RECENT CASES

ATTORNEY'S LIEN—SERVICES RENDERED ON COUNTERCLAIM IN EQUITY.—Defendant answered petitioner's divorce suit and filed a counter-claim for reconveyance of property transferred by him to petitioner. In pursuance to the decree of the court, the petitioner transferred and reconveyed the property in question to the defendant. Subsequently, the solicitor of the defendant attempted to impress a lien for his attorney's fees and disbursements on said property. *Held,* that the Attorney's Lien Act of 1914 (P. L. 1914, p. 410) was not applicable to counter-claims in equity. *McCarthy v. McCarthy,* 117 N. J. Eq. 22 (E. & A. 1934), following dictum in *MacDonnell v. Vitille,* 111 N. J. Eq. 502, 506 (E. & A. 1932).

In its decision, the court seems to have overlooked the fact that at the date of the passage of the Attorney's Lien Act in 1914, counter-claims did not exist in equity. Under the practice then existing, if a defendant wished affirmative relief against the complainant, he must file a separate pleading along with his answer, praying for such relief by way of a cross-action. This separate pleading was known as a cross-bill, and even though on answer it appeared that the defendant was entitled to some affirmative relief, none could be accorded until a cross-bill, on leave to file obtained, was actually filed seeking such relief. *Miller v. Gregory,* 16 N. J. Eq. 274 (Ch. 1863); *Hoff v. Burd,* 17 N. J. Eq. 201 (Ch. 1864); *Scott v. Lalor's Ex'rs.,* 18 N. J. Eq. 301 (Ch. 1867); *Leddel's Ex'r. v. Starr,* 19 N. J. Eq. 159 (1868); *Monoghan v. Collins,* 71 Atl. 617 (N. J. Ch. 1908). In 1915, by supplement to the Chancery Act, cross-bills in chancery were abolished. P. L. 1915, p. 195, rule 54. This rule was adopted as rule 70 of the Court of Chancery in 1916. The rule provides that: "Any matter, being the proper subject of a cross-bill under the existing practice, may be set up by counter-claim." Rule 71 of the Court of Chancery, also adopted in 1916 (having been rule 55 of the Chancery Act of 1915, P. L. 1915, p. 195), reads as follows: "A counter-claim is deemed to be a cross-action, and the rules respecting the form and manner of pleading the complaint and answer, apply respectively to the counter-claim and the answer thereto." This change of a cross-bill to a counter-claim is thus a change in name only. *McAnarney v. Lembeck,* 97 N. J. Eq. 361 (E. & A. 1925); *Beller v. Fenning,* 101 N. J. Eq. 430 (Ch. 1927). Only those matters which were formerly the subject matter of a cross-bill can be set up in a counter-claim. *McAnarney v. Lembeck, supra; Beller v. Fenning, supra; Pettit v. Port Newark Nat. Bk. of Newark,* 110 Eq. 324 (Ch. 1932). See also, *Seacoast Development Co. v. Beringer,* 100 N. J. Eq. 295 (E. & A. 1926); *South Camden Trust Co. v. Stiefel,* 101 N. J. Eq. 41 (Ch. 1927). The counter-claim in the McCarthy divorce action is essentially what would have been defined as a cross-bill under the practice as it existed before the supplement to the Chancery Act of 1915. It is inherently a cross-bill for affirmative equitable

relief, and was so treated by the court in the decree rendered in the original proceedings in this case. It seems clear, therefore, that the legislature did not include counter-claims in equity in the Attorney's Lien Act of 1914 because in fact there were none. Certainly a cross-action or cross-bill must have been considered by the legislature to have been included within the language of the act as passed by them. Further more, it seems unreasonable that the legislature should have provided for counter-claims in actions at law, and to have deliberately excepted counter-claims in equity. The construction placed upon attorneys' liens by the Court of Errors and Appeals in the case of *MacDonnell v. Vitille, supra,* and in the instant case, seems to be clearly unsound.

