# RECENT CASES

GUARANTY—TERMINATION BY DEATH OF GUARANTOR.—The deceased guaranteed in writing certain prospective obligations of the principal debtor. Subsequent to the death of the guarantor, but prior to knowledge thereof by the guarantee, the credit was extended. The principal debtor failed to pay, and an action to recover was brought against the guarantor's estate. *Held,* where the guaranty could have been revoked by the guarantor during his lifetime, it terminates by his death as to future obligations. *L. Teplitz Thrown Silk Co. v. Rich et. al.,* 13 N. J. Misc. 494, 179 Atl. 305 (C. C. 1935).

The weight of authority on the question of revocation of a continuing guaranty requires the death of the guarantor and notice thereof to the guarantee to effectuate a termination of the guaranty. *Valentine v. Donohoe-Kelly Banking Co.,* 133 Cal. 191, 65P. 381 (Sup. Ct. 1901); *Gay v. Ward,* 67 Conn. 147, 34 Atl. 1025 (Sup. Ct. of E. 1895); *National Eagle Bank v. Hunt,* 16 R.I. 148, 13 Atl. 115 (Sup. Ct. 1888); see also cases cited in annotation 42 A.L.R. 926. But several states, notably Massachusetts, hold that death will *ipso facto* act to relieve the guarantor's estate from future obligations arising subsequent to the death of the guarantor even though the guarantor has specifically agreed that written notice shall be given to effectively terminate his obligation. *Aitkin v. Lang,* 106 Ky. 652, 51 S.W. 154 (Ct. of E. 1899); *Hyland v. Habich,* 150 Mass. 112, 22 N.E. 765 (Sup. Jud. Ct. 1889); *Jordan v. Dobbins,* 122 Mass. 168 (Sup. Jud. Ct. 1877); *In re Kelly's Estate,* 173 Mich. 492, 139 N.W. 250 (Sup. Ct. 1913); *Illinois Roofing & Supply Co. v. Gorton,* 19 Pa. Co. Ct. Rep. 124. Our courts have elected to follow the Massachusetts rule—and rightly so, for on the facts, it is undoubtedly the accurate conclusion, reached by the application of elementary and incontrovertable principles of contract law. The jurisdictions holding contrary to this rule have predicated their result too largely upon considerations of expediency, which, though of unassailable importance, have no place where definitely established legal rules are available. Two unquestioned and universally accepted legal principles dealing with the effect of death in contract law are (1) the death of either party before acceptance is communicated causes an offer to lapse (2) death will not invalidate, or otherwise terminate a contract where such contract does not require the personal services of the deceased in its execution. The problem, therefore, resolves itself into a determination of whether a guaranty on the basis of which there is to be a future extension of credit is an offer or a binding executory contract. Those jurisdictions in which death and notice or knowledge thereof are construed to terminate the obligation of the guarantor, reach that result by assuming the existence of a contract, and by interpreting notice of death as constructive notice to the guarantee. This by implication revokes the guaranty. The reasoning is sound if we are content to accept the

original premise, namely, the existence of a contract. The view taken by New Jersey, and what is submitted to be the better view, is that a guaranty of this type unsupported by a present consideration moving to the guarantor, can be regarded as nothing more than an offer by the guarantor to secure the guarantee for such credit as he may extend to the principal. There is no consumated contract until the credit is extended, for there is lacking the essential element of mutuality. New Jersey in rejecting the greater weight of authority and following the Massachusetts rule has adopted the most legally sound of the divergent views.

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INSURANCE—FORFEITURE—DUTY OF COMPANY TO APPLY MONEY DUE ASSURED TO PREVENT FORFEITURE.—The complainant, insured under a non-cancellable disability policy, became entitled to payment under a claim. Before defendant company paid this, a premium fell due, and complainant defaulted. The company thereupon cancelled the policy. *Held,* On date premium became due the defendant had complainant's money in its possession, and was under an equitable duty to deduct the amount of the premium. *Ruderman v. Massachusetts Accident Co.,* 118 N.J.Eq. 461, 180 Atl. 237 (1935).

