

SOME DIVERGENCIES BETWEEN THE RESTATEMENT OF THE LAW OF CONTRACTS AND THE NEW JERSEY DECISIONS*

The Restatement of the Law of Contracts is a statement of the existing common law on the subject of contracts. It is the synthesis of the views of at least 49 jurisdictions each differing from the others to some extent in social, economic, and legal background.¹ To expect the amalgam to be exactly like the materials which compose it would be unreasonable. Indeed, the astonishing thing is that there are so few points of difference between the New Jersey law and the Restatement.

Some distinctions are the result of legislative action. Sections 2 and 5 of the Gaming Act² permitting recovery from the stakeholder of money deposited with him for a wager even though he has paid it to the winner before notice of repudiation by the loser³ enact a rule contrary to Section 524 of the Restatement;⁴ altho prior to the statute the rule was in accord.⁵ The Usury Act,⁶ Section 16 of the Building and Loan Act,⁷ the Small Loan Act,⁸ all create rules independent of judicial decision which differ in some details from the general principles dealing with usury.⁹ New Jersey statutes dispensing with a

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¹ The Explanatory Notes reveal that the Restators considered English as well as American decisions.

² Rev. 1877, p. 458, secs. 2 and 5; C.S. 2624.

³ Van Pelt v. Schauble, 68 N.J.L. 638, 54 Atl. 437 (1903).

⁴ "WHERE MONEY IS DEPOSITED WITH A STAKEHOLDER BY PARTIES TO A WAGER, EITHER PARTY CAN RECOVER THE MONEY DEPOSITED WITH HIM EVEN AFTER THE HAPPENING OF THE CONDITION UPON WHICH IT WAS AGREED THAT THE MONEY SHOULD BE PAID TO THE OTHER PARTY. UNDER NO CIRCUMSTANCES CAN EITHER PARTY RECOVER MORE FROM THE STAKEHOLDER; AND THE STAKEHOLDER IS DISCHARGED FROM ALL DUTY IF HE PAYS THE WINNER OF A WAGER BEFORE RECEIVING NOTICE OF REPUDIATION THEREOF BY THE LOSER."

⁵ Sutphin v. Crozer, 32 N.J.L. 462 (1865), reversing 30 N.J.L. 257 (Sup. Ct. 1863) and overruling Huncke v. Francis, 27 N.J.L. 55 (Sup. Ct. 1858); Moore v. Trippe, 20 N.J.L. 263 (Sup. Ct. 1844).

⁶ Rev. 1877, p. 519, Section 1 as amended P.L. 1878, p. 30; 4 C.S. 5704-5706.

⁷ P.L. 1925, C. 65, p. 195; 1 Sup. to C.S. 139.

⁸ P.L. 1932, C. 62, p. 94, Sec. 13.

⁹ Note preceding Section 526 of the Restatement shows that the Restators were cognizant of the state of the law. Examples of rules created by statutes

seal in certain cases where the instrument contains a recital that it has been sealed¹⁰ varies from the Restatement requirement that some substance, device or scroll be affixed to the instrument.¹¹ Similarly, the Restatement declaration¹² that consideration is not necessary to render a sealed instrument binding is varied by the statute providing that in every action upon a sealed instrument, the seal shall be only presumptive evidence of consideration.¹³ Since the Restatement purports to be merely a statement of the common law, variations such as these, while important to the attorney, cannot properly be considered divergencies from the principles formulated in it.

In comparing local common law¹⁴ with the Restatement some important considerations must be borne in mind. The first is, that the primary function of the courts is to decide controversies between litigants, and that statement of rules and

not covered by the Restatement are Section 7 of the Usury Act (P.L. 1902, p. 459) prohibiting a corporation from pleading usury; the Small Loan Act (note 8, *supra*); the Building and Loan Act (note 7, *supra*) authorizing building and loan associations to take premiums for loans from their members and to accept interest in advance for a period not exceeding one month.

¹⁰ P.L. 1898, p. 677, sec. 20; P.L. 1904, p. 205; 2 C.S. 1540; P.L. 1931, C. 12.

¹¹ Restatement, sec. 96.

¹² Restatement, sec. 110.

¹³ Rev. 1877, p. 387, sec. 66; 2 C.S. 2240. See also P.L. 1900, p. 366, sec. 15; 2 C.S. 2225. Despite dicta to the contrary [*Stoy v. Stoy*, 41 N.J.E. 370, 7 Atl. 625 (1886); *Risley v. Parker*, 50 N.J.E. 284, at p. 287, 23 Atl. 424 (Ch. 1892); *Campbell v. Tompkins*, 32 N.J.E. 170, at p. 172 (Ch. 1880), *affirmed* 33 N.J.E. 362 (1880); *U. & G. Rubber Mfg. Co. v. Conrad*, 80 N.J.L. 286, at p. 291, 78 Atl. 203 (1910)] the statutes actually effect a change in the law. *Aller v. Aller*, 40 N.J.L. 446 (Sup. Ct. 1878), the case cited for the proposition that no consideration is necessary where none is intended, concerned a transaction prior to the statute. Under well established rules of construction the court could apply the substantive effect of the statute prospectively only. It, therefore, considered it merely as a rule of evidence. See *First Presbyterian Church v. State Bank*, 57 N.J.L. 27, at p. 29, 29 Atl. 320 (Sup. Ct. 1894), *aff.*, 58 N.J.L. 406, 36 Atl. 1129 (1895). Several decisions declare that the statute effects a change in substantive law as well as procedure. *Marvel v. Jonah*, 81 N.J.E. 369, at p. 373, 86 Atl. 968 (Ch. 1913) reviewed on other ground, 83 N.J.E. 295, 90 Atl. 1004 (1914); *Sarco Co. of N. J. v. Gulliver*, 3 Misc. 641, at p. 649, 129 Atl. 399 (Ch. 1925), *aff.*, 99 N.J.E. 432, 131 Atl. 923 (1926); *Weinberg v. Weinberg*, 118 N.J.E. 97, at p. 98, 177 Atl. 844 (Ch. 1935). See also *First Presbyterian Church v. State Bank*, *supra*.

The statute does not apply when the instrument is used for a defensive purpose. *Braden v. Ward*, 42 N.J.L. 518 (Sup. Ct. 1880); *F. W. Waggoner Co. v. Charles D. Winters et al.*, 31 N.J.L.J. 90 (Bergen County Cir. Ct. 1908); see *Waln v. Waln*, 53 N.J.L. 429, 22 Atl. 203 (1891).

¹⁴ Common law here is used in the sense of the adjudicated cases plus English statutes made part of the New Jersey law by Article XXII of the Constitution of 1776.

principles of law is only a by product of that function, while the only function of the Restatement is to formulate rules and principles of law. The second is, that the Restatement is a comprehensive study of all contract law, while each decision of a court is focused primarily upon the few rules applicable to the facts before it. Indeed, anything else would be obiter dictum. To expect the courts, in the hand of ordinary mortals, to develop rounded definitions of legal terms or link rules and principles into a closely woven, consistent analytical structure would be unreasonable. Thus in most instances the courts refrain from defining terms, and in the exceptional cases do so only by the implications that may be drawn from the decisions.¹⁵ Similarly, and for good reason,¹⁶ attempts to develop well rounded statements of anything more than isolated rules are rare. An example is the field of interpretation. Despite the fact that quarrels about the meaning of contracts are one of the most prolific sources of litigation, and that numerous principles of varying importance are applicable,¹⁷ prior to the Restatement few cases revealed that the subject amounted to more than the application of rudimentary rules of thumb.¹⁸

Of most interest, however, are the comparatively few instances in which decisions of New Jersey courts diverge from the principles and rules enunciated in the Restatement. Primarily, because they indicate how much of the Restatement can be considered settled law in this state. Secondarily, because they point out the fields in which local law needs intensive study and examination in order to ascertain whether the

¹⁵ e.g. No case defines "creditor or donee beneficiary," "assignment," "assignor," assignee," "breach of contract," "interpretation." The definition of such terms as "misrepresentation" and "impossibility" is obtained only by the conclusions to be drawn from the cases. "Mistake" has been well defined. *Santamaria v. Shell Eastern Petroleum Products, Inc.*, 116 N.J.E. 26, at p. 29, 172 Atl. 339 (1934). "Duress" has received its best definition by the adoption of the Restatement definition. *Miller v. Eisele*, 111 N.J.L. 268, at 275, 168 Atl. 426 (1933).