BANKS—LIABILITY FOR THE PAYMENT OF AN INCOMPLETE NEGOTIABLE INSTRUMENT STOLEN FROM DEPOSITOR.—The plaintiff depositor signed a blank check and placed it in his safe from which it was stolen and filled out payable to cash. It was then endorsed by the person presenting it to the defendant drawee for payment. The defendant paid the check without identification of the bearer. *Held,* that the defendant could not debit the plaintiff's account with the item, and must sustain the loss of such payment. *Joseph Heimberg, Inc. v. Lincoln National Bank,* 113 N. J. L. 76, 172 Atl. 528 (Sup. Ct. 1934).

The rule seems to be well established as to the ability of a holder in due course to enforce a completed negotiable instrument, lacking delivery, against the maker of such instrument. *Schaeffer v. Marsh,* 90 Misc. 307, 153 N. Y. S. 96 (1915); *Greeser v. Sugarman,* 76 N. Y. S. 922 (1902); *Augus v. Downs,* 147 Pac. 630 (Wash. 1915). This rule is applied by virtue of section 16 of the Negotiable Instruments Act. But although section 15 states "Where an incomplete instrument has not been delivered it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder as against any person whose signature was placed thereon before delivery," there seems to be a varied opinion as to the enforceability of incomplete instruments lacking delivery. As between the maker of such an incomplete instrument and a bona fide purchaser other than the maker's bank the rule seems to be that if the instrument was never actually delivered, and that without any confidence or negligence or fault of the maker, but by force or fraud, it was put into circulation, there can be no recovery on it. *Linick v. Nutting & Co.,* 140 N. Y. App. Div. 265 (1910); *Salley v. Terrill,* 50 Atl. 896 (1901). The purchaser of such a negotiable instrument can take it or not at his option, and usually, at least to some extent, relies upon the responsibility of the last holder, hence should bear the loss as against the maker who exercised no volition in the matter. *Trust Co. of America v. Conklin,* 119 N. Y. S. 367 (1909). The N. I. L. provision that a valid delivery by all parties prior to a holder in due course to make them liable to him is conclusively presumed, applies only to

completed instruments. *Holzman, Cohen & Co., Inc. v. Teague,* 158 N. Y. S. 211 (1916); *Baxendale v. Bennett,* 3 Q. B. D. 325. Where a maker is in the habit of leaving instruments signed in blank in a position where they might be easily seen and stolen, it is such negligence as to estop him from setting up lack of delivery as against an innocent purchaser. *Phillip v. A. W. Joy Co.,* 114 Me. 403, 96 Atl. 727 (1916). Similarly, where a maker placed blank instruments in the hands of another for a certain use and such person fraudulently filled them out and used them in his own business, the maker is guilty of such negligence that a bona fide purchaser may recover. *Clifford Banking Co. v. Donovan Comm. Co.,* 94 S. W. 527 (1906). But where the loss by payment of a blank check lacking delivery must be sustained as between the maker and the maker's bank, the courts have held that the maker must suffer. *Snodgrass v. Sweetser,* 15 Ind. App. 682, 44 N. E. 648 (1896). This holding is based on various theories. The risk of signing and keeping a blank check, whether the keeping is negligent or careful, is assumed by the maker and not the bank which pays it. *S. S. Allen Co. v. Bank of Buchanan County,* 182 S. W. 777 (Mo. 1916). A bank is bound to know the signature of a depositor, but is not bound to draw a suspicious inference from the discovery that the body of the check is in an unfamiliar handwriting. Checks in ordinary business are issued in such form. 2 DANIEL ON NEG. INST., 6th ed., sec. 1654a; *S. S. Allen Co. v. Bank, supra.* A bank must, by its contract, honor a check presented on funds on deposit with it, while a purchaser may refuse to accept it, therefore, the depositor owes a greater degree of care to the bank. *Trust Co. of America v. Conklin, supra.* The decision in the instant case that the bank should not be immune from the operation of section 15 of the N. I. L. seems unsound. The bank is not a holder of the instrument so as to bring it within the operation of the statute. Its liability is properly governed by its contract with the depositor. The determinitive question should be whether it has discharged its duty of care in paying drafts under the contract. It is submitted that paying the instrument in dispute under the circumstances was not such negligence as to make the defendant responsible.

