NOTES

ARE INTERIM CERTIFICATES FOR THE BONDS OF A FOREIGN GOVERNMENT NEGOTIABLE?—Hundreds of millions of dollars of foreign bonds will be floated in this country during the next fifty years to enable the European governments to adjust obligations contracted during the World War. For almost a century it has been the practice of bankers negotiating such bond issues to put out interim certificates pending the preparation and issue of the definitive bonds by the government in question. These certificates generally certify that the bearer will be entitled to a definitive bond after receipt thereof from the government. It is at once apparent of what far reaching consequences is a decision as to the negotiability of these interim certificates.

In 1920, J. P. Morgan & Co. and the Guaranty Trust Co. of New York, by a contract with the Belgian government, were made its fiscal agents for the purpose of negotiating a loan of $50,000,000, to be raised by an issue of bonds. The bankers agreed to endeavor to form a syndicate to offer the bonds to the public, and, during the life of such syndicate, to use their best efforts to obtain subscriptions for the entire amount. The form of the bonds was agreed upon but, pending their preparation and issue, two temporary bonds for the whole amount, to be cancelled on receipt of the definitive bonds, were issued to the bankers and they were to be at liberty to issue in their own names interim certificates, evidencing the right of the holder to receive an amount in bonds as therein specified. When the syndicate was formed the Belgian government was to be credited immediately with the entire amount of the issue. Pursuant to this contract circulars were immediately distributed by the bankers, as agents of the Belgian government and in its name, inviting public subscriptions to the bonds, and the interim certificates were issued in the following form: "This is to certify that the bearer is entitled to receive a bond for one thousand dollars principal amount, of the kingdom of Belgium twenty-five-year external gold loan 7½% sinking fund redeemable bonds . . . when, as, and if delivered to us in definitive form by the obligor, and upon surrender of and in exchange for this certificate . . . subject, however, to the provisions following: If the bond deliverable hereunder be not delivered prior to Dec. 1, 1920, the interest thereon due on that date, will be paid upon presentation and surrender of the annexed warrant, provided moneys for the payment of interest on the bonds of the issue shall have been received by the undersigned from the obligor . . . (signed) J. P. Morgan & Co." Three of these certificates were stolen from their owner and delivered to the plaintiff bank which took them for value and in good faith. J. P. Morgan & Co. refused upon demand to exchange bonds for the certificates because of notice of the theft and the plaintiff thereupon brought an action for their value. The New York Court of Appeals held, by a unanimous decision, that the certificates were not negotiable and

that the plaintiff had received no better title than its transferor had and therefore affirmed the judgment of the lower court for the defendant.[1] The decision was based upon three grounds: 1. That the facts of the case do not bring it within Goodwin v. Robarts,[2] the leading English authority on the negotiability of this general type of instruments. 2. That interim certificates are within the purview of the *Negotiable Instruments Law* and must satisfy its prerequisites for negotiability, which the certificates in question fail to do. 3. Assuming that the case does come within the case of Goodwin v. Robarts and is not covered by the *Negotiable Instruments Law,* yet the plaintiff failed to make satisfactory proof of a commercial usage to treat the particular type of interim certificate in question as negotiable.

As far as can be gathered, the court distinguished the case of Goodwin v. Robarts upon four grounds: (a) The interim certificates in the latter case were signed by the bankers, who floated the loan, with the descriptive word "agents." (b) They were the obligations of the Russian government and not of the bankers. (c) The interest warrant annexed to the certificate contained an absolute undertaking to pay the interest and was not conditional, as in the principal case, upon the receipt of moneys therefor from the government. (d) The certificates in the Goodwin case really amounted to provisional and informal bonds exchangeable for formal bonds thereafter. Now as to point (a) the court does not seem to have been accurately informed, the interim certificates probably having been confused with the bonds. The latter instruments were signed "Agents N. M. Rothschild," but to the interim certificates the bankers subscribed their signature unqualified by any descriptive words whatever.[3] As to point (b), when the

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[1] Manhattan Co. v. Morgan, 242 N. Y. 38, 150 N. E. 594 (1926).

[2] L. R. 10 Ex. 76 (Eng., 1875); L. R. 10 Ex. 337 (Eng., 1875); L. R. 1 App. Cas. 476 (Eng., 1876). The facts of this case were as follows: The Russian government, desirous of raising a loan on bonds, employed Messrs. Rothschilds as its agents for that purpose in England and in pursuance of that employment Messrs. Rothschilds issued scrip, pending the receipt of definitive bonds, in the following form: "Imperial Government of Russia. Issue of £15,000,000 sterling nominal capital in 5% Consolidated Bonds of 1873; negotiated by Messrs. N. M. Rothschild & Sons, London, and Messrs. De Rothschild Brothers, Paris. Bearing interest half-yearly, payable in London from 1st December, 1873. Scrip for one hundred pounds stock, No. . Received the sum of twenty pounds, being the first instalment of twenty per cent. upon one hundred pounds stock; and on payment of the remaining instalments at the periods specified, the bearer will be entitled to receive a definitive bond or bonds for one hundred pounds after receipt thereof from the Imperial Government. London, 1st December, 1873. (Then followed provisions for the payment of the instalments, blank receipts for the same when paid, and a warrant for the first periods interest.) N. M. Rothschilds." All the installments had been paid and the receipts therefor signed. Upon proof of commercial usage to treat such scrip as a negotiable instrument, transferable by delivery, the Court of Exchequer held it to be negotiable and this decision was affirmed by the Exchequer Chamber and the House of Lords.