¹⁶ The pitfalls that lie in judicial dicta have been too often stated to need repetition.

¹⁷ Restatement, Chapter IX.

¹⁸ *Clott v. Prudential Insurance Co. of America*, 114 N.J.L. 18, 175 Atl. 203 (Sup. Ct. 1934) and *Corn Exchange, etc., v. Taubel*, 113 N.J.L. 605, 175 Atl. 55 (1934), both citing the Restatement, are the first to attempt to correlate the various rules of interpretation.

intrinsic merits of the rules outweigh the advantages of uniformity with other jurisdictions.¹⁹

In addition to the statutory distinction between the Restatement and the local law concerning sealed instruments, some differences have arisen by decision. While the Restatement declares that "Delivery may be made either unconditionally or in escrow to the promisee or to any other person,"²⁰ New Jersey decisions hold delivery in escrow to the promisee of an instrument²¹ or to the grantee of a deed²² impossible.

Analytically, there seems no reason for the variation adopted by the New Jersey courts. They are agreed that change of possession of the instrument without intent to create a binding obligation does not impose liability upon the obligor.²³ They also are agreed that there may be delivery in escrow to a co-obligor,²⁴ or to the agent of the promisee.²⁵ They go so far as to hold that a co-obligor may be made a special agent for the purpose of delivery and that the obligee receiving the instrument takes the risk of a breach of authority on the co-obligor's part.²⁶ The result is that delivery of a sealed instrument to the promisee therein with the words "I do not intend to be bound; hold this for me," creates no obligation,²⁷ while tradition of the same instrument to the promisee with the words "Hold this for me until tomorrow, at which date I will consider myself bound," creates an immediate obligation.²⁸

¹⁹ The same argument is the basis of many decisions under the uniform acts.

²⁰ Section 102.

²¹ *Elwood v. Smith*, 104 N.J.L. 248, 139 Atl. 900 (Sup. Ct. 1928), *aff.* 105 N.J.L. 236, 143 Atl. 916 (1928); *Ordinary v. Thatcher*, 41 N.J.L. 403 (Sup. Ct. 1879).

²² *Totten v. National Ben Franklin Fire Insurance Co.*, 110 N.J.E. 354, 160 Atl. 572 (Ch. 1932); see *Lake v. Weaver*, 76 N.J.E. 280, 74 Atl. 451 (1909).

²³ *Cannon v. Cannon*, 26 N.J.E. 316 (Ch. 1875); *Schlicher v. Keeler*, 67 N.J.E. 635, 61 Atl. 434 (1905); *Rennebaum v. Rennebaum*, 78 N.J.E. 427, 79 Atl. 309 (Ch. 1911), *aff.* 79 N.J.E. 654, 83 Atl. 1118 (1912); *Folly v. Vantuyt*, 9 N.J.L. 153 (Sup. Ct. 1827); *Brown v. Brown*, 33 N.J.E. 650 (1881); *Walkowitz v. Walkowitz*, 95 N.J.E. 249, 122 Atl. 835 (1923).

²⁴ *State Bank v. Evans*, 15 N.J.L. 155 (Sup. Ct. 1835), repudiating *State Bank at Elizabeth v. Chetwood*, 8 N.J.L. 1 (Sup. Ct. 1824).

²⁵ *Bowman v. Brown*, 87 N.J.E. 47, 99 Atl. 839 (Ch. 1917), *aff.* 87 N.J.E. 363, 100 Atl. 1070 (1917); see *Kelly v. Chinich*, 91 N.J.E. 97, 108 Atl. 372 (1919).

²⁶ *The Real Estate-Land, etc., Co. v. Stout*, 117 N.J.E. 37, 175 Atl. 128 (1934).

²⁷ See *Rennebaum v. Rennebaum*, cited note 23, *supra*.

²⁸ See notes 21 and 22, *supra*.

From a practical standpoint, also, the rule seems unwise. There is no danger of falsification inherent in a delivery to the obligee in escrow, which is not present in a tradition to the obligee without intent to create a binding obligation. The only effect of the rule is to nullify the intent of parties in a transaction into which the normal person is likely to enter and which would seem a means of expediting business transactions.

A further but perhaps minor problem in the field of delivery of sealed instruments is presented by Section 102 of the Restatement.²⁹ While the New Jersey decisions are in accord in holding that delivery occurs where the promisor puts the instrument out of his possession with apparent intent to create a present contract,³⁰ *Folly v. Vantuy*³¹ presents the question whether delivery may not take place in New Jersey without a change of possession. There the promisor executed a bond and held it out to the promisee with the words "Here is your bond; what shall I do with it?" The obligee asked him to hold it for her. Held a binding obligation had been created.³² In a sense the problem is not covered by the Restatement since it does not define possession. If possession be defined as legal control³³ there is no conflict with the Restatement. If it be defined as actual physical holding,³⁴ there may be a conflict. From the standpoint of common sense, the New Jersey decision seems right in any event. As a practical matter, the obligee had control. To require her to take the instrument in her hands and to return it to the obligor would merely add a formality without effecting a factual change.

Section 136 (1, a) of the Restatement,³⁵ stating the rule

²⁹ "A PROMISE UNDER SEAL IS DELIVERED UNCONDITIONALLY WHEN THE PROMISOR PUTS IT OUT OF HIS POSSESSION WITH THE APPARENT INTENT TO CREATE IMMEDIATELY A CONTRACT UNDER SEAL, UNLESS THE PROMISEE THEN KNOWS THAT THE PROMISOR HAS NOT SUCH ACTUAL INTENT."

³⁰ *Rowley v. Bowyer*, 75 N.J.Eq. 80, 71 Atl. 398 (Ch. 1908); *Dooley v. Kushin*, 105 N.J.L. 595, 146 Atl. 208 (1929).

³¹ 9 N.J.L. 153 (Sup. Ct. 1827).

³² See in accord *Cannon v. Cannon*, 26 N.J.Eq. 316, at p. 319 (Ch. 1875); *Den ex dem Farlee v. Farlee*, 21 N.J.L. 279, at p. 285 (Sup. Ct. 1848).

³³ 49 C.J., Section 2, p. 1093.

³⁴ See *Connecticut Mutual Life Insurance Co. v. Fields*, 86 N.J.Eq. 393, 98 Atl. 643 (Ch. 1916).

³⁵ "A PROMISE TO DISCHARGE THE PROMISEE'S DUTY CREATES A DUTY OF THE PROMISOR TO THE CREDITOR BENEFICIARY TO PERFORM THE PROMISE; * * *

permitting a third party creditor beneficiary to recover, raises another problem. While, in general, this Section represents the unquestioned law of this State,⁸⁶ in the application of the rule to a grantee's assumption of a mortgage on the premises conveyed, there seems to be a divergence from the Restatement. Illustration 2³⁷ of Section 136 shows that such an assumption is considered to create a direct right in the mortgagee against the grantee. New Jersey decisions take the view that such a promise merely gives the mortgagee the right in equity to follow the grantor's right against the grantee.³⁸ In *Crowell vs. Currier*³⁹ the court said,

"The right of a mortgagee to hold the purchaser of an equity of redemption for deficiency, who assumed the payment of his mortgage by covenant to the mortgagor, does not rest upon the theory of a contract between the purchaser and mortgagee upon which an action at law may be maintained, but stands exclusively, according to an almost unbroken line of adjudications on the ground that the covenant of the purchaser is a collateral security obtained

⁸⁶ P.L. 1903, p. 531, 3 C.S. 4059, Section 28; *Joslin v. New Jersey Car Spring Co.*, 36 N.J.L. 141 (Sup. Ct. 1873); *Economy Building and Loan Ass'n. v. West Jersey Title Co.*, 64 N.J.L. 27, 44 Atl. 854 (Sup. Ct. 1899); *Collier v. De Brigard*, 80 N.J.L. 94, 77 Atl. 513 (Sup. Ct. 1910); *Chambers v. Philadelphia Pickling Co.*, 79 N.J.L. 1, 75 Atl. 159 (Sup. Ct. 1910; *aff.* 83 N.J.L. 543, 83 Atl. 890 (1912); *Mendel v. Women's Christian Temperance Union*, 1 Misc. 605 (Sup. Ct. 1923); *Lister v. Vogel*, 110 N.J.Eq. 35, 158 Atl. 534 (1932); *Yellow Cab v. Bankers Indemnity Co.*, 110 N.J.L. 546, 166 Atl. 186 (1933).