EQUITY—STATUTE OF LIMITATIONS—ESTOPPEL.—The defendant while operating a motor vehicle struck the complainant. Defendant failed to stop and give his name as required by the Motor Vehicle Act. Complainant did not know who hit him until some two years later when complainant retained a lawyer, skilled in negligence work, who by chance discovered the identity of the defendant. Complainant immediately brought action for personal injuries against the defendant. Defendant pleaded the statute of limitations as a bar to all claims for personal injuries accruing more than two years before the action was brought.

Held, that defendant was estopped from pleading statute of limitations as a bar to the action at law brought against him when his own wrongful conduct prevented complainant from bringing his action until it was subject to the bar of the statute. *Noel v. Teffeau,* 116 N. J. E. 446 (Ch. 1934).

The Statute of limitations is for the benefit and repose of individuals and not to secure general objects of policy, hence it may be waived by express contract or by necessary implication. *Quick v. Corlies,* 39 N. J. L. 11, (Sup. Ct. 1876). The benefits of the statute of limitations may be lost by conduct invoking the established principles of estoppel in pais. *Freeman v. Conover,* 95 N. J. L. 89 (E. & A. 1920). While it is the rule in New Jersey that law courts will not estop the defendant from setting up the bar of the statute even where he has fraudulently concealed the cause of action, *Somerset Freeholders v. Veghte,* 44 N. J. L. 509 (E. & A. 1882); *Freeman v. Conover, supra,* overruling *Crawford v. Winterbottom,* 88 N. J. L. 588 (Sup. Ct. 1916), it is the accepted rule that the Court of Chancery may and will grant relief in such cases by enjoining the defendant from relying upon the bar of the statute. *Martin v. State Insurance Co.,* 44 N. J. L. 485 (Sup. Ct. 1882; *Clark v. Augustine,* 62 N. J. E. 689, (Ch. 1902); *Howard v. West Jersey R. R. Co.,* 102 N. J. E. 517, (Ch. 1928). Equity Courts ordinarily act in obedience to the statute where the right involved is recognized both in law and in equity and jurisdiction is concurrent. *Colton v. Depew,* 60 N. J. E. 454, (Ch. 1900). It is submitted that there is nothing involved in this case which gives Equity an excuse to exercise its jurisdiction. The court seems to have taken for granted that the defendant's act of omission in failing to stop and give his name, as required by the Motor Vehicle Act, was a breach of a duty owed by him to the complainant. In all of the above cited cases wherein Equity has restrained the defendant from setting up the bar of the statute fraud has been involved. In *Howard v. West Jersey R. R. Co., supra,* the enjoined party lulled his adversary into a false sense of security regarding terms of settlement for an injury caused by the defendant, thereby causing complainant to subject his claim to the bar of the statute. In *Martin v. State Insurance Co., supra,* the defendant contributed to delay in bringing suit by fraudulently holding out hopes of amicable adjustment. The violation of the Motor Vehicle Act does not denote a fraudulent breach of duty (to speak, or otherwise) to any person who happens to become involved as a victim. If there is no fraud involved in omission and failure to speak—however reprehensible it may be—it is difficult to justify the jurisdiction of Equity in enjoining the setting up of the statute in this case.

NEGLIGENCE—PHYSICIANS AND SURGEONS—LIABILITY FOR LEAVING FOREIGN BODY IN ABDOMEN AFTER OPERATION.—Plaintiff sued defendant physician for negligence in failing to remove a surgical sponge

from her abdomen before sewing up the incision. The operation was performed at a public hospital and the defendant was assisted by nurses in the employ of the hospital. According to established practice, a nurse kept count of the sponges used and reported them all accounted for, before the wound was closed. Defendant contended that a verdict should have been directed in his favor. *Held,* that despite nurse's count, defendant was under a duty to make an independent examination, and whether he was negligent in so doing was a question for the jury. *Stawicki v. Kelley,* 113 N. J. L. 551, (Sup. Ct. 1934).