[3] "In the meantime they themselves (that is, Rothschilds) issue the scrip and sign the receipt, not signing as agents." Argument of Mr. Benjamin, counsel for the defendant, L. R. 10 Ex. at p. 80. "It is true that Messrs.

cases are subjected to a detailed comparison and the reasoning of the English court is carefully examined, there would seem to be every bit as much ground for this conclusion in the one case as in the other. In the Goodwin case "the bearer (of the certificate) will be entitled to receive a definitive bond . . . after receipt thereof from the Imperial Government." By the instrument in the principal case it is certified "that the bearer is entitled to receive a bond . . . when, as, and if delivered to us . . . by the Obligor." No words descriptive of an agency appear in the signatures to either instrument. In both documents, therefore, the natural meaning of the language imports a personal undertaking on the part of the banker. In the Goodwin case this argument was very vigorously pressed upon the court on the appeal to the Exchequer Chamber and Cockburn, C. J., answered (quoting from Story and Chancellor Kent) that an agent contracting on behalf of a government is not personally bound because the party contracting with him is presumed to rely wholly upon the faith and credit of the government.[4] The chain of reasoning of the English courts seems to have been that since Rothschilds in issuing the certificates were known to be the agents of the Russian government and since, from the conditional language used in the certificate and the legal principle that an agent contracting on behalf of a government within the scope of his agency is not personally bound, Rothschilds were not personally bound thereby to do anything, that the public, therefore, took the certificates, just as it later took the bonds, wholly on the faith and credit of the Russian goverment.[5] This reasoning, it is submitted, is just as applicable to the case in hand. The circular of the bankers made public their agency. And while the contract creating this agency also gave the bankers power to organize and, in effect, sell the entire bond issue to, a syndicate, yet the certificates were issued not by this syndicate but by the bankers and as agents. The public therefore took the certificates, just as it later took the bonds, wholly on the faith and credit of the Belgian government. Point (c) would seem to weaken rather than to strengthen the Goodwin case in that it tends to contradict the agency theory of the English court. If the certificate is considered by itself the fact that the underaking to pay interest is absolute would tend to show that Rothschilds, them-

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Rothschild have signed the document on their own behalf." Cleasby, B., L. R. 10 Ex. at p. 85. The copy of the scrip printed in the statement of the case contained no signature at all and the copy of the bond which immediately followed the copy of the scrip contained the signature "Agents N. M. Rothschilds."

[4] L. R. 10 Ex. at p. 344.

[5] Note the language of Cockburn, C. J., L. R. 10 Ex. at p. 346: "Nor can we suppose that the persons taking this scrip did so otherwise than through their faith in the honour of the foreign government, just as they would have had to trust to it on their afterwards receiving the bonds in lieu of the scrip. They would then be equally without legal redress against the foreign government and must have trusted to its honour in the fulfilment of its engagements."

selves, had underwritten the bond issue and intended to bind themselves personally. In making point (d), that the certificates in the Goodwin case were really themselves a kind of informal bond, the court seems to have had the opinion that the English court in Goodwin v. Robarts permitted custom to write into the certificates the provisions and incidents of the bonds for which they were later exchanged.[6] But the only custom proved in that case was a commercial usage to treat the certificates as negotiable. And such a theory does not seem tenable in the light of the later English cases which hold interim certificates calling for non-negotiable stock to be negotiable.[7]

In deciding that interim certificates come within the purview of the *Negotiable Instruments Law* and must therefore first satisfy its prerequisites for negotiability, the thesis of the court is as follows: Negotiable instruments may be divided into two classes: 1. Those which represent property and give rise to rights *in rem,* such as warehouse receipts and bills of lading. 2. Those which are promissory and executory in character and give rise to rights *in personam,* such as promissory notes and bills of exchange. Instruments of the second class lie within the purview of the *N. I. L.* and must satisfy its prerequisites for negotiability, but it is assumed, though not decided, that those of the first class are without the statute. The interim certificate in question is promissory in all its essential features, is therefore in the second class, and consequently is governed by the *N. I. L.* Having once reached this conclusion, the rest is quite simple. The instrument undertakes that the bearer is entitled to a bond "when, as, and if delivered to us." It therefore contains no unconditional promise to pay a sum certain in money;[8] it is not payable on demand, or at a fixed or determinable future time;[9] it is dependent upon a contingency;[10] it contains an undertaking to do an act in addition to the payment of money.[11] It is consequently non-negotiable.