³⁷ "A TRANSFERS BLACKMERE TO B SUBJECT TO A MORTGAGE IN FAVOR OF C, WHICH B ASSUMES AND CONTRACTS TO PAY. AFTER DEFAULT C MAY SUE B AND GET JUDGMENT FOR THE AMOUNT OF THE MORTGAGE IF THE MORTGAGED PROPERTY HAS BEEN SOLD ON FORECLOSURE, FOR THE AMOUNT OF ANY DEFICIENCY IN THE SUM REALIZED BY THE SALE. A ALSO MAY SUE B, AS IN ILLUSTRATION I."

³⁸ *Klapworth v. Dressler*, 13 N.J.Eq. 62 (Ch. 1860); *Crowell v. Currier*, 27 N.J.Eq. 152, at p. 154 (Ch. 1876); *aff. sub. norm.* *Crowell v. Hospital of Saint Barnabas*, 27 N.J.Eq. 650 (1876); *Wise v. Fuller*, 29 N.J.Eq. 257 (Ch. 1878); *Norwood v. DeHart*, 30 N.J.Eq. 412 (Ch. 1879); *Eakin v. Shultz*, 61 N.J.Eq. 156, 47 Atl. 274 (Ch. 1900); *Klemmer v. Kerns*, 71 N.J.Eq. 297, 71 Atl. 332 (1906); *Feitlinger v. Heller*, 112 N.J.Eq. 209, 164 Atl. 6 (1933); *Fisk v. Wuensch*, 115 N.J.Eq. 391, 171 Atl. 174 (Ch. 1934); *Garfinkel v. Vinik*, 115 N.J.Eq. 42, 169 Atl. 527 (Ch. 1933); *Jerome C. Eisenberg and Israel Spicer: Mortgage Deficiencies in New Jersey*, 3 MERCER BEASLEY LAW REVIEW 27, at p. 47.

³⁹ At p. 514, cited note 38, *supra*.

by the mortgagor, which, by equitable subrogation, inures to the benefit of the mortgagee."

Although there is no decision at law denying the mortgagee the right to recover from the grantee,⁴⁰ analysis of the cases supports this statement. If anywhere in the chain of title between the mortgagor and the assuming grantee a holder of the title is not bound personally to pay the mortgage, the assuming grantee is not liable.⁴¹ Were the contract a third party beneficiary one that factor would be of little moment. The argument that the adequacy of the remedy at law might be a basis for denial of relief,⁴² is discounted by the fact that relief is given in equity.⁴³ If the contract were actually for the benefit of the mortgagee the remedy at law would be at least as good as that in equity. Moreover, release by grantor of the grantee prior to the institution of suit bars the right of the mortgagee,⁴⁴ while such release would be ineffectual against the mortgagee, if the contract were made for his benefit, after he had changed his position in reliance thereon.⁴⁵

The fundamental question involved is interpretation of the assumption promise. The meaning of the ordinary assumption clause has been fixed by the courts. There is, however, no reason to believe that if the parties manifest an intent to make the mortgagee the beneficiary of the promise sufficiently clear, that he will be unable to maintain an action at law on the third party beneficiary theory.⁴⁶

⁴⁰ The only decisions are *Sparkman v. Gove*, 44 N.J.L. 252 (Sup. Ct. 1882) and *Algrod Realty Co. v. Bayer*, 10 Misc. 651, 160 Atl. 504 (Sup. Ct. 1932), in which suits were brought by grantors against grantees.

⁴¹ *Norwood v. DeHart*; *Eakin v. Shultz*; *Garfinkel v. Vinik*, cited in note 38, *supra*.

⁴² See comment of V. C. Backes in *Feitlinger v. Heller*, at p. 210, cited in note 38, *supra*.

⁴³ *Fisk v. Weunsch*, cited in note 38, *supra*.

⁴⁴ *Crowell v. Hospital of Saint Barnabas*, cited in note 38, *supra*; see *Fisk v. Weunsch*, at p. 395, cited in note 38, *supra*. Such a release will be set aside when it is a fraud on creditors. *Field v. Thistle*, 58 N.J.Eq. 339, 43 Atl. 1072 (Ch. 1899), *aff.* 60 N.J.Eq. 444, 46 Atl. 1099 (E. & A. 1900).

⁴⁵ *Am. Malleables Co. v. Bloomfield*, 83 N.J.L. 728, 85 Atl. 167 (1912); see *Bennett v. Merchantville B & L Ass'n*, 44 N.J.Eq. 116, 13 Atl. 852 (Ch. 1888); *Restatement*, Section 143 (a).

⁴⁶ *Knapp v. Heidritter Lumber Co.*, 99 N.J.Eq. 381, at p. 481, 131 Atl. 909 (1926); *Cockran v. Public Service Electric Co.*, 97 N.J.L. 480, at p. 481, 117 Atl. 620 (1922).

Comparison of the Restatement chapter on assignments with local decisions reveals the existence of several important variations. Section 156 of the Restatement⁴⁷ states that a partial assignment is enforceable, even where the obligor did not agree to make partial payments, where "all persons having collectively a right to the entire performance are joined in the proceeding". In contradiction to this rule, the New Jersey courts make the flat statement that partial assignments are not enforceable at law,⁴⁸ but that relief may be had in equity.⁴⁹ If the courts mean what they say, their position is unsound. The only reasonable grounds upon which a partial assignee may be denied recovery are set forth in *Superintendent and Trustees of Public Schools in Trenton vs. Heath*:⁵⁰

"The reason of the principle is plain—a creditor shall not be permitted to split up a single cause of action into many actions without the assent of the debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments by which it may be broken into fragments. When he undertakes to pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to in fractions to any other persons."

⁴⁷ "AN ASSIGNMENT OF EITHER A FRACTIONAL PART OF A SINGLE AND ENTIRE RIGHT AGAINST AN OBLIGOR, OR OF A STATED AMOUNT FROM SUCH A RIGHT, IS OPERATIVE AS TO THAT PART OR AMOUNT TO THE SAME EXTENT AND IN THE SAME MANNER AS IF THE PART HAD BEEN A SEPARATE RIGHT, SUBJECT TO THE LIMITATION THAT IF THE OBLIGOR HAS NOT CONTRACTED TO MAKE SUCH A PARTIAL PERFORMANCE NO LEGAL PROCEEDING CAN BE MAINTAINED BY SUCH AN ASSIGNEE AGAINST THE OBLIGOR OVER HIS OBJECTION, UNLESS ALL PERSONS HAVING COLLECTIVELY A RIGHT TO THE ENTIRE PERFORMANCE ARE JOINED IN THE PROCEEDING."

⁴⁸ *Van Schoick v. Van Schoick*, 76 N.J.L. 242, 69 Atl. 1080 (Sup. Ct. 1908); *Sternberg v. Lehigh Valley R.R. Co.*, 78 N.J.L. 277, 73 Atl. 39 (Sup. Ct. 1909); *aff.* 80 N.J.L. 468, 78 Atl. 1135 (1910); *Glaser v. Columbia Laboratories, Inc.*, 11 Misc. 707, 167 Atl. 211 (Sup. Ct. 1933), *aff.* 112 N.J.L. 91, 169 Atl. 693 (1934).

⁴⁹ *Lanigan's Adm'r. v. Bradley and Currier Co.*, 50 N.J.Eq. 201, 24 Atl. 505 (Ch. 1892); see *Glaser v. Columbia Laboratories, Inc.*, cited in note 48, *supra*; *Todd v. Meding*, 56 N.J.Eq. 83, 38 Atl. 349 (Ch. 1897), *rev.* 56 N.J.Eq. 820, 41 Atl. 222 (1898).

⁵⁰ 15 N.J.Eq. 22, at p. 28 (Ch. 1862); WILLISTON ON CONTRACTS, Section 442, p. 843.

Where the obligor himself interpleads all parties claiming rights after a partial assignment there is no hesitancy about deciding the rights of all parties because he has consented to splitting the cause of action.⁵¹ Similarly, in equity, where all interested parties may be joined, all the rights in the fund may be adjudicated in a single action and the difficulties enumerated in the *Heath* case avoided.⁵² However, since the Practice Act of 1912⁵³ providing " * * * any person may be made a defendant * * * whom it is necessary to make a party for the complete determination or settlement of any question involved therein," the same facilities are available at law. In none of the cases cited above denying enforcement of a partial assignment at law, was the assignor joined. Thus, on their facts, the decisions are plainly right and consistent with the Restatement. However, the statement in *Glaser vs. Columbia Laboratories, Inc.*,⁵⁴ that partial assignments are enforceable in equity only is inconsistent, under the Practice Act, both with the Restatement and the reasoning in the earlier New Jersey cases.