It may be argued that the insured's failure to pay the premium when due amounts to a rejection of the continuance of the policy, despite the fact that the insurer has a claim still due the insured. A court cannot make it incumbent on insurer to apply part of the funds to the payment of the premium, for such a holding would be onerous on the insurance company, inasmuch as the insured has already expressed his intention to lapse the policy by his failure to pay according to express agreement. Furthermore, in the absence of an understanding or custom between the parties, is the insurer bound to use the funds of insured to defray the premium when insured has given no such direction? The courts, in applying the general rule that an insurance company is under a legal and equitable duty to apply funds belonging to the insured to the payment of the premium *pro tanto* in order to prevent a forfeiture, answer these arguments by stating that the insured's assent to the use of his funds is to be presumed, for one would agree to anything that would inure to his benefit rather than to his detriment. *Union Central Life Ins. Co. v. Caldweli* 68 Ark. 505, 58 S.W. 355 (1900); *Franklin Life Ins. Co. v. Wallace,* 93 Ind. 7 (1884); *Mutual Life Ins. Co. v. Breland,* 117 Miss. 479, 78 So. 362, L.R.A. 1918 D 1009; *Girard Life Ins. A. & T. Co. v. Mut. Life Ins. Co.,* 97 Pa. 15 (1881). The insurer needs no direction by insured to apply funds of insured to the payment of the premium, for when it becomes due, the insurer has the right to deduct the amount applied to pay the premium under the law of set-off.

*North v. Nat. Life and Accident Ins. Co. of Nashville, Tenn.*, 231 S.W. 665 (Mo. 1921). But the general rule has its limitations which revolves around the question as to what funds are or are not applicable to the payment of a premium. Dividends earned but not declared are not funds which may be used to pay premium. *Mutual L. Ins. Co. v. Girard L. Ins. A. & T. Co.*, 100 Pa. 172, 11 Wkly. Notes Cas. 469 (1882). Dividends must be sufficient to discharge in full the premium due. *Hollister v. Quincy Mutual F. Ins. Co.*, 118 Mass. 478 (1875). Guaranty funds are not applicable to avoid forfeiture. *Stringham v. Bankers Life Ass'n.*, 309 Ill. 181, 140 N.E. 860, 29 A.L.R. 512 (1923). An insurance company owes no duty to apply cash surrender value. *Commonwealth Life Ins. Co. v. Gault's Adm'rs.*, 256 Ky. 625, 76 S.W. (2nd) 618 (1934). The fact that an insurer owes money in a transaction not connected with the insurance does not prevent a forfeiture. Thus there is no duty on the part of the company to apply wages due to the payment of an assessment. *Pister v. Keystone Mut. Ben. Ass'n.*, 3 Pa. Super. Ct. 50 (1896). In the principal case the claim arises out of the policy and does not come within the foregoing limitations. A few rulings apposite to the N. J. case follow: *Benefit Ass'n. Ry. Employees v. Bray*, 147 So. 640 (Ala. 1933); *Inter-Ocean Casualty Co. v. Copeland*, 43 S.W. (2nd) 65 (Ark. 1931); *Missouri State Life Ins. Co. v. Foster*, 69 S.W. (2d) 667 (Idaho 1933); *Olizene v. Eagle L. Ins. Co., Inc.*, 11 La. App. 153, 121 So. 881 (1928). The application of an equitable principle for the first time in a jurisdiction usually invites much argument pro and con. From a purely contractual point of view one might seriously question the general principle as applied in the principal case, but cannot easily overlook the weight of authority which supports it. The New Jersey decision, in line with other jurisdictions on this point, appears equitable and rightly decided.

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MUNICIPALITIES—WATER LIENS—CONTRACTS.—The owners of certain real property sought a decree quieting title to their property whereon the defendant municipality claimed a lien for water furnished by it and used on the premises (as provided by P. L. 1917, Ch. 32, Sect. 11 and 12). The municipality installed its water service and supplied water to the property, that had always hitherto been supplied by an artesian well located thereon, at the request of the occupant tenant but without the owner's permission or knowledge. *Held*, the municipality not entitled to assert a lien thereon for water rents in arrears. *Diorio v. Fairlawn*, 118 N.J.Eq. 556 (Ch. 1935).

