *H. D. Still's Sons* v. *American Nat. Bank, et al.*, 209 Fed. 749, the Circuit Court of Appeals for the Fourth Circuit had occasion to pass upon a novel and interesting question affecting partnerships in bankruptcy. It appeared that the alleged bankrupt was a partnership engaged chiefly in farming. The court concluded that a partnership so engaged was exempt from involuntary bankruptcy. The following provisions of Bankruptcy Act are important in this connection.

§ 1 (19). "Persons shall include corporations, except where otherwise specified, and officers, partnerships and women, etc."

§ 4b. "Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any * * * corporation, except, * * * may be adjudged an involuntary bankrupt, etc."

§ 5a. "A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt."

The correctness of the court's conclusion would seem to depend entirely upon whether or not a partnership as such is covered by *"Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil."* The exception of wage-earners and farmers is clearly a limitation upon *"Any natural person."* So the question for consideration was, in short, whether a partnership as such is a natural person.

The expression "natural person" would seem to need no explanation; its meaning is obvious. If a partnership as such has an existence in bankruptcy separate and distinct from the natural persons composing the firm it would seem inevitably to follow that the firm as such is not a natural person. Congress has defined "person" as including a partnership, but in § 4b under the provisions of which a partnership engaged in farming must find its exemption, if any, from involuntary bankruptcy, Congress has used the expression "natural person," supposedly for some reason.

The court in the principal case seemed much influenced in arriving at its conclusion by the argument that there is no real reason why individuals when engaged in farming should be exempt while a partnership made up of those individuals should not be exempt when engaged in the same business. That argument addressed to the law-making body ought to be well nigh conclusive; but the court in deciding the principal case was concerned primarily not with what exemptions from involuntary bankruptcy *ought* to be recognized, but with what exemptions Congress had made. In view of the fact that in the present Bankruptcy Act Congress has apparently sought to provide a comprehensive treatment of the subject it would seem a proper rule of construction that no exemptions from bankruptcy proceedings should be recognized unless clearly within the exemptions provided for by Congress. It may perhaps well be doubted whether the court in the principal case was correct in its conclusion.

R. W. A.

THE ADMISSIBILITY OF ADMISSIONS BY AN INSURED AS AGAINST A BENEFICIARY.—An interesting case involving the use of an assured's admissions in an action by the beneficiary on an insurance policy is *Metropolitan Life Ins. Co.* v. *O'Grady,* 80 S. E. 743, (Virginia, 1914.) In this suit to recover the amount of the policy, the Insurance Company set up in defence that assured had falsely misrepresented his age and the condition of his health in his application for the policy, and in proof thereof offered in evidence his admissions made prior to the application. The court held that the admissions were incompetent against the beneficiary for two reasons; first, that the assured could not bind the beneficiary by his admissions, and second, that the admissions were not against the declarant's interest when made.