The question of priorities between successive assignees of the same right is dealt with under Section 173.⁵⁵ The rule enun-

⁵¹ Superintendent and Trustees of Public Schools in Trenton v. Heath, cited in note 50, *supra*; Lanigan v. Bradley and Currier Co., 50 N.J.Eq. 201, 24 Atl. 505 (Ch. 1892).

⁵² See Otis v. Adams, 56 N.J.L. 38, 27 Atl. 1092 (Sup. Ct. 1893).

⁵³ P.L. 1912, p. 378, Section 6, 1. Rule 18 of Supreme Court Rules, 1929, permits the assignee to join with the assignor having the remaining interest as parties plaintiff.

⁵⁴ At p. 708, cited in note 48, *supra*.

⁵⁵ "WHERE THE OBLIGEE OR AN ASSIGNEE MAKES TWO OR MORE SUCCESSIVE ASSIGNMENTS OF THE SAME RIGHT, EACH OF WHICH WOULD HAVE BEEN EFFECTIVE IF IT WERE THE ONLY ASSIGNMENT, THE RESPECTIVE RIGHTS OF THE SEVERAL ASSIGNEES ARE DETERMINED BY THE FOLLOWING RULES:

(A) A SUBSEQUENT ASSIGNEE ACQUIRES A RIGHT AGAINST THE OBLIGOR TO THE EXCLUSION OF A PRIOR ASSIGNEE IF THE PRIOR ASSIGNMENT IS REVOCABLE OR VOIDABLE BY THE ASSIGNOR;

(B) ANY ASSIGNEE WHO PURCHASES HIS ASSIGNMENT FOR VALUE IN GOOD FAITH WITHOUT NOTICE OF A PRIOR ASSIGNMENT, AND WHO OBTAINS

(I) PAYMENT OR SATISFACTION OF THE OBLIGORS DUTY, OR

(II) JUDGMENT AGAINST THE OBLIGOR, OR

(III) A NEW CONTRACT WITH THE OBLIGOR BY MEANS OF A NOVATION, OR

(IV) DELIVERY OF A TANGIBLE TOKEN OR WRITING, SURRENDER OF WHICH IS REQUIRED BY THE OBLIGORS CONTRACT FOR ITS ENFORCEMENT,

CAN RETAIN ANY PERFORMANCE SO RECEIVED AND CAN ENFORCE ANY JUDGMENT OR NOVATION SO ACQUIRED, AND, IF HE HAS OBTAINED A TOKEN OR WRITING AS STATED IN SUB-CLAUSE (IV), CAN ENFORCE AGAINST THE OBLIGOR THE ASSIGNED RIGHT;

ciated there is that the prior assignee for valuable consideration prevails unless the subsequent assignee first obtains a legal right for a valuable consideration without notice. In *Jenkinson v. New York Finance Co.*,⁵⁶ the English rule was adopted and the subsequent assignee who gave notice first was preferred, although he complied with none of the requisites enumerated in the section under discussion. Moreover, in *Emley v. Perrine*,⁵⁷ the subsequent assignee who obtained delivery of a non-negotiable note was held to have a right inferior to a prior assignee for the benefit of creditors. Subsequent decisions have attempted to depart from the *Jenkinson* ruling. In *The Board of Education of Elizabeth v. Zinc*,⁵⁸ the soundness of the decision was questioned and a ruling on the point evaded by holding that the subsequent assignee was not a bona fide purchaser for value and therefore not entitled to protection under even the English rule. In *Morristown Trust Co. v. Buzby*,⁵⁹ Vice Chancellor Leaming criticized the *Jenkinson* case adversely and, citing the section of the Restatement under consideration, approved it. However, there as in the *Zinc* case, the subsequent assignee was not a purchaser without notice. Thus both the *Zinc* and *Buzby* cases are consistent with the English as well as the Restatement view, while the *Jenkinson* case is a flat ruling in favor of the English rule and against the Restatement rule.

Emley v. Perrine at first seems inconsistent with both views, since under either, the assignee first obtaining a legal right should prevail.⁶⁰ However, the court there relies upon a statute vesting all property of the assignor in the assignee for benefit of creditors. The case is therefore distinguishable from the usual assignment situation.

Chapter 8 of the Restatement, entitled the Statute of Frauds, reveals other differences from the New Jersey law. Of most importance is that concerning the doctrine of part per-

(C) EXCEPT AS STATED IN CLAUSES (A) AND (B), A PRIOR ASSIGNEE IS ENTITLED TO THE EXCLUSION OF A SUBSEQUENT ASSIGNEE TO THE ASSIGNED RIGHT AND ITS PROCEEDS."

⁵⁶ 79 N.J.Eq. 247, 82 Atl. 36 (Ch. 1911).

⁵⁷ 58 N.J.L. 472, 33 Atl. 951 (Sup. Ct. 1896).

⁵⁸ 101 N.J.Eq. 78, 137 Atl. 713 (Ch. 1927).

⁵⁹ 109 N.J.Eq. 409, 157 Atl. 663 (Ch. 1931).

⁶⁰ WILLISTON ON CONTRACTS, Section 435, p. 827.

formance. The Restatement⁶¹ sets forth two kinds of actions which will remove an oral contract from the bar of the statute:⁶² first, the making of valuable improvements on the land; second, taking possession of the land plus the payment of part of the purchase price. No decision has been found in which valuable improvements were made without taking possession, but it is clear that they are an important factor in removing the bar of the statute.⁶³ That performance of the second renders a memorandum unnecessary is clear.⁶⁴ There is, however, ample authority that a memorandum will be dispensed with even where neither of these types of action has taken place. In *Van Dyne v. Vreeland*,⁶⁵ defendant agreed with complainant's father to bequeath complainant his property if the father gave complainant to him as a son. Complainant for many years had acted as defendant's son, cultivated defendant's land and performed miscellaneous other services for defendant. Defendant then conveyed away his property in order to prevent complainant from inheriting it. The conveyance was set aside as a fraud upon complainant's rights. Here there was no delivery of possession to complainant, since complainant lived on defendant's land together with defendant, defendant being in complete control. Nor was there anything which could be properly characterized as the making of improvements. Obviously, complainant had done no more than pay part of the purchase price.

The *Van Dyne* decision is the basis of a well developed line

⁶¹ "SECTION 197. WHERE, ACTING UNDER AN ORAL CONTRACT FOR THE TRANSFER OF AN INTEREST IN LAND, THE PURCHASER WITH THE ASSENT OF THE VENDOR
 (A) MAKES VALUABLE IMPROVEMENTS ON THE LAND, OR
 (B) TAKES POSSESSION THEREOF OR RETAINS A POSSESSION THEREOF EXISTING AT THE TIME OF THE BARGAIN, AND ALSO PAYS A PORTION OR ALL OF THE PURCHASE PRICE,
 THE PURCHASER OR THE VENDOR MAY SPECIFICALLY ENFORCE THE CONTRACT."

⁶² The New Jersey statute is found in Rev. 1877, p. 445; 2 C.S. 2612, Section 5.

⁶³ *Gilbert v. Trustees of East Newark Co.*, 12 N.J.Eq. 180 (Ch. 1858); *Wharton v. Stoutenburgh*, 35 N.J.Eq. 266 (1882); *Fee v. Sharkey*, 59 N.J.Eq. 284, 44 Atl. 673 (Ch. 1900), *aff.* 60 N.J.Eq. 446, Atl. 1091 (1900); *Brown v. Pinniger*, 81 N.J.Eq. 229, 86 Atl. 541 (Ch. 1913).

⁶⁴ *Ashmore v. Evans*, 11 N.J.Eq. 151 (Ch. 1856); *Collins v. Leary*, 77 N.J.Eq. 529, 77 Atl. 518 (1910); *Krah v. Wassmer*, 75 N.J.Eq. 109, 71 Atl. 404 (Ch. 1908), *aff. sub. nom.* *Krah v. Radcliffe*, 78 N.J.Eq. 305, 81 Atl. 113 (1911).