This chain of reasoning seems rather unfortunate. Once it is admitted—and this point never seems to have been questioned—that bills of lading and warehouse receipts lie without the purview of the *N. I. L.,*[12] then the sweeping provisions of Section 1, "An instrument

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[6] Cardozo, *J.,* in the principal case indicates this opinion in the sentences, "Doubt, if there was any, as to the meaning of the abbreviated promise (in the certificate of the Goodwin case), was removed by evidence of the custom of the market," and "We leave the question open whether custom may write into "scrip" or other abbreviated forms of contract . . . the terms and incidents of the definitive instruments to be delivered in exchange."

[7] Rumball v. Metropolitan Bank, L. R. 2 Q. B. D. 194 (Eng., 1877); Webb, Hale & Co. v. Alexandria Water Co., 93 L. T. R. 339, 21 Times L. R. 572 (Eng., 1905).

[8] N. I. L., § 1.

[9] N. I. L., § 1.

[10] N. I. L., § 4.

[11] N. I. L., § 5.

[12] Aigler, *Recognition of New Types of Negotiable Instruments,* 24 COL. L. REV. 563, at p. 592.

to be negotiable must conform to the following requirements": must no longer be taken to be all inclusive, as is the natural sense of the language used, but on the contrary to have a special and restricted meaning. Instead of meaning "all" it must be taken to mean "some" instruments. This conclusion seems inescapable. And once this section is admitted to have a restricted meaning it becomes a very nice problem to determine just what instruments are included and just what instruments are excluded. There is no test, ear-marked as such, to be found in the statute. The normal purposes of legislation prepared to secure uniformity would seem to be those of codifying the existing law, of selecting the better view where the cases were in conflict, and perhaps, in a very limited way, of anticipating possible future conflicts. The *N. I. L.*, however, went further than this since it quite clearly made several radical changes in the law, as it existed at the time the statute was drafted, in instances where there had been no conflict among the authorities. Nevertheless it would seem quite proper that the statute be taken as merely codifying the existing law save in those instances only where an intention otherwise is clearly shown. More specifically, the requisites for negotiability listed in the *N. I. L.* should not be applied to a type of instrument to which they had not been previously applied unless clearly required by a strict construction of the statute. Some light may be thrown on the problem by a comparison with the English act. Their statute, which to some extent served as a pattern for our own, is expressly restricted to promissory notes, bills of exchange and checks while the *N. I. L.* on its face is all inclusive. This would tend to show that our statute is intended to have a scope broader at least than that of the English act.

In view of the uncertainty surrounding the whole subject, however, it seems dogmatic to assert that all negotiable instruments must fall into either of two classes—1, those representing property and giving rise to rights *in rem;* 2, those promissory and executory in character and giving rise to rights *in personam*—and that all those in the second group must satisfy the requisites of the *N. I. L.* for negotiability. Professor Aigler's view adding a special third class for interim certificates [13] seems more reasonable. Alluding to the probability that bills of lading and warehouse receipts lie without the scope of the statute he suggests that Section 1 (2) of the *N. I. L.*, which provides that instruments to be negotiable "must contain an unconditional promise or order to pay a sum certain in money," be construed as indicating the type of paper covered by the statute, *viz.*, instruments calling for money.[14] The difficulty with this theory is that bills and notes payable in goods have been held to be non-negotiable

[13] Aigler, *Recognition of New Types of Negotiable Instruments, supra,* n. 12, at p. 591.

[14] Aigler, *Recognition of New Types of Negotiable Instruments, supra,* n. 12, pp. 591-592.

long before that statute was drafted.[15] This same section, however, might well be construed as indicating that only such instruments as undertake to pay a fixed value, with as many units of money or goods generally as are necessary to aggregate that value, are within the purview of the act. An interim certificate could be distinguished then since it is more akin to a bill of sale of specified goods, being a contract to pass title to a fully described and predetermined bond at such time as it may come into being and be received by the banker. The one type of instrument calls for a "sum certain," being "payable" in property or money as it may specify. The other type calls for specified property, without special regard to its market value, and is more precisely "exchangeable" for that property. This view of an interim certificate seems entirely in line with the opinions of the English justices who passed upon the similar certificate in *Goodwin* v. *Robarts*. "It is the document of title," said Cleasby, B., in the Court of Exchequer, " . . . by virtue of which the person holding it, according to the terms of it, can call upon the government of Russia to give him the title to the money, that is, to give him a bond."[16] Later in the House of Lords, Lord Selborne referred to the certificates as "instruments of title to shares in foreign loans." [17]

If the proper test of instruments covered by the *N. I. L.* were, whether they are promissory and executory in character giving rise to rights *in personam,* it is difficult to see why bills of lading and warehouse receipts would not equally come within the purview of the statute. A bill of lading contains a contract by the carrier to carry certain goods and to deliver them to order or to bearer at a specified destination.[18] A warehouse receipt contains a contract by the warehouseman to store goods for a specified period and at the end of that time to deliver them to order or to bearer.[19] Both instruments seem promissory and executory in character. Both undertake to pay other than money and to do an act (to carry and to store the goods, respectively) in addition to the payment of money. Furthermore a bill of lading is not payable on demand or at a fixed or determinable future time. Both would therefore be non-negotiable under the statute. And these instruments as a class cannot be distinguished from interim certificates on the ground that they rest upon ancient mercantile custom since warehouse receipts are a comparatively modern invention,[20] barely senior, if at all, to the interim certificate. All three seem to be

[15] See, for example, Hodges v. Clinton, 1 N. C. 53 (1792), a case of a note for £100, payable in tobacco.