Resting upon the first ground assigned, the decision is unquestionably in harmony with the majority of adjudications. There is in general no privity of interest nor agential relation existing between the assured and the beneficiary by reason of which the latter should be bound by the former's admissions. *Lahrs* v. *Lahrs,* 123 N. Y. 367; *Bagley* v. *Grand Lodge,* 131 Ill. 498; *Richmond* v. *Johnson,* 28 Minn. 447; although some of the language in *Swift* v. *Mass. Mutual Life Ins. Co.,* 63 N. Y. 186, indicates the existence of the relation of agent; and the general rule is that admissions of the assured are not competent against the beneficiary in an action by the latter on the policy. *Union Central Life Ins. Co.* v. *Pollard,* 94 Va. 146; *Schwarzbach* v. *Protective Union,* 25 W. Va., 622; *Ins. Co.* v. *Morris,* 3 Lea (Tenn.) 101; *Hermany* v. *Fidelity Mut. Life Ins. Co.* 151 Pa. St. 17; *Penn Mut. Life Ins. Co.* v. *Wiler,* 100 Ind. 92; *Union Cent. Life Ins. Co.* v. *Cheever,* 36 Ohio St. 201; *Washington Life Ins. Co.* v. *Haney,* 10 Kas. 525. Various modifications arise under particular forms of insurance contracts. It has been held, for instance, that when the assured retains a dispositive power over the beneficial interest in the policy, his admissions bind the beneficiary. In such a case the beneficiary has, until the death of the assured, no vested interest in the policy, but only an expectancy; and claiming through the assured, is bound by his admissions. *Steinhausen* v. *Preferred Mut. Accident Ass'n.* 13 N. Y. Sup. 37; *Life Ass'n.* v. *Winn,* 96 Tenn. 224. And they may come in under the rule of res gestae although not competent as admissions, strictly speaking. *Sutcliffe* v. *Traveling Men's Ass'n,* 119 Ia. 220; *Henn* v. *Metropolitan Life Ins. Co.* 67 N. J. L. 310. Statements by the assured that the policy has been forfeited have also been held admissible, though it seems difficult to justify this exception on reason. *Manhattan Life Ins. Co.* v. *Myers,* 109 Ky. 372. If, however, the facts as to his health or age have been established by other evidence, assured's admissions are always competent to show his knowledge of the facts and fraudulent intent. This is recognized by the principal case. See also *Union Cent. Life Ins. Co.* v. *Pollard,* supra; *Rawson* v. *Ins. Co.,* 115 Wis. 641; *Towne* v. *Towne,* 191 Ill. 478.

The second reason given by the court, that admissions are incompetent which were not against interest when made is questionable. In support of this reasoning the court cites GREENLEAF, EVIDENCE, § 179, and two early Virginia cases, *Burton* v. *Scott,* 3 Rand. 399, and *Caines' Admin.* v. *Alexander,* 7 Grattan 257. So far as the decision rests upon the authority of GREENLEAF, it

is evidently the result of misapprehension of the rule stated in that work. The court quotes the following from GREENLEAF, § 179; "The admissions which are thus receivable in evidence must be those of a person having at the time some interest in the matter afterwards in controversy, in the suit to which he is a party." Reference to the context will show, however, that Prof. GREENLEAF had in mind only the use of admissions against one suing in a representative capacity made before his investiture with that trust, for in the next sentence the author puts the following illustration: "The admissions, therefore, of a guardian, or an executor or administrator, made before he was completely clothed with that trust, or of a prochein amy, made before the commencement of suit, cannot be received either against the ward or infant in the one case or against himself as the representative of heirs, devisees, and creditors, in the other." The case of *Gaines' Admin.* v. *Alexander*, supra, falls squarely within this principle, and the statement of the court that all admissions must have been against interest at the time is mere dictum. Examining Mr. GREENLEAF'S work still further, it is found that he has not only not countenanced, but has on the contrary explicitly repudiated such a rule. In § 169 he says, "Plaintiff's statement at a prior time that he lent the defendant fifty dollars throws discredit on his present claim in the pleadings that he lent one hundred dollars. The evidential weight of the inconsistency may be greater if his prior statement was against his interest—as if he declared that he never lent the money at all—but that is not essential to its admissibility." And again in the same section he says of admissions, "There is nothing in their nature which entitles us to say that they are explainable only as made against the person's interest." Prof. GREENLEAF'S view accords, moreover, with that of at least two other great commentators on the law of evidence. In WIGMORE, EVIDENCE, § 1048, subd. 2, the author says, "The subject of an admission is not limited to facts against interest at the time. * * * * * On principle it is plain that every prior statement of a party exhibiting an inconsistency with his present claim tends to throw doubt upon it, whether he was at the time speaking apparently in his own favor or against his own interest." And later on he characterizes the opposite rule as "a fallacy, in the fullest sense." To the same effect see CHAMBERLAYNE EVIDENCE, § 1383, in which the existence of adverse interest is treated as going to the weight, rather than to the admissibility, of such evidence.