⁶⁵ 11 N.J.Eq. 370 (Ch. 1857), on final hearing, *Van Dyne v. Vreeland*, 12 N.J.Eq. 142 (Ch. 1858).

of authority.⁶⁶ Since it is commonplace that mere payment of the purchase price will not remove the bar of the statute,⁶⁷ it is important to examine the limits of the exception. The key is probably to be found in a comparison with *Cooper v. Colson*⁶⁸ and *Johnson v. Wehrle*.⁶⁹ In both cases there was an oral agreement to devise land to complainants if complainants lived on the land and performed services for the obligor. In both cases, relief was denied on the ground that the remedy at law was adequate. In the *Cooper* case the *Van Dyne* decision was distinguished on the ground that there the services could not be properly valued at law. The distinction between the line of decisions is intangible but real. In that represented by the *Van Dyne* case the complainant was asked to devote his life to the promisor's service, assume a personal relationship with him and give up thoughts of another career. In the *Cooper* and *Johnson* cases all complainant was required to do, and did, was render services. The hardship upon complainant if he is denied relief in the *Van Dyne* situation is manifestly much greater than in the other situation.

In other decisions, also, the courts have indicated that sympathy for the complainant might move them to dispense with a memorandum where the remedy at law is inadequate. In *Barbour v. Barbour*⁷⁰ a husband orally promised his wife a house if she discontinued her petition for divorce. After she had done so, the statute was considered no bar in her suit for the house. On appeal a reversal was based on the theory that no contract had been proved.⁷¹ In *Johnson v. Hubbel*⁷² a father

⁶⁶ *Davidson v. Davidson*, 13 N.J.Eq. 246 (Ch. 1861); *Schutt v. Missionary Soc.*, 41 N.J.Eq. 115, 3 Atl. 398 (Ch. 1886); *Vreeland v. Vreeland*, 53 N.J.Eq. 387, 32 Atl. 3 (Ch. 1895); *Danenhauer v. Danenhauer*, 105 N.J.Eq. 449, 148 Atl. 390 (Ch. 1930), *aff.* 107 N.J.Eq. 597, 153 Atl. 906 (1931).

⁶⁷ *Cole v. Potts*, 10 N.J.Eq. 67 (Ch. 1854); *Campbell v. Campbell*, 11 N.J.Eq. 268 (Ch. 1856); *Partridge v. Cummings*, 99 N.J.Eq. 14, 131 Atl. 683 (Ch. 1926); *Johnson v. Wehrle*, 9 Misc. 939, 156 Atl. 229 (Ch. 1931); *Richmond v. Richmond*, 117 N.J.Eq. 226, 175 Atl. 179 (Ch. 1934). But see *dictum contra* *Rutherford National Bank v. H. R. Boyle & Co.*, 114 N.J.Eq. 571, at p. 576 (Ch. 1933).

⁶⁸ 66 N.J.Eq. 328, 50 Atl. 337 (1904).

⁶⁹ Cited in note 67, *supra*.

⁷⁰ 49 N.J.Eq. 429, 24 Atl. 227 (Ch. 1892).

⁷¹ 51 N.J.Eq. 267, 29 Atl. 148 (1893).

⁷² 10 N.J.Eq. 332 (Ch. 1855).

orally promised his son half his estate if he made certain conveyances to his sister. The court considered the making of the conveyance sufficient to remove the case from the operation of the statute, but denied specific performance as a matter of discretion.

While *Johnson v. Hubbel* and *Barbour v. Barbour* may be discounted as dicta, the exception established by the *Van Dyne* case is too well grounded in our local law to be doubted. Evaluation of its merit is almost pointless. The social interest in stability and certainty of real estate transactions which might originally have militated against extending the number of instances in which the statute of frauds does not apply, equally militates against deviation from an established rule.

The second important difference between the Restatement and the New Jersey decisions under the heading "Statute of Frauds" deals with the definition of a contract for work and materials as distinguished from one for the sale of goods. Section 199 of the Restatement⁷³ sets up two requisites for a contract for work and services: first that the goods be manufactured by the seller especially for the buyer; second, that the goods be unsaleable, when manufactured, in the ordinary course of the seller's business. Although the language of the Restatement is taken verbatim from the Sales Act,⁷⁴ the test still applied is that set forth in *Finney v. Apgar*:⁷⁵

⁷³ "A CONTRACT TO SELL OR TO BUY, 1, GOODS OR 2, INTERESTS IN INTANGIBLES NOT INCLUDED WITHIN CLASS IV OF SECTION 178, WHETHER OR NOT THE RIGHT TO SUCH INTERESTS IS EVIDENCED BY WRITING OR TOKEN, IS WITHIN CLASS VI, AND IS NOT ENFORCEABLE IF THE GOODS OR INTERESTS ARE OF A VALUE EQUAL TO OR EXCEEDING AN AMOUNT FIXED IN THE LOCAL STATUTE OF EACH STATE, UNLESS

- (A) THE BUYER ACCEPTS ALL OR PART OF THE GOODS OR OF SOME TANGIBLE EVIDENCE OF THE INTANGIBLE INTERESTS AND ACTUALLY RECEIVES THE SAME, OR
- (B) THE BUYER GIVES SOMETHING IN EARNEST TO BIND THE BARGAIN, OR IN PART OR ENTIRE PAYMENT OF THE PRICE, OR
- (C) A MEMORANDUM IN WRITING OF THE CONTRACT IS SIGNED BY THE PARTY TO BE CHARGED OR HIS AGENT IN THAT BEHALF;

EXCEPT THAT WHERE GOODS ARE TO BE MANUFACTURED BY THE SELLER ESPECIALLY FOR THE BUYER, AND ARE NOT SUITABLE FOR SALE TO OTHERS IN THE ORDINARY COURSE OF THE SELLER'S BUSINESS, THERE IS NO SUCH REQUIREMENT."

⁷⁴ P.L. 1907, p. 312, Section 4; 4 C.S. 4648. In *Eigen v. Rosolin*, 85 N.J.L. 515, 89 Atl. 923 (Sup. Ct. 1914) this provision was held to supersede the statute of frauds provision relating to the sale of goods.

⁷⁵ 31 N.J.L. 266, at p. 270 (Sup. Ct. 1865).

"That where a contract is made for an article not existing at the time in *solido*—to use an expression of the older cases—and when such an article is to be made according to order and as a thing distinguished from the general business of the maker, then such contract is, in substance and effect, not for a sale, but for work and materials."⁷⁶

In *Bauer v. Victory Catering Company*⁷⁷ plaintiff sold defendant silverware which it manufactured for defendant and stamped with defendant's crest. In order to resell the silverware plaintiff was forced, at considerable expense to have the crest removed. A judgment for plaintiff was reversed on appeal on the ground that there was no written memorandum of the contract. In ruling on the argument that the contract was one for the sale of work and materials, the court applied the test of *Finney v. Apgar, supra*, and found that the goods could be manufactured in the ordinary course of plaintiff's business. The Sales Act was not cited. It would seem that since the goods could not be resold in the ordinary course of business there would have been a different result had it been applied.⁷⁸ Thus in this instance conformity to the Restatement is compliance with the New Jersey statute.

In the rules concerning "bargains tending to obstruct the administration of justice,"⁷⁹ there is considerable difference between the Restatement and the local law. The most important is that the Restatement retains the law of champerty and maintenance,⁸⁰ while in New Jersey it has long been discarded.⁸¹ Instead, the courts control contracts made by attorneys for fees

⁷⁶ *Accord* Pawelski v. Hargreaves, 47 N.J.L. 334 (1885); see Roubicek and Zobel v. Haddad, 67 N.J.L. 522, 51 Atl. 938 (Sup. Ct. 1902).

⁷⁷ 101 N.J.L. 364, 128 Atl. 282 (1925). Cf. Roubicek v. Zobel, cited in note 76, *supra*.

⁷⁸ 1 WILLISTON ON SALES (2d Ed.) Section 55 a, at p. 93; Davis et al v. Blanchard, 138 N.Y.S. 202 (Sup. Ct. Appellate Term, 1912); Schneider v. Lezinsky, 162 N.Y.S. 769 (Sup. Ct. Appellate Term, 1917); Roth Shoe Co. v. Zager and Blessing, 195 Iowa 1238, 193 N.W. 546 (Sup. Ct. Iowa, 1923).

⁷⁹ Restatement, Chapter 18, Topic 6.

⁸⁰ See Sections 540-546 of Restatement.