[16] L. R. 10 Ex. at p. 85.

[17] L. A. 1 App. Cas. at p. 495.

[18] DANIEL, NEGOTIABLE INSTRUMENTS (6th ed., 1913) § 1728.

[19] DANIEL, NEGOTIABLE INSTRUMENTS (6th ed., 1913) § 1713a.

[20] DANIEL, NEGOTIABLE INSTRUMENTS (6th ed., 1913) § 1713.

creatures of commercial necessity developed in turn by the carrier, the warehouseman, and the banker and performing largely similar functions.

With due respect for the New York Court of Appeals it is submitted, therefore, that the better view would hold interim certificates to lie without the scope of the *N. I. L.* And once the restrictive atmosphere of this statute is safely left behind, *Goodwin v. Robarts* and the cases in its wake are very respectable authorities as to the principles of the law merchant applicable to the problem in hand. An attempt has been made in the first part of this note to show that the facts of the principal case bring it within this line of cases. The interim certificates in question could properly have been held to be negotiable, therefore, upon satisfactory proof of a commercial usage to treat them as such. The principal case fails only on this proof of commercial usage and the decision might well have been placed solely on that ground.

Though the correctness of the decision itself cannot be questioned, the reasoning upon which it is based is disappointing. This exact problem had only come before the courts of this country twice before and in both instances does not seem to have been fully and accurately presented.[21] It is one of grave importance. When large bond issues are floated, whether by a foreign government or a large corporation, the banker must base his estimates on the present condition of the market and cannot afford to gamble on possible fluctuations in the demand for this type of securities during the time required for the preparation of the definitive bonds; the government or corporation wants immediate assurance that the money will be forthcoming; the investor demands something that he can pledge or sell immediately in the same way as the bonds. A fully negotiable interim certificate is apparently the only solution. The public benefit of a decision affirming the proposition, more and more lost sight of, that business men of today, as in the past, should be left free to develop their own law merchant, will hardly be denied. Coming from the highest court of our great financial center and written by one of the ablest judges in the country, this opinion, placing the law merchant even more securely in the straight-jacket prepared for it, is apt to

[21] In Bowie v. National City Bank, 122 Wash. 269, 210 Pac. 498 (1922), the interim certificate did not purport on its face to be negotiable and its non-negotiability seems to have been conceded by counsel. Hearne v. Gillette, 151 La. 79, 89 So. 23 (1922), was decided on the ground that the instrument was neither a bill or a note, since not a promise to pay money, and neither a bill of lading or a warehouse receipt, since the person issuing it was not a common carrier or a warehouseman, and therefore non-negotiable. Babcock v. National Surety Co., 106 Misc. 149, 175 N. Y. Sup. 432 (N. Y., 1919), went off on the same narrow interpretation of the N. I. L. as in the principal case. Apparently *Goodwin v. Robarts* was not presented to the court in any of these cases.

have a powerful and unfortunate influence upon future decisions in other states. It is very difficult to see how the incidents of negotiability can be so far secured by estoppel or by contract as to protect a purchaser in good faith from a thief.[22] Apparently the sole remedy is still more legislation.[23]

B. A. B.

THE MEANING OF "DIRECT LOSS OR DAMAGE BY FIRE" IN A FIRE INSURANCE POLICY—The difficulty with which the insurance company is confronted in describing exactly the contingency against which it insures is nowhere more strikingly illustrated than in the use of the phrase "direct loss or damage by fire." A recent case in Washington [1] reopens this interesting and difficult problem in the law of insurance. The facts of the case were as follows:

The plaintiff insured his stock and fixtures against "all direct loss or damage by fire." In his bakery a sprinkler system had been installed. Flame from one of his ovens leaped through a crack in the oven, caused one of the sprinkler heads to melt, and water was thrown upon the stock. The insurance company denied liability on the ground that the loss was caused by the sprinkler, and was not a direct loss by fire. The court, however, permitted recovery on the policy.

Two questions are raised by the facts of the case:

(1) If it be assumed that the flame leaping from the crack in the oven was a "fire," in the sense in which the insurance company insured against fire, was the damage caused by the sprinkler a "direct loss by fire"?

(2) Was the escaping flame a fire within the meaning of the insurance policy?