The decision in *Burton* v. *Scott*, however, fully supports the principal case. In that case the court ruled that admissions, to be competent evidence, must have been against interest when made, saying, "The true meaning and sense of the rule that declarations of parties may be given in evidence against them is the reasonable presumption that no person will make any declaration against his interest unless it be founded in truth." It is believed that this decision is exceptional rather than the general rule, and that it is due to a confusion of the rules governing admissions and those in regard to the declarations against interest of third persons. Extra-judicial statements of third persons are mere hearsay, and are properly excluded unless against interest, because there can be no guarantee of their truth. An exception to this rule has arisen in favor of declarations against a pecuniary or proprietary

interest, a substitute for the binding effect of the oath being found in the presumption that no one would speak falsely against his own interest. That admissions of parties to a suit stand on an entirely different footing is evident from the fact that even where an adverse interest is required, it is never limited to a pecuniary or proprietary interest. They are received rather on the theory that any words or acts of a party inconsistent with his present position are relevant to the issue. Even if such statements were self-serving and false they should still be admissible as showing his disposition to depart from the truth to further his own ends.

Admissions not against interest at the time have been received in many cases. *Wilson* v. *Minneapolis etc. Ry. Co.*, 31 Minn. 481; *Shiland* v. *Loeb*, 69 N. Y. Sup. 11; *Smay* v. *Etmire*, 99 Ia. 149; *State* v. *Willis*, 71 Conn. 283; *State* v. *Anderson*, 10 Ore. 448; *State* v. *Mowry*, 21 R. I. 376. In some instances the courts have received such admissions only for the purpose of impeaching the bona fides of the present claim. *Skillman* v. *Leverich*, 11 La. 517; *Lord* v. *Bigelow*, 124 Mass. 185; *Glen* v. *Lehnen*, 54 Mo. 45. But these considerations go to the probative value of different classes of admissions, and not to their admissibility.

It would seem therefore that upon this point the principal case is in conflict with the understanding of the most eminent commentators and with a majority of the decisions in courts of last resort. S. S. W.

THE EXTRATERRITORIAL EFFECT OF EXEMPTION LAWS.—The case of *John H. Schroeder Wine and Liquor Co.* v. *Willis Coal and M. Co.*, 161 S. W. 352, recently decided by the St. Louis Court of Appeals, throws some light on the very confused subject of the extraterritorial effect of exemption statutes. The facts of the case are as follows:

A Missouri corporation was garnisheed in the courts of that state by the creditor, also a citizen of Missouri, for a debt owed by a citizen of Illinois. The fund attached was wages, owed by the garnishee to the debtor for labor performed in Illinois, and payable there. The debtor was summoned by publication and did not appear personally. Under the Illinois Statute the wages of the head of a family are exempt to the amount of $15.00 per week and the employer must pay that amount notwithstanding any writ of garnishment. Under the Missouri statute no one can be charged as garnishee for more than 10% of any wages.

Under these facts the Missouri Court applied the Illinois Statute. They based their decision entirely upon the principle of comity between the several states. The court said in part "the courts of our state commonly recognize the laws of another state when the general policy of the two states on the subject is alike. That this is the case with respect to the statutes of Illinois and those of our own state on the matter of exemption of wages from garnishment proceedings is clear. There is a difference in the amount of exemption; there is no difference whatsoever in policy. * * * Shall we applying the Illinois law by comity hold them exempt in our jurisdiction? We answer this in the affirmative."

The court cites several Missouri decisions as sustaining the principle of comity, but none of them concerned exemption statutes. All of them related to statutes which affected the cause of action directly as where they created a cause for action in tort or were made a part of a foreign contract.

The question of the application of the principle of comity to the exemption statutes of another state is one upon which there is a very decided conflict of opinion. Such statutes are usually considered to relate to the remedy simply and not to the obligation. For this reason most courts have never given to foreign exemption laws the recognition which they have given to laws that affect obligations, but have applied the lex fori in regard to exemption as in all other matters relating to remedy and procedure. *Morgan* v. *Neville*, 74 Pa. St. 52; *National Tube Co.* v. *Smith*, 57 W. Va. 210, 1 L. R. A. N. S. 195, 110 Am. St. Rep. 771.

