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NOTES AND COMMENTS

**Assignments for Benefit of Creditors—Judgment Recovered
Within Four Months of the Assignment Not a Preference.**

Certain creditors of the debtor Book Store docketed judgments against the debtor store and had executions issued. Before any property was levied upon, the debtor, being insolvent, transferred substantially all its property to X to hold for the benefit of all its creditors. X, the assignee, immediately brought an action to restrain the sheriff from levying on the assigned property on the ground that the judgments were unlawful preferences because obtained within four months of the registration of the assignment.¹ The court held that the judgments were

¹N. C. CODE ANN. (Michie, 1935) §1611 provides that it is the duty of the assignee to recover, for the benefit of the estate, preferences. A preference under this section is deemed to be a transfer or conveyance of property within four months of the registration of the assignment in consideration of a pre-existing debt, when the grantee knows or has reason to believe that the grantor or assignor was insolvent.

not unlawful preferences under the North Carolina statute and executions were allowed.²

This is the first time that this issue has been raised in this state, and it is clear that under the present assignment statutes³ the court's decision was proper. Though perhaps a majority of the states under their respective statutes are in accord with North Carolina,⁴ the National Bankruptcy Act⁵ and states⁶ with assignment statutes less obsolete make such judgments voidable by the assignee.

Since the purpose of any statute forbidding preferences in connection with assignments for the benefit of creditors is to enable creditors to share equally, preferences whether obtained by acts of the parties or by legal proceedings alike defeat the purpose of the statute.

As the North Carolina statute now stands, creditors seeking equality in the distribution of the assets are obliged to resort to an involuntary bankruptcy to recover preferences obtained by judicial proceeding. This, of course, impairs the usefulness of assignments. The North Carolina statute should be amended so as to define and invalidate such preferences.⁷

The North Carolina statutes contain additional defects. Section 1610⁸ requires that within ten days of the registration of the deed of assignment an inventory of the debtor's property must be filed by the assignee. This is true though there is no statute that absolutely requires registration of the instrument. If the inventory is not filed, the assignment fails. According to the court's interpretation of C. S. §1609⁹ if an insolvent

² Pritchett v. Tolbert, 210 N. C. 644, 188 S. E. 71 (1936).

³ N. C. CODE ANN. (Michie, 1935) §§1609-1620.

⁴ Loeb Grocery Co. v. Brickman and Co., 173 Ala. 316, 56 So. 119 (1911); Beardsley v. Beecher, 47 Conn. 408 (1879); Green v. Walker, 5 Del. Ch. 26 (1874); Marder Luse and Co. v. Filkins, 15 Ill. App. 587 (1893); Feltenstein v. Stein, 157 Ill. 19, 45 N. E. 502 (1895); McGoldrick v. Slevin, 43 Ind. 522 (1873); Exchange Bank v. Gillispie, 19 Ky. 1317, 43 S. W. 401 (1897); Murchie v. Wentworth, 74 N. H. 3, 64 Atl. 507 (1906); Waggoner v. Moses, 26 N. J. L. 570 (1857). By implication OHIO CODE ANN. (Throckmorton, 1929) §11139 and N. Y. CON. LAWS (Cahill, 1930) §13 do not affect judgments similar to the ones recovered in the principal case.

⁵ 44 Stat. 666 (1929), 11 U. S. C. A. §96 (1936); Wilson v. Nelson, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. ed. 147 (1901); Benjamin v. Chandler, 142 Fed. 217 (M. D. Pa. 1905).

⁶ Swack v. Beeman, 102 Pa. Super. 362, 156 Atl. 745 (1931); WIS. STAT. (1931) §§128.02-128.28; PA. STAT. (Purdon, 1936) tit. 39, §71. In an old New York case, Jackson v. Sheldon, 9 Abb. Prac. 127 (1859), a judgment was recovered against an insolvent partnership prior to the execution of the assignment. The court said that upon the happening of insolvency the assets became a trust fund to be divided among all creditors, and that the judgment creditor could not obtain a preference by reason of the debtor's omission to place the assets in the hands of a trustee.

⁷ A new section as to preferences might be patterned after the National Bankruptcy Act, 44 Stat. 666 (1929), 11 U. S. C. A. §96 (1936).

⁸ N. C. CODE ANN. (Michie, 1935) §1610.

⁹ N. C. CODE ANN. (Michie, 1935) §1609; Farmers' Banking and Trust Co. v. Tarboro Tobacco Co., 188 N. C. 177, 124 S. E. 158 (1924).

debtor transfers substantially all his property to one creditor for a past consideration, it will be deemed an assignment enuring to the benefit of all creditors. The transfer may be made by deed of trust or by a mortgage as well as by a deed of assignment.¹⁰ An assignment therefore may result by operation of law where none was intended by the debtor or his transferee. In a majority of cases, a mortgagee or trustee will not realize that by force of the statute he is supposed to hold the property for the benefit of all creditors. Thus he will fail to make the required inventory of the property transferred to him; consequently, the assignment will fail.¹¹ Our statute should be amended to allow the filing of the inventory within a reasonable time after the transfer has been judicially declared to be an assignment for the benefit of all.

Since the assignee is usually a close friend of the debtor, the assignee may be reluctant to institute suits against the debtor, and reluctant to recover for the estate illegal transfers or concealments by the debtor. Therefore, interested creditors should be able to sue upon the refusal of the assignee to sue and upon the giving of a satisfactory bond. The need for allowing creditors to sue is especially great in North Carolina because: (1) The original assignee, unless he is insolvent, is not required to post bond to protect the creditors if he fails to perform diligently his duties.¹² (2) It may prove difficult to have an incompetent assignee removed.¹³

Under the present statutes the assignor may empower the assignee to continue the debtor's business.¹⁴ It should be provided that, regardless of the powers given the assignee in the deed of assignment, whether the debtor's business will be continued and if so how long it should be continued, will be a matter for the court to determine.

The assignee has no statutory power to sell, compound or compromise debts or claims. Provision should be made for this since such power would tend to facilitate an efficient settlement of the debtor's estate.¹⁵

Several states have found it advantageous to give the court power to summon the debtor and force him to submit to an examination in

¹⁰ *National Bank v. Gilmer*, 117 N. C. 416, 23 S. E. 333 (1895); N. C. CODE ANN. (Michie, 1935) §1609.

¹¹ *Odom v. Clark*, 146 N. C. 544, 60 S. E. 513 (1908); *Virginia Trust Co. v. Pharr Estates*, 206 N. C. 894, 175 S. E. 186 (1934).

¹² N. C. CODE ANN. (Michie, 1935) §1613.

¹³ N. C. CODE ANN. (Michie, 1935) §1613, §1614. One fourth of the number of creditors whose claims aggregate more than fifty per cent of the total indebtedness of the debtor must petition the clerk of the superior court to have another assignee appointed; or the clerk, on his own motion, may notify all interested creditors and substitute a new assignee.

¹⁴ *Stoneburner v. Jeffreys*, 116 N. C. 78, 21 S. E. 29 (1895).

¹⁵ ALA. CODE ANN. (Michie, 1928) §10410; IND. ANN. STAT. (Burns, 1933) §3831; KY. STAT. (Carroll, 1936) §94; MO. REV. STAT. (1929) §664; N. Y. DEBTOR AND CREDITOR LAWS §19.

regard to matters affecting the estate.¹⁶ Such a statute in North Carolina would be of tremendous aid in determining the debtor's assets and liabilities and in uncovering unlawful dealings. South Carolina has an effective scheme whereby the assignee must call a meeting of the creditors at which meeting they choose agents to work in conjunction with the assignee in preserving, liquidating and distributing the debtor's estate.¹⁷

Perhaps the greatest fault to be found is that North Carolina has no provision for amending any defects, informalities or mistakes in the assignment or its administration. Thus, due to some irregularity, the whole assignment may fail. Upon such failure a few creditors may pounce upon the estate by attachment, garnishment, or judgment and execution to the detriment of other creditors. To prevent this the court should be authorized to allow amendments to the assignment at any time, and such amendments should be retroactive in effect;¹⁸ and to cure procedural defects by order that the proper steps be taken. And it should be further provided that should the assignment fail for any reason, the court shall administer the estate for the ratable benefit of all the creditors.

WILLIAM THORNTON WHITSETT.

Bankruptcy—Receiverships—Separate Suits.

Plaintiff's tort action was pending when the defendant-debtor filed its petition for reorganization under Section 77B of the National Bankruptcy Act. The Bankruptcy Court accepted the petition, appointed trustees, and inter alia, enjoined the institution or further prosecution of any action at law against the debtor. Plaintiff then moved for leave to prosecute his suit to judgment, showing by affidavit that the debtor was covered by liability insurance,¹ and that in order to sue the insurance company under the New York Insurance Law,² he, the plain-

¹⁶ COLO. COMP. LAWS (1921) §6262; ILL. ANN. STAT. (Cahill, 1933) c. 72, §47; IOWA CODE (1935) §12738; KY. STAT. (Carroll, 1936) §83; TEX. REV. CIV. STAT. (1925) a. 272; WASH. COMP. STAT. (Remington, 1922) §1095.

¹⁷ S. C. CODE ANN. (Michie, 1932) §§9097-9104.

¹⁸ WIS. STAT. (1931) §§128.02-128.28.

¹ Although the plaintiff in his affidavit for continuance alleged that the debtor was covered by liability insurance, it was not until the debtor filed a supplemental brief that he learned the debtor was a self-insurer up to \$2,500. Therefore, this amount would have to be filed in the reorganization proceedings. See Brief for Petitioner; *Foust v. Munson Steamship Lines* 82 F. (2d) 289 (C. C. A. 2nd, 1936).

² "No policy of insurance against loss or damage resulting from accident to or injury suffered by an employee . . . shall be issued . . . unless there shall be contained within such policy a provision that the insolvency . . . of the person insured shall not release the insurance carrier . . . and stating that in case execution . . . is returned unsatisfied . . . because of such insolvency. . . , then an action may be maintained by the injured person, or his personal representative" against the insurer. CONS. LAWS OF N. Y. (Cahill, 1936 Supp.) c. 30, §109.

tiff, must show an unsatisfied judgment against the insured. He further alleged that as the action was under the Merchant Marine Act of 1920³ he was guaranteed a jury trial. The Bankruptcy Court denied plaintiff's motion and ordered that a special master be appointed to hear the claim. The C. C. A. affirmed the order, stating as a reason that jurors in negligence cases often return "far larger verdicts than reason justifies."⁴ On appeal the Supreme Court held that the Bankruptcy Court had abused its discretion in denying petitioner the right to proceed.⁵

In various types of liquidation or reorganization proceedings the problem often arises whether separate suits against the debtor in other courts should be maintained or whether all claims must be filed and settled in the liquidation or reorganization proceedings.

Section 77B⁶ provides that the judge, in addition to the regular provisions of Section 29⁷ for staying suits, "may enjoin or stay the commencement or continuation of suits against the debtor until after final decree" and refer such matters to a special master for consideration and report. This case, the first in the Supreme Court on this particular section of 77B, holds that the judge, before he enjoins prosecution of the separate suit, must determine whether allowing it to proceed will "hinder, burden, delay or be at all inconsistent with the reorganization proceedings."⁸ In the instant case, allowing plaintiff's suit to proceed would in no way embarrass the reorganization proceedings, whereas a stay would seriously injure his rights. The insurance company would meet all expenses incurred in defending this suit; an unsatisfied judgment was a condition precedent for the plaintiff to collect from the insurance company, and such a judgment could be obtained only by allowing plaintiff to proceed. Also, plaintiff had been specifically guaranteed a jury trial.⁹

³ This Act is in the nature of a Compensation Act and provides that in case of death or injury, a seaman or his personal representative may maintain an action at law "with the right of jury trial" preserved. 41 Stat. 1007 (1920), 46 U. S. C. A. §688 (1928).

⁴ 80 F. (2d) 859 (C. C. A. 2d, 1936). In this "deferring" opinion, the Court said "if Foust is willing to stipulate not to use any judgment he may recover in the state action as a claim against the estate, there could be no objection to allowing that action to proceed." Upon Foust's refusal to stipulate, the C. C. A. handed down its final decision in 82 F. (2d) 289 (C. C. A. 2d, 1936).

⁵ 57 Sup. Ct. 90, 81 L. ed. Adv. Op. 30 (1936).

⁶ Reorganization proceedings for private Corporations. 49 Stat. 965 (1935), 11 U. S. C. A. 207(c) (10) (Supp. 1936).

⁷ Applicable to regular bankruptcy proceedings. 30 Stat. 549 (1898), 11 U. S. C. A. 29 (1928).

⁸ 57 Sup. Ct. 95, 81 L. ed. Adv. Op. 35. Court also said that unless "the prosecution of petitioner's action would embarrass the administration of the debtor's estate, the District Court should have granted leave." 57 Sup. Ct. 94, 81 L. ed. Adv. Op. 33.

