UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 35 | Number 1 Article 19

12-1-1956

Descent and Distribution -- The Right of a Prospective Heir to Release or Assign an Expectancy

Thomas Stephen Bennett

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation

Thomas S. Bennett, *Descent and Distribution -- The Right of a Prospective Heir to Release or Assign an Expectancy*, 35 N.C. L. Rev. 127 (1956).
Available at: http://scholarship.law.unc.edu/nclr/vol35/iss1/19

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

Continuing to drive under the following conditions which resulted in falling asleep have justified a finding of gross or wilful and wanton negligence; (1) drinking of intoxicating beverages; (2) prior warning, refusal of relief; (3) excessive length of time at the wheel; and (4) statutes limiting driving time.[21]

While the threat of civil liability serves as a deterrent to drivers falling asleep while driving, a look at accident statistics indicates that more extreme measures should be taken. Since the Supreme Court of North Carolina apparently has adopted the rule as set out in *State v. Mundy* regarding criminal liability, this writer would like to see the legislature pass a statute similar to a recent Michigan statute.[22] Although this statute does not speak expressly of sleeping at the wheel, it does make negligence of a lesser degree than wilful and wanton, resulting in death, a misdemeanor. Thus, if the rationale inferred in *Baird v. Baird* and *Hobbs v. Queen City Coach Co.* is followed, the state could get a conviction under this statute by proving the fact of falling asleep alone without more. Such a measure should have some effect in reducing highway fatalities.

PARKS ALLEN ROBERTS

Descent and Distribution—The Right of a Prospective Heir to Release or Assign an Expectancy

During his lifetime, deceased entered into an agreement with four of his eight children whereby in consideration of $6,000.00 paid to each of them by him they released all interest and right of inheritance in his estate. After the death of the deceased, the administrator of the estate brought an action in which he sought to have the court rule upon the legal effect of the instrument purporting to be a release. The North Carolina Supreme Court unanimously held that the release was binding and enforceable in equity if fairly made upon a valuable consideration

misconduct have been enacted in many states. These are commonly denominated "guest" statutes. Certain things may amount to gross negligence or wilful and wanton misconduct within the meaning of the guest statutes. Whether or not there is such negligence as the statute requires is ordinarily a question for the jury. With its conclusion the courts do not ordinarily interfere. 5 AM. JUR., *Automobiles*, 237, 240 (1933). Also see cases cited note 18 *supra*.

[21] For example, see Belletete v. Morin, 322 Mass. 214, 76 N. E. 2d 660 (1948); Oast v. Mopper, 58 Ga. App. 566, 199 S. E. 249 (1938); Smith v. Williams, 180 Ore. 232, 178 P. 2d 710 (1947); Masters v. Cardi, 186 Va. 261, 42 S. E. 2d 203 (1947).

[22] MICH. STAT. ANN. c. 286a, § 28.556 (1954), which reads: "Any person who, by the operation of any vehicle at an immoderate rate of speed or in a careless, reckless or negligent manner, but not wilfully or wantonly, shall cause the death of another, shall be guilty of a [misdemeanor] punishable by imprisonment in the state prison not more than two years or by a fine of not more than $2,000.00. . ." Also see 49 Cal. Code, Penal § 500 (1956); Kan. Gen. Stat. § 8-529 (1947).

and not accompanied by fraud or undue influence.[1] Thus, the four releasing children were estopped to claim any part of the estate.