This principle has been followed where all the parties were citizens of the same foreign state and the proceedings were brought in the forum for the manifest purpose of evading the exemption laws of that state. *Goodwin* v. *Clayton*, 137 N. C. 224, 49 S. E. 173, 67 L. R. A. 209, 107 Am. St. Rep. 479.

Many of the cases sustaining this doctrine were decided before the decision of *Harris* v. *Balk*, 198 U. S. 215, 49 L. Ed. 1023, 23 Sup. Ct. 625, settled the question of the situs of a debt for purposes of garnishment. Before this case decided that a debt could be attached where personal service could be had on the debtor and irrespective of the domicile of any of the parties, the law on this subject was in confusion, and courts in applying their own exemption laws against citizens of other states whose funds were garnisheed in their courts were not necessarily enforcing them in the other states under the full faith and credit clause as is the case since that decision. Most of the courts which refused to recognize foreign exemption laws also refused to recognize foreign garnishment proceedings against their own citizens when the debtor was sued by publication only. Since the decision in *Harris* v. *Balk*, the states can no longer refuse to recognize such judgments, and can therefore be compelled to apply the exemption laws of another state against their own citizens. States have sought to protect their exemption laws by means of penal statutes and injunctions but these are at best only an indirect way of accomplishing the result desired. Other states have met the question squarely by the statutes recognizing the exemption laws of a foreign state when a citizen of such a state is garnisheed in their courts. A typical statute of this kind is that of Illinois. The effect of such statutes is reviewed in *Re Flukes*, 157 Mo. 125, 51 L. R. A. 176, 80 Am. St. Rep. 619. See also note in note to 36 L. R. A. 582.

On account of the results following from the blind application of the lex fori in all such cases, some courts have taken this extreme position, but under certain circumstances have given effect to the exemption laws of other states. It is in this connection that the principal case is of interest. The leading case sustaining this view is *Drake* v. *Lake Shore & M. S. Ry.*, 69 Mich. 169. In this case the principal debtor and creditor were citizens of Indiana and the latter attempted to evade the exemption laws of that state by assigning his claim to a citizen of Michigan where the wages of the debtor were

not exempt. The assignee garnisheed the railroad in Michigan for the wages owed to the debtor. The Michigan court applied the exemption laws of Indiana on the grounds (1) that interstate comity would not permit a state to allow its courts to be used for the purpose of evading the laws of a sister state; (2) that when all the parties at the time of the creation of both debts reside in the same state the exemption laws of that state become an incident of the debt and a vested right in rem which follows the debt wherever it is considered to be situated. Other cases holding the same views are, *Macon* v. *Beebe,* 44 Fed. 556; *Ill. Cent. Ry.* v. *Smith,* 70 Miss. 344, 35 Am. St. Rep. 651; *Wright* v. *Chicago etc. Ry.,* 19 Neb. 175, 56 Am. Rep. 747; *Pierce* v. *Chicago etc. Ry.,* 36 Wis. 283; *Mo. Pac. Ry.* v. *Skarritt,* 43 Kans. 375; *Singer Mfg. Co.* v. *Fleming,* 39 Neb. 679, 23 L. R. A. 210, 42 Am. St. Rep. 613.

In some of these cases, as in most of the cases cited by them, the question of the extraterritorial effect of exemption laws is confused by the different views formerly held by the courts as to the situs of debts for the purposes of garnishment, a question which was settled by *Harris* v. *Balk,* supra. But in all of them the principle of comity is recognized with reference to exemption statutes. In all of these cases, however, the parties were both citizens of a state other than the forum and there was evidently an attempt to evade the laws of that state. In none of them was the law of another state enforced against a citizen of the forum. But in the principal case the creditor and garnishee were both citizens of the forum, Missouri. There was no attempt to evade the laws of another state, as the proceeding was brought in the logical court. There was no argument that the exemption law was a part of the debt itself. The court therefore applied the law of a foreign state relating to a remedy against the interest of one of its own citizens. It is believed that few if any courts have gone as far as this in recognizing the exemption laws of another state. The authorities do not sustain any such holding although the language in *Mason* v. *Beebe,* supra, is broad enough to cover the present case.