A physician who treats a patient confined to a hospital is generally not liable for the negligent acts of internes and nurses assigned to his case by the hospital. They are the servants of the institution and not of the visiting medical practitioner. *Morrison v. Henke,* 165 Wis. 166, 160 N. W. 173 (1916); *Reynolds v. Smith,* 148 Iowa 264, 127 N. W. 192 (1910); *Stewart v. Manasses,* 244 Pa. 221, 90 Atl. 574 (1914). So, a surgeon, operating at a hospital with the assistance of resident nurses, is not responsible for their negligent failure to keep an accurate check on the sponges used in the body cavity. *Funk v. Bonham,* 151 N. E. 22 (Ind. 1926); *Olander v. Johnson,* 258 Ill. App. 89 (1932). A surgeon ordinarily delegates the duty of keeping track of sponges, pads, and packs used in the operation to a nurse. In order to devote his complete skill to his delicate task it is necessary for him to be unhampered by such details. This practice has become customary in the vast majority of hospitals. The question naturally arises as to how far reliance on a nurse's count is a defense to a charge of negligence in leaving a foreign body in a patient's abdomen. A few courts exempt the physician from liability entirely where the custom of relying on a nurse's count was followed. *Funk v. Bonham, supra; Guell v. Tenney,* 262 Mass. 54, 159 N. E. (1928). In New York, where the leaving of a sponge in the abdomen is *res ipsa loquitur,* the defendant's burden of going forward is satisfied by expert testimony that it is proper for a surgeon to accept the nurse's count and that manual exploration for sponges is dangerous. *Blackburn v. Baker,* 237 N. Y. S. 611 (1929). On the other hand in Pennsylvania, where the *res ipsa loquitur* rule also applies, the inference of negligence is not met by showing that the sponge nurse reported all removed. *Davis v. Kerr,* 239 Pa. 351, 86 Atl. 1007 (1913). It may be noted that *res ipsa loquitur* has no application to this situation in New Jersey. *Niebel v. Winslow,* 88 N. J. L. 191 (E. & A. 1915). The majority of jurisdictions hold the defendant physician to a greater degree of care than that established in the *Guell* case. The duty to see that foreign bodies are all removed is primarily his and cannot be completely delegated. *Walker v. Holbrook,* 130 Minn. 106, 153 N. W. 305 (1915). Hence, although the nurse reports that the same number of sponges have been abstracted as were inserted, a duty to examine still remains on the surgeon. *Davis v. Kerr, supra; Paro v. Carter,* 177 Wis. 121, 188 N. W. 68 (1922); *Spears v. McKinnon,* 168 Ark. 357, 270 S. W. 524 (1925); *Ault v. Hall,* 154 N. E. 528 (Ohio, 1928).

What is a reasonable examination depends on the circumstances of each case. *Barnett v. Brand,* 165 Ky. 616, 177 S. W. 357. An ocular inspection may be sufficient if all sponges are reported checked. *Olander v. Johnson, supra.* The principal case appears sound and consistent with the weight of authority.

TORTS—DAMAGES—EVIDENCE—ADMISSIBILITY OF COVENANT NOT TO SUE IN MITIGATION.—Plaintiff, a passenger in a bus owned and operated by a common carrier, received personal injuries by reason of a collision between the bus in which she was riding and a bus owned and operated by the defendant. At the trial counsel for the defendant attempted to establish that the plaintiff had received, in consideration for signing a covenant not to sue, a sum of money from the common carrier, and that such money should be applied in mitigation of any damages that might be assessed against the defendant. *Held,* the consideration paid by one joint tort feasor, for a covenant not to sue, is admissible and may be shown in mitigation of damages in an action against the other joint tort feasor. *Brandstein v. Ironbound Transportation Co.,* 112 N.J.L. 585 (E. & A. 1934), reversing *Fast v. Pecan,* 11 Misc. 254 (Sup. Ct. 1933).