Prior to the above case, *Price v. Davis*,[2] there were only three cases decided in North Carolina which considered the right of a prospective heir to release[3] his expectancy[4] in his ancestor's estate.[5] The first of these cases, *Cannon v. Nowell*,[6] decided in 1859, held that a release of this kind was invalid and unenforceable. Ruffin, J., said: "Heirs take by positive law when the ancestor dies intestate and the course of descents cannot be altered by words excluding particular heirs, or by any agreement of parties."[7] The court in the *Price* case would not accept *Cannon v. Nowell* as still being the law in North Carolina, probably because it was an action at law rather than equity before the fusion of the two in this state. It seems to be the universal rule that the release of an expectancy is recognized only in equity.[8]

Not until 1938 and 1939 did the question arise again in the cases of *Allen v. Allen*[9] and *Coward v. Coward*,[10] which involved agreements in the nature of a release. In the *Allen* case the parents of one of the plaintiffs agreed with each other and with their children to pool their separately held real estate and divide it during their lifetime among their children. Two of the children received deeds for their shares; the deeds made to the other children were never delivered to them. On the death of the parents, one of the sons and the children of his deceased sister sought to share with the other children in the real estate left by the parents. The court held the plaintiffs estopped from taking any real estate since that son and the sister had accepted the deeds as their full shares of the lands belonging to their mother and father. Barnhill, J., said: "It would be contrary to all principles of equity to permit them

[1] Price v. Davis, 244 N. C. 229, 93 S. E. 2d 93 (1956).
[2] 244 N. C. 229, 93 S. E. 2d 93 (1956).
[3] By a release is meant "the relinquishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced." BLACK, LAW DICTIONARY 1453 (4th ed. 1951).
[4] "An expectancy is the possibility of an heir apparent or presumptive that he may inherit land; the possibility of the prospective next of kin that he acquire personalty by a distribution or intestacy; and the possibility of a prospective legatee or devisee that he may acquire property by will on the death of the testator." SIMES & SMITH, FUTURE INTERESTS § 391 (2d ed. 1956).
[5] Coward v. Coward, 216 N. C. 506, 53 S. E. 2d 537 (1939); Allen v. Allen, 213 N. C. 264, 195 S. E. 801 (1938); Cannon v. Nowell, 51 N. C. 436 (1859).
[6] 51 N. C. 436 (1859).
[7] Cannon v. Nowell, 51 N. C. 436, 437 (1859).
[8] *In re* Edelman, 148 Cal. 233, 82 Pac. 692 (1905); *In re* Simon, 158 Mich. 256, 122 N. W. 544 (1909); Nesmith v. Dinsmore, 17 N. H. 515 (1845); Price v. Davis, 244 N. C. 229, 93 S. E. 2d 93 (1956); Power's Appeal, 63 Pa. 443 (1869); Gore v. Howard, 94 Tenn. 577, 30 S. W. 730 (1895); Coffman v. Coffman, 41 W. Va. 8, 23 S. E. 523 (1895).
[9] 213 N. C. 264, 195 S. E. 801 (1938).
[10] 216 N. C. 506, 5 S. E. 2d 537 (1939).

[the plaintiffs] now to disavow the conditions upon which the deed was given to them and to successfully assert a further interest in the real estate of their parents."[11] "They accepted the benefits of the gift or advancement and must abide by the conditions upon which it was made."[12] Except for the parties, the facts in the *Coward* case were identical to those in the above case, and the court cited *Allen v. Allen* with approval. The recent *Price* case predicated its decision mainly on these two cases,[13] and as a result there can now be no doubt that North Carolina is in line with the greater weight of authority in holding such contracts for the release of an expectancy valid and enforceable.

The majority jurisdictions[14] enforce the release on various theories. It is frequently held that the release operates as an equitable estoppel,[15] with some courts enforcing the release in equity because they presume that the ancestor relied upon the agreement and, except for it, would have made a will,[16] and because the heir should be compelled to abide by his promise in order to prevent the expectation of the ancestor from being disappointed.[17] One court applies the equitable estoppel theory in order to secure equality among those who have equality of right.[18] Several courts hold that the release acts as an extinguishment of the

[11] Allen v. Allen, 213 N. C. 264, 271, 195 S. E. 801, 805 (1938).

[12] *Id.* at 269, 195 S. E. at 804. The court seems to have based its decision in part on the theory that the deeds constituted an advancement liquidated by agreement as to each child's share in the realty.

[13] Price v. Davis, 244 N. C. 229, 233-34, 93 S. E. 2d 93, 96-97 (1956).