Statutory liens upon real property for water rents or charges for water supplied thereon to the tenant must depend for their validity either upon the municipality's taxing power or upon contract. *Ford Motor Co. v. Kearny*, 91 N.J.L. 671, 103 Atl. 254 (E. & A. 1918).

In selling water to its inhabitants for a price, a municipality is exercising its private or proprietary functions and is governed by the same rules as apply to private corporations. *Jersey City v. Morris Canal and Banking Co.,* 41 N.J.L. 66 (Sup. Ct. 1829); *Olesiewicz v. Camden,* 100 N.J.L. 336, 126 Atl. 317 (E. & A. 1924). Hence the charge for water furnished by a municipality to an owner or occupant of land within the municipality is not a tax, but is the subject of a contract, *Lehigh Valley R. R. Co. v. Jersey City,* 103 N.J.L. 574, 138 Atl. 467 (Sup. Ct. 1927) that must be expressly or impliedly assented to by the owner before any water lien can attach upon the property. *Ford Motor Co. v. Kearny,* 91 N.J.L. 671, 103 Atl. 254 (E. & A. 1918). See also *Sheldon v. Hamilton, 22* R.I. 230. If the statute authorizing the water lien ordinance here involved, is to be construed as permitting a lien on land for water rent in the total absence of any contract or assent by the owner of that land for water used by the occupant, it would most certainly be unconstitutional as being a deprivation of property without due process of law. But, if interpreted so as to require some contract, express or implied, with the owner, then the statute is constitutional. New Jersey follows the rule requiring interpretation of a statute, admitting of two or more interpretations, in such a way as to maintain its constitutionality if possible. *State v. Sutton,* 87 N.J.L. 192, 94 Atl. 788 (E. & A. 1915). There is nothing in this case that points to any circumstances from which an assent, express or implied, may be drawn. The fact that there were no water pipes from the city mains to the property when leased, coupled with the fact that artesian wells on the property had hitherto supplied the necessary water all point conclusively to an utter absence of circumstances from which an assent might be drawn.

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PRACTICE AND PLEADINGS. — Sham and frivolous defenses — A motion to strike an answer and separate defenses on the ground that the same are sham and/or frivolous and do not set forth a valid defense *Held,* that a pleading cannot be both sham and frivolous. *Business Men's Bldg. & Loan Assn. v. Tumulty,* 13 N.J. Misc. 638, 180 Atl 772 (C.C. 1935).

The New Jersey courts as well as the New Jersey bar in general have for a considerable time evinced unwarranted di....culty in the application of the terms sham and frivolous. A sham plea is a plea good in form, but manifestly and intrinsically false in fact; whereas, a frivolous plea is one, which in any vew of the facts pleaded, fails to set forth a valid defense. Black's Law Dictionary, p. 1306, p. 1617, 21 Ruling Case Law 452, see also Black's Law Dictionary p. 821. Essentially sham means false, and frivolous means insufficient. The unmitigated fact that allegations are false, in no conceivable way precludes the possibility