But however weak the case may be on authority, it suggests a solution to the difficulty into which the former doctrine has led the courts. The decision in *Harris* v. *Balk* has made the effect of ignoring the exemption laws of a sister state much more serious to that state than was formerly the case. Although among sovereignties the rule undoubtedly is that laws relating to remedies have no extraterritorial effect, yet in international law there is no full faith and credit clause, and a sovereign state need not recognize a foreign judgment that violates its public policy. This is not true among the states of the Union. The Missouri court evidently thinks that the principle of comity should not be confined to those classes of laws to which it is applied among sovereign states.

P. B. B., Jr.

LIABILITY OF TESTATOR'S ESTATE FOR LIBEL CONTAINED IN HIS WILL.—It has frequently been said that the law of wills is so well developed that in examining cases involving that subject, one scarcely, if ever, meets with a case for which there is not somewhere a precedent. In *Harris* v. *Nashville Trust Company* (Tenn. 1914) 162 S. W. 584, which was a case involving a will, there

arose a question which, so far as the writer has been able to find, has never before been considered. The case is interesting not only because of the decision reached, but also because it is another example of the courts' attempting to apply settled principles of law to new exigencies as they arise.

The will contained matter which was libelous per se in that it designated some of the legatees as illegitimate children. The libel was published by the executor in probating the will, and the action for damages was brought against him by one of the legatees. In deciding the case the court arrived at a number of conclusions which deserve brief mention.

The Statute of Tennessee which provides that no actions shall abate because of death save those for wrongs affecting the character of the plaintiff, SHANNON'S CODE, § 4569, does not change the common law rule with respect to the class of actions to which the one in the present case belongs, *Hambly* v. *Trott*, 1 Cowp. 371. If then the rule that "actio personalis moritur cum persona" were applicable to this case, the decision obviously would have been that upon the death of the testator the action abated. But the libelous act was never completed in the lifetime of the testator. The publication of the libel, which was necessary to its completion as a tort, was not consummated until his death; and so, since no cause of action arose during his lifetime, the court concluded, logically, it seems, that the above rule did not apply, and that the action did not abate upon the testator's death. The court also concluded that since it was the duty of the executor to probate this will, the failure of the performance of which duty would result in his being criminally accountable, *Smith* v. *Harrison*, 2 Heisk. 230; SHANNON'S CODE, § 6565, the executor should not be held to any liability for the publication of the libel. This conclusion, too, is reasonable. Finally the court concluded that there existed between the testator and the executor a relationship of agency, that the executor in publishing the will was acting as the agent of the testator, and therefore the court decided that the testator's estate, which was the estate of the principal, should respond to the plaintiff for damages.

This last conclusion is absolutely illogical, indeed, so much so, that it approaches absurdity. How can it be said that the death of the testator resulted in the executor's being constituted his agent? What authority is there for saying that death can create an agency? The general rule is that death terminates the agency relationship, *Hunt* v. *Rousmanier's Adm'rs*, 8 Wheat. 174. There are some exceptions to this rule, *Nicolet* v. *Pillot*, 24 Wend. (N.Y.) 240; *Durbrow* v. *Eppens*, 65 N. J. Law 10, 46 Atl. 582; *Garrett* v. *Trabue*, 82 Ala. 227; but it is not asserted that there ever existed any such relation in the lifetime of the testator, and therefore the court could not have understood that this case came within one of the exceptions to the general rule. During the so-called principal's life there never existed any agency relationship to be terminated or not to be terminated by his death.