[14] *Arkansas:* Leggett v. Martin, 203 Ark. 88, 156 S. W. 2d 71 (1941); Felton v. Brown, 102 Ark. 658, 145 S. W. 552 (1912); *California: In re* Estate of Wickersham, 153 Cal. 603, 96 Pac. 311 (1908); *In re* Garcelon's Estate, 104 Cal. 570, 38 Pac. 414 (1894); *Georgia:* Barham v. McKneely, 89 Ga. 812, 15 S. E. 761 (1892); Newsome v. Cogburn, 30 Ga. 291 (1860); *Illinois:* Mires v. Laubenheimer, 271 Ill. 296, 111 N. E. 106 (1916); Crum v. Sawyer, 132 Ill. 443, 24 N. E. 956 (1890); *Indiana:* Brown v. Brown, 139 Ind. 653, 39 N. E. 152 (1894); Boyer v. Boyer, 62 Ind. App. 73, 111 N. E. 952 (1915); *Iowa:* Stennett v. Stennett, 174 Iowa 431, 156 N. W. 406 (1916); Jones v. Jones, 46 Iowa 466 (1877); *Maine:* Hilton v. Hilton, 103 Me. 92, 68 Atl. 595 (1907); Smith v. Smith, 59 Me. 214 (1871); *Massachusetts:* Kenney v. Tucker, 8 Mass. 143 (1811); *Michigan: In re* Simon's Estate, 158 Mich. 256, 122 N. W. 544 (1909); *New Hampshire:* Nesmith v. Dinsmore, 17 N. H. 515 (1845); *New Jersey:* Phillips v. Phillips, 122 Atl. 620 (N. J. Ch. 1923); Havens v. Thompson, 26 N. J. Eq. 383 (1875); *New York:* Kinyon v. Kinyon, 72 Hun 452, 25 N. Y. S. 225 (1893); *North Carolina:* Price v. Davis, 244 N. C. 229, 93 S. E. 2d 93 (1956); *Pennsylvania:* Estate of Summerville, 129 Pa. 631, 18 Atl. 554 (1889); *West Virginia:* Adams v. Adams, 82 W. Va. 244, 95 S. E. 859 (1918); Coffman v. Coffman, 41 W. Va. 8, 23 S. E. 523 (1895); *Wisconsin:* Lifinger v. Field, 78 Wis. 367, 47 N. W. 613 (1890); *England:* Medcalf v. Medcalf, 1 Atk. 64, 26 Eng. Rep. 42 (Ch. 1737); *Canada: In re* Lewis, 29 Ont. 609 (1898).

[15] *In re* Edelman, 148 Cal. 233, 82 Pac. 692 (1905); Pylant v. Burns, 153 Ga. 529, 112 S. E. 455, 28 A. L. R. 423 (1922); Boyer v. Boyer, 62 Ind. App. 73, 111 N. E. 952 (1916); Brands v. DeWitt, 44 N. J. Eq. 545, 10 Atl. 181 and 14 Atl. 894 (1888); SIMES & SMITH, FUTURE INTERESTS § 394 (2d ed. 1956).

[16] Eissler v. Hoppel, 158 Ind. 82, 62 N. E. 692 (1901); Brands v. DeWitt, *supra* note 15; Martin v. Martin, 222 S. W. 291 (Tex. Civ. App. 1920).

[17] Cases cited note 16 *supra*.

[18] Brands v. DeWitt, 44 N. J. Eq. 545, 10 Atl. 181 and 14 Atl. 894 (1888).

heir's right to take by descent.[19] Once the consideration vests in the releasor, it is held that the contract becomes binding in equity.[20] The minority jurisdictions[21] on the other hand base their view on the reasoning of the common law in holding that a man cannot release what he does not have[22] and that the course of descent cannot be altered by any agreement of the parties.[23]