That there is no right of contribution among joint tort feasors is well established. *Public Service Ry. Co. v. Matteucci,* 105 N.J.L. 114 (E. & A. 1928). And it is a fundamental rule of damages that an injured party is entitled to but one satisfaction for his injuries, *Spurr v. North Hudson County Ry. Co.,* 56 N.J.L. 346 (Sup. Ct. 1893); *Rogers v. Cox,* 66 N.J.L. 432 (Sup. Ct. 1901). If the consideration for the covenant can be said to be received in partial or full satisfaction of the damages to the injured party, then the rule in the principal case is sound, even though it allows, in effect, of a contribution among joint tort feasors. This is in accord with the weight of authority in other jurisdictions. *O'Neill v. National Oil Co.,* 231 Mass. 20, 120 N.E. 107 (1918); *Dwy v. Connecticut Co.,* 89 Conn. 74, 92 Atl. 883 (1915); *Knapp v. Roche,* 94 N.Y. 329 (1884); *Ellis v. Esson,* 50 Wisc. 138, 6 N.W. 518 (1880). *Contra, Nashville Inter. Ry. v. Gregory,* 137 Tenn. 422, 193 S.W. 1053 (1917); *Musolf v. Duluth Edison Electric Co.,* 108 Minn. 369, 122 N.W. 499 (1909). But if the injured party receives money by way of gratuity or contract this does not operate to reduce the damages recoverable, *Rusk v. Jeffries,* 110 N.J.L. 307 (E. & A. 1932), since the money is not received in partial or full satisfaction for the injuries, but is paid supposedly by a disinterested third party, who is in no way connected with the wrong done. When an injured party releases one person from liability for a tort, the fact, whether that person was not in fact or law liable, presents, as regards the release from liability of another for the same injury, a question upon which the decisions are regarded as

conflicting, although many of them may be harmonized by reference to the distinction now so widely recognized, between the effect of a release for a consideration not intended as compensation, and the effect of the receipt of a sum of money as compensatory damages. *Pickwick v. McCauliff,* 193 Mass. 70, 78 N.E. 730 (1906); *Wagner v. Union Stock Yards & Transit Co.,* 41 Ill. App. 410 (1891); *Hirschfield v. Alsberg,* 47 N.Y.Misc. 141, 93 N.Y.Supp. 617 (1905); *Thomas v. Central Ry. Co.,* 194 Pa. 511, 45 Atl. 344 (1900). Whether or not the consideration paid for the covenant is received to mitigate the covenantor's damages depends on the terms of the covenant and the intention of the parties thereto. In the absence of clear evidence of a contrary intention it should be presumed that the payment in consideration for the covenant is a payment on account of the damages. This is so in debt actions against joint debtors, WILLISTON, *Releases of Joint Debtors,* 25 HARV. L. REV. 203, 218, and the same principle should apply in an action sounding in tort. However, the fact that a covenantee was present at or was involved in the commission of a wrong does not make him a tort feasor. He may be desirous of buying his peace, when in fact he is not liable, or though his liability is barred by statute, still he may be actuated by altruistic motives to pay a sum not intended as compensation to the injured party. To allow a wrongdoer to show such sum in mitigation of damages, where the covenant expressly provides, and it was clearly the intention of the parties, that such sum was not paid as compensatory damages, is to vitiate the rule of *Rusk v. Jeffries, supra.* It seems that the rule in the principal case is too broad and that the better practice would be that when the request is made to admit the covenant in evidence, the Court should rule on its admissibility according to testimony adduced on the issue of whether or not the consideration for the covenant was in fact paid as compensatory damages, and if it is clearly shown that the money received by the covenantor was not paid as compensatory damages, then the covenant should not be admitted.