In *Davis* v. *Lane*, 10 N. H. 156, in which it was held that as a general rule the authority of an agent is terminated by the insanity of the principal, the court used the following language: "An authority to do an act for and in the name of another pre-supposes a power in the individual to do the act himself, if present. The act to be done is not the act of the agent, but the act of the

principal; and the agent can do no act in the name of the principal which the principal might not himself do, if he were personally present. The principal is present by his representative. * * * * But it would be preposterous, where the power is in its nature revocable, to hold that the principal was, in contemplation of law, present, making a contract, or acknowledging a deed, when he was in fact lying insensible upon his death bed, and this fact well known to those who undertook to act with and for him. The act done by the agent, under a revocable power, implies the existence of volition on the part of the principal. He makes the contract—he does the act. It is done through the more active instrumentality of another, but the latter represents his person and uses his name." How much more preposterous is it to conceive of a man's committing a tort when he is in his grave?

In *Moore* v. *Weston*, 13 N. D. 574, 102 N. W. 163, the court expressly held that an attempt to create an agency to become effective at the death of the principal is nugatory. In that case there was a memorandum upon the back of a note which provided that if it were not paid before the payee's death, the maker should expend the balance due, for funeral expenses and monument for the payee. It was held that the maker was the agent of the payee to carry out the provisions of the memorandum after his death, but that the agency never became operative as *the death terminated the authority which purported to create it.*

The executor is not an agent of the testator. He is a principal himself. He is part of an instrumentality which the law has provided to carry out the testator's will. It cannot be denied that the injury done to the plaintiff by the publication of the libel was one for which ample damages were justly due. As the court said, the libel will be republished and the plaintiff's character maligned every time the title to any land devised in the will is examined upon the records. And from one point of view the attempt by the court to adopt a seemingly tenable theory, which, although it overthrew settled principles of law, would do justice to this particular case, is commendable. But the making of law is for legislative bodies, and any attempts by a court to usurp that function by distorting well-founded principles is inconsistent with our departmental form of government.

W. F. S.

THE RULE OF HIGHER INTERMEDIATE VALUE.—What is the measure of damages, upon the conversion of, or breach of contract to deliver, goods of a fluctuating value? This was the interesting and by means settled question involved in the recent case of *Brewer et al.* v. *Neatherly et al.*, 162 S. W. 1185 (Texas), where the defendant contracted to deliver on or before November 20, 1912, two hundred bales of cotton at 10¾ cents per lb. On November 8, defendant gave plaintiff notice that he would not perform the contract; on that day cotton was worth 11⅞ cents, on November 12, it was worth 12 1-6 cents, and still increasing in price and had been so increasing since October 28th. No evidence was given as to the value on November 20, the agreed date of delivery, or as to the value at the time of trial. Plaintiff contended that he was entitled to the difference between the contract price and the value of cot-

ton on November 20, the agreed date of delivery. Defendant contended the damages should be the difference between the contract price and the value at the date of breach. The court held contrary to the contentions of both, that November 12 should be taken as the date for computing the damages, but did not undertake to state the rule of law involved. The earlier cases in England left the law in an unsettled state and it still seems to be undetermined. A leading case *Sheperd* v. *Johnson*, 2 East 211, was on a writ of inquiry to assess damages on a bond given by defendant, conditioned to replace on August 1, 1799, a quantity of stock lent him. The question was whether the damages should be calculated as of August 1, or as of the date of trial. It was held that the value at the date of trial was the true rule, and LAWRENCE J., in support of this view contended that if a bill in equity had been filed for specific performance, the court would compel a restoration as of that date, consequently the defendant cannot complain if he is compelled to pay that sum as damages. But in a later case in the Court of Exchequer, *Startup* v. *Cortazzi*, 2 C. M. & R. 165, Lord ABINGER refused to apply this rule to the sale of linseed, saying however that it might be applicable to stocks. This rule was then followed in *Owen* v. *Routh*, 14 C. B. 327 and *McArthur* v. *Seaforth*, 2 Taunt, 257. It seems therefore, that in England the courts apply the extreme rule in the case of failure to deliver stocks and give the value as of date of trial, while in the case of conversion of other chattels they go to the other extreme and arbitrarily take the date of conversion, while in cases of failure to deliver on a contract, it is left open and depends on the terms of the contract and the surrounding circumstances. The rule of higher intermediate value is not applied.