If the releasor dies before his ancestor, the release will bind the releasor's heirs taking by representation.[24] This is based on the idea that since the releasor would be estopped if he were alive from asserting any claim in the estate, his heirs should likewise be estopped.[25] However, the release is not literally enforced in all cases. In Georgia it was held that where the effect of the release is to disinherit a sole lineal heir in favor of collateral heirs, the release will not be enforced because it is opposed to that state's statute of distribution requiring the estate to descend to heirs of the first degree and because disinheritance of a sole descendant heir would be an unreasonable construction of the release.[26] A contract of release between a grandparent and a grandchild made during the life of the grandchild's parents releasing the child's expectancy in his parent's estate has been held unenforceable because it violates the law of descents and distributions and cuts off the grandchild's right to take by inheritance his due proportion of his parent's estate.[27]

If fraud and gross inequality are not present, the consideration for

[19] Mires v. Laubenheimer, 271 Ill. 296, 111 N. E. 106 (1916); Crum v. Sawyer, 132 Ill. 443, 24 N. E. 956 (1890); Phillips v. Phillips, 122 Atl. 620 (N. J. Ch. 1923).

[20] *In re* Edelman's Estate, 148 Cal. 233, 82 Pac. 962 (1905); *In re* Garcelon's Estate, 104 Cal. 570, 38 Pac. 414 (1894); Donough v. Garland, 269 Ill. 565, 109 N. E. 1015 (1915).

[21] *Kentucky:* Elliott v. Leslie, 124 Ky. 553, 99 S. W. 619 (1907); *Tennessee:* DeVault v. DeVault, 48 S. W. 361 (Tenn. Ch. App. 1898); *South Dakota: In re* Thompson's Estate, 26 S. D. 576, 128 N. W. 1127 (1910); *Virginia:* Headrick v. McDowell, 102 Va. 124, 45 S. E. 804 (1903); *accord: Florida:* Towles v. Roundtree, 10 Fla. 299 (1863); *Ohio:* Needles v. Needles, 7 Ohio St. 432, 70 Am. Dec. 85 (1857); *Vermont:* Simonds v. Simond's Estate, 96 Vt. 110, 117 Atl. 103 (1922); see RESTATEMENT, PROPERTY § 316 (1940).

[22] Elliott v. Leslie, *supra* note 21; Ferendaugh v. Ferendaugh, 104 Ohio St. 556, 136 N. E. 213 (1922); Simonds v. Simond's Estate, *supra* note 21.

[23] Towles v. Roundtree, 10 Fla. 299 (1863); Elliott v. Leslie, 124 Ky. 553, 99 S. W. 619 (1907); Needles v. Needles, 7 Ohio St. 432 (1857); Headrick v. McDowell, 102 Va. 124, 45 S. E. 804 (1903).

[24] Simpson v. Simpson, 114 Ill. 603, 4 N. E. 137 and 7 N. E. 287 (1885); Smith v. Smith, 59 Me. 214 (1871); Allen v. Allen, 213 N. C. 264, 195 S. E. 801 (1938); Powers Appeal, 63 Pa. 443 (1869); Pritchard v. Pritchard, 76 W. Va. 91, 85 S. E. 29 (1915); Coffman v. Coffman, 41 W. Va. 8, 23 S. E. 523 (1895); *In re* Lewis, 29 Ont. 609 (1898). "It would seem that if the releasing child and all his brothers and sisters predecease the source, the shares of the grandchildren should not be affected by the release." ATKINSON, WILLS § 130 (2d ed. 1953).

[25] See note 24 *supra*.

[26] Pylant v. Burns, 153 Ga. 529, 112 S. E. 455 (1922). *Contra*, RESTATEMENT, PROPERTY § 316, comment *f* and illustration 6 (1940).

[27] Pritchard v. Pritchard, 76 W. Va. 91, 85 S. E. 29 (1915).

the release will usually be held fair even though its amount may later turn out to be an inadequate share of the estate.[28] The burden of proving want of consideration is on the party asserting such want.[29] All that is required of the instrument to constitute a release which will bar the releasor's descendants is that it meet the formalities of an ordinary written contract.[30] However, the release must be certain, clear and unambiguous,[31] executed by one competent to contract,[32] and sufficient to satisfy the local Statute of Frauds.[33] This would indicate that the courts do not favor a release by implication and that a draftsman might well use the word "release" and specifically provide for the bar of the releasor's descendants in case he should predecease his ancestor.