WILLS—BEQUEST CONDITIONED UPON DIVORCE OR SEPARATION.—A bequest was made by a testatrix authorizing her executor, as trustee, to pay a certain sum of money set aside by her, "to my daughter, Anna Dwyer, only when and if she shall no longer be the legal wife of Hurlburt Dwyer, either because he shall have predeceased my said daughter, Anna Dwyer, or because of an absolute or qualified legal divorce between them". *Held,* that the condition is void as it tends to divorce between husband and wife and the gift becomes absolute. *Dwyer v. Kuchler,* 116 N. J. E. 426 (Ch. 1934).

Ample authority supports the general rule that a provision in a will which conditions a gift or benefit thereunder on the divorce or separation of married persons is void as against public policy and good morals,

where it manifestly tends to induce such divorce or separation. The doctrine is supported by the somewhat recent case of *Tripp v. Payne,* 339 Ill. 178, 171 N. E. 131 (1930), wherein the will under construction provided that, "in case my said son shall cease to live with his present wife then the net income arising from the said trust shall be paid to my said son during such time as he shall not live with his said wife". In holding the provision clearly contrary to the public policy of the state, and hence void, the court said that such a provision could have had no other purpose than to induce a separation between these two people, who so far as disclosed by the evidence, were living together in the greatest of harmony and marital felicity. Of similar import are: *Coe v. Hill,* 201 Mass. 15, 86 N. E. 949 (1909); *Witherspoon v. Brokaw,* 85 Mo. App. 169 (1900); *Hawke v. Euyart,* 30 Neb. 149, 46 N.W. 422 (1890); *Crueger v. Phelps,* 21 Misc. 252, 47 N. Y. Supp. 61 (1897); *Moores v. Gywnne,* 15 Ohio C. C. N. S. 31, 33 Ohio C. C. 463 (1911); *In re Moore,* L. R. 39 Ch. Div. (Eng.) 116 (1887). A dictum of Chancellor Zabriskie, in *Graydon's Executors v. Graydon,* 23 N. J. E. 229, 231, adopts the principle: "On the other hand, in a gift to one as long as she continues to live separate from her husband, the limitation or condition is void and the gift is absolute. So any condition is void, that is criminal, illegal or *contra bonos mores.*" Judicial opinion sustains the validity of such a condition when made by way of provision for an existing or anticipated separation, or which does not, for any other reason, operate as an inducement to the parties to separate, or obtain a divorce. In *Cooper v. Remsen,* 5 Johns. Ch. (N. Y.) 459 (1821), the instrument under review provided: "I do give and bequeath to her (the legatee) during her separation from her present husband, one thousand dollars a year". The condition was held lawful and proper, the separation actually existing, without being induced by the testator. *Re Nichols,* 102 Wash. 303, L. R. A. 1918 E. 968, 172 Pac. 1146 (1918); *Re Kelley, 222* App. Div. *29, 232* N. Y. Supp. 84 (1928), *aff'd* 251 N. Y. 529, 168 N. E. 415 (1929); *William v. Hund,* 302 Mo. 451, 258 S. W. 703 (1924); *Shewell v. Dvarris,* Johns. V. C. 172, 70 Eng. Reprint 384 (1858). In *Thayer v. Spear,* 58 Vt. 327, 2 Atl. 161 (1886), it appeared that the testatrix bequeathed to the daughter the income only of her estate so long as she remained the wife of a certain person; and further provided that if the daughter should become a widow, or for any cause should cease to be the wife of such person, her ownership was to become absolute. The provision was held to be valid, for the reason that the testatrix did not intend to induce a separation from the husband, but to provide for the daughter in case she should be deprived of her husband's care. A bequest to a son if he shall procure a divorce from his present wife, and in default of which his interest shall be restricted to a life estate, will not be deemed void as contrary to public policy, where the divorce action between the son and his wife was pending when the will was executed. *Ransdell v. Boston,* 172 Ill. 439, 50 N. E. 111 (1898). The rule invalidating gifts