The answer to the first question must be in the affirmative. The law is clear that where there has been a fire, and damages result which may be said to have been proximately caused by the fire, the

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[22] There can be no estoppel in the principal case, for example, since the owner of the certificates did not entrust them to the possession of the thief, nor did he negligently leave them where they were likely to be stolen.

As to negotiability by contract see American National Bank v. A. G. Sommerville, Inc., 191 Cal. 364, 216 Pac. 376 (1923).

[23] It is interesting to note that an act has already been drafted for presentation to the New York Assembly with a view to overruling the decision in the principal case.

[1] Pappadakis v. Netherlands Ins. Co., 242 Pac. 641 (Wash., 1926).

damage or loss is regarded as a "direct loss by fire." [2] In deciding when a fire is the remote cause and when the proximate cause of the loss, the courts have entered into that nebulous field with which all students of the law of torts are familiar. However, the decisions on their facts show that, in the instant case, the fire leaping from the crack in the oven would be generally regarded as the proximate cause of the injury.

For example—losses which are caused by efforts to put out a fire are regarded as direct loss by fire,[3] as also are losses caused by removal made necessary by fire,[4] and, similarly, losses caused by thefts after a fire.[5] Damage caused by a sprinkler system, in addition to the damage by fire, has been held to be a direct loss by fire,[6] and so also of damage caused by a short circuit in an electrical system, as the result of a fire.[7] Where a fire causes an explosion, the resultant loss is regarded as direct loss by fire.[8]

Hence it is apparent that where there has been a fire upon the premises, and that fire sets other forces in motion, and these forces cause the injury, the courts are prone to regard the injury as a direct loss by fire. It is necessary only that the fire be a proximate cause of the injury. The above review of the decisions indicates that the flame from the crack in the oven in the principal case would undoubtedly be considered the proximate cause of the injury which followed.

Thus far it has been assumed that there was a fire in the principal case. Is this a fair assumption? Does an insurance company pretend to insure against damages caused by a flame from a man's own oven where no substance has been ignited outside of the oven?

The rule is quite clear that where the fire is confined to the place where it is supposed to be, and where there is no ignition outside of that place, there cannot be recovery for such damages as may result

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[2] For a collection of authorities see 26 C. J. 341, note 59. See also, CAMERON, LAW OF FIRE INSURANCE IN CANADA 51 (1909), and RICHARDS, INSURANCE LAW 284 (3d ed., 1909) to the effect that "direct" means nothing more than "proximate."

[3] Case v. Hartford Fire Ins. Co., 13 Ill. 676 (1852); Cohn v. National Fire Ins. Co., 96 Mo. App. 315, 70 S. W. 259 (1902).

[4] Case v. Hartford Fire Ins. Co., *supra*, note 3; Independent Mut. Ins. Co. v. Agnew, 34 Pa. 96 (1859).

[5] Independent Mut. Ins. Co. v. Agnew, *supra*, note 4.

[6] Cohn v. National Fire Ins. Co., *supra*, note 3.

[7] Lynn Gas Co. v. Meriden Fire Ins. Co., 158 Mass. 570, 33 N. E. 690 (1893).

[8] Waters v. Merchants' Louisville Ins. Co., 11 Peters 213 (U. S., 1839). There is an important exception to the rule in the case of explosions: that the fire must have extended to the premises of the insured. If the property of the insured is damaged by an explosion caused by a fire in a nearby property, still there is no recovery unless the premises of the insured were themselves reached by the flame. Bird v. St. Paul Ins. Co., 224 N. Y. 47, 120 N. E. 86 (1918); Liverpool, L. & G. Ins. Co. v. Currie, 234 S. W. 232 (Tex., 1921).

from smoke and heat.[9] If the fire spreads out of the place where it is confined (there being in a sense a second fire), then of course any loss which followed would be within the purview of the contract.

The situation we are now considering occupies the middle ground between these two propositions. The flames were not entirely confined within the oven. At the same time, no substance external to the oven was ignited by the flames. The only fire was that lighted for the purposes of the baking shop. Under the earlier cases, no recovery would be allowed under these facts. The earliest and perhaps the leading case on the subject is that of *Austin v. Drew.*[10] In that case the building insured was seven or eight stories high. A flue ran from the basement to the top story. At each story there was a register whereby more or less heat could be introduced. One morning the owner's servant forgot to open the register on the highest story. Sparks, heat and smoke were forced into the lower stories causing considerable damage. No recovery was permitted, however, because the fire was normal and was confined within its proper limits. A fire which emitted sparks throughout the building was not regarded by the court as a "fire" within the meaning of the policy. In the instant case, instead of sparks escaping, flame escaped through a cracked oven. The court regarded this as an accidental, or, to use the phrase coined by a Massachusetts court, a "hostile" fire.[11] Clearly, the decisions are irreconcilable.