Another type of transaction closely related to and resembling the release of an expectancy is the assignment of an expectancy. In most states[34] equity will enforce the assignment[35] of an expectancy to a third

[28] Eissler v. Hoppel, 158 Ind. 82, 62 N. E. 692 (1902); Boyer v. Boyer, 62 Ind. App. 73, 111 N. E. 952 (1916); Kenney v. Tucker, 8 Mass. 143 (1811); *In re* Simon, 158 Mich. 256, 122 N. W. 544 (1909); Coffman v. Coffman, 41 W. Va. 8, 23 S. E. 523 (1895); *In re* Lewis, 29 Ont. 609 (1898).

[29] *In re* Edelman, 148 Cal. 233, 82 Pac. 962 (1905); Summerville's Estate, 129 Pa. 631, 18 Atl. 554 (1889); Mow v. Baker, 24 S. W. 2d 1 (Tex. Com. App. 1930).

[30] Mires v. Laubenheimer, 271 Ill. 296, 111 N. E. 106 (1915); Rodemeier v. Brown, 169 Ill. 347, 48 N. E. 468 (1897); Binns v. Dazey, 147 Ind. 536, 44 N. E. 644 (1896); Brown v. Brown, 139 Ind. 653, 39 N. E. 152 (1894); Swigt v. Miles, 75 Ind. App. 85, 130 N. E. 130 (1921); Stolenburg v. Dierchs, 117 Iowa 25, 90 N. W. 525 (1902).

[31] Williams v. Swango, 365 Ill. 549, 7 N. E. 2d 306 (1937); Mires v. Laubenheimer, *supra* note 30.

[32] Bishop v. Davenport, 58 Ill. 105 (1871).

[33] Gary v. Newton, 201 Ill. 170, 66 N. E. 267 (1903); Chidester v. Harlan, 180 Iowa 171, 159 N. W. 659 (1916); Riddell v. Riddell, 70 Neb. 472, 97 N. W. 609 (1903); Brands v. DeWitt, 44 N. J. Eq. 545, 10 Atl. 181, 14 Atl. 894 (1888). However, the agreement may be oral if the parent has carried out the agreement. Mixture Guano Co. v. McKoone, 168 Ga. 317, 147 S. E. 711 (1929); Mires v. Laubenheimer, 271 Ill. 296, 111 N. E. 106 (1916).

[34] *Alabama:* Fuller v. Nichols, 219 Ala. 58, 121 So. 52 (1929); *California:* Bridge v. Kedon, 163 Cal. 493, 126 Pac. 149 (1912); *Connecticut:* Brown v. Brown, 66 Conn. 493, 34 Atl. 490 (1895); *Idaho:* Casady v. Scott, 40 Idaho 137, 237 Pac. 415 (1925); *Illinois:* Thornton v. Louch, 297 Ill. 204, 130 N. E. 467 (1921); *In re* Landis, 41 F. 2d 700 (7th Cir.) *cert. denied,* 282 U. S. 872 (1930); *Iowa:* Burk v. Morain, 223 Iowa 399, 272 N. W. 441 (1937); Mally v. Mally, 121 Iowa 169, 96 N. W. 735 (1903); *Kansas:* Clendening v. Wyatt, 54 Kan. 523, 38 Pac. 792 (1895); *Maine:* Curtis v. Curtis, 40 Me. 24 (1855) (family agreement); *Maryland:* Keys v. Keys, 148 Md. 397, 129 Atl. 504 (1925); *Massachusetts:* Gadsby v. Gadsby, 275 Mass. 159, 175 N. E. 495 (1931); *Missouri:* Bank of Moberly v. Meals, 222 Mo. App. 862, 5 S. W. 2d 1113 (1928); *New Hampshire:* Peterborough Sav. Bank v. Hartshorn, 67 N. H. 156, 33 Atl. 729 (1891); *New Jersey:* Bacon v. Bonham, 33 N. J. Eq. 614 (1881); *New York: In re* Strange, 164 Misc. 929, 300 N. Y. S. 23 (Surr. Ct. 1937); *North Carolina:* Boles v. Caudle, 133 N. C. 528, 45 S. E. 835 (1903); Mastin v. Marlow, 65 N. C 695 (1871); McDonald v McDonald, 58 N C. 211 (1859); *accord,* Kornegay v. Miller, 137 N. C. 659, 50 S. E. 315 (1905); *Ohio:* Hite v. Hite, 120 Ohio St. 253, 166 N. E. 193 (1929); *Oklahoma:* Kaylor v. Kaylor, 172 Okla. 535, 45 P. 2d 743 (1935); *Pennsylvania: In re* Norris, 329 Pa. 483, 198 Atl. 142 (1938); *South Carolina:* Wallace v. Quick, 156 S. C. 248, 153 S. E. 168 (1930); *Tennessee:* Tate v. Greenlee, 141 Tenn. 103, 207 S. W. 716 (1918); *Texas:* Young v. Hollings-