⁹ See note 3, *supra*. When separate suits are enjoined, the court may order the claims which would have been the subject of these separate suits referred to a

In the typical equity receivership it seems settled that a court cannot arbitrarily and in all cases enjoin the carrying on of a suit in a court of another forum, pending at the time the receivership proceedings are brought, when the primary purpose of the action is to obtain a judgment *in personam* so as to liquidate a claim against the debtor.¹⁰ The judgment recovered in a suit which is allowed to continue is conclusive as to the amount of the claim to be filed with the receiver.¹¹ However, if the separate suit seeks to establish a lien upon, or affect possession of, the property which the receivership court has taken under the receivership proceedings, the suit will be stayed.¹²

Under the Bankruptcy Act, it is provided that when the claim being sued on is one dischargeable under the Act, the Court "shall" enjoin any pending prosecution "until after adjudication or dismissal of the petition," thus making it mandatory to grant the stay up to that point in the proceedings.¹³ After adjudication, it becomes a matter of discretion whether the court will continue the stay for the statutory period.¹⁴ There is no need to resort to the state court in which the separate action is pending to discontinue the suit, since the Bankruptcy Court is empowered to enjoin state court proceedings.¹⁵

Section 74,¹⁶ applicable to compositions and extensions in Bankruptcy, gives the judge power, if he deems it "fair and equitable," to

master with the right of jury trial if desired. *In re Risenberg*, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. ed. 403 (1908); *HIGH RECEIVERS* (4th ed. 1910) §254b. In the instant case, then, plaintiff's objection that he was being deprived of a jury trial could have been met by ordering the special master to empanel a jury to hear plaintiff's claim.

¹⁰ *Riehle v. Margolis*, 279 U. S. 218, 49 Sup. Ct. 310, 73 L. ed. 669 (1929); *Hatch v. Morosco Holding Co.*, 19 F. (2d) 766 (C. C. A. 2d, 1927); *Cooper v. Philadelphia Worsted Co.*, 57 Atl. 733 (N. J. Ch. 1904).

¹¹ *Riehle v. Margolis*, 279 U. S. 218, 49 Sup. Ct. 310, 73 L. ed. 669 (1929); *Iron Co. v. Car Works*, 53 Fed. 853 (C. C. D. Ind. 1893); *HIGH RECEIVERS* (4th ed. 1910) §318; *TRACY, CORPORATE FORECLOSURE* (1929) §147.

¹² See *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 219, 33 L. ed. 538 (1889); *Oppenheimer v. Land and Irrigation Co.*, 246 Fed. 934 (C. C. A. 5th, 1917); *Hatch v. Morosco Holding Co.*, 19 F. (2d) 766, 768 (C. C. A. 2d, 1927).

¹³ 30 Stat. 549 (1898), 11 U. S. C. A. 29 (1928); *Orgill Bros. v. Coleman*, 146 Miss. 217, 111 So. 291 (1927); 7 *REMINGTON, BANKRUPTCY* (4th ed. 1934) §§3465, 3473.

¹⁴ Twelve months after adjudication, or, if the debtor applies for a discharge within this time, until the question of discharge is determined. 7 *REMINGTON, BANKRUPTCY* (4th ed. 1934) §§3474, 3476.

¹⁵ The Bankruptcy Court's power to determine whether the suit ought to be stayed or not is paramount since the Constitution grants to Congress the right to enact bankruptcy statutes. Its acts are binding on both federal and state courts. *Hill v. Harding*, 107 U. S. 631, 633, 2 Sup. Ct. 404, 406, 27 L. ed. 493, 494 (1883); 7 *REMINGTON, BANKRUPTCY* (4th ed. 1934) §3477.

However, dicta in certain cases would indicate that as a matter of comity the motion to discontinue the suit ought to be made first in the state court. See: *In re Geister*, 97 Fed. 322, 323 (N. D. Iowa 1899); *Allard v. Estes*, 197 N. E. 884, 888 (Mass. 1935); 7 *REMINGTON, BANKRUPTCY* (4th ed. 1934) §3478.

¹⁶ 49 Stat. 246 (1935), 11 U. S. C. A. 202(n) (Supp. 1936). This authority to enjoin secured creditors is given in addition to that general power conferred by §29.

enjoin secured creditors from further proceeding in any court for the enforcement of their liens until confirmation or denial of the composition extension, thus giving him control over all pending actions.

No uniform rules for the exercise of discretion in enjoining separate suits can be laid down, but the court ought to balance the inconvenience to the liquidation or receivership proceedings if the action be allowed to continue, with the possible detriment to the plaintiff in that suit if it be enjoined.

O. W. CLAYTON, JR.

Constitutional Law—Impairment of Contracts—Statutory Regulation of Foreclosure Sales—Deficiency Judgments.

The mortgagee purchased the mortgaged property at foreclosure sale and sued for a deficiency judgment. The mortgagor was permitted to show as a defense and off-set that the mortgaged property was bid in at less than its true value and was actually worth the amount of the mortgage indebtedness. The mortgagee contended that the North Carolina statute¹ allowing such a defense was unconstitutional as an impairment of the contract. *Held*, constitutional, as the statute provides merely for judicial supervision of the execution of the power of sale.²

Periods of financial stress have given rise to two classes of legislation for the relief of debtors. (1) Moratory laws designed to prevent sacrifice sales at depression prices and to grant time extensions to debtors within which to meet their indebtedness.³ Such laws are constitutional when limited to emergencies.⁴ (2) Laws designed to relieve the debtor-mortgagor from the lack of competitive bidding at foreclosure sales. Without such aid the mortgagee could often bid in the property at a nominal figure and at the same time obtain a large deficiency judgment. The North Carolina statute involved in the principal case is of this class.

Generally the force and effect of a mortgage is determined by the law in force at the time the mortgage was executed.⁵ Changes in the mortgage law which impose new restrictions and conditions upon the

¹ P. L. 1933, c. 275, §3; N. C. CODE ANN. (Michie, 1935) §2593(d).

² *Richmond Mortgage and Loan Corp. v. Wachovia Bank and Trust Co.*, 210 N. C. 29, 185 S. E. 482 (1936), *aff'd* 57 Sup. Ct. 338, 81 L. ed. Ad. Op. 361 (1937).

³ *Jones v. Crittenden*, 4 N. C. 55 (1814); *Miller v. Gibson*, 63 N. C. 635 (1869) (Early "stay laws" enacted in North Carolina were declared unconstitutional as laws impairing the obligation of contract.).

⁴ *Home Building and Loan Ass'n v. Blaisdell*, 290 U. S. 398, 54 Sup. Ct. 231, 78 L. ed. 251 (1934). *Contra* under State Constitutions: *Cleveringa v. Klein*, 63 N. D. 514, 249 N. W. 118 (1933); *Murphy v. Phillips*, 63 S. W. (2d) 404 (Tex. 1933).

⁵ *East Tenn., V. and G. Ry. v. Frazier*, 139 U. S. 288, 11 Sup. Ct. 517, 35 L. ed. 196 (1890); *Bateman v. Sterrett*, 201 N. C. 59, 159 S. E. 14 (1931); *Hood, Com'r of Banks v. Simpson*, 206 N. C. 557, 174 S. E. 579 (1934).

mortgagee in the enforcement of his substantive rights are generally ruled invalid as an impairment of the contract.⁶ The obligations of the contract, however, may be impaired in an emergency calling for drastic action,⁷ as the emergency exception may be regarded as an implied term in every contract.⁸ Such emergency legislation must be limited in period of duration.⁹ However, when legislative action is permitted because remedial, and there is a resulting detriment to the rights of one class of persons, appropriate provisions for the protection and compensation of such persons should be made.¹⁰

Section one of the North Carolina statute¹¹ provides for enjoining the sale of the mortgaged premises or the confirmation thereof where the amount bid is inadequate and inequitable. The application for such injunction must be made before the sale is confirmed,¹² and the enjoining party must furnish bond to indemnify the mortgagee or enjoined party. Section two empowers the judge to order a resale before confirmation.¹³ Both sections have been held constitutional as remedial in nature and not an impairment of contract or a deprivation of property without due process of law.¹⁴ Other states are divided.¹⁵ The

⁶ *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. 1042, 41 L. ed. 93 (1895).

⁷ *Home Bldg. and Loan Ass'n v. Blaisdell*, 290 U. S. 398, 54 Sup. Ct. 231, 78 L. ed. 251 (1934); *Weisel v. Hagdahl Realty Co.*, 241 App. Div. 314, 271 N. Y. Supp. 629 (1934).

⁸ *Slirsberg v. N. Y. Life Ins. Co.*, 244 N. Y. 482, 155 N. E. 749 (1927), *cert. denied*, 275 U. S. 526, 48 Sup. Ct. 19, 72 L. ed. 407 (1927).

⁹ *W. B. Wortham Co. v. Thomas*, 292 U. S. 426, 54 Sup. Ct. 816, 78 L. ed. 1344 (1934) (An Arkansas statute undertaking to exempt from the claim of creditors the proceeds of life, health, accident, and disability insurance policies could not be sustained as emergency legislation, although it purported to be such, when it contained no limitation as to time, amount, circumstances, or need, since such statute impaired the contract right of existing creditors.); *Home Bldg. and Loan Ass'n v. Blaisdell*, 290 U. S. 398, 54 Sup. Ct. 231, 78 L. ed. 251 (1934) (court strongly influenced in upholding legislation by fact that legislation temporary); *Chastleton Corp. v. Sinclair*, 264 U. S. 543, 44 Sup. Ct. 405, 68 L. ed. 841 (1924); *Block v. Hirsh*, 256 U. S. 135, 157, 41 Sup. Ct. 458, 460, 65 L. ed. 865, 871 (1920) ("A limit in time, to tide over a passing trouble, may well justify a law that could not be upheld as a permanent change."); *Vanderbilt v. Brunton Piano Co.*, 111 N. J. L. 596, 169 Atl. 177 (1933); *Langever v. Miller*, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A. L. R. 853 (1934); Note (1933) 47 HARV. L. REV. 660, 666 (If the statutes are limited they are more likely to be sustained.). The North Carolina statute is not limited but is justified as remedial in nature.

¹⁰ *Home Bldg. and Loan Ass'n v. Blaisdell*, 290 U. S. 398, 54 Sup. Ct. 231, 78 L. ed. 251 (1934); *Cleveringa v. Klein*, 63 N. D. 14, 249 N. W. 118 (1933) (failure to provide for giving mortgagee rents and profits, instrumental in declaring statute unconstitutional); *Roth v. Waterfield*, 167 Okla. 209, 29 P. (2d) 24 (1934).

¹¹ P. L. 1933, c. 275, §1; N. C. CODE ANN. (Michie, 1935) §2593(b).

¹² *Whitford v. The N. C. Joint-Stock Bank of Durham*, 207 N. C. 229, 176 S. E. 740 (1934).

¹³ P. L. 1933, c. 275, §2; N. C. CODE ANN. (Michie, 1935) §2593(c).

¹⁴ *Woltz v. Asheville Safe Deposit Co.*, 206 N. C. 239, 173 S. E. 587 (1934); (1934) 12 N. C. L. Rev. 363; *Hopkins v. Swain*, 206 N. C. 439, 174 S. E. 409 (1934); *Miller v. Shore*, 206 N. C. 732, 175 S. E. 133 (1934); *Barringer v. Trust Co.*, 207 N. C. 505, 177 S. E. 795 (1934).

¹⁵ *Farmers' Life Ins. Co. v. Stegink*, 106 Kan. 730, 189 Pac. 965 (1920) (Statute providing where sale price greatly below true value, trial court authorized to with-

principal case' held section three, allowing the true value rather than the amount bid by the mortgagee to be considered in determining the deficiency, constitutional, as did the earlier case of *Hopkins v. Swain*.¹⁶ Other states are divided as to the constitutionality of like statutes limiting deficiency judgments.¹⁷ Attempts to abolish deficiency judgments¹⁸ are unconstitutional.¹⁹

The mortgagee's remedies in North Carolina were further restricted by a statute, passed at the same time, limiting actions to recover deficiency judgments to one year from the date of foreclosure.²⁰ Parties have no vested interest in a particular limitation²¹ and the Legislature is at liberty to change or modify limitation statutes since they are purely remedial.²² Such changes may operate upon existing contracts.²³ In changing or modifying a fixed limitation the Legislature must provide an adequate and reasonable remedy²⁴ and the courts will not question

hold confirmation of the sale and to set it aside as inequitable, was upheld.); *Travelers' Ins. Co. v. Marshall*, 124 Tex. 45, 76 S. W. (2d) 1007 (1934) (Statute providing for enjoining sales under execution by orders of court was held unconstitutional as impairing the obligation of contract.); *Stand v. Sill*, 114 W. Va. 208, 171 S. E. 428 (1933) (Statute provided that the trustee must file a report and ask for confirmation. If the judge was satisfied that the price was adequate he was to confirm the sale. Held unconstitutional as applied to prior trust deeds.). As to financial depression being ground for enjoining sale under mortgage or deed of trust see (1932) 11 N. C. L. Rev. 172; Notes (1932) 82 A. L. R. 976, (1934) 90 A. L. R. 1330, 1338, (1935) 104 A. L. R. 375, 383. As to financial depression being grounds for setting sale aside see Notes (1934) 90 A. L. R. 1330, 1337, (1934) 94 A. L. R. 1352, 1357, (1934) 96 A. L. R. 853, 856, (1935) 97 A. L. R. 1123, 1126, (1935) 104 A. L. R. 375, 382. Cases collected *Beaver Co. Bldg. and Loan Ass'n v. Winowich*, 187 Atl. 481 (Pa. 1936), (1936) 3 Pitt. L. Rev. 54.