In *Samuels v. Continental Ins. Co.*,[12] the flame in a lamp flared up two or three feet above the chimney, and caused damage by throwing off soot and smoke. Nothing was ignited outside of the lamp, however, and no recovery was allowed on the policy. In *Fitzgerald v. German American Ins. Co.*,[13] recovery for damages caused by a smoking lamp was refused. It does not appear from the facts whether the flames escaped from the lamp, but the court was of the opinion that a lighted lamp was not in itself a "fire" within the meaning of the policy.

It is certainly reasonable to infer from these decisions that a fire, to come within the policy, must have ignited some substance outside of the place where the fire was confined. The mere escape of flame, in the absence of external ignition, would seem to be not enough to permit recovery. A similar inference may be drawn from Mr. Wood's treatment of the subject. He says:

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[9] Scripture v. Lowell Mut. Fire Ins. Co., 64 Mass. 356 (1852); St. John v. American Mut. Fire Ins. Co., 11 N. Y. 516 (1854); Fitzgerald v. German-American Ins. Co., 30 Misc. 72, 62 N. Y. Supp. 824 (1899); 4 JOYCE, LAW OF INSURANCE 4789 (2d ed., 1918). But see O'Connor v. Queen Ins. Co., *infra*, note 15.

[10] 4 Camp. 360 (Eng., 1815).

[11] See Way v. Abington Mut. Fire Ins. Co., 166 Mass. 67, 74, 43 N. E. 1032, 1033 (1896).

[12] 2 Pa. Dist. 397 (1892).

[13] *Supra*, note 9.

"Where fire is employed as an agent, either for the ordinary purposes of heating the building, for the purposes of manufacture, or as an instrument of art, the insurer is not liable for the consequences thereof, *so long as the fire itself is confined within the limit of the agencies employed,* as from the effects of smoke or heat evolved thereby, or escaping therefrom, from any cause whether intentional or accidental. In order to bring such consequences within the risk, there must be actual ignition outside of the agencies employed, not *purposely* caused by the assured, and these, as a consequence of such ignition, *dehors* the agencies." [14]

It is thus apparent that many of the authorities would not regard the flame in the principal case as a hostile fire, and consequently, not a basis for recovery on the contract of insurance. Nevertheless, there are a number of cases which would permit recovery, some of them requiring less than appears in the principal case.

O'Connor v. Queen Ins. Co. of America [15] represents the most extreme view. There the insured was protected against "direct loss or damage by fire." His servant put into the furnace of the insured's building some cannel coal, a fuel not intended for that purpose. The fire raged excessively, filled the house with an unusual degree of heat, and caused damage by charring, and discoloration from smoke. Although the fire at no time escaped from the furnace, the court regarded it as hostile, and allowed recovery. In *Way v. Abington Mut. Fire Ins. Co.,*[16] ignited soot in a chimney was regarded as a fire, within the meaning of the insurance policy, and recovery was allowed for the damage caused by smoke. In *Singleton v. Phœnix Ins. Co.,*[17] a boat loaded with quick lime was sunk to prevent its destruction by fire. The fire was started by the slacking of the lime, and the court intimated that actual ignition or combustion was not necessary to establish a loss by fire, and allowed recovery.[18] In *Collins v. Del. Ins. Co. of Phila.,*[19] the court charged the jury that even though the fire was confined within a stove, if it spread to a part of the stove where it was not intended to be, there could be a recovery for the damages which resulted. It has also been held that the expulsion of live coals from the furnace upon the floor was enough to make a fire hostile, although the fire was not communicated to anything outside of the heater.[20]

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[14] 1 WOOD, FIRE INSURANCE 236 (2d ed., 1886).

[15] 140 Wis. 388, 122 N. W. 1038 (1909).

[16] *Supra,* note 11.

[17] 132 N. Y. 298, 30 N. E. 839 (1892).

[18] But *cf.* Western Woolen Mill Co. v. Northern Assurance Co., 139 Fed. 637 (C. C. A., 1905).

[19] 9 Pa. Super. 576 (1899).

[20] Cabbell v. Milwaukee Mechanics' Ins. Co., 260 S. W. 490 (Mo. App., 1924).

From the above review of the cases,[21] it is apparent that the rule as laid down in the earlier decisions, notably that of *Austin v. Drew,* has been broadened by some of the courts to permit recovery even where no substance external to the agency confining the fire has been ignited. By way of summary, the following propositions are advanced as an attempted generality upon the cases reviewed:

(1) The phrase "direct loss or damage by fire" in an insurance policy will include all losses of which fire is the proximate cause. This rule is clearly established.

(2) "Fire" in an insurance policy does not mean fire intentionally lighted for a useful purpose. Unless the fire spreads and causes actual ignition outside of the stove, furnace, etc., where it is confined, there can be no recovery for the damage such a fire may cause. Some courts make an exception in one situation, *viz.:*

(3) Where an intentionally lighted fire has taken on an extraordinary character, or has behaved in an unusual manner, these courts will permit recovery for the damage caused, even though nothing was ignited outside of the place where the fire was contained.