person if made free from fraud and oppression and in good faith upon a valuable consideration by one *sui juris* who survives the ancestor.[36] Another element necessary in some but not all of the majority rule states is that the ancestor consent to the assignment of the expectancy.[37] Equity treats the assignment as an executory contract to convey the property to the assignee if and when it ceases to be an expectancy and comes into the assignor's possession as a vested estate or interest, and specific performance of the contract itself is decreed.[38] In this situation the purchaser receives only what the seller has; therefore, if the assigner dies before his ancestor, no interest has ever vested in the seller nor will any vest in his estate which will pass to his assignee. Thus, the assignor's heirs are not bound by the assignment because in such case they take directly as heirs of the ancestor.[39]

North Carolina has for a long time followed the majority rule and enforces the assignment of an expectancy to a third person.[40] In *McDonald v. McDonald*,[41] decided in 1859, Battle, J., said: "[The assignor] had a right to make a contract to convey whatever interest he might in future have in his cousin's property; and such a contract, when fairly made upon a valuable consideration, the Court of Chancery will enforce whenever the property shall come into his possession."[42] As in other

worth, 16 S. W. 2d 844 (Tex. Civ. App. 1929); *Vermont:* Hoyt v. Hoyt, 61 Vt. 413, 18 Atl. 313 (1889) (family agreement); *Virginia:* Lewis v. Madisons, 15 Va. (1 Munf.) 303 (1810) (family agreement); *Wisconsin:* Hofmeister v. Hunter, 230 Wis. 91, 283 N. W. 335, 121 A. L. R. 444 (1939); *England:* Bennett v. Cooper, 9 Beav. 252, 50 Eng. Rep. 340 (Rolls Ct. 1845).

[35] By assignment is meant a transfer of the expectancy to a third party, stranger or co-heir, who is not the ancestor of the assignee.

[36] See cases cited note 34 *supra.*

[37] Consent required: McClure v. Raben, 133 Ind. 507, 33 N. E. 275 (1893); Farmers Loan & Trust Co. v. Wood, 78 Ind. App. 147, 134 N. E. 899 (1922); Curtis v. Curtis, 40 Me. 24 (1855); Stevens v. Stevens, 181 Mich. 438, 148 N. W. 225 (1914). *Contra:* Gannon v. Graham, 211 Iowa 516, 231 N. W. 675 (1930); Gadsby v. Gadsby, 275 Mass. 159, 179 N. E. 495 (1931); Hale v. Hollon, 90 Tex. 427, 39 S. W. 287 (1897); Hoyt v. Hoyt, 61 Vt. 413, 18 Atl. 313 (1889); Hofmeister v. Hunter, 230 Wis. 81, 283 N. W. 330 (1939); inference that no consent needed: Stover v. Eycleshimer, 3 N. Y. 620 (1867); McDonald v. McDonald, 58 N. C. 211 (1859); Fritz's Estate, 160 Pa. 156, 28 Atl. 642 (1894); Steele v. Frierson, 85 Tenn. 430, 35 S. W. 649 (1887).