⁸¹ Schomp v. Schenck, 40 N.J.L. 195 (Sup. Ct. 1878); Hassel v. Van Houten, 39 N.J.Eq. 105 (Ch. 1884); Bouvier v. Baltimore and N. Y. R. Co., 67 N.J.L. 281, 51 Atl. 781 (1902); Bigelow v. Old Dominion Copper, etc. Co., 74 N.J.Eq. 457, 71 Atl. 153 (Ch. 1908); Casner v. Hartshorne, 13 Misc. 295, 177 Atl. 890 (Sup. Ct. 1935).

by exercise of their power to control their officers.⁸² It would seem that the New Jersey method of control of the attorney client relationship is better. It substitutes a discretionary regulation for regulation by an inflexible rule, permitting the lawyer to adapt himself to the financial necessities of the individual client, while checking unconscionable bargains without regard to whether they would have been legal under the law of champerty and maintenance.

Section 546 of the Restatement⁸³ states that an agreement for the procuring of claims for litigation is illegal, but that such an agreement does not invalidate the agreement for compensation between the owner of the claim and the person who paid for its procurement. P.L. 1928, c. 94, p. 201, as amended P.L. 1930, c. 85, p. 942⁸⁴ rendering it a crime to solicit negligence actions for pecuniary gain, covers a portion of this Section. The authority on the remainder is meager. However, in *Ready v. National State Bank of Newark*,⁸⁵ holding illegal an agreement by an attorney to pay a layman 50% of his fee in return for the layman's services in referring a case to him, the Essex County Circuit Court seems to have laid down a broader rule than that set forth in the Restatement. The prohibition in the Restatement is directed against the business of soliciting claims; that applied in the *Ready* case covers a single, isolated solicitation. *Peraino v. De Mayo*⁸⁶ reveals a further conflict with this Section. There, the court refused to enforce an attorney's lien on a claim which had been obtained by "ambulance chasing" in violation of the statute set forth above. Since the suit did not involve the "chaser," the statute was not appli-

⁸² See *Johnston v. Reilly*, 68 N.J.Eq. 130, 59 Atl. 1044 (Ch. 1905); *Soper v. Bilder*, 87 N.J.Eq. 564, 100 Atl. 858 (Ch. 1917); *Grimm v. Franklin*, 102 N.J.Eq. 198, 140 Atl. (Ch. 1928), *aff.*, 146 Atl. 914 (1929).

⁸³ "AN AGREEMENT TO PAY FOR THE PROCURING OF CLAIMS FOR LITIGATION OR OF MATTERS FOR LEGAL ADVICE OR ADJUSTMENT, IS ILLEGAL; BUT A BARGAIN FOR COMPENSATION MADE BETWEEN THE OWNER OF A CLAIM THUS PROCURED AND THE PERSON WHO HAS AGREED TO PAY FOR ITS PROCUREMENT, IS NOT THEREBY INVALIDATED."

⁸⁴ *Sup.* to C.S., p. 457.

⁸⁵ 13 Misc. 517, 179 Atl. 639 (Essex County Circuit Ct. 1935).

⁸⁶ 13 Misc. 233, 177 Atl. 692 (Bergen County Court of Com. Pleas, 1935).

cable.⁸⁷ The basis of decision must have been the court's power to control the attorney as an officer of the court.⁸⁸

Weehawken Realty Co. v. Hass,⁸⁹ created another conflict. Section 563 of the Restatement⁹⁰ states that the fact that a fee for obtaining official action is contingent is not conclusive evidence that improper means are to be used in obtaining the desired results. In the *Hass* case defendant agreed to pay plaintiff a fee if he secured a reduction in defendant's tax assessment. The contract was held illegal, without inquiry into whether improper methods were used. The question was raised *de novo*.⁹¹ Query; the soundness of the rule in the light of the fact that such arrangements have been sanctioned by long usage?

In the rather uncertain field of relief against mutual mistake of fact a difference between the Restatement and the local law exists. Section 508 of the Restatement⁹² enunciates the principle that negligence does not bar rescission or reformation for mutual mistake. In the case of *Berryman v. Graham*⁹³ the Court of Errors and Appeals reversed an opinion denying relief for mutual mistake on the ground that complainant could, by exercising proper diligence, have ascertained the true facts.⁹⁴

⁸⁷ *Evans v. City of Trenton*, 24 N.J.L. 764 (1853); *Todd v. Pennington*, 47 N.J.Eq. 569, 21 Atl. 297 (1890); *Wentink v. Freeholders of Passaic*, 66 N.J.L. 65, 48 Atl. 609 (Sup. Ct. 1901); Restatement, Section 597. Cf. *Illingworth v. Bloemecke*, 67 N.J.Eq. 483, 58 Atl. 566 (Ch. 1904); *Watson v. Murray*, 23 N.J.Eq. 257 (Ch. 1872); *Ekert v. West Orange*, 90 N.J.L. 545, 101 Atl. 269 (1917).

⁸⁸ See note 82, *supra*.

⁸⁹ 13 Misc. 231, 177 Atl. 434 (Sup. Ct. 1935).

⁹⁰ "THE FACT THAT THE COMPENSATION FIXED IN A BARGAIN FOR EFFORTS TO SECURE LEGISLATION OR OFFICIAL ACTION IS CONTINGENT ON SUCCESS IS NOT CONCLUSIVE EVIDENCE THAT IMPROPER MEANS ARE CONTEMPLATED IN SECURING THE DESIRED RESULTS."

⁹¹ In *Edmunds v. Bullett*, 59 N.J.L. 312, 36 Atl. 774 (Sup. Ct. 1896) an attorney agreed to forbear collection of part of his fee until his client obtained a tax reduction. The forbearance was a gratuity which could have no effect on the original contract.

⁹² "THE NEGLIGENT FAILURE OF A PARTY TO KNOW OR TO DISCOVER THE FACTS, AS TO WHICH BOTH PARTIES ARE UNDER A MISTAKE DOES NOT PRECLUDE RESCISSION OR REFORMATION ON ACCOUNT THEREOF."

⁹³ Opinion in 21 N.J.Eq. 370 (E. & A. 1869); Memorandum of opinion in 19 N.J.Eq. 574.

⁹⁴ 19 N.J.Eq. 29, at p. 35 (Ch. 1868). It is important to note in considering the future influence of the highest court's decision that the decision may also be based on the theory that a principal may not retain the fruits of his agent's fraud. *Reitman v. Fiorillo*, 76 N.J.L. 815, 72 Atl. 74 (1909); *Camden Securities Co. v. Azoff*, 112 N.J.Eq. 270, 164 Atl. 398 (1933); *Diamond Rubber Co.*

DuPont Chemical Company v. Buckley,⁹⁵ however, presents a view opposed to that of the Restatement. There, complainant sold to the defendant second hand wooden tanks under the representation that they were cyprus tanks. Defendant inspected the tanks and purchased them under the belief that they were cyprus. They were actually pine. Defendant brought an action at law for the damages and complainant applied for an injunction and rescission on the ground of mutual mistake as to the nature of the wood. The court denied relief saying,⁹⁶ "Nor can the equitable notion of mistake arise when the mistake is the result of complainant's negligence".⁹⁷ This statement is in accord with the language in prior decisions.⁹⁸

The view thus expressed was modified by Vice Chancellor Backes in *Elizabethport Banking Co. v. Delmore Realty Co.*, where he said, after granting relief to a negligent complainant,⁹⁹

"All mistakes are due to some form of imperfect circumsppection, but these frailties in human action do not connote carelessness, nor does carelessness in its lesser degrees import that measure of negligence which prompts a court of equity to remain passive."

The holding of this case finds some support,¹⁰⁰ the dictum seems an attempt to distinguish prior decisions but casts doubts on

v. Feldstein, 112 N.J.L. 514, 171 Atl. 815 (1934); *Duralith v. Van Houten*, 113 N.J.L. 374, 174 Atl. 484 (1934).

⁹⁵ 96 N.J.Eq. 465, 126 Atl. 674 (Ch. 1924).

⁹⁶ At p. 466.

⁹⁷ This case is somewhat unusual since the action for rescission was brought by the party which apparently got the better of the bargain. The reason for the action was probably a desire to forestall the action at law by having the contract terminated by the action of the court.