Proposition (3) is the ever recurrent "doubtful case" in the law of insurance, which will not permit of categorical treatment. The fire has been intentionally lighted for a useful purpose, and yet it has acquired something of an accidental nature. The courts tend to resolve the doubt by leaning in the direction of the insured.

R. D. G.

THE CONFLICT OF LAWS AS TO FOREIGN DIVORCES — The anomalous situation of a person unmarried in one state but married in another has again confronted our courts in the two recent cases of *Dean v. Dean*[1] and *Miller v. Miller.*[2] The facts of these two cases are substantially the same. In each, the husband left his wife, acquired a domicil in a foreign jurisdiction, and there obtained a divorce on constructive service of the wife. Upon his return, the

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[21] For an exhaustive collection of cases on the subject see Abbott, *The Meaning of Fire in an Insurance Policy Against Loss or Damage by Fire,* 24 HARV. L. REV. 119 (1910).

[1] 149 N. E. 844 (N. Y., 1925).

[2] 206 N. W. 262 (Iowa, 1925).

validity of this divorce was attacked by the wife.[3] In the Dean case, the majority of the New York court refused to recognize the divorce obtained in another jurisdiction, but in *Miller v. Miller* the foreign decree was held valid. The conflicting decisions illustrate the minority and the majority views respectively.

The Constitution of the United States provides that "Full Faith and Credit shall be given in each state to the Public Acts, Records, and Judicial Proceedings of every other State."[4] The Miller decision did give full faith and credit to the foreign decree. Did New York violate this provision of the Constitution in the Dean decision? In *Atherton v. Atherton*[5] the Supreme Court of the United States held that the invalidation, in New York, of a Kentucky decree, granted on constructive service to a husband deserted there by his wife who went to New York, was a violation of the full faith and credit clause. But in *Haddock v. Haddock*,[6] where the husband deserted the wife in New York, and obtained a divorce valid in Connecticut, it affirmed the New York courts' refusal to recognize the Connecticut decree, holding that New York is not bound to give full faith and credit to such a decree. The decision was by a five to four majority,[7] and caused considerable adverse comment.[8]

The most vulnerable points in Justice White's opinion in the Haddock case are the propositions: (1) that proper domicil having been obtained by the plaintiff, personal jurisdiction over the defendant party will give the state jurisdiction to grant the divorce; and (2) that the location of the marriage status depends upon the guilt or innocence of the separating parties. These two propositions show the confusion of two theories of divorce, a confusion found in many of the New York decisions. One theory regards divorce as an action on the con-

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[3] In the Dean case the wife was in Canada when the husband got the divorce in Pennsylvania. Later the husband became domiciled in New York, and the wife, who had also become domiciled there, sued him for maintenance. The divorce as granted in Pennsylvania was held not valid as to the wife in Canada.

[4] Article IV, 1. See also Rev. Stat. 905, re-enacting act of May 26, 1790, c. 11, 1 STAT. 122.

[5] 181 U. S. 155 (1901).

[6] 201 U. S. 562 (1905).

[7] Justice Holmes dissented, claiming that he saw no difference between the Atherton case and the Haddock case and consequently that the full faith and credit clause should apply. Justice Brown, also dissenting, saw in the majority view a step back to the narrow confines of comity, a doctrine which the full faith and credit clause was intended to broaden.

[8] One of the outstanding critics was J. H. Beale, Jr., in 19 HARV. L. REV. 586 (1906). Prof. Beale showed some modification in his position in the recent article, *Haddock Revisited*, 39 HARV. L. REV. 417 (1926).

tract of marriage and requires personal service of the defendant to give the courts jurisdiction over him.[9] No court adopts this theory absolutely.[10] The other disregards the contractual element of marriage, considering it, once performed, as a status or a condition which society jealously guards. A divorce action has as its subject matter the marriage status which is a *res,* and divorce is thus an action in *rem.* Once, therefore, jurisdiction is obtained over this *res,* the court, when a proper plaintiff applies, may serve the defendant constructively.[11]

How jurisdiction is obtained over this *res,* however, offers one of the most knotty problems in modern law. There is of course no doubt that where both parties are domiciled in a given state, its courts have jurisdiction over the marriage status, and due to the fact that the husband is legally the head of the family and bears responsibility for its support, he has the control over its physical location, and the wife must follow where he reasonably leads.[12] By a legal fiction, her domicil follows his when she in fact refuses to move. But where the husband leaves unjustifiably or forces his wife to leave, she may establish a separate legal domicil.[13] It is in these latter situations that the difficulty begins. Does the marriage status stay with either, neither, or both? The Haddock case states that if the marriage status is a *res,* it is subject to the laws of matter and incapable of being in two places at the same time. This seems to be open to the objection that this *res* is not a corporeal thing, but a condition of being married, and hence it may very well be in New York with one spouse, and in Connecticut with the other spouse.[14] The Haddock case further holds that the innocent party is the one who retains the

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[9] "The contract of marriage cannot be annulled by judicial sanction any more than *any other contract inter partes,* without jurisdiction of the person of the defendant." Jones v. Jones, 108 N. Y. 415, 424; 15 N. E. 707 (1888).