¹⁶ 206 N. C. 439, 174 S. E. 409 (1934) (entire statute declared constitutional); *Tarboro Bldg. and Loan Ass'n v. Bell*, 210 N. C. 35, 185 S. E. 486 (1935).

¹⁷ *Wilson v. Superior Court*, 8 Cal. App. (2d) 14, 47 P.(2d) 331 (1935) (statute providing limitation on deficiency judgment was unconstitutional and unenforceable where trust deed made prior to the passage of the statute); *Mewrer v. Keimel*, 150 Misc. 113, 267 N. Y. Supp. 799 (1933) (The New York Foreclosure Act should be liberally construed in every way possible to protect the mortgagor from a deficiency judgment.); *Klirke v. Samuels*, 264 N. Y. 144, 190 N. E. 324 (1934) (statute permitting party against whom deficiency judgment was sought to set off fair and reasonable market value of the mortgaged premises held constitutional). As to whether financial depressions warrant fixing an upset or minimum price, requiring credit of specified amount on mortgage debt, or denying or limiting the amount of deficiency judgment, see Notes in (1933) 85 A. L. R. 1480, (1933) 89 A. L. R. 1087, (1934) 90 A. L. R. 1330, 1338, (1934) 94 A. L. R. 1352, 1358, (1934) 96 A. L. R. 853, 857, (1935) 97 A. L. R. 1123, 1127, (1935) 104 A. L. R. 375, 384.

¹⁸ Note (1934) 47 HARV. L. REV. 660, 665 n. 36.

¹⁹ *Dennis v. Moses*, 18 Wash. 537, 52 Pac. 333 (1898).

²⁰ P. L. 1933, c. 529, §1; N. C. CODE ANN. (Michie, 1935) §437(a).

²¹ *Graves v. Howard*, 159 N. C. 594, 75 S. E. 998 (1912); *Bateman v. Sterrett*, 201 N. C. 59, 159 S. E. 14 (1931).

²² *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475 (1866); *Perkins v. Guy*, 55 Miss. 153 (1877); *Whitehurst v. Dey*, 90 N. C. 542, 545 (1884); *McFarland v. Cornwell*, 151 N. C. 428, 432, 66 S. E. 454 (1909).

²³ *Aycock v. Martin*, 37 Ga. 124 (1867); *Morse v. Gould*, 11 N. Y. 281 (1854).

²⁴ *Bronson v. Kinzie*, 1 How. 311, 11 L. ed. 143 (1843); *Union County Bldg. and Loan Ass'n v. Wettchek*, 12 N. J. Misc. 847, 175 Atl. 625 (1934) (A statute changing the period of limitation from six months to three months after

the legislative judgment unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice.²⁵ The Legislature, however, cannot shorten the limitation period to a time already expired²⁶ or alter the statute so as to allow more time in a case in which the bar of the statute has already become complete.²⁷ Under the new North Carolina statute the action for a deficiency judgment on a mortgage or deed of trust must be brought within one year from the date of sale under such foreclosure, or from the date of the ratification of this act (May 15th, 1933) if such sale precedes its ratification.²⁸ Although the change in the North Carolina statute of limitations for an action on a deficiency judgment from ten years to one year is great, still the year left affords the mortgagee an adequate remedy in the sense of sufficient time within which to bring his action.

J. D. MALLONEE, JR.

Contracts—Interpretation of Agreements for "Permanent" Employment.

Out of the cases dealing with contracts for "permanent" employment two general rules have evolved.¹ In most American jurisdictions a contract for "permanent" employment is treated as an indefinite hir-

foreclosure sale in actions for deficiency judgments was not unconstitutional on the ground that it impaired the obligation of contract. The court stated that it is well settled that the obligation of contract is not impaired by a law which changes the legal or equitable means for its enforcement existing at the time it was entered into, provided an adequate, though perhaps not convenient, remedy is retained or substituted therefor.).

²⁵ *Terry v. Anderson*, 95 U. S. 632, 24 L. ed. 365 (1877); *Union County Bldg. and Loan Ass'n v. Weitchek*, 12 N. J. Misc. 847, 175 Atl. 625 (1934); *Barnhardt v. Morrison*, 178 N. C. 563, 101 S. E. 218 (1919); *Farmers' Life Ins. Co. v. Wolters*, 10 S. W. (2d) 698 (Tex. 1928); *Frank v. State Bank and Trust Co.*, 10 S. W. (2d) 704 (Tex. 1928), (1929) 7 TEX. L. REV. 484.

²⁶ *State v. Haynie*, 169 N. C. 277, 84 S. E. 385 (1915).

²⁷ *Whitehurst v. Dey*, 90 N. C. 542, 545 (1884) ("Statutes of limitations relate only to the remedy and may be altered or repealed before the statute bar has become complete, but not after, so as to defeat the effect of the statute in extinguishing the rights of action.").

²⁸ P. L. 1933, c. 529, §1; N. C. CODE ANN. (Michie, 1935) §437(a).

¹ For a treatment of these contracts see: 1 LABATT, *MASTER AND SERVANT* (2nd ed. 1913) §175; 1 WILLISTON, *CONTRACTS* (Rev. ed. 1936) §39; Comment (1936) 1 MD. L. REV. 73, 35 MICH. L. REV. 321; Notes (1925) 35 A. L. R. 1432, (1929) 62 A. L. R. 231.

Although no "permanent" employment cases can be found in North Carolina the following upheld agreements for "life" employment. The contracts were, however, supported by consideration additional to the performance of the services. *Fisher v. John L. Roper Lumber Co.*, 183 N. C. 485, 111 S. E. 857 (1922); *Stevens v. So. Ry.*, 187 N. C. 528, 122 S. E. 295 (1924); *Dotson v. Royster Guano Co.*, 207 N. C. 635, 178 S. E. 100 (1934).

It is generally accepted that "permanent" employment contracts are not within the Statute of Frauds, for performance is deemed possible within one year. *Penn. Co. v. Dolan*, 6 Md. App. 109, 32 N. E. 802 (1892); *Jackson v. Illinois C. R. R.*, 76 Miss. 607, 24 So. 874 (1899); *Rua v. Bowyer Smokeless Coal Co.*, 84 W. Va. 47, 99 S. E. 213 (1919).

ing, terminable at the will of either party.² Little distinction has been made between these contracts and others of an indefinite character. The source of the rule, that indefinite employment contracts are terminable at will, can be traced to a statement made by an early American text writer.³ Citing no authority for his view, he says that such a contract is *prima facie* terminable at will. This *prima facie* terminability, by reason of the difficulty of establishing sufficient evidence to overcome it, has the force of a rule of law. Such phrases in the contract as: "permanent vacancy,"⁴ "so long as the employee faithfully performs,"⁵ and "so long as the employee desires,"⁶ have been treated by the courts as too indefinite to prevent the assumption of a hiring at will.

The doctrine of the English courts may be stated thus: It is a presumption of fact that a general or indefinite hiring is a hiring for a year.⁷ However, this presumption may be overcome by proof to the contrary.⁸ Reasonable notice is necessary for the termination of these contracts.⁹ As in this country, English courts make no distinction between "permanent" employment contracts and others of an indefinite nature.¹⁰ A case held that where the employee relinquished a personal injury claim in consideration of a "permanent" contract this did *not* give the employee a right to employment so long as he was willing and able to perform.¹¹ Another case held that the use of the phrase "continue to retain" was merely a redundancy of expression.¹²

An exception to the American rule has developed where the contract is supported by a consideration in addition to the performance of the services. Here the contract is said to continue so long as the employee is able and willing to perform his work satisfactorily. This exception has been applied most frequently where an employee is given a "permanent" contract in settlement of a personal injury claim.¹³ This is desirable. Most courts apply the exception where the employee

² *Perry v. Wheeler*, 75 Ky. 541 (1877); *Rape v. Mobile and Ohio R. R.*, 136 Miss. 38, 100 So. 585 (1924); *Arentz v. Morse Dry Dock and Repair Co.*, 249 N. Y. 439, 164 N. E. 342 (1928); *Combs v. Standard Oil Co. of La.*, 166 Tenn. 88, 59 S. W. (2d) 525 (1933).

³ *WOOD, MASTER AND SERVANT* (2nd ed. 1886) §136.

⁴ *Campion v. Boston and M. R. R.*, 269 Mass. 579, 169 N. E. 499 (1930).

⁵ *Combs v. Standard Oil Co. of La.*, 166 Tenn. 88, 59 S. W. (2d) 525 (1933).

⁶ *Lord v. Goldberg*, 81 Cal. 596, 22 Pac. 1126 (1889).

⁷ *Rex v. Hampreston*, 5 T. R. 205 (K. B. 1793).

⁸ *Rex v. Elslack*, *Bott Poor Law*, 298 Cald. 480 (K. B. 1785).

⁹ *Payzu, Ltd. v. Hannaford*, 2 K. B. 348 (1918).

¹⁰ *Elderton v. Emmens*, 4 C. B. 498 (1847).

¹¹ *Lawrie v. Brown and Co.*, 5 E. 705 (Ct. of Sess. 1908).

¹² *Elderton v. Emmens*, 4 C. B. 498 (1847).

¹³ *St. Louis I. M. and S. R. R. v. Morgan*, 107 Ark. 202, 154 S. W. 518 (1918); *Louisville and N. R. R. v. Cox*, 145 Ky. 667, 141 S. W. 389 (1911); *Duff v. Ford Motor Co.*, 91 S. W. (2d) 871 (Tex. Civ. App. 1936). *Contra*: *Baltimore and Ohio R. R. v. King*, 168 Md. 142, 176 Atl. 626 (1935).

has left another position or business in consideration of a "permanent job."¹⁴

No court has construed the word "permanent" to mean a period longer than the employer remained in business, and had available work for the employee.¹⁵ Co-existent with this is the familiar rule that where the contract specifies a definite term, abandonment of the employer's business is no excuse for termination.¹⁶

The objection to holding that all "permanent" employment contracts continue so long as the employee performs satisfactorily is that the contracts are too vague to justify such a result. Additional consideration would seem to eliminate this objection, because acceptance of the offer is sufficient consideration for an employment contract at will. Therefore, the existence of this additional consideration is evidence that the parties intended more than a contract at will. But a similar intent may also exist in the absence of additional consideration. However, such intent may be extremely difficult of proof. The intent of the parties rarely finds expression in the instrument. Frequently the agreements are oral. Usually the employer has the advantage of experience and legal counsel in such transactions. Not so with the employee, who, being a novice at such dealings, too readily accepts the popular conception of the word "permanent." Should not the popular conception be accepted as the intent of the parties in the absence of a showing to the contrary?

A second objection to holding these contracts to continue so long as the employee performs satisfactorily is that the employee may cease work at any time; thus no mutuality of obligation is said to exist. This objection lacks weight, since it would be equally applicable to an employment contract for a term of years, which type of contract has been held enforceable although unilateral.¹⁷

Another rationale of the problem is found in *Carnig v. Carr*,¹⁸ where the court said: "To ascertain what the parties intended by 'permanent employment' it is necessary to consider the circumstances surrounding the making of the contract, its subject, the situation and relation of the parties, and the sense in which, taking these things into account, the

¹⁴ *Ragne v. New York Evening Journal Pub. Co.*, 164 App. Div. 126, 149 N. Y. Supp. 668 (1918); *Kevil v. Standard Oil Co.*, 8 Ohio N. P. 311 (1910); *Roxana Petroleum Co. v. Rice*, 109 Okla. 161, 235 Pac. 502 (1925); *Carnig v. Carr*, 167 Mass. 544, 46 N. E. 117 (1897). *Contra*: *Hickey v. Kiam*, 83 S. W. 716 (Tex. Civ. App. 1904).

¹⁵ *Yellow Poplar Lumber Co. v. Rule*, 106 Ky. 455, 50 S. W. 685 (1899); *Perry v. New England Casualty Co.*, 78 N. H. 346, 100 Atl. 605 (1917).