that those allegations, false or true, fail to set forth a defense sufficient in law. The one reflects on the truth of the allegations, the other attacks the adequacy of the plea. The meaning is plain and the import unequivocal. That a pleading can, adopting the accepted definitions, be both sham and frivolous requires no demonstration. It is only by the arbitrary inculcation of extraneous and superficial qualifications that sham and frivolous assume mutually unreconcilable meanings. In *Fidelity, etc. Co. v. Wilkes Barre etc. Co.,* 98 N.J.L. 507, 120 Atl. 734 (E.&A. 1923); *Milberg v. Kuethe,* 98 N.J.L. 779, 121 Atl. 713 (E.&A. 1923); *National Surety Co. v. Mulligan,* 105 N.J.L. 336, 146 Atl. 373 (E.&A. 1929); *Seulthorpe v. Commonwealth Casualty Co.,* 98 N. J. L. 845, 121 Atl. 751 (E.&A. 1923); *Holdman v. Tansey,* 107 N.J.L. 378, 151 Atl. 873 (E.&A. 1930); *Platt v. Currie,* 100 N.J.Eq. 543, 135 Atl. 808 (E.&A. 1927); *In re Baum et al.,* 93 N.J.Eq. 593, 117 Atl. 613 (Prerog. 1922); *First Natl. Bank of Carteret v. Turner,* 9. N.J. Misc. 311, 154 Atl. 318 (Sup. Ct. 1931); and *Egan v. Hemmingway,* 10 N.J. Misc. 466, 159 Atl. 703 (Sup. Ct. 1932) our courts held in contradiction to the normal and accepted definitions of the terms, that a plea could not be both sham and frivolous, but vacillated from that view in *Rapps v. Tulenko,* 102 N.J.Eq. 207, 140 Atl. 244 (Ch. 1928), where the court stated, "It is clear to me, in the matter *sub judice,* that the answer of the defendants is both sham and frivolous," and again in *McMichael v. Barefoot et al.,* 85 N.J.Eq. 140, 95 Atl. 620 (E.&A. 1915), "The court, on practice motions which were not reported, frequently dismissed appeals and writs of error as sham and frivolous." The rule that a plea could not be both sham and frivolous was definitely reversed in *Gee v Independent etc. Insurance Co.,* 109 N.J.L. 563, 162 Atl. 644 (E.&A. 1932), where an order was entered striking out the answer as sham and/or frivolous, the court concisely and sharply pointing out, "it is possible, of course, for an answer to be both sham and frivolous." The clarity of the statement is gratifying in view of the previous uncertainty, and it is deplorable that neither court nor counsel refers to this most recent case (*Gee v. Independent etc. Insurance Co., supra*). In view of that case, and the commonly accepted meaning of the terms, the startling statement of the court that, "it is clearly decided by our Court of Errors and Appeals that a pleading could not be both sham and frivolous," is unfounded in law and fallacious in reason.

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TRIAL—FUNCTION OF THE JUDGE AS THE TRIER OF FACTS.—On a rule to show cause why a judgment entered for defendant should not be set aside and judgment entered for the plaintiff, or in the alternative why a new trial should not be granted, the trial judge set the judgment aside and entered judgment for the plaintiff. *Held,* the trial judge erred in entering judgment for the plaintiff on the rule and should have lim-

ited his relief to a new trial. *Dorman v. Usbe Building and Loan Ass'n,* 115 N.J.L. 337, 180 Atl. 413 (Sup. Ct. 1935).

When a case is submitted by stipulation, the judge trying the case without a jury may first render a judgment for defendant and later. after reviewing the facts, order a judgment for plaintiff. *Sammak v. Lehigh Valley R. R. Co.,* 112 N.J.L. 540 172 Atl. 60 (E.&A. 1934). The reason for this rule is that, the facts having been stipulated, they cannot be changed on another trial of the cause. Interpretation of the facts is removed from the trial judge. These facts distinguish this rule from the one *sub judice.* When the proof is not discredited and the trial judge would have had to direct the jury to find for the plaintiff, he, sitting without a jury, must accept the proofs with the same conclusive effect that they would have had upon the jury. The reason for this is plain, the judge trying the facts must analyze them in the same manner that the jury would do, and if they were such that the jury could not differ, it is obvious that the judge must accept them as conclusive. *Eustace v. Metropolitan Savings Bank and Trust Co.,* 115 N.J.L. 541, 181 Atl. 60. (E.&A. 1935). In the principal case the trial judge states that he would have had to hear the case on the retrial and therefore he would save time by entering judgment on the rule when he was satisfied that he had made a mistake on the trial. The appellate court, however, pointed out that new evidence might be presented on a retrial and therefore the facts might be materially changed and a totally different verdict arrived at. Reasons not assigned by the appellate court in support of this rule are numerous. It is conceivable that the trial judge might not have heard the case on the retrial. His term might have expired before the retrial or he might have been rmoved from office. It is also quite possible that he might have resigned or that he might have died. Considering the foregoing reasons it is clear why the power does not lie in the trial judge to change the verdict for defendant into one in favor of the plaintiff. It is submitted that the case is well decided.