[38] *In re* Barnett, 124 F. 2d 1005 (2d Cir. 1942); Hooker v. Hooker, 130 Conn. 41, 32 A. 2d 68 (1943); Clendening v. Wyatt, 54 Kan. 523, 38 Pac. 792 (1895); Donough v. Garland, 269 Ill. 565, 109 N. E. 1015 (1915); *In re* Strange's Estate, 164 Misc. 929, 300 N. Y. S. 23 (Surr. Ct. 1937); McDonald v. McDonald, 58 N. C. 211 (1859); Bayler v. Commonwealth, 40 Pa. 37 (1861); Tate v. Greenlee, 141 Tenn. 103, 207 S. W. 716 (1918); Hale v. Hollon, *supra* note 37; Hofmeister v. Hunter, *supra* note 37.

[39] Donough v. Garland, *supra* note 38; Benson v. Benson, 180 N. C. 106, 104 S. E. 68 (1920); Johnson v. Breeding, 136 Tenn. 528, 190 S. W. 545 (1916); French v. McMillon, 79 W. Va. 639, 91 S. E. 538 (1917).

[40] Boles v. Caudle, 133 N. C. 528, 45 S. E. 835 (1903); Mastin v. Marlow, 65 N. C. 695 (1871); McDonald v. McDonald, 58 N. C. 211 (1859).

[41] 58 N. C. 211 (1859).

[42] *Id.* at 214.

jurisdictions, the assignment is treated as an executory contract entitling the assignee to a specific performance as soon as the assignor has acquired the power to perform it.[43]

Where there is an assignment of a possibility coupled with an interest, equity will also take cognizance of the transaction.[44] A possibility coupled with an interest is a contingent one created in an instrument, such as an executory devise, contingent remainder, springing use, or shifting use.[45] Such a future interest may be sold, transmitted, or devised since it is a present contingent interest in an estate.[46] The validity of the assignment of a possibility coupled with an interest "has been sustained as an executory contract to convey, passing no present interest or estate, but a mere right in equity, to be enforced by suit when the contingency upon which the estate vests occurs. Such assignments are sometimes sustained upon the doctrine of estoppel, especially when the deed contains a warranty of title. It has also been held that an assignment of such interest, while not passing any present legal title or estate, does pass the equitable title of the assignor, which is perfected by converting the assignor into a trustee for the benefit of the assignee when the estate vests."[47]

Neither the release nor the assignment of an expectancy are favorites of the courts and such transactions are examined with caution.[48] They may result in the taking of undue advantage of an heir in distressed and unfortunate circumstances.[49] Both are in disfavor because they allow an expectant heir to spend his inheritance before it comes into his possession.[50] The assignment has been the special object of criticism; it has been called a gambling contract and therefore held unenforceable in at least one jurisdiction.[51] Also it has been said that an assignment tends to destroy or lessen the ancestor's control over the expectant heir by giving him independent means of gratifying his desires, thus encouraging extravagance and vice on his part.[52] It may also create a

[43] McDonald v. McDonald, 58 N. C. 211 (1859).

[44] Kornegay v. Miller, 137 N. C. 659, 50 S. E. 1015 (1915); SIMES & SMITH, FUTURE INTERESTS § 402 (2d ed. 1956); *see also* SIMES, FUTURE INTERESTS § 712 (1st ed. 1936).

[45] Kornegay v. Miller, *supra* note 44, at 665, 50 S. E. at 318 (dictum).

[46] Kornegay v. Miller, 137 N. C. 659, 50 S. E. 315 (1905); Bodenhamer v. Welch, 89 N. C. 79 (1883).

[47] *Id.* at 664, 50 S. E. at 317.