The leading case on the rule of higher intermediate value in the United States is *Romaine* v. *Van Allen*, 26 N. Y. 309, in which case the court tried to strike an equitable medium between the two extremes laid down by the English courts, and thereby actually compensate the plaintiff for his loss rather than to choose an arbitrary date. As a result of this attempt we had substantially the first so called rule of "higher intermediate value," which however was modified as shown below. In *Romaine* v. *Van Allen* the action was for the wrongful conversion of railway shares pledged with the defendant as collateral security for a loan. The court allowed "the highest value at any time" between conversion and date of trial. The court did not restrict the application of the rule to stocks, for as Justice ROSEKRANS said: "Although the general rule of damages in trover may be the value of the chattel at the time of its conversion, with interest, or that value when the chattel has a determinate or fixed value, yet when there is any uncertainty or fluctuation attending the value, and the chattel afterwards rises in value, the plaintiff can only be indemnified by giving him the price of it at some period subsequent to the conversion; * * * * * that in such cases plaintiff is entitled to recover the market value of the property at any time intermediate the conversion and the trial." This decision was followed and reaffirmed in *Burt* v. *Dutcher*, 34 N. Y. 493, which was an action for conversion of merchandise and not of stocks. It was again affirmed in *Markham* v. *Javdon*, 41 N. Y. 235, GROVER and WOODRUFF, JJ., dissenting.

The rule as laid down in *Romaine* v. *Van Allen* was permanently modified by the case of *Baker* v. *Drake,* 53 N. Y. 211, 217, 13 Am. Rep. 507, wherein the rule was restricted to the market value within a resonable time, after plaintiff received notice of the conversion. This modification was approved and affirmed in *Wright* v. *Bank of Metropolis,* 110 N.Y. 237, 6 Am. St. Rep. 356,, 1 L. R. A. 289. We then have from the foregoing cases in New York the so called "higher intermediate value" rule as stated at the present time: "In actions for the conversion of stocks, the measure of damages is the highest market value between the time of injury and the time when the plaintiff might with due diligence have replaced himself in the market." This rule applies to dealings in contracts for the failure to deliver chattels of a fluctuating value, viz, "cotton futures," *Hurt v. Miller,* 105 N. Y. Supp. 775.

The Supreme Court of the United States has adopted the New York rule as applied to stock transactions, but refused to extend it to other chattels. *Galigher* v. *Jones,* 129 U.S. 193, 9 Sup. Ct. 335, BRADLEY J. saying "Other goods wrongfully converted are generally supposed to have a fixed market value at which they can be replaced at any time, and hence with regard to them the ordinary measure of damages is their value at the time of conversion, or in case of sale and purchase, at the time fixed for their delivery."

Texas, the state where the principal case was decided, seems to apply the rule as first laid down in New York in *Romaine* v. *Van Allen,* and without the limitation of *Baker* v. *Drake;* the Texas rule may be stated as follows, "Plaintiff is entitled to the highest intermediate value between the date of the injury and the time of trial, subject however, to the limitation that the plaintiff must bring his action seasonably, otherwise the plaintiff is restricted to the value at the time of injury. *Heilbroner* v. *Douglass,* 45 Tex. 402.

Mr. SEDGWICK, in his work on DAMAGES, gives his views of the rule as follows: "In most jurisdictions the rule is not recognized. Its existence can perhaps best be explained by saying that in its present form the rule of higher intermediate value represents the efforts of the courts in the direction of minimizing the effects of what was once a rule still more opposed to principle."

C. W.