⁹⁸ *Deare v. Carr*, 3 N.J.Eq. 513, at p. 518 (Ch. 1836); *Hayes v. Stiger*, 29 N.J.Eq. 196, at p. 197 (Ch. 1878); *Haggerty v. McCanna*, 25 N.J.Eq. 48, at p. 51 (Ch. 1874); *Voorhis v. Murphy*, 26 N.J.Eq. 434, at p. 435 (Ch. 1875); *Serrell v. Rothstein*, 49 N.J.Eq. 385, 24 Atl. 369 (Ch. 1892). With the exception of *Deare v. Carr*, all of these decisions involve cases of unilateral mistake. *Deare v. Carr* turns on the effect of the recording act. See also *Cazzone & Co. v. Redfield*, 98 N.J.Eq. 41, at p. 44, 129 Atl. 699 (Ch. 1925), *aff.* 103 N.J.Eq. 19, 141 Atl. 920 (1928). Note that in *Friel v. Turk*, 95 N.J.Eq. 425, 123 Atl. 610 (Ch. 1924) where the same rule is repeated, the relief sought was specific performance of a contract defendant never made, while the relief actually granted was rescission.

⁹⁹ 116 N.J.Eq. 270, at p. 276, 173 Atl. 331 (Ch. 1934).

¹⁰⁰ See *Collignon v. Collignon*, 52 N.J.Eq. 516, at p. 520, 28 Atl. 794 (Ch. 1894); *Institute B. & L. Ass'n. v. Edwards*, 81 N.J.Eq. 359, p. 367, 86 Atl. 962 (Ch. 1913).

what the decision portends.¹⁰¹ Assuming the force of the Vice Chancellor's logic sufficient to overcome earlier precedent, it remains to be seen what the meaning of "carelessness in its lesser degrees" is. Should it be defined to include all cases except such as *Serrell v. Rothstein*,¹⁰² where defendant deliberately ran the risk of making a mistake, the conflict with the Restatement would be nominal only.

The lack of wisdom of adhering to the rule set forth in *DuPont v. Buckley*, *supra*, seems amply demonstrated by Vice Chancellor Backes.¹⁰³ Whether the addition of the doctrine of degrees of negligence to the rule will work a change beyond rendering the prediction of the outcome in a given case more difficult, seems questionable.¹⁰⁴ Under these circumstances the social value of conformity to the general law of other jurisdictions should outweigh whatever merits may be found in our local rule.

While there is general agreement between New Jersey and the Restatement in the rules dealing with breach of contract, there is a serious difference on the rule stating when a total breach of contract exists. Section 317 of the Restatement¹⁰⁵

¹⁰¹ 2 POMEROY'S EQUITY JURISPRUDENCE (3d ed.), Section 856, seems to express a point of view substantially in accord with that taken by the Vice Chancellor.

¹⁰² Cited in note 98, *supra*.

¹⁰³ *Elizabethport Banking Co. v. Delmore Realty Co.*, cited in note 99, *supra*, at p. 276, where he says, "Documents which, through mistakes of draftsmen, fail to express the intention of the parties, typical in the instant case, are constantly reaffirmed in equity. If ideal care were the price of reformation there would be few sales."

¹⁰⁴ " * * * the term "gross negligence is only ordinary negligence with a vituperative epithet." ADDISON ON TORTS (4th Eng. ed.) p. 22, note 1. The doctrine of degrees of negligence in tort actions is criticized by Thomas McCooly in his works in TORTS (3d ed.), Section 752, p. 1324. The principal has been expressly rejected in many states. *Leonard v. Bartle*, 101, 135 Atl. 853 (Sup. Ct. R.I. 1927); *Young v. Potter*, 133 Me. 104, 174 Atl. 387 (Sup. Jud. Ct., Me. 1934). In 45 C.J., Section 33, at p. 665, the author says, "there is, however, considerable authority for the view that a division of negligence into degrees serves no useful purpose, but on the contrary tends to confusion and uncertainty * * *."

¹⁰⁵ "1. EXCEPT AS STATED IN SECTION 316, ANY BREACH OF CONTRACT IS TOTAL IF IT CONSISTS OF SUCH NON-PERFORMANCE OF A PROMISE OR OF SUCH PREVENTION OR HINDRANCE AS IS EITHER MATERIAL UNDER THE RULES STATED IN SECTIONS 275, 276 OR IS ACCOMPANIED OR FOLLOWED BY ONE OF THE ACTS OF REPUDIATION ENUMERATED IN SECTION 318."

"2. WHERE THERE HAS BEEN SUCH A TOTAL BREACH OF CONTRACT AS IS STATED IN SUBSECTION (1), THE INJURED PARTY MAY BY CONTINUANCE OR AS-

lays down the principle that a breach is total when it is material under the circumstances, or where there is an act of repudiation. No case formulates a general rule on the subject.^{105a} The leading case of *Blackburn v. Reilly* in dealing with an installment contract states the rule as follows:¹⁰⁶

"The rule is, that defaults by one party in making particular payments or deliveries will not release the other party from his duty to make the other deliveries or payments stipulated in the contract, unless the conduct of the party in default be such as to evince an intention to abandon the contract or a design no longer to be bound by its terms."¹⁰⁷

Section 45 of the Sales Act¹⁰⁸ modifies the law on this point and substitutes the test suggested by the Restatement.¹⁰⁹ The statute, however, is applicable only to sale of goods and leaves untouched the vast field of other types of contracts. Thus in *Vine v. Robert W. Kennedy Co.*,¹¹⁰ in which a contract for the building of a house was under discussion, the rule of the *Blackburn* case was applied.

If the premises upon which the courts based their decisions

SENTING TO THE CONTINUANCE OF PERFORMANCE, OR BY OTHERWISE MANIFESTING AN INTENTION SO TO DO, TREAT THE BREACH AS PARTIAL, EXCEPT THAT WHERE THERE HAS BEEN ONE OF THE ACTS OF REPUDIATION ENUMERATED IN SECTION 318, WHETHER ANTICIPATORY OR NOT SUBSEQUENT ASSENT OF THE WRONGDOER TO THE CONTINUANCE OF THE CONTRACT IS REQUISITE IN ORDER TO PERMIT THIS RESULT."

Sections 275 and 276 enumerate the items which render a breach material. Section 318 deals with the doctrine of "anticipatory breach."

^{105a} The closest approach to it is *Dixon v. Smythe Sales Corp.*, 110 N.J.L. 459, 166 Atl. 103 (1933) where the court inquired whether the contract was broken in a "vital and substantial" manner. In *Luce v. New Orange Industrial Association*, 68 N.J.L. 31, 52 Atl. 306 (Sup. Ct. 1902) the test was whether a "subsidiary" part of the contract was broken.

¹⁰⁶ 47 N.J.L. 290, at p. 308, 1 Atl. 27 (1885).

¹⁰⁷ The following cases have applied the rule: *Trotter v. Heckscher*, 40 N.J.Eq. 612, 4 Atl. 83 (1885); *Gerli v. Poidebard Silk Mfg. Co.*, 57 N.J.L. 432, 31 Atl. 401 (1894); *Empire Rubber Mfg. Co. v. Morris*, 77 N.J.L. 498, 72 Atl. 1009 (1909); see *Magliaro v. Modern Homes, Inc.*, 115 N.J.L. 151, at p. 155, 178 Atl. 733 (1935). This rule is that adopted in England and is contrary to the weight of American authority. 2 WILLISTON ON CONTRACTS, sec. 865, p. 1657.

¹⁰⁸ P.L. 1907, p. 328; 4 C.S. 4657, Sec. 45.

¹⁰⁹ *Corey Co. v. Minch*, 82 N.J.L. 223, 82 Atl. 304 (Sup. Ct. 1912); *DuPont v. United Zinc Co.*, 85 N.J.L. 416, 89 Atl. 992 (Sup. Ct. 1914).

¹¹⁰ 2 Misc. 774 (Ch. 1924).

in these cases be accepted, their conclusions are sound. In *Blackburn v. Reilly*, *supra*, the contract provided that plaintiff deliver and defendant receive one carload of bark weekly for one year at \$18 a ton, payment to be made on delivery. Defendant refused to accept delivery after having received five loads of unmerchantable bark. He interposed the inferior quality of the merchandise as a defense, but the defense was overruled and judgment rendered for plaintiff. The court considered the promises independent.¹¹¹ It could, therefore, do nothing but hold that a breach by plaintiff which did not indicate an intent to terminate the contract did not warrant defendant's refusal to perform.¹¹² It is submitted that in its interpretation of the contract the court was plainly in error. That payment of the price and delivery of the goods were really concurrent conditions seems hardly arguable.¹¹³ Where the only facts are that the parties stipulate that delivery and payment are to be at the same time, no other intention can be inferred. Moreover, in the light of such an agreement, it seems but reasonable to suppose that delivery and payment for one instalment were considered a condition precedent to further performance.¹¹⁴ How then can it be said that failure to perform any number of instalments, regardless of the injury done thereby, will not excuse counter performance?¹¹⁵

¹¹¹ At p. 309 the court said, "It also accords with the ancient doctrine laid down by Sergeant Williams in his note to *Prdage v. Cole*, 1 Saund. 320, b, that where a covenant (of the plaintiff) goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the contract on the part of the defendant without averring performance in the declaration."