¹⁶ *Kelly v. Carthage Wheel Co.*, 62 Ohio St. 598, 57 N. E. 984 (1900); (1925) 34 A. L. R. 817.

¹⁷ *Jones v. Light Co.*, 206 N. C. 862, 175 S. E. 167 (1934) (contract for ten years held enforceable though unilateral).

¹⁸ 167 Mass. 544, 46 N. E. 117, 118 (1897).

words would be commonly understood; for it may be fairly assumed that the parties used and understood them in that sense." The contract in this case *was* supported by additional consideration. Yet the court nowhere even intimated that such consideration would be requisite. Adoption of the rule of this case would seem to place the parties on an equal footing, unencumbered by any rule or presumption. However, the difficulty of proof would still remain an obstacle. But evidence of the type of work or profession, the relation of the parties, and the customs of the particular vicinity, would aid in the construction of the contract.

The majority rule, treating the contract as terminable at will, enables the employer to keep the employee when labor is scarce, because the employee believes he has the security of a lasting employment. Then the employer can nevertheless discharge him when labor becomes cheap and abundant. In many cases the employee's expectation of employment so long as he is able to perform seems reasonable. It should be weighed as indicative of intent. A more desirable result would be reached if the risk of drawing a clearly defined agreement were put on the employer.

HARRY LEE RIDDLE, JR.

Contracts—Partition—Waiver of Right by Implication.

P and *D* were tenants in common of a fifteen year filling station lease. One of the terms of the contract between them was that if either desired to sell his interest in the lease he should give the other member a right to purchase his interest at a certain price for a period of fifteen days. If this offer was not accepted then the offeror should have the privilege of disposing of his interest to such third persons as he might desire. *P* gave written notice to *D* under the terms of the contract. Upon *D*'s failure to buy and *P*'s inability to find another purchaser, *P* instituted partition proceedings. The court denied partition, holding that by the terms of the contract *P* had waived his statutory right to partition.¹

The right to compulsory partition of estates held in cotenancy has been regulated by statute throughout the United States.² Generally it may be said that it is a matter of right for a tenant in common to have a partition of the property.³ The statutes granting this form of relief are not mandatory but elective. Therefore cotenants may expressly

¹ *Chadwick v. Blades*, 210 N. C. 609, 188 S. E. 198 (1936). *P* having died in the meantime, the suit was continued by his administrator and heirs.

² FREEMAN, COTENANCY AND PARTITION (1882) §428; N. C. CODE ANN. (Michie, 1935) §§3213, 3215, 3253.

³ 30 Ann. Cas. 402 (1913); *Hill v. Reno*, 112 Ill. 154 (1883); *Trainer v. Greenough*, 145 Ill. 543, 32 N. E. 545 (1892).

contract against partition.⁴ But courts vary as to how extensive this prohibition may be. A perpetual waiver is usually held to be an undue restraint upon the free and easy alienation and enjoyment of property. The majority view is that a waiver must be for a reasonable time.⁵

Even though partition is a statutory right still the remedy may be waived by implication. Generally the existing law is made a part of every contract as if it were specifically written therein by the parties.⁶ When, however, the general law is an optional matter, the courts will not apply it, if to do so would be in contravention of the expressed agreement. Therefore where owners in common have contracted relative to the property, or bought it for certain purposes necessitating its continuance as a unity, then partition is denied if it is inconsistent with or would defeat the purpose of their purchase or agreement. For, to grant relief would be to allow persons to defraud their co-owners by perverting their expressed, binding contractual obligations. This rule of waiver by implication is based upon the principle of estoppel.⁷ The rule, though simple in statement, is perplexing in application. The results have apparently depended largely upon the circumstances of the individual cases. The courts look to the purpose of the transaction and the agreements between the parties, and will not allow one to contradict himself once he has induced reasonable reliance from the other owner.

Partition has been denied in the following situations where: land was bought for speculative purposes such as a real estate development;⁸ children agreed that their mother should use the land during her life;⁹ parties bought the property to establish a college, and each agreed to render services until the college was self-supporting;¹⁰ there was an agreement to lease for a term of years;¹¹ it would defeat the purpose of a trust;¹² one party mortgaged his interest and the mortgagee was in

⁴ *Martin v. Martin*, 170 Ill. 639, 48 N. E. 924 (1897) (even when the agreement was oral and in violation of the statute of frauds); *Avery v. Payne*, 12 Mich. 540 (1864).

⁵ *Roberts v. Wallace*, 100 Minn. 445, 111 N. W. 289 (1907); *Haeussler v. Missouri Iron Co.*, 110 Mo. 188, 19 S. W. 75, 16 L. R. A. 220 (1892); *Hunt v. Wright*, 47 N. H. 396 (1867); *Greene v. Stadiem*, 198 N. C. 445, 152 S. E. 398 (1930). *Contra*: *Peck v. Cardwell*, 2 Beav. 137 (1839).

⁶ *Bateman v. Sterrett*, 201 N. C. 59, 159 S. E. 14 (1931).

⁷ *Hill v. Reno*, 112 Ill. 154 (1883).

⁸ *McInteer v. Gillespie*, 31 Okla. 644, 122 Pac. 184 (1912); *Peck v. Cardwell*, 2 Beav. 137 (1839).

⁹ *Seals v. Treatch*, 282 Ill. 167, 118 N. E. 422 (1917); *Henderson v. Henderson*, 136 Iowa 564, 114 N. W. 178 (1907); *Friesner v. Friesner*, 193 Iowa 576, 187 N. W. 437 (1922) (Heirs quitclaimed to their mother for eighteen years. Partition barred during this period.).

¹⁰ *Marchand v. Marsh*, 280 Pa. 292, 124 Atl. 427 (1924).

¹¹ *Eberts v. Fisher*, 54 Mich. 294, 20 N. W. 80 (1884); *Arnold v. Arnold*, 308 Ill. 365, 139 N. E. 592 (1923).

¹² *Springer v. Bradley*, 188 S. W. 175 (Mo. 1916); *Rayhol v. Holland*, 110 Conn. 516, 148 Atl. 358 (1930); *Whitaker v. Scherrer*, 313 Ill. 473, 145 N. E. 177 (1924) (land held in trust for speculative purposes).

possession;¹³ the property was leased as a joint parsonage and held in trust;¹⁴ father and daughter bought property for a joint home which was to go to the daughter upon the death of the father;¹⁵ heirs agreed to draw lots for the land;¹⁶ the property was a cemetery lot because partition in such a case is against public policy.¹⁷

Partition has been allowed in the following situations where: a will directed the executor to sell or divide the estate;¹⁸ mill owners jointly constructed a flume and bulkhead for developing power even when they had contributed unequally in financing the venture;¹⁹ parties bought the land for the purpose of "building up" an olive orchard;²⁰ three churches bought land for a joint parsonage;²¹ a will provided that a daughter should have a home on the land (partition sale allowed, but the land subject to the lien of the daughter);²² property leased for a term of years (partition sale allowed, the lessee becoming the tenant of the purchaser);²³ there was a covenant by the tenants in common that a certain person should have the use of a part of the property as a yard (partition sale allowed, the right of occupancy remaining as an easement after the sale);²⁴ the interest of one of the owners was subject to a lien or incumbrance;²⁵ the lessee purchased part of the reversion and then asked for partition;²⁶ a prior petition for partition had been denied;²⁷ the property belonged to a partnership.²⁸

¹³ *Yglesias v. Dewey*, 60 N. J. 62, 47 Atl. 59 (1900).

¹⁴ *Appeal of Latshaw*, 122 Pa. 142, 15 Atl. 676 (1888).

¹⁵ *Hardin v. Wolf*, 318 Ill. 77, 148 N. E. 873 (1925).

¹⁶ *Hensler v. Alberding*, 86 Ind. App. 372, 158 N. E. 243 (1927). Partition denied also in: *Jones v. Jones*, 84 Ind. App. 176, 149 N. E. 108 (1925) (would be contrary to the intent of the testator); *Peterson v. Damoude*, 98 Neb. 370, 152 N. W. 786 (1915) (will provided that the land was not to be divided before a certain reasonable date).

¹⁷ *Berry v. Abbott*, 16 Del. Ch. 449, 143 Atl. 491 (1927).

¹⁸ *Ruggles v. Powers*, 201 Iowa 284, 207 N. W. 116 (1926); *Appeal of Rawle*, 119 Pa. 100, 12 Atl. 809 (1888); *Caldwell v. Synder*, 178 Pa. 420, 35 Atl. 996 (1896); *In re Carter's Estate*, 225 Pa. 355, 74 Atl. 240 (1909).

¹⁹ *Hooker v. McLeod*, 70 Vt. 327, 41 Atl. 234 (1898).

²⁰ *Hayne v. Gould*, 54 Fed. 951 (C. C. S. D. Cal., 1893).

²¹ *Munson v. Bringe*, 146 Wis. 393, 131 N. W. 904 (1911).

²² *Chew v. Shelton*, 214 N. Y. 344, 108 N. E. 552 (1915). Partition or sale allowed, property remaining subject to an incumbrance: *Hunt v. Meeker County Abstract and Loan Co.*, 128 Minn. 207, 150 N. W. 798 (1915) (occupancy of different floors of a building); *Whittaker v. Rhodes*, 242 Ill. 110, 89 N. E. 677 (1909) (widow's life estate); *Schmidt v. Schmidt*, 292 Ill. 275, 126 N. E. 736 (1920).

²³ *Oliver v. Lansing*, 50 Neb. 828, 70 N. W. 369 (1897).

²⁴ *Fisher v. Dewerson*, 3 Metc. 544 (Mass., 1842).

²⁵ *Gardiner v. Cord*, 145 Cal. 157, 78 Pac. 544 (1904).

²⁶ *Hill v. Reno*, 112 Ill. 154 (1883).

²⁷ *Miller v. Lanning*, 211 Ill. 620, 71 N. E. 1115 (1904).

²⁸ *Collins v. Dickinson*, 2 N. C. 240 (1795); *Baird v. Baird*, 21 N. C. 524 (1837) (when all accounts have been settled). Accord: *Sherrod v. Mayo*, 156 N. C. 144, 149, 72 S. E. 216, 218 (1911). Partition allowed also in the following: *Uden v. Patterson*, 252 Ill. 335, 96 N. E. 852 (1911) (agreement to waive right for a certain time no bar after that time has expired); *Alpena Lumber Co. v. Fletcher*, 48 Mich. 555, 12 N. W. 849 (1882) (prior agreement barring partition may be waived); *Mylin v. King*, 139 Ala. 319, 35 So. 998 (1904) (agreement waiving

In view of the holdings in the above cases it seems that no general rule can be deduced which would be applicable in every instance. Results differ with the varying facts of particular cases. Further, the holdings are not entirely consistent from jurisdiction to jurisdiction.

In the principal case, if the reservation of the right to purchase the other's interest be treated as only an option, inserted merely as a protective provision against a sale to an undesirable third party, and if the parties did not intend the written instrument to exclude their statutory remedies, there would be no obstacle to granting the partition.²⁹

However, the lease was for a period of fifteen years. The parties were to be partners in conducting the filling station business. *P* was to operate the station, but finding it unprofitable, he left without notice to his co-partner. *P*, in his letter to *D*, giving notice of his desire to withdraw from the lease, apparently treated a sale by him under the contract as his only remedy. *D* contributed a greater sum than *P* towards the construction of the station. Due to the character of the property a sale would be necessary if a partition were had, and such a procedure would defeat the purpose for which the enterprise was organized. It would also probably result in substantial loss to *D*, who has the larger sum at stake.³⁰

Thus if the written contract alone is considered to decide the intentions of the parties a partition should be allowed. However, if, in addition to the written contract, all the facts and surrounding circumstances are considered, as they should be in every case of this type, then the court in the instant case reached the better and more logical conclusion in denying the request for partition.

W. C. HOLT.

Evidence—Privileged Communications between Husband and Wife.

In its search for truth as the basis upon which justice is administered, the law is constantly faced with the necessity of balancing, against a full attainment of that objective, the desirability of fostering certain other social gains. The law of privileged communications is a recognition of the desirability of protecting certain human relation-

right no bar to those not entering into the agreement); *Flournoy v. Kirkman*, 270 Mo. 1, 192 S. W. 462 (1917) (contract barring partition held not binding after death of one of parties unless a good reason exists for continuing it); *Vollmer v. Wheeler*, 42 Cal. App. 1, 183 Pac. 264 (1919) (Even where parties have contracted against partition, equity may order a sale unless some fact other than the mere contract of the parties appears.).

²⁹ Excessive hardships to *D* would not be a bar to partition because undue burdening of one party is not grounds alone for denying partition. *Hill v. Reno*, 112 Ill. 154 (1883); *Oliver v. Lansing*, 50 Neb. 828, 70 N. W. 369 (1897).