based upon a future separation of husband and wife is inapplicable to a bequest upon condition that it shall be effectual only if the spouse of the legatee be dead, or be divorced, because the gift takes effect according to the state of facts existing at the time of the testator's death, and cannot be said to influence the conduct of the beneficiary. *In re Grunning,* 234 Pa. 139, 83 Atl. 61, (1912). It has frequently been recognized that a testator may make the vesting of a legacy depend upon the legatee's separation from her husband, through death, divorce or other permanent separation, where it appears from the will in connection with the surrounding circumstances that only a divorce or separation for a cause recognized by law was intended by the testator. *Born v. Horstman,* 80 Cal. 452, 22 Pac. 169, 338 (1889); *Daboll v. Moon,* 88 Conn. 387, 91 Atl. 646, (1914); *Baker v. Hickman,* 127 Kan. 340, 273 Pac. 480 (1929). *Cowley v. Twombly,* 173 Mass. 393, 53 N. E. 886 (1899) presented a will providing that certain property should be held in trust so long as the testator's son should remain the husband of his then wife. It was further provided that on the death or divorce of the wife, the trust was to cease, and the son was to hold the property in this own right. It was held that it was not against public policy to make a devise contingent on the devisee's obtaining a divorce, because a divorce was a legal right, obtainable only for a cause; and that there was no greater inducement to the son improperly to procure a divorce between himself and his wife than to induce him to procure her death. The instant case, not indicating an existing separation between husband and wife, by way of contrast to the doctrine hereinabove expounded, appears in accord with the better reasoned decisions

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WORKMEN'S COMPENSATION—SUBROGATION OF INSURER TO RIGHTS OF EMPLOYER AGAINST THIRD-PARTY TORT FEASOR—Defendant Bickford, while employed by the defendants, commissioners of Palisades Interstate Park, was injured through the fault of the complainants. Payment was made to Bickford in the sum of $2,835 by the employer's insurance carrier according to the terms of an award made by the Workmen's Compensation Bureau. On bill of interpleader Bickford claims the entire fund of $8,000 awarded in settlement of his suit against the complainants, and the insurance carrier seeks to be subrogated to the rights of the employer and be reimbursed to the extent of expenditures made for him. *Held,* that the employer's insurance carrier who paid compensation to an injured employee is entitled to reimbursement out of damages recovered by employee from tort feasor. *Scheno Trucking Co., Inc., v. Bickford,* 115 N. J. Eq. 380, 170 At. 881 (Ch. 1934).

Since the early English case of *Mason v. Sainsbury,* 99 Eng. Rep. 538 (K.B. 1782) the rule has been well established that the insurance carrier may maintain an action for the loss sustained, against the tort feasor who causes the injury to the assured. This principle of subroga-