Similar language can be found in the other cases cited in note 107.

¹¹² *Coles v. Celluloid Manufacturing Co.*, 39 N.J.L. 326 (Sup. Ct. 1877), *aff.* 40 N.J.L. 381 (E. & A. 1878); *O'Toole v. O'Toole*, 10 Misc. 159, 158 Atl. 337 (Sup. Ct. 1932). See 2 WILLISTON ON CONTRACTS, Sec. 890, p. 1701.

¹¹³ In *Skillman Hardware Co. v. Davis*, 53 N.J.L. 144, 20 Atl. 1080 (Sup. Ct. 1890) it was so held. To the same effect see *Gerli v. Poidebard Silk Mfg. Co.*, cited in note 107, *supra*; *Englander v. Abramson-Kaplan Co.*, 94 N.J.L. 25, 109 Atl. 307 (Sup. Ct. 1919); Restatement, Sec. 251. But *Cf.* *Otis v. Adams*, 56 N.J.L. 38, 27 Atl. 1092 (Sup. Ct. 1893).

¹¹⁴ See *Skillman Hardware v. Davis*, cited in note 113, *supra*. Restatement, Section 272. See *contra*: *Trotter v. Hecksher*, cited note 107, *supra*; *Vine v. Robert W. Kennedy Co.*, cited note 110, *supra*.

¹¹⁵ In most of the cases cited the conditions may actually have been independent. Examples are: *Vine v. Robert W. Kennedy Co.*, cited in note 110, *supra*; *Gerli v. Poidebard Silk Mfg. Co.*, cited in note 107, *supra*; *Magliaro v.*

If carried to its logical conclusion the rule of *Blackburn v. Reilly* would lead to shocking hardship. It would enable a party to a contract, who protested his intent to perform with sufficient vehemence, to totally deprive the other party of the promised performance while forcing him to comply with every detail of the contract and receive a law suit for compensation.¹¹⁶ The courts have shrunk from pursuing their own logic. Where there is a breach of a single promise which the parties regard as essential it is considered total.¹¹⁷ Or the vehicle of anticipatory breach¹¹⁸ may be used to give plaintiff a remedy in damages and excuse counter-performance.¹¹⁹ Moreover, where one party will be unable to perform the other may have his legal and equitable remedies without performance on his part.^{119a} Similarly, performance by one party is excused when the other has repudiated the contract.^{119b} Perhaps the reason the rule still exists is that no case sufficiently demonstrating its weakness has appeared since 1885.

What the effect of the Retatement will be on these, as well

Modern Homes, Inc., cited in note 107, *supra*. Empire Rubber Mfg. Co. v. Morris, cited in note 107, *supra*, may be justified on the ground that the breach was not material, but testimony as to the materiality was apparently not taken.

¹¹⁶ See dissenting opinion of Justice Van Syckel in Gerli v. Poidebard Silk Mfg. Co., cited in note 107, *supra*, at p. 438.

¹¹⁷ Corn Exchange, etc., Phil. v. Taubel, 113 N.J.L. 605, 175 Atl. 777 (1907). See breach of warranty cases in insurance policies; Marone v. Hartford Fire Insurance Co., 114 N.J.L. 295, 176 Atl. 320 (1935); Brodsky v. Motorists Casualty Insurance Co., 112 N.J.L. 211, 170 Atl. 248 (Sup. Ct. 1934), *aff.* 114 N.J.L. 154, 176 Atl. 143 (1935).

¹¹⁸ O'Neil v. Supreme Council American L. of Honor, 70 N.J.L. 410, 57 Atl. 463 (Sup. Ct. 1904), establishes the doctrine of anticipatory breach. It has since been consistently followed. Holt v. United Security Life Insurance Co., 74 N.J.L. 795, 67 Atl. 118 (1907), on new trial, 76 N.J.L. 585, 72 Atl. 301 (1909); Samel v. Super, 85 N.J.L. 101, 88 Atl. 954 (Sup. Ct. 1913); Ferber v. Cona, 89 N.J.L. 135, 97 Atl. 720 (Sup. Ct. 1916), *aff.* 91 N.J.L. 688, 103 Atl. 471 (1918); Stein v. Francis, 91 N.J.L. 205, 109 Atl. 739 (Ch. 1919); Storms v. Corwin, 7 Misc. 931, 147 Atl. 578 (Sup. Ct. 1929); Scoredice Service Corp. v. Feldman, 10 Misc. 228, 158 Atl. 409 (Sup. Ct. 1932).

¹¹⁹ Vickers v. Electrozone Commercial Co., 67 N.J.L. 665, 52 Atl. 467 (1902).

^{119a} In land contracts—Sapis v. Sommers, 108 N.J.L. 370, 158 Atl. 512 (1932); Bernstein v. Kohn, 96 N.J.L. 223, 114 Atl. 543 (1921); Naugle v. McVoy, 96 N.J.L. 515, 115 Atl. 393 (1921); Reutler v. Ramsin, 91 N.J.L. 262, 102 Atl. 351 (1917). On contracts for the sale of goods—Gerli v. Poidebard Silk Mfg. Co., cited in note 107, *supra*. Where the essential subject matter of the contract is destroyed without fault. Matthews Construction Co. v. Brady, 104 N.J.L. 438, 140 Atl. 433 (1928).

^{119b} See cases cited in note 118, *supra*.

as other controversial points, is difficult to predict. At the present writing it has been cited numerous times by New Jersey courts with approval,¹²⁰ and not once with disapproval. In one instance it caused the Court of Errors and Appeals to select one of three rules for which previous local decisions furnished precedent.¹²¹ In another instance it caused the consolidation and correlation of rules which could be best used only in association with one another.¹²² It can safely be said that it will make courts, and lawyers, appreciate more clearly the meaning of decisions already made. But will it be persuasive enough to make the courts change their minds?

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¹²⁰ *Moorestown Trust Co. v. Buzby*, 109 N.J.Eq. 409, 157 Atl. 603 (Ch. 1931); *Miller v. Eisele*, 111 N.J.L. 268, 168 Atl. 426 (1933); *Coast National Bank v. Bloom*, 113 N.J.L. 597, 174 Atl. 576 (1934); *Clott v. Prudential Insurance Co.*, 114 N.J.L. 18, 175 Atl. 203 (Sup. Ct. 1934); *Bullock v. Thermoid Co.*, 114 N.J.L. 205, 176 Atl. 596 (1935); *Brittingham v. Huyler's*, 118 N.J.Eq. 352, 179 Atl. 275 (Ch. 1935); *Corn Exchange, etc., Phila. v. Taubel*, cited in notes 18 and 117, *supra*.

¹²¹ *Miller v. Eisele*, cited in note 120, *supra*, fixed the subjective test for duress in New Jersey. The court had before it the choice of the following definitions:

1. A threat of imprisonment or bodily harm. *Van Deventer v. Van Deventer*, 46 N.J.L. 460 (Sup. Ct. 1884); *Wright v. Remington*, 41 N.J.L. 48 (Sup. Ct. 1879), *aff.* 43 N.J.L. 451 (1881); *Sooy ads. State*, 38 N.J.L. 324 (Sup. Ct. 1876) *aff.* 41 N.J.L. 394 (1879).
2. Whether a person of ordinary firmness would be put in fear. *Capossa v. Collona*, 95 N.J.Eq. 35, 122 Atl. 378 (Ch. 1923), *aff.* 96 N.J.Eq. 385, 124 Atl. 760 (1924); *Byron v. Byron, Heffernan and Co.*, 98 N.J.L. 127, 119 Atl. 12 (1922); *Ballantine v. Stadler*, 99 N.J.Eq. 404, 132 Atl. 664 (1926); *Doscher v. Schroder*, 105 N.J.Eq. 315, 147 Atl. 781 (1929).
3. The subjective test—whether this person was actually put in fear. *Koewing v. West Orange*, 89 N.J.L. 539, 99 Atl. 203 (1916).

¹²² *Clott v. Prudential Insurance Co. of America and Corn Exchange, etc., Philadelphia v. Taubel* in field of interpretation, both cited in notes 18 and 117, *supra*.