³⁰ Brief for *D*, p. 1, *Chadwick v. Blades*, 210 N. C. 609, 188 S. E. 198 (1936).

ships, even at the expense of the judicial investigation of truth.¹ Perhaps the best known and the least criticized testimonial privilege is that covering confidential communications between husband and wife. The slow, but complete, development of the privilege at common law, culminating in widespread statutory adoption in American jurisdictions, bears witness that, in judicial and legislative opinion, the balance was well struck.²

The social gain to be fostered is complete confidence between spouses. The means of fostering that gain is the law's assurance that, if one spouse discloses certain matters to the other in confidence, that disclosure will not be aired in court without the consent of the spouse who made the disclosure. Thus, if the husband confides in his wife, he is given the privilege to prevent her from testifying to that confidence, even though she might be willing to do so. And the privilege obtains regardless of whether either spouse is a party to the action in which the wife's testimony is sought.³

The protection of the privilege is thrown around communications, whether oral or written,⁴ made confidentially between husband and wife during marriage.⁵ The privilege does not ordinarily embrace mere acts.⁶ It does not extend to communications between persons living in unlawful cohabitation,⁷ or between spouses who have separated.⁸ But

¹ WIGMORE, EVIDENCE (2d ed. 1923) §2285.

² The privilege for communications between husband and wife was the second of such privileges to be enforced at common law, the first being that of attorney and client. However, an explicit statement of the privilege, distinct from any other rule, did not come in England nor America until near the middle of the 19th century. The reason for the delay in recognition was that not until the statutory abolition and modification of the rules as to marital disqualification and the marital privilege against adverse testimony, in the period from 1840 to 1870, did a real necessity for this privilege arise. WIGMORE, EVIDENCE (2d ed. 1923) §2333. (The disqualification of one spouse to testify on the other's behalf, the privilege against adverse marital testimony in general, and the privilege for confidential communications should not be confused. Judicial confusion of them is still frequent. Occasional legislative commingling of these three rules in the same sentence and the same enactment has given rise to much of this confusion. WIGMORE, EVIDENCE (2d ed. 1923) §2334. The statutes have been collected in WIGMORE, EVIDENCE (2d ed. 1923) §488).

³ *Dalton v. People*, 68 Colo. 44, 189 Pac. 37 (1920); *Westchester F. Ins. Co. v. Foster*, 90 Ill. 421 (1878); *Howard v. Com.*, 118 Ky. 1, 80 S. W. 211, 81 S. W. 704 (1904). *Contra*: *Galbraith v. McLain*, 84 Ill. 379 (1877) (but the words of the extraordinary Illinois statute permit this ruling).

⁴ *Mercer v. State*, 40 Fla. 216, 24 So. 154 (1898); *Stillman v. Stillman*, 187 N. Y. Supp. 383, 115 Misc. Rep. 106 (1921); *Mitchell v. Mitchell*, 80 Tex. 101, 15 S. W. 705 (1891).

⁵ *Whitford v. Ins. Co.*, 163 N. C. 223, 79 S. E. 501 (1913) (letter written by husband and received by wife after death of husband not privileged, since communication was not made during marriage).

⁶ WIGMORE, EVIDENCE (2d ed. 1923) §2337.

⁷ *Wells v. Fisher*, 1 Moo. & Rob. 99 (N. P. 1831) (here the man was a second husband, but the first husband, who had been supposed dead, had returned from foreign parts).

⁸ *Holyoke v. Holyoke's Estate*, 110 Me. 469, 87 Atl. 40 (1913). *Cf.* *Holtz v. Dick*, 42 Ohio St. 23 (1884) (letters of wife, who married before the age of 16, admitted to show ratification of marriage).

once the privilege has arisen, it survives the termination of the marital relation by death⁹ or divorce.¹⁰

The privilege protects only communications made in confidence.¹¹ Hence, it has no application where a conversation between man and wife takes place in the presence of others, as the veil of confidence has been removed.¹² Since the privilege gives the assurance to the communicating spouse only that his confidences will not, against his consent, be disclosed in court by the addressee,¹³ a third person who, although unknown to the spouses, overhears them is not prohibited from making a disclosure.¹⁴ For the same reason, written communications taken from the addressee without his consent may be admitted.¹⁵

Since the privilege belongs to the communicating spouse only,¹⁶ he may waive it.¹⁷ Thus, a voluntary disclosure to others by the spouse who made the communication constitutes a waiver.¹⁸ At common law, however, the receiving spouse was denied the power to waive the privilege of the other by disclosing the latter's confidences without his consent.¹⁹

For almost three quarters of a century the North Carolina Supreme Court has construed our statute²⁰ as preserving this common-law priv-

⁹ *Schreffler v. Chase*, 245 Ill. 395, 92 N. E. 272 (1910).

¹⁰ *Griffith v. Griffith*, 162 Ill. 368, 44 N. E. 820 (1896); *Davis v. State*, 45 Tex. Cr. 292, 77 S. W. 451 (1903).

¹¹ *Hester v. Hester*, 15 N. C. 228 (1833) (husband's remarks of dissatisfaction with his will and of an intention to call in neighbors to help him revise it, held not confidential); *Gaskill v. King*, 34 N. C. 213 (1851) (a wife's testimony to the husband's handing her a deed and telling her to record it for A when she pleased, admitted); *Toole v. Toole*, 112 N. C. 152, 16 S. E. 912 (1893) (communication in a third person's presence, admitted); *State v. Brittain*, 117 N. C. 783, 23 S. E. 433 (1895) (confession of incest by a wife to a husband, excluded).

¹² *Gannon v. People*, 127 Ill. 507, 21 N. E. 525 (1889); *Toole v. Toole*, 112 N. C. 152, 16 S. E. 912 (1893).

¹³ *Dalton v. People*, 68 Colo. 44, 189 Pac. 37 (1920) (conspiracy with Mrs. R. to steal an automobile; Mrs. R. had been convicted; a letter from Mrs. R. to her husband, written in the prison, was shown by him to defendant's counsel, who made a copy, and the letter was destroyed: the privilege held to prevent R. from testifying to the copy, on behalf of the defendant).

¹⁴ *Com. v. Everson*, 123 Ky. 330, 96 S. W. 460 (1906) (eavesdropper); *Com. v. Wakelin*, 230 Mass. 567, 120 N. E. 209 (1918) (homicide; conversation between husband and wife in jail, overheard by a dictograph, admitted); *State v. Center*, 35 Vt. 378 (1862) (overheard by a witness who was in next room).

¹⁵ *O'Toole v. Ohio G. F. Ins. Co.*, 159 Mich. 187, 123 N. W. 795 (1909) (a letter lost by the husband and found by a third person without collusion, admitted); *State v. Wallace*, 162 N. C. 622, 78 S. E. 1 (1913) (husband's letter found by a policeman in husband's house, admitted).

¹⁶ WIGMORE, EVIDENCE (2d ed. 1923) §2340.

¹⁷ *Driver v. Driver*, 52 N. E. 401 (Ind. 1898); *State v. Branch*, 193 N. C. 621, 137 S. E. 801 (1927).

¹⁸ See note 17, *supra*.

¹⁹ WIGMORE, EVIDENCE (2d ed. 1923) §2340.

²⁰ ". . . No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage." N. C. CODE ANN. (Michie, 1935) §1801. This statute is applicable to civil actions. The same provision, applicable to criminal actions, is contained in §1802. The statute preserving this privilege was first enacted in the year 1868. C. C. P., s. 341.

ilege.²¹ The receiving spouse has not been permitted to disclose confidences made to him without the consent of the communicating spouse.²² In *McCoy v. Justice*,²³ for example, a letter written by the husband to his wife was excluded, on the ground that a betrayal of confidence by the wife in delivering the letter to a third person did not terminate the husband's privilege.

In *Hagedorn v. Hagedorn*,²⁴ a recent case involving a suit for alimony without divorce, the North Carolina Supreme Court, apparently disregarding its former rulings,²⁵ permitted the wife to testify to confidential conversations with her husband, over the husband's objection. By allowing the addressee to make a voluntary disclosure, the Court departed from the common-law view that the spouse to whom a confidential communication was made had no power to waive a privilege belonging to the other. Thus, under this decision, where one spouse confides in the other, apparently both spouses are given a privilege not to disclose the confidence, but either can waive it for both.

In arriving at this result, the Court relied solely upon one North Carolina case,²⁶ which is not in point, and a *dictum* of the Supreme Court of the United States.²⁷ Furthermore, such a result can be justified only by a literal construction of the statute—a construction which the Court has not heretofore seen fit to adopt.

Legal reasoning aside, the most serious question presented by the decision is: will the desired social gain, *viz.*, marital confidence, be fostered by this interpretation of the statute? Will a husband feel free to confide in his wife if she may disclose his confidence on the witness-

²¹ North Carolina recognized the common-law privilege before it was written into our statute. In *State v. Jolly*, 20 N. C. 108, 112 (1838) Gaston, J., speaking for the Court, said: "... whatever is known by reason of that intimacy [marriage] should be regarded as knowledge confidentially acquired, and that neither [husband nor wife] should be allowed to divulge it to the danger and disgrace of the other."

²² *State v. Banks*, 204 N. C. 233, 167 S. E. 851 (1933).

²³ 199 N. C. 602, 155 S. E. 452 (1930).

²⁴ 211 N. C. 175, 189 S. E. 507 (1937).

²⁵ Plaintiff's brief at p. 20 incorrectly stated that the letters in *McCoy v. Justice* were "obtained secretly" by a third party. The Court states in the opinion in that case, at p. 612, "... It is too clear for doubt that the plaintiff procured these letters with the consent . . ." of the wife. It is interesting to speculate to what extent the Court was influenced by this misstatement of fact in reaching its decision in *Hagedorn v. Hagedorn*.

²⁶ *Nelson v. Nelson*, 197 N. C. 465, 149 S. E. 585 (1929). The husband, over the wife's objection, was permitted to testify to the contents of a letter written by the wife to him. She objected on the ground that a diligent search for the letter had not been made, but she herself later testified to the contents thereof. The question of confidential communications was not considered by the Court. Even if it had been, the privilege was hers and she waived it by testifying.

²⁷ *Stickney v. Stickney*, 131 U. S. 227, 236, 9 Sup. Ct. 677, 679, 33 L. ed. 136, 142 (1889) (commenting upon a New York statute). In *Murray v. Murray*, 30 N. M. 557, 240 Pac. 303 (1925) the wife was permitted to admit letters written to her by her husband, under a statute similar to the North Carolina statute.

stand, even over his objection? The Court has, it is submitted, discarded the policy which gave birth to the statute, or, at least, has destroyed the statute as a means of enforcing that policy.²⁸

E. C. SANDERSON.

Master and Servant—Wage Deductions—Bankruptcy.

The bankrupt employer maintained an unincorporated welfare association to provide life, health, and accident insurance for its employees. Dues were "automatically deducted" from the wages of employees and paid to the association. Beginning almost ten months before the appointment of a receiver, the bankrupt began to fall in arrears, and there was always an unpaid balance due the association up until the time bankruptcy proceedings were instituted, over three months after the appointment of the receiver. The credits to the association were regularly made on the books of the bankrupt. However, at no time did the bankrupt segregate any money due the association or deposit any money in a separate trust account or bank account. Over three months prior to the appointment of the receiver the association was dissolved and its assets assigned to the plaintiff. Plaintiff claimed that it was entitled to a preferential claim against the bankrupt's estate, either on the theory that a constructive trust existed or on the theory that the association had an equitable title to or lien upon the bankrupt's property. *Held*: Denied. The relationship of the parties was merely that of debtor and creditor.¹

"Constructive trusts are such as are raised by equity in respect of property which has been acquired by fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds it. They arise purely by construction of equity, independently of any actual or presumed intention of the parties to create a trust, and are generally thrust on the trustee for the purpose of working out the remedy. . . . Equity declares the trust in order that it may lay its hands on the thing and wrest it from the possession of the wrongdoer."² Once the relationship of trustee and cestui que

²⁸ Where either spouse needs the evidence of communication (by one to the other) in a trial involving a controversy between them, the privilege should perhaps cease. In this situation the privilege sometimes suffered an exception at common law, and under a few statutes the communications may be disclosed as exceptions. WIGMORE, EVIDENCE (2d ed. 1923) §2338. The Court does not rely upon such an exception in the *Hagedorn* case. Nor does the North Carolina statute (N. C. CODE ANN. (Michie 1935) §§1801, 1802) provide for such an exception.

¹ *McKey v. Paradise*, 57 Sup. Ct. 124, 81 L. ed. Ad. Op. 71 (1936).