[10] Jurisdictions most strongly influenced by it are New York and North Carolina. South Carolina permits no divorce. For Pennsylvania view see Colvid v. Reed, 55 Pa. 375 (1867); Grossman's Estate, 263 Pa. 139, 106 Atl. 86 (1919); Duncan v. Duncan, 265 Pa. 464, 109 Atl. 220 (1920). Pennsylvania will grant divorces on constructive service under Act of 1913, P. L. 191, Pa. St. 1920, §§ 9158, 9164. Clark v. Clark, 24 Pa. Dist. 475 (1914). See also W. D. Crocker, *Recent Divorce Legislation in Pennsylvania as Treated by Federal Principles of Jurisdiction,* 65 U. OF PA. L. REV. (1917). The above courts follow the minority view.

[11] This doctrine is followed by the vast majority of jurisdictions including Mass., Ala., Ill., Wis., etc.

[12] Franklin v. Franklin, 190 Mass. 349, 77 N. E. 48 (1906).

[13] Williamson v. Osenton, 232 U. S. 619 (1914). The modern tendency is to allow the wife to establish a separate domicil even when she deserts the husband.

[14] J. H. Beale, *supra,* note 8.

marriage status.[15] That seems to be untenable because the marriage status is not an actual thing that may be left or taken but is merely a condition of being married. It is thus naturally attached to both.[16] And since the defendant is domiciled in Connecticut, its courts have the right to determine his legal status—in this case, the marriage status. But, by the nature of marriage, removing the bonds of matrimony from him *ipso facto,* removes it from the wife, for the figure of a wifeless husband or a husbandless wife is unknown to the law.[17] And so the Connecticut courts really determine the status not only of the person domiciled in Connecticut but also of the one domiciled in New York. To this New York objects, even though its objection seems to threaten the purpose of the full faith and credit clause.

The New York position seems to be ill taken. That there ought to be uniformity of law in regard to such an important proceeding as divorce seems self-evident. The fact that a foreign divorce may be valid in one state and not in another threatens legally remarried men with indictments of bigamy and adultery, and their legitimate offspring of the second marriage with bastardization, when the family moves from the jurisdiction of divorce. The danger of constructive service, making defendant's appearance unnecessary (frequently the defendant spouse does not know of the action), opening the door to fraud, as may have been the fact in the Dean case, is relieved by the current law that a foreign divorce decree may be attacked when there is fraud in "allegations and representations designed and intended to mislead with knowledge of falsity, and resulting in damaging deception." [18] Such proof must be of the most satisfactory sort, because of the serious nature of invalidation of a decree of divorce.[19] Requirements as to considerable length of residence of the libellant or plaintiff within the jurisdiction are quite universal, and in Pennsylvania, where *bona fide* residence is not required by statute,[20] the trend of decisions has rightly been one of demanding such good faith.[21] There

[15] This is supported by L. F. Clinton, *The Conflict of Laws as Applied to Divorce,* 7 LAW. AND BANK. 434 (1914).

[16] M. L. Lewis, *Divorce and the Federal Constitution,* 49 AM. L. REV. 852 (1915).

[17] Atherton v. Atherton, *supra,* note 5.

[18] Hunt v. Hunt, 72 N. Y. 217 (1878), appeal dismissed 131 U. S., appendix clxiv.

[19] Royal Arcanum v. Carley, 52 N. J. Eq. 642, 29 Atl. 813 (1894).

[20] Act of 1913, P. L. 191, Pa. St. 1920, § 9159.

[21] There is jurisdiction "where the libellant or applicant shall have been a resident of this Commonwealth for one year previous to the filing of the petition or libel in divorce." Dulin v. Dulin, 33 Pa. Super. 4 (1907), (citing Reed v.

is left the fear that the courts holding the minority view, that a decree rendered in another jurisdiction on laws different from those of their own jurisdiction, violates the policy of protecting one's citizens. The compromise of the Ohio courts, which acknowledge the divorce as dissolving the marriage relation, but not as affecting the dower rights and other property rights of the defendant spouse, offers itself as a possible solution.[22] The Miller case also suggests the efficacy of courts of equity for redress to the injured spouse. Finally, there seems to be no objection to the enforcement of the "full faith and credit" clause from the social point of view, since if the parties are in different jurisdictions the marriage has at least socially ceased to be of any practical effect.[23]

D. J. D.

Reed, 30 Pa. Super. 229): "Our decisions require that it must affirmatively appear that there has been a clear intention to abandon a former residence . . . coupled with an actual *bona fide* residence for one year."

[22] Doerr v. Forsythe, 50 Ohio 726, 35 N. E. 1055 (1893). Accord: Iowa, and Minnesota.

[23] BISHOP, MARRIAGE, DIVORCE AND SEPARATION, § 137 (1891).