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SEPARATION AGREEMENT—EFFECT OF REFUSAL TO RESUME MARITAL RELATIONS.—Husband and wife entered into a separation agreement. The wife refused her husband's request to return to his bed and board. *Held,* the husband's liability under the agreement is not terminated by his rejected offer to resume marital relations. *Aiosa v. Aiosa,* 118 N.J.Eq. 169, 178 Atl. 63 (Ch. 1935).*

If the courts are to confine themselves to logical deductions from established law, the decision appears to be unsound. The case raises for determination a novel issue in this jurisdiction, one hypothecated only once before in the erudite dictum of the court in *Devine v. Devine,* 89 N.J.Eq. 51, 56, 104 Atl. 370, 371 (Ch. 1918), to the effect that the

* Reversed, 119 N.J.Eq. 385 (E. & A. 1936), decided Jan. 31, 1936.

wife's refusal to return to her husband's bed and board operated to terminate his liability under a separation agreement. The case is criticized in *Whittle v. Schlemm,* 94 N.J.L. 112, 109 Atl. 305 (E. and A 1919), but it is not clear whether the court disapproved of the dictum on the subject. The English cases afford no sound basis for determination of the issue. In that jurisdiction it is conclusively established that agreements to separate are specificially enforceable; consent thereto once given is irrevocable excpt by mutual agreement of the parties. Consequently, the existence of a separation contract is a complete bar to a bill brought by one party to restore the status and relationships. *Besant v. Wood,* L.R. 12 Ch. Div. 605, and cases there cited. It will be observed that the law obtaining here differs fundamentally from that which guides the English courts. It is well settled that although separation agreements are not absolutely void, they will not be enforced as such. *Emery v. Neighbor,* 7 N.J.L. 142 (Sup. Ct. 2824); *Miller v Miller,* 1 N. J. Eq. 386 (Ch. 1831); *Calame v. Calame,* 25 N.J.Eq. 548 (E.&A. 1874); *Aspinwall v. Aspinwall,* 49 N.J.Eq. 302, 24 Atl. 926 (E.&A. 1892); *Mockridge v. Mockridge,* 62 N.J.Eq. 570, 50 Atl. 182 (Ch. 1901). It is the policy of the law that the period for which persons may contract touching their separation is limited to the period of their future, mutual assent, and that, accordingly, in the absent of wrongdoing on his or her part, either may offer to resume marital relations. Refusal constitutes the recalcitrant an obstinate deserter. *Moores v. Moores,* 16 N.J.Eq. 275 (Ch. 1863). Any different intent entertained by the parties is contrary to public policies and cannot be recognized. *Miller v. Miller, supra.* When husband and wife live apart by agreement obviously neither is a wilful and obstinate deserter. And the divorce will not be granted on that ground. *Moores v. Moores, supra.* The law has been shown to be that where husband and wife are living apart pursuant to a separation contract, refusal by one of the other's offer to resume marital relations constitutes that one a deserter. Clearly these two doctrines are irreconcilable except on the logical assumption that in the latter case the agreement has been terminated and has no legal existence. The wife's right of action where she has refused her husband's request to return to him must then of necessity arise out of her husband's common law obligation to support her, unless that obligation has been made statutory, as it has in New Jersey by the Divorce Act (Revision of 1907), 2 Comp. St. 1910, Sec. 26, p. 2038. If she is entitled to support by that statute, her action is well brought. If not, it would seem not only logical, but equitable and just, and consistent with the established law, that she should be barred from setting up the repudiated articles of separation. *Cf. Buttlar v. Buttlar,* 57 N.J.Eq. 645, 42 Atl. 755 (E.&A. 1898), an offer to assume marital relations cannot defeat the right to recover arrears of payment due under a separation agreement. It is respectfully submitted in the light of precedent and reason that the decision in the instant case is erroneous.