² 26 R. C. L. 1232; *Angle v. Chicago, St. P., M. & O. R. R.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. ed. 55 (1893); *Misamore v. Berglin*, 197 Ala. 111, 72 So. 347, L. R. A. 1916F 1024 (1916); *Barnes v. Thuet*, 116 Iowa 359, 89 N. W. 1085 (1902); *Wright v. Yates*, 140 Ky. 283, 130 S. W. 1111 (1910); *Byer v. Szandrow*

trust has been established it is necessary for the cestui to trace the converted funds into the assets of the bankrupt. Just what degree of traceability is required is a point upon which courts are in conflict. A majority require that the cestui show that the money or property held by the trustee is part or all of the original trust property, or is property which has been produced by the original trust res.³ A minority require no identification but only that the cestui show that his money or property went into the estate of the trustee to swell the assets.⁴

Although there is a distinction between the two, courts occasionally confuse a constructive trust and an equitable lien. A constructive trust is an estate, and, when raised, usually entitles the cestui to compel a conveyance of the property to him.⁵ An equitable lien, being only a lien, is not an estate or property in the res itself, but is simply a right which constitutes a charge or encumbrance on the res, and which may be enforced in an equitable action by a sale of the res and sequestration of the proceeds, or by applying the rents and profits on the claim of the lienor.⁶ A plaintiff is usually said to have the election of impressing the property with a trust or of charging the property with an equitable lien.⁷ Although the distinction between these two types of remedies

ski, 160 Md. 212, 153 Atl. 49 (1931); *Testerman v. Burt*, 143 Okla. 220, 289 Pac. 315 (1930); *Newman v. Newman*, 60 W. Va. 371, 55 S. E. 377, 7 L. R. A. (N. S.) 370 (1906).

³ *In re See*, 209 Fed. 172 (C. C. A. 2nd, 1913); *State Bank of Winfield v. Alva Security Bank*, 232 Fed. 847 (C. C. A. 8th, 1916); *Farmers' Nat. Bank v. Pribble*, 15 F.(2d) 175 (C. C. A. 8th, 1926); *Dudley v. Richards*, 18 F.(2d) 876 (C. C. A. 8th, 1927); *Hauk v. Van Ingen*, 196 Ill. 20, 63 N. E. 705 (1902); *Gault v. Hospital for Consumptives*, 121 Md. 591, 89 Atl. 105 (1913); *Hewitt v. Hayes*, 205 Mass. 356, 91 N. E. 332 (1910); *Commonwealth v. Tradesmen's Trust Co.*, 250 Pa. 372, 95 Atl. 574 (1915); *Yeldell v. People's Bank*, 118 S. C. 442, 110 S. E. 789 (1922); *Watts v. Newberry*, 107 Va. 233, 57 S. E. 657 (1907); *Burnham v. Barth*, 89 Wis. 362, 62 N. W. 96 (1895).

⁴ *Schumacher v. Harriett*, 52 F. (2d) 817 (C. C. A. 4th, 1931), 82 A. L. R. 46; *City of Miami v. First Nat. Bank of St. Petersburg*, 58 F. (2d) 561 (C. C. A. 5th, 1932); *Myers v. Federal Reserve Bank of Atlanta*, 101 Fla. 407, 134 So. 600 (1931); *Independent Dist. of Boyer v. King*, 80 Iowa 497, 45 N. W. 908 (1890); *Eastman v. Farmers' State Bank*, 175 Minn. 336, 221 N. W. 236 (1928); *In re Farmers' Exchange Bank of Gallatin*, 327 Mo. 640, 37 S. W. (2d) 936, 82 A. L. R. 46 (1931); *First Trust Co. v. Exchange Bank*, 126 Neb. 856, 254 N. W. 569 (1934).

⁵ *Crabtree v. Potter*, 150 Cal. 710, 89 Pac. 971 (1907); *Byer v. Szandrowski*, 160 Md. 212, 153 Atl. 49 (1931); *Shearer v. Barnes*, 118 Minn. 179, 136 N. W. 861 (1912); *Testerman v. Burt*, 143 Okla. 220, 289 Pac. 315 (1930); *Meek v. Meek*, 79 Ore. 579, 156 Pac. 250 (1916); *Johnson v. Johnson*, 112 Wash. 117, 210 Pac. 382 (1922).

⁶ *Society of Shakers v. Watson*, 68 Fed. 730 (C. C. A. 6th, 1895); *Clatworthy v. Ferguson*, 72 Colo. 259, 210 Pac. 693 (1922); *Jones v. Carpenter*, 90 Fla. 407, 106 So. 127, 43 A. L. R. 1415 (1925); *Oppenheimer v. Szulerecki*, 297 Ill. 81, 130 N. E. 325, 28 A. L. R. 1445 (1921); *Arnold v. Potter*, 122 N. C. 242, 29 S. E. 414 (1898); *Garrison v. Vermont Mills*, 154 N. C. 1, 69 S. E. 743, 31 L. R. A. (N. S.) 450 (1910).

⁷ *Primeau v. Granfield*, 184 Fed. 480 (C. C. S. D. N. Y. 1911); *Shearer v. Barnes*, 118 Minn. 179, 136 N. W. 861 (1912); *Smith v. Green*, 243 S. W. 1006 (Tex. 1922); 1 BOGART, TRUSTS AND TRUSTEES (1935) §32.

might be of importance in many instances, a verdict for the plaintiff in the principal case would have yielded only money under either remedy, as it sought only a preferred money claim. The court properly held that there was neither a constructive trust nor an equitable lien or title. No question of fraud was involved. At no time was a special fund contemplated or set up. There was no trust fund or res.

Where wage deductions are made by employers to be turned over to some other organization or used for some specific purpose on behalf of the employees, and such moneys are not so turned over or used but are on the contrary kept by the employer, the question arises as to what relation the employer holds to the other parties. Is he to be treated as holding moneys belonging either to the employees or the proper recipients of the moneys? Or is he to be treated as being in arrears on wage payments, and therefore a mere debtor? Logically he stands midway between the position of one who has received money from a third party to be handed over to someone else, and the position of one who has not paid money he owes. Here the employer has received from itself money to be turned over to someone else. It might be argued that as agent he has received money of the employees and has failed to turn it over. However, it seems that the position taken by the court is a sounder one, since in fact no money was ever received and kept; there was instead a failure to pay, a mere debtor-creditor relationship. Little authority aside from the principal case has been discovered on this point. Legislation of recent years has largely removed the necessity for such deductions. The Workmen's Compensation Acts have provided compensation for injuries or death arising out of and in the course of employment. By many of the statutes the expense of this compensation is borne entirely by the employer.⁸ In addition, the new Social Security Act⁹ provides for old age and unemployment insurance. True, under this Act part of the expense is borne by the employees in the form of wage deductions. These deductions are made by employers and by them paid to the Federal Government. However, they are in the form of taxes, and under the provisions of the Bankruptcy Act¹⁰ the Government will have a prior claim against the assets of any employer who should become bankrupt before paying them. Thus the problem presented by the principal case will not arise under this Act.

The principal case settles the matter for the purposes of priorities

⁸ The following are illustrative statutes: ILL. REV. STAT. (Cahill, 1933) c. 48, §227(c); IOWA CODE (1935) §1414; KY. STAT. (Carroll, 1936. Baldwin's Rev.) §4962; MONT. REV. CODES ANN. (1935) §2937; N. Y. CON. LAWS (Cahill, 1930) c. 66, §31; N. C. CODE ANN. (Michie, 1935) §8081(cc); VA. CODE ANN. (Michie, 1936) §1887(69)c; WASH. REV. STAT. (Remington, 1932) §7676.

⁹ 42 U. S. C. A. c. 7 (1936).

¹⁰ 44 Stat. 666 (1926), 11 U. S. C. A. §104(b) 6 (1936).

in bankruptcy. The problem may arise in other liquidation proceedings such as receiverships. It is submitted that the principal case sets a sound precedent for decisions in such proceedings.¹¹

C. M. IVEY, JR.

Torts—Insurers—Contribution.

A instituted suit for personal injuries in 1933 against *B* and *C*, who were driving the automobiles, respectively, of *X* and *Y*, also parties defendant. A nonsuit was entered as to *X* and *Y*. Thereupon the jury found that the injury to *A* was the result of the "joint and concurring negligence" of *B* and *C*, and the Supreme Court affirmed the resulting judgment.¹ Both automobiles were covered with liability insurance; each policy containing the "omnibus clause," by which the insurer agreed to pay any judgment obtained against the owner or the driver, if the car was being driven with the permission of the owner. *A* then brought action against *B* and *X*'s insurer for satisfaction of the judgment and upon motion, *C* and *Y*'s insurer were also made parties defendant. *X*'s insurer then filed a cross-action against *C* and *Y*'s insurer, praying that *C* and *Y*'s insurer contribute to *A*'s judgment as per Consolidated Statutes §618.² Demurrer to this cross-action was overruled in the lower court but sustained on appeal; the court saying that Consolidated Statutes §618 did not apply to liability insurers.³ A judgment was however rendered against *C* by default. *X*'s insurer thereupon paid *A*'s judgment and had it assigned to a third party for its benefit. *X*'s insurer now prosecutes this action against *Y*'s insurer for contribution. The court on appeal sustained *Y*'s demurrer, again reiterating that Consolidated Statutes §618 was not applicable. In addition, the court said, the principles of equitable subrogation will not sustain contribution, implying that this results since no co-suretyship was here established.⁴

The traditional rule against contribution among joint tortfeasors was

¹¹ This problem has apparently been settled in North Carolina by an analogous case. A corporation retained from its employees' wages the price of supplies furnished to them by the plaintiff. Upon the appointment of a receiver for the corporation the plaintiff claimed a lien or priority on the grounds of a constructive trust or an equitable lien, but this was denied. *Arnold v. Porter*, 122 N. C. 242, 29 S. E. 414 (1898).

¹ *Gaffney v. Phelps*, 207 N. C. 553, 178 S. E. 355 (1935).

² N. C. CODE ANN. (Michie, 1935) §618 "... and in the event the judgment was obtained in an action arising out of a joint tort, and only one, or not all of the joint tort-feasors, were made parties defendant, those tort-feasors made parties defendant, and against whom judgment was obtained, may, in an action therefor, enforce contribution from the other joint tort-feasors; or at any time before judgment is obtained, the joint tort-feasors made parties defendant may, upon motion, have the other joint tort-feasors made parties defendant."

³ *Gaffney v. Casualty Co.*, 209 N. C. 515, 184 S. E. 46 (1936).

⁴ *Lumberman's Mutual Casualty Co. v. United States Fidelity and Guaranty Co.*, 211 N. C. 13, 188 S. E. 634 (1936).

first propounded in *Merryweather v. Nixon*.⁵ The justifications for the rule have been said to be that (1) it deterred tortious conduct, (2) that the court will not lend its aid to a wrongdoer.⁶ A few states have "whittled down" the resulting harshness so as to allow contribution in all cases except where the conduct of the tortfeasors is willful.⁷ A larger group continues to follow the common law in all its rigor.⁸ It is encouraging to note, however, that eleven states by statutes have attempted to abrogate in whole or in part the asperity of *Merryweather v. Nixon*.⁹ Included in this group is North Carolina, whose statute goes further than that of any other state in an attempted abrogation.¹⁰

As a general proposition the liability insurer, upon indemnification, is said to "stand in the shoes" of the insured.¹¹ Thus those states which refuse contribution among joint tortfeasors, likewise do not allow the indemnitor to get contribution from the insured's joint tortfeasor.¹² Conversely, those which permit contribution usually permit the insurance company to recover.¹³ By analogy, however, it was held in *Kolb*

⁵ 8 T. R. 186 (K. B. 1799). But here the acts of the joint wrongdoers were willful. Willfulness prevents contribution even in those jurisdictions which would otherwise allow it. See note 7 *infra*.

⁶ *Avery v. Central Bank of Kansas City*, 221 Mo. 71, 119 S. W. 1106 (1909); (1932) 45 HARV. L. REV. 349; (1934) 32 MICH. L. REV. 1011; (1928) 76 U. OF PA. L. REV. 979.

⁷ *Underwriters at Lloyds v. Smith*, 166 Minn. 388, 208 N. W. 13 (1926); *Duluth, M. and N. Ry. v. McCarthy*, 183 Minn. 414, 236 N. W. 766 (1931) (contribution allowed where the first tortfeasor had made a "fair" compromise); *Armstrong County v. Clarion County*, 66 Pa. 218 (1870); *Mitchell v. Raymond*, 181 Wis. 591, 195 N. W. 855 (1923). But see *Acheson v. Miller*, 2 Ohio St. 203, 205 (1853). In *Betts v. Gibbins*, 2 Ad. and E. 57 (K. B. 1834), Lord Dena says, "The case of *Merryweather v. Nixon* seems to me to have been strained beyond which the decision will bear. . . . The general rule is, that between wrongdoers there is neither indemnity nor contribution: the exception is, where the act is not clearly illegal in itself." WOODWARD, THE LAW OF QUASI-CONTRACTS (1913) §257.