[48] Grimm v. Grimm, 26 Cal. 2d 173, 157 P. 2d 841 (1945); Kaiser v. Cobbey, 400 Ill. 214, 79 N. E. 2d 604 (1948); Gannon v. Graham, 211 Iowa 516, 231 N. W. 675 (1930); Kornegay v. Miller, *supra* note 46; Hite v. Hite, 120 Ohio St. 253, 166 N. E. 193 (1929); McConnell v. Corgey, 153 Tex. 49, 262 S. W. 2d 944 (1954); Graef v. Kanouse, 205 Wis. 597, 238 N. W. 377 (1931).

[49] Boynton v. Hubbard, 7 Mass. 112 (1810); Hale v. Hollon, 90 Tex. 427, 39 S. W. 287 (1897); SIMES & SMITH, FUTURE INTERESTS § 395 (2d ed. 1956).

[50] Kornegay v. Miller, 137 N. C. 659, 669, 50 S. E. 315, 319 (1905) (dictum); SIMES & SMITH, FUTURE INTERESTS § 395 (2d ed. 1956).

[51] McClure v. Raben, 125 Ind. 139, 25 N. E. 179 (1890).

[52] *Id.* at 147, 25 N. E. at 182.

desire in the purchaser for the early death of the ancestor.[53] And, in addition, it has been held that an assignment operates as a fraud upon the ancestor, perhaps deluding him into leaving his property not to the person intended but to a stranger.[54] Thus it would appear that of the two, the release is looked on less harshly because it generally keeps the inheritance in the family and is more in the nature of a family settlement, which is favored by the courts.[55]

It would appear that *Allen v. Allen* and *Coward v. Coward* actually left little room for doubt as to the validity of the relase of an expectancy in North Carolina. However, the seemingly square holding contra in *Cannon v. Nowell* caused confusion in this area. *Price v. Davis* has at last removed this confusion.

THOMAS STEPHEN BENNETT

Fire Insurance—Estate by the Entirety—Insurable Interest—Right to Proceeds

A husband and wife own an estate in land as tenants by the entirety. The spouses are separated, the husband remaining the occupant of the dwelling-house. He insures the home in his name alone for $4,000 and pays the premiums from his own funds. The home burns and pending payment of the claim by the insurance company the spouses obtain an absolute divorce. To whom do the proceeds of the policy belong?

The above facts presented a case of first impression in North Carolina.[1] The supreme court, reversing the decision of the trial court, held in *Carter v. Continental Ins. Co.*[2] that the husband's interest in the property was not insurable for his benefit alone as a separate moiety apart from the estate owned by him and his wife and the proceeds of a policy so taken inured to the benefit of the entire estate. Thus, upon absolute divorce the wife was entitled to one half of the proceeds,[3] even though she was not named as insured or beneficiary in the policy and had not contributed to the payment of premiums.

Ordinarily a fire insurance policy is a personal contract to indemnify the insured for a loss sustained;[4] and where one has an insurable in-

[53] McClure v. Raben, 125 Ind. 139, 147, 25 N. E. 179, 182 (1890).
[54] *In re* Edelman's Estate, 148 Cal. 233, 82 Pac. 962 (1905); Hale v. Hollon, 90 Tex. 427, 39 S. W. 287 (1897); See SIMES & SMITH, FUTURE INTERESTS § 395 (2d ed. 1956).
[55] Bank of Wadesboro v. Hendley, 229 N. C. 432, 50 S. E. 2d 302 (1948); Redwine v. Clodfeter, 226 N. C. 366, 38 S. E. 2d 203 (1946); Fish v. Hanson, 223 N. C. 143, 25 S. E. 2d 461 (1943).

[1] Carter v. Continental Ins. Co., 242 N. C. 578, 89 S. E. 2d 122 (1955).
[2] 242 N. C. 578, 89 S. E. 2d 122 (1955).
[3] Divorce converts a tenancy by the entirety into a tenancy in common.
[4] VANCE, INSURANCE § 13 (1951).