tion of the insurer to the rights of the assured has been followed in New Jersey in cases involving various types of insurance contracts including fire, marine, suretyship, and building contracts. *Irick v. Black,* 17 N. J. Eq. 189 (Ch. 1864); *Monmouth Co. Fire Insurance Co. v. Hutchinson,* 21 N. J. Eq. 107 (Ch. 1870); *Insurance Co. v. Woodruff,* 26 N. J. L. 541 (E. & A. 1857); *Weber v. Morris & Essex R. R. Co.,* 35 N. J. L. 409 (Sup. Ct. 1872); *Hackensack Brick Co. v. Borough of Bogota,* 86 N. J. Eq. 143, 97 Atl. 725 (Ch. 1916). In spite of their sympathy for the general principle of subrogation, our courts have refused to allow the employer to be subrogated to the rights of the employees against the tort feasor causing the injury, even tho the employer's liability is purely a statutory one. *Newark Paving Co. v. Klotz,* 85 N. J. L. 432, 91 Atl. 91, *aff'd* 86 N. J. L. 690, 92 Atl. 1086 (E. & A. 1914). This inequitable situation was remedied, however, by an enactment of the legislature giving the employer the right to recover out of the award made to the employee by the tort feasor a sum equivalent to the amount of compensation payments which the employer had theretofore paid to the injured employee, P.L. 1913, pp. 302, 312. Our Supreme Court in *Weber v. Morris & Essex R. R. Co., supra,* expressed the long accepted principle that the insured and the insurer are to be regarded as one person. Yet our courts have seen fit to construe the amendment of 1913 strictly and have held that the statute applies to the employer only, and extends no relief to the insurer either by way of subrogation or reimbursement. *Hartford Accident & Indemnity Co. v. Englander,* 93 N. J. Eq. 188, 115 Atl. 533 (E. & A. 1921); *Warner-Quinlan Co. v. Byram,* 106 N. J. Eq. 82, 150 Atl. 212 (Ch. 1930). In 1931 the legislature passed an amendment to section 23(f) of the Workmen's Compensation Act providing that when an injured employee or his dependent fails within six months of the accident to take legal action against a third party responsible for the injury, or accepts a settlement for less than the compensaton obligation of the employer, the employer or his insurance carrier may proceed against such third party, P. L. 1931 P. 704. It would seem that this amendment was designed to cure the evil caused by the holdings in the previous cases, yet the cases uniformly hold, with the exception of the principal case, that an employer's insurance carrier is not entitled to reimbursement of compensation paid an injured employee from a tort feasor out of damages recovered by the employee against the tort feasor. *N. Y. S. & W. R. R. Co. v. Huebschmann,* 109 N. J. Eq. 40, 156 Atl. 330, *aff'd* 111 N. J. Eq. 547, 162 Atl. 767 (E. & A. 1932); *Erie R. R. Co. v. Michelson,* 111 N. J. Eq. 541, 162 Atl. 764 (E. & A. 1932); *Fidelity & Casualty Co. of N. Y. v. Sisters of St. Joseph of Peace,* 112 N. J. Eq. 579, 165 Atl. 430 (Ch. 1933); *Degler v. Domejka,* 112 N. J. Eq. 588, 165 Atl. 583 (Ch. 1933). It should be noted here that although these cases were decided after the enactment of the amendment of 1931, the amendment is not alluded to in any of the opinions, with the exception of the *Huebschmann* case, and then only to note that it is not pertinent for the reason that it was not

passed until after the rights of the parties had become fixed. It is quite possible that the same situation which existed in the *Huebschmann* case, existed in the other cases, although this is impossible to determine from the reports. If the converse were true, however, and the amendment was passed before the rights of the parties were fixed, then the holdings of these cases would give rise to the rather untenable situation of allowing the insurer relief if the employee did not sue within six months, but giving him no relief if the employee sued within that time. There is no valid reason, of course, for making the action of the employee determine the rights of the insurer, and the decision of the principal case eliminating this unsound measure of the rights of the insurer is to be commended as being in harmony with the great weight of authority in both this country and in England. *Aetna Life Insurance Co. v. Moses,* 287 U. S. 530 (U. S. Sup. Ct. 1933); *Moreno v. Los Angeles Trans. Co.,* 186 Pac. 800 (Cal. 1919); *Hall v. Thayer,* 113 N.E. 644 (Mass. 1916); *Traveler's Insurance Co. v. Padula Co.,* 121 N. E. 348 (N. Y. 1918); *Walters v. Eagle Ind. Co.,* 61 S. W. 2d 666 (Tenn. 1933); and cases cited in 88 A. L. R. 682, and COUCH—CYCLOPEDIA OF INSURANCE LAW SEC. 2301. As has been pointed out, none of the previous cases have given an interpretation of the 1931 amendment, and it is therefore submitted that the Vice-Chancellor, in deciding as he did, was not, (as would seem at first blush), going against the weight of authority in New Jersey, his decision being the first to deal directly with the problem involved. And with this decision New Jersey now has the sounder rule, in conformity with the better authority throughout the country, which recognizes that there is no valid reason why the doctrine of subrogation should not apply to workmen's compensation cases as well as to other forms of insurance.