⁸ *Union Stock Yards v. C., B. and O. R. R.*, 196 U. S. 217, 25 Sup. Ct. 226, 49 L. ed. 453 (1905) (contribution refused where the employers were vicariously liable); *Taylor v. Jones*, 195 N. C. 30, 141 S. E. 492 (1928) (decided prior to passage of amendment to Consolidated Statutes §618); *Manowitz v. Kanov*, 107 N. J. L. 523, 154 Atl. 621 (1931) (assignee of judgment brought suit); *Boyer v. Bolender*, 129 Pa. 328, 18 Atl. 127 (1889); (1932) 81 U. OF PA. L. REV. 130; (1932) 45 HARV. L. REV. 349.

⁹ *Legis.* (1931) 45 HARV. L. REV. 369 (a complete discussion of the statutes). The states which have passed laws in one form or another are: Georgia, Kentucky, Maryland, Michigan, Missouri, New Mexico, New York, North Carolina, Texas, Virginia, West Virginia.

¹⁰ See note 2, *supra*.

¹¹ *Fidelity Ins. Co. v. Atlantic Coast Line R. R.*, 165 N. C. 136, 80 S. E. 1069 (1914) (The insurer upon indemnification is entitled to no more rights or privileges that the insured had.). VANCE, INSURANCE (2d ed., 1930) §175.

¹² *Adams v. White Bus Line*, 184 Cal. 710, 195 Pac. 389 (1921); *Royal Indemnity Co. v. Becker*, 122 Ohio St. 582, 173 N. E. 194, 75 A. L. R. 1486 (1930); *Cain v. Quannah Light and Ice Co.*, 131 Okla. 25, 267 Pac. 641 (1928).

¹³ *Underwriters at Lloyds v. Smith*, 166 Minn. 388, 208 N. W. 13 (1926); *Frankfort Gen. Ins. Co. v. Milwaukee Elec. Ry. and Light Co.*, 169 Wis. 533, 173 N. W. 307 (1919).

*v. National Surety Co.*¹⁴ that a surety on an appeal bond, upon paying the tortfeasee, was entitled to contribution from a tortfeasor, even though the surety's principal would not have been so entitled. The court reasoned that a surety did not come within the reprobation of the law as to joint tortfeasors; the surety not being a wrongdoer. It would seem that contributive relief for an insurer could be justified on the same grounds. Moreover, to refuse contribution will not restrain tortious conduct (a reason given for refusing contribution among joint tortfeasors) as the interests of an insurance company are already diametrically opposed to tortious conduct when such would affect it in the capacity of liability insurer.

Can the liability insurer of one tortfeasor, however, force contributive reimbursement from the insurer of the other? For the purpose of clarity the fact set-up of the instant case is somewhat simplified.¹⁵ This is done in view of holdings to the effect that a driver with permission stands in the same relative position to the insurer as did the insured in the first instance, when the insurance policy contains the "omnibus clause" as it here did.¹⁶ The Ohio Court in *United States Casualty Co. v. Indemnity Insurance Co.*¹⁷ refused to allow one insurer to get contribution from the other on the ground that no co-suretyship was established.¹⁸ Furthermore, the court said that since contribution is not permitted between joint tortfeasors in Ohio,¹⁹ it should not be permitted between insurance companies. The fallacy of such a holding is that the reasons given above for refusing contribution when only the joint tortfeasors are involved, are wholly inapplicable to an insurer.

It seems that the second objection by the Ohio court would be met in North Carolina by Consolidated Statutes §618,²⁰ which permits contribution among joint tortfeasors and joint judgment debtors. Thus in the instant case the court might have reasoned that since the liability insurer is said to "stand in the shoes" of the insured *upon indemnification* then the two insurance companies should stand in the same relative position to each other as did the insured tortfeasors in the first instance. The logical difficulty would be that Y's insurer has made *no*

¹⁴ 176 N. Y. 233, 68 N. E. 247 (1903).

¹⁵ The tortfeasors, B and C, were driving the automobiles of X and Y respectively, X and Y having taken out the liability insurance.

¹⁶ (1935) 3 BROOKLYN L. REV. 343.

¹⁷ 129 Ohio St. 391, 195 N. E. 850 (1935), (1935) 35 COL. L. REV. 1310, (1935) 21 CORN. L. Q. 119, (1935) 45 YALE L. J. 151.

¹⁸ Technically, the parties were not co-sureties.

Contribution arose at common law on the basis of contract. It would seem however that it is quasi-contractual in nature and not limited to the co-surety relationship. POMEROY, *EQUITY JURISPRUDENCE* (2d ed., 1919) §2339; WOODWARD, *THE LAW OF QUASI-CONTRACTS* (1913) §254.

¹⁹ But cf. *Acheson v. Miller*, 2 Ohio St. 203, 205 (1853) which by dictum would permit contribution between joint tortfeasors if they were equally negligent.

²⁰ See note 2, *supra*.

indemnification. Also the court might say that the policy was not taken out for the benefit of the other tortfeasor or his insurer, or there may be a statute which says an action may be brought against the insurer only by the "person injured."²¹ To overcome this difficulty, *Langmaid* in his article entitled "Subrogation in Suretyship and Insurance"²² suggests that the insured might have garnishment of his fellow tortfeasor's insurance policy on the ground that it is an asset. This remedy should be available since performance of the contract would enure only to the benefit of the garnishor and not the general creditors of the insured. On this theory the first insurer (*i. e.*, *X's* insurer in the principal case) could have subrogation to this remedy upon indemnification, and thereupon could force contribution from the other insurance company (*i. e.*, *Y's* insurer in the principal case).

Regardless of such constructions and interpretations it would seem that the plaintiff in the instant case would be entitled to contribution. Contribution is said to be based upon the maxim, "equality is equity"—the law implying a contract to pay in order that unjust enrichment might be prevented.²³ This reasoning was suggested by the dissent in the *United States Casualty Co.* case.²⁴ Both the North Carolina court and the Ohio court implied that contribution was limited to the co-suretyship relation, but such is not the law. It extends to cover any situation where there is a common burden followed by a payment by one of the parties which relieves the others of the risk.²⁵

In view of the probable increase in the use of liability insurance in the future²⁶ it could be cogently reasoned that a refusal of contribution would not have any substantial adverse effect on the insurance companies. The risk would eventually be spread.

Nevertheless, even though the risk may be spread, there is a practical reason why contribution should be allowed. By a refusal, the tortfeasee (*A*) may by his own whim and caprice choose the indemnitor who will pay the judgment. The tortfeasee is given the opportunity for collusive control where there are two solvent indemnitors as here. He may play one against the other with the result that the insuring public will pay the eventual spoils.

The refusal of the North Carolina court to sanction contribution is open to question. Legislation permitting the indemnifying insurer

²¹ GENERAL LAWS OF CAL. (Deering, 1931) Act 3738.

²² (1934) 47 HARV. L. REV. 976, 1005.

²³ Leflar, *Contribution and Indemnity between Joint Tortfeasors* (1932) 81 U. OF PA. L. REV. 130, 136. The cases do not talk in terms of "unjust enrichment," but this seems to be fundamentally behind the decisions which permit contribution.

²⁴ 129 Ohio St. 391, 397, 195 N. E. 850, 853 (1935).

²⁵ (1935) 45 YALE L. J. 151, 153.

²⁶ Deak, *Liability and Compensation for Automobile Accidents* (1937) 21 MINN. L. REV. 127.

to get contribution from the other would seem desirable. To simplify matters and obviate the difficulty raised in *Gaffney v. Casualty Co.*²⁷ it would seem also desirable that Consolidated Statutes §618 be amended so as to permit one insurer to bring in the other on a cross-bill (as is permitted between joint tortfeasors). A circuity of action would thus be prevented.

J. WILLIAM COPELAND.

Torts—Release of Tortfeasor as Release of Physician.

The plaintiff was injured in an automobile accident and engaged the defendant to treat her injuries. Several months later she released the original tortfeasors from any and all claims, past, present, or prospective, growing out of that accident. She now sues the defendant for malpractice and the defendant pleads the release as a bar. The suit was dismissed by the trial court and this was affirmed on appeal.¹

The problem here presented is whether a general and complete release of an original tortfeasor will of itself release the liability of a physician, not a party to the release, whose malpractice aggravated the injury. The result in the instant case is based on the reasoning that since the original tortfeasor is liable for all the damage which the injured person suffers including the aggravation,² the injury is single and indivisible and therefore only one recovery or compensation will be allowed. This line of reasoning apparently had its inception in three decisions.

In *Ross v. Erickson Construction Co.*³ the Washington Supreme Court held that an employee who accepted compensation under the Washington Workmen's Compensation Act could not thereafter sue a physician for malpractice. The reason given for this was that by the enactment of the Workmen's Compensation Act the Legislature intended to gather up all claims against all persons which an injured worker might have growing out of an industrial accident and therefore the claim against the physician had necessarily been included in the award. In *Martin v. Cunningham*⁴ the same court held that a general release to an employer worked the same result at common law. In so holding the court purported to be following the Ross case. But in effect it held both that the original tortfeasor and the doctor were joint

²⁷ 209 N. C. 515, 184 S. E. 46 (1936), cited *supra* note 3.

¹ *Smith v. Thompson*, 210 N. C. 672, 188 S. E. 395 (1936).

² *Texas and Pacific Ry. v. Hill*, 237 U. S. 208, 35 Sup. Ct. 575, 59 L. ed. 918 (1915); *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20 (1884); *McGarrahan v. N. Y., N. H., and H. R. R.*, 171 Mass. 211, 50 N. E. 610 (1898); *Sauter v. N. Y. Central R. R.*, 66 N. Y. 50 (1876); *Tanner v. Epsey*, 128 Ohio St. 82, 190 N. E. 229 (1934); *RESTATEMENT, TORTS* (1934) §332.

³ 89 Wash. 634, 155 Pac. 153 (1916).

⁴ 93 Wash. 517, 161 Pac. 355 (1916).

tortfeasors⁵ and that the injury was single and indivisible. This is an unjustified extension of the Ross case, which case by implication, at least, admits the existence of several tortfeasors and liabilities.⁶ In *Hooyman v. Reeve*⁷ the Supreme Court of Wisconsin independently reached a similar result. The court refused to consider the argument that the physician and original wrongdoer were joint tortfeasors and based its decision solely upon the theory that the injury was single and had been once paid for.

These cases are the earliest decisions directly in point, and set the precedent which has been almost unanimously followed in the United States.⁸ They are undoubtedly the controlling authorities in the instant case since the only cases directly in point which the North Carolina Court cites,⁹ rely in turn on these older decisions.

Most of the cases which have reached a different result from the Ross, Hooyman, and Cunningham cases are distinguishable. One line of cases holds that if the tortfeasor furnishes the physician, using reasonable care in selection, he is not liable for the physician's negligence.¹⁰ The result of this would be that a release would not affect the physician's liability. Or the right to sue the physician may be specifically

⁵ *Martin v. Cunningham*, 93 Wash. 517, 161 Pac. 355, 357 (1916) "The release . . . precludes the appellant from beginning a second action for malpractice against the surgeon, occupying somewhat the position of a joint tort-feasor."

⁶ *Ross v. Erickson Constr. Co.*, 89 Wash. 634, 155 Pac. 153, 156 (1916). Quoting from *Peet v. Mills*, 76 Wash. 437, 440, 136 Pac. 685 (1913): "That in so doing [enacting the Workmen's Compensation Act] the legislative mind was intent upon the abolishment of all causes of action that may have theretofore existed, irrespective of the persons in favor of whom or against whom such right might have existed, is equally clear from the language of section 5 . . . providing that each workman injured in the course of his employment should receive certain compensation and 'such payment shall be in lieu of any and all rights of action whatsoever against any person whatsoever.'"

⁷ 168 Wis. 420, 170 N. W. 282 (1919).

⁸ *Feinstone v. Allison Hospital*, 106 Fla. 302, 143 So. 251 (1932); *Edmondson v. Hancock*, 40 Ga. App. 652, 151 S. E. 114 (1929); *Guth v. Vaughan*, 231 Ill. App. 143 (1923); *Phillips v. Werndorff*, 215 Iowa 521, 243 N. W. 525 (1932); *Wells v. Gould*, 131 Me. 192, 160 Atl. 30 (1932); *Smith v. Mann*, 184 Minn. 485, 239 N. W. 223 (1931); *Adams v. De Yoe*, 110 N. J. L. 473, 166 Atl. 485 (1933); *Milks v. McIver*, 264 N. Y. 267, 190 N. E. 487 (1934); *Retelle v. Sullivan*, 191 Wis. 576, 211 N. W. 756 (1927). In *Keown v. Young*, 129 Kan. 563, 283 Pac. 511, 513, the court stated: "It will be observed that in the present action defendant is not charged with causing any new hurt or injury to plaintiff. The sole complaint made is that the physician, because of his negligence as alleged, did not repair or improve the injury caused the plaintiff by the railway company. . . ."

⁹ *Feinstone v. Allison Hospital*, 160 Fla. 302, 143 So. 251 (1932); *Edmondson v. Hancock*, 40 Ga. App. 652, 151 S. E. 114 (1929).

¹⁰ *Second v. St. Paul, M., and M. Ry.*, 18 Fed. 221 (C. C. D. Minn., 1883); *Atl. Coast Line R. R. v. Whitney*, 62 Fla. 124, 56 So. 937 (1911); *Stage v. Mich. Central R. R.*, 199 App. Div. 675, 191 N. Y. Supp. 824 (1922). This is the very general rule in spite of the fact that there seems to be no real logical distinction from the case where the injured party gets his own physician. However, the two rules exist side by side in the same jurisdictions. This inconsistency has been noted in (1925) 22 VA. L. REV. 231.

reserved either directly or by implication as in *Stahlin v. Hochdoerfer*,¹¹ where the release recited that the releasor did not consider the releasee liable for the malpractice of the physician.

Apparently the sole jurisdiction contra to the majority is Texas, which in *Hoffman v. Houston Clinic*¹² held that even an award under the Workmen's Compensation Act did not preclude suit against the physician for malpractice. This case recognizes the fact that although the original wrongdoer is vicariously liable for the additional injury caused by malpractice, the acts of the physician constitute a separate and distinct tort for which he is separately liable. The mere fact that the physician's negligence takes the form of an aggravation of the existing injury does not make the injuries one and the same.¹³

If it is true that there is only a single and indivisible injury, the original tortfeasor, held for the total damage, could not become subrogated to a claim against the physician except in a minority of jurisdictions and in those states with specific contribution statutes. Nevertheless the general rule seems to allow this subrogation.¹⁴ Moreover, the rule that the original tortfeasor is not liable where he hires the physician, if he used due care in selection, necessarily recognizes separate torts and separate injuries.

The release in the instant case certainly could cover the liability of the physician if the parties so intended, but this should be a matter for the jury to determine, taking into consideration the amount which the plaintiff received from the releasee, whether the plaintiff was fully aware of the effects of the malpractice at the time,¹⁵ and whatever other relevant facts the particular case presents.¹⁶ A careful weighing of these matters would insure against the possibility of a double recovery and at the same time avoid the inequitable result of releasing a totally independent tortfeasor, not a party to the release, whose independent liability is often not in the minds of the parties at the time the release is made.

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¹¹ 235 S. W. 1060 (Mo. 1921).

¹² 41 S. W. (2d) 134 (Tex. Civ. App. 1931). See also *Wheat v. Carter*, 97 N. H. 150, 106 Atl. 602 (1919).

¹³ (1934) 8 U. OF CIN. L. REV. 209; (1932) 30 MICH. L. REV. 1349; (1932) 81 U. OF PA. L. REV. 485.

¹⁴ *Fisher v. Milwaukee E. Ry. and L. Co.*, 173 Wis. 57, 180 N. W. 269 (1920); *Retelle v. Sullivan*, 191 Wis. 576, 211 N. W. 756 (1927).

¹⁵ It is not clear in the instant case whether the extent of the malpractice was known or not. It appears from a more complete statement of the facts in counsel's brief for the defendant that the negligence of the defendant, if any, was known and had been remedied at the time the release was made. Brief for Defendant-Appellee, p. 1, *Smith v. Thompson*, 210 N. C. 672, 188 S. E. 395 (1936).

¹⁶ See *Wheat v. Carter*, 97 N. H. 150, 106 Atl. 602 (1919); (1932) 30 MICH. L. REV. 1349.

Torts—Wills—Interference With Making a Will.

Courts have long distinguished between legal "rights" and "mere expectancies" and have protected the former but not the latter.¹ Recently a well known writer on Torts, discussing the recognition and protection in law of reasonable expectancies, said, "It would seem to be inevitable that courts of law, as our system of jurisprudence is evolved to meet the growing wants of an increasingly complex social order, will discover, define and protect from undue interference more of these 'probable expectancies.'"² This statement is well illustrated by the recent North Carolina case of *Bohannon v. Trust Co.*³ There the plaintiff, grandson of testator, alleged that testator "had formed the fixed intention and settled purpose of providing for plaintiff in the distribution of his estate, and would have carried out his intention and purpose but for the wrongful acts" of defendants, which wrongful acts consisted of a conspiracy to deprive plaintiff of a share of testator's estate, "by false and fraudulent representations" made to testator. Plaintiff alleged that as a result of the fraud of the defendant, he was deprived of a share in the testator's estate, although he mentioned no specific share. *Held*, the facts alleged were sufficient to constitute a cause of action.⁴

In the case of *Lewis v. Bloede*⁵ it was held that where the defendant wrongfully prevented the plaintiff from entering into a contract, the plaintiff was entitled to have his case submitted to the jury and it was error for the trial court to direct a verdict for the defendant. Connor, J., said, "It having been settled that an action, as for a tort, would lie for a malicious—that is wrongful—interference with the performance of an executory contract,⁶ the question naturally arose whether the principle extended to a case in which a third party, with like motive and without lawful excuse, by his interference prevented one from entering into, or making, a contract. * * * If A makes a definite proposal to B to enter into a contract, the character, terms, etc., of

¹ For a treatment of the protection afforded legal rights, expectancies, etc., see Green, *Relational Interests* (1934) 29 ILL. L. REV. 460; (1935) 29 ILL. L. REV. 1041; (1935) 30 ILL. L. REV. 1; (1935) 30 ILL. L. REV. 314; (1936) 31 ILL. L. REV. 35.

² HARPER, TORTS (1933) §231.

³ 210 N. C. 679, 188 S. E. 390 (1936).

⁴ The question as to whether plaintiff had stated a cause of action arose when the defendants objected to plaintiff's application for an order of examination of one of the defendants, in order to obtain facts material to plaintiff's case.

⁵ 202 Fed. 7 (C. C. A. 4th, 1912). Although this is a decision on appeal from the District of Columbia to the Circuit Court of Appeals for the Fourth Circuit, it has particular weight in North Carolina as the opinion was written by Connor, J., who had been a member of the North Carolina Supreme Court.

⁶ (1935) 14 N. C. L. REV. 112, "The right to maintain an action against a third person for maliciously inducing another to break his contract with the plaintiff has long been recognized in this state."

which are sufficiently definite to be capable of acceptance, and, while B is negotiating, or after he has determined to accept the proposal, C maliciously interferes and prevents the acceptance on the part of B, or procures a withdrawal of the proposition by A, by reason whereof loss is sustained, can it be said that the party who is injured by such interference has sustained no injury,—that is, loss? Is there not in such case *damnum et injuria*, which constitute the elements of an actionable wrong?"⁷

In the Bohannon case the North Carolina court seems to adopt Judge Connor's opinion that interference with the making of a contract is actionable, and concludes, "If the plaintiff can recover against the defendant for the malicious and wrongful interference with the making of a contract, we see no good reason why he cannot recover for the malicious and wrongful interference with the making of a will."⁸ Thus by analogy, the court extended the doctrine to wrongful interference with the making of a will.⁹ This analogy seems logical since the plaintiff, in cases where a will or contract is prevented from being made, has only reasonable expectations and no actual contract rights.¹⁰ In addition to this analogy, the court in the Bohannon case also relied on the maxim that for every wrongful act resulting in an injury, there is a remedy for the injured party.

The opposite theory is illustrated by a recent Ohio case,¹¹ where a husband, by threats to do bodily injury to his wife, induced her not to execute a will in favor of plaintiff, the wife's sister. The husband would have been entitled to his wife's property had she died intestate. The court refused recovery in a tort action by plaintiff against the husband, basing its decision on the theory that defendant had not violated any legal right

⁷ *Lewis v. Bloede*, 202 Fed. 7, 16 (C. C. A. 4th, 1912).

⁸ *Bohannon v. Trust Co.*, 210 N. C. 679, 685, 188 S. E. 390, 394 (1936).

⁹ The earlier North Carolina case of *Dulin v. Bailey*, 172 N. C. 608, 90 S. E. 689, L. R. A. 1917B 558 (1916), (1917), 30 HARV. L. REV. 527, (1917) 2 CORN. L. Q. 248, held that a wrongdoer who destroyed part of a will wherein plaintiff was named as a legatee, which legacy plaintiff was unable to prove in probate, was liable to plaintiff in an action for damages. In *Creek v. Laski*, 248 Mich. 425, 227 N. W. 817 (1929), (1930) 14 MINN. L. REV. 704, (1931) 30 COL. L. REV. 409, where the defendant spoliated a will, and plaintiff could not establish her legacy because of the lack of a sufficient number of witnesses, plaintiff was permitted to recover the amount of the alleged legacy from the defendant.

¹⁰ In *Mitchell v. Langley*, 143 Ga. 827, 85 S. E. 1050, Ann. Cas. 1917A 473 (1915), a beneficiary named in a certificate of a benefit society was held to have a cause of action against a person who by false and malicious defamation of the beneficiary, induced the member of the beneficiary society to change the beneficiary in the certificate.

¹¹ *Cunningham v. Edward*, 52 Ohio App. 61, 3 N. E. (2d) 58 (1936), (1936) 5 FORDHAM L. REV. 514. An earlier Ohio case, *Pettit v. Morton*, 38 Ohio App. 348, 176 N. E. 494 (1930), *aff'd*, 124 Ohio 241, 177 N. E. 591 (1931), (1931) 30 MICH. L. REV. 478, held that where a will was wrongfully and fraudulently suppressed and hence could not be probated, a legatee named in the will had a cause of action against the wrongdoer.

of the plaintiff. In a New York case, decided in 1845,¹² the plaintiff had been named as a legatee in testator's will. Defendants, by a fraudulent, malicious and wrongful conspiracy, induced testator to revoke the will. The court denied recovery.¹³ In both the Ohio and New York cases, the reason given for the result was that no legal right of plaintiff had been violated, but this is merely a way of expressing the result. The real question in the North Carolina, New York and Ohio cases was to what extent ought the court protect the interest of the plaintiff, and the New York and Ohio courts merely held that the plaintiff's interest should not come within the scope of protection; whereas the North Carolina court held that it should. The North Carolina ruling is commendable in that it seeks to compensate the plaintiff for an obvious, though legally nameless,¹⁴ wrong done him. But there are difficulties with the rule. For instance, in the usual case the question as to the measure of damages would be difficult, and more especially is this true in the Bohannon case. First, there was no specific sum mentioned that testator intended to leave to the plaintiff; second, if there had been a specific sum mentioned, the testator may not have remained firm in his intention to leave a legacy to the plaintiff; and third, even if the measure of damages is the amount of the specific legacy, the testator's property may have so dwindled at his death that the legacy might be valueless.

But the mere fact that the damages would be difficult to prove, coupled also with the fact that the cause of action (as pointed out by the North Carolina court) would be difficult to establish, does not mean that the scope of protection should not be extended to include the plaintiff's injury. Whether or not plaintiff has a cause of action should

¹² *Hutchins v. Hutchins*, 7 Hill 104 (N. Y. 1845).

¹³ In *Lewis v. Corbin*, 195 Mass. 520, 81 N. E. 248 (1907) testator had the defendant, who was a beneficiary in the residuary clause, add a codicil to the will, which gave a \$5,000 legacy to the plaintiff's father. Massachusetts law required that a codicil be executed before two witnesses, and defendant, knowing that fact, had only one witness present. By Massachusetts law, plaintiff would have been entitled to a share in his father's legacy, the latter at the time of the execution of the codicil, unknown to the testatrix, being deceased. In a tort action the defendant's demurrer was sustained because the complaint did not allege that the testatrix did not change her intention before her death, and did not show that the fraud was operative up to the time of the death of testatrix. In *Marshall v. De Haven*, 209 Pa. 187, 58 Atl. 141 (1904), the defendant, a legatee in a will, paid a third party \$3,000 for his services in persuading testator not to change his will in plaintiff's favor. A demurrer was held properly sustained because there was no averment of fraud or undue influence, or that testator would have so changed his will but for the actions of the defendant. In *Hall v. Hall*, 91 Conn. 514, 100 Atl. 441 (1917), (1917) 27 YALE L. J. 263, the defendant made false representations to the plaintiff's father about the plaintiff's sanity, and as a result the father of the plaintiff transferred certain property to the defendant that plaintiff would otherwise have acquired by inheritance. *Held*, plaintiff suffered no legal wrong, therefore no recovery.

¹⁴ See Smith, *Torts Without Particular Names* (1930) 69 UNIV. PA. L. REV. 91.

not be made to depend on the difficulty of proof. The North Carolina decision is preferable to that of the New York and Ohio courts. If the plaintiff can establish the facts constituting his cause of action, the damages should be the value of the detriment plaintiff has actually suffered, the amount being arrived at through a consideration of all the surrounding circumstances.

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