# RECENT CASES

ADMINISTRATION OF ESTATES—ASSIGNABILITY OF EXPECTANCIES—PUBLIC POLICY.—Suit was brought to declare invalid a trust agreement whereby the complainants, settlors, assigned to the defendant, trustee, for equal division, any and all property which they might in any way receive from the estate of a sister, adjudicated incompetent by a New York court. The defendant had been appointed committee of the person and property of the incompetent by the court and was a son-in-law of one of the settlor-complainants. On appeal from a decree of the Court of Chancery upholding the trust, *held,* reversed. The agreement is invalid as contravening public policy. *Dufford v. Nowakoski,* 4 Atl. (2nd) 314 (E. & A. 1939).

An assignment of an expectancy is not binding or valid at law,[1] on the theory that an expectancy is a "mere hope" and confers upon the assignor thereof no rights legally capable of transferance.[2] Equity, however, will enforce such a contract if it be fairly entered into, supported by a valuable consideration, and not in contravention of public policy.[3]

The agreement in the principal is distinguished from the usual assignment of an expectancy. Here the expectant heirs attempted without the knowledge, consent or the acquescence of the present owner to offset any division of property which she might transfer by will or otherwise. The court found this to be in contravention of the policy and intent of the legislature in enacting the laws governing descent, distribution, and testacy,[4] and tending to nullify their effect and operation. Should the present owner choose to cut off by will any of the settlors, the agreement would frustrate her testamentary intent and would operate to divide the estate equally.

Invalidation of contracts on the basis of publilc policy[5] gives rise

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1. Fidelity Union Trust Co. v. Reeves, 96 N.J.Eq. 490, 125 Atl. 582 (Ch. 1924).
2. *In re* Zimmerman's Will, 172 N.Y.Supp. (1918).
3. Fidelity Union Trust Co. v. Reeves, *supra,* note 1. See Nugent v. Smith, 195 N.Y.Supp. 338 (1922).
4. Rev. St. 1937, 3:2-1 *et seq.*
5. See, *e.g.,* Driver v. Smith, 89 N.J.Eq. 339, 104 Atl. 717 (Ch. 1918).

to a consideration of interference with the freedom of contract.[6] The general rule is that competent parties are to be allowed full freedom and contracts thus made are to be enforced by the courts.[7] The rule of public policy is not to be evoked arbitrarily or for slight reasons,[8] or because the contract turns out unfortunately for one party.[9] But the liberty of contract must not be contrary to public policy.[10] This power of curbing is a dangerous weapon, susceptible by its nature of misuse and abuse and should be used sparingly. The advantage to accrue to the public by invalidating a particular contract must be certain and substantial.[11] Public policy is both a flexible and vague governing principle, and while courts must follow the legislative indication of the policy of the law, yet each decision must be predicated upon the facts peculiar to the case at hand. Precedent may serve in an advisory capacity, but it cannot, from the very nature of the problem, be compelling or decisive.[12] An important consideration in the court's determination is that the *tendency* to injure the public and not the injury itself is decisive.[13] Nor does it matter that the complainants are parties to an illegal contract.[14] Relief is given to the public and not to the complaining party.[15] One entering into such a contract owes to the public a continuing duty to withdraw therefrom.[16]

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6. See cases collected in 13 C. J., sec. 360-362, and 12 Am. Juris., sec. 167 *et seq.*

7. "It must not be forgotten that you are not to extend arbitrarily those rules which say a given contract is void as being against public policy, because if there is one thing which more than any other public policy demands it is that men of full age and of competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sound and shall be enforced by the courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract." Sun Printing Co. v. Sampson, 19 Eng. Eq. 462, per Jessel, M. R.

8. Brooks v. Cooper, 50 N.J.Eq. 761, 26 Atl. 978 (E. & A. 1893).

9. *Ibidem.*

10. Cameron v. Alliance, 118 N.J.Eq. 11, 176 Atl. 692 (E. & A. 1935).

11. Brooks v. Cooper, *supra,* note 8.

12. See Fidelity Union Trust Co. v. Reeves, *supra,* note 1.

13. Brooks v. Cooper, *supra,* note 8.

14. Cameron v. Alliance, *supra,* note 10.

15. See Walsche v. Sherlock, 110 N.J.Eq. 223, 159 Atl. 661 (Ch. 1932).

Upon these principles the court found the trust agreement in the principal case to be against the public policy expressed in the Statute of Wills. The possibilities of fraud, and a consequent tendency to injure public welfare, present in an agreement by which individuals seek to violate the wishes of a testator and the provisions of a law, are sufficient ground for the invalidation of the contract, even though no injury has occurred or may occur. The result of the principal case is strengthened by the treble role occupied by the defendant, as trustee for the complainants, committee for the incompetent, and son-in-law of one of the settlor-beneficiaries, through whom defendant's wife and child were to benefit. The law frowns with justifiable severity upon dual capacities and relationships.

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EQUITY — INTERPLEADER — REQUISITES THEREOF. — Complainant notified many brokers that it desired to sell its property on certain terms. Subsequently, defendant Bedworth procured a contract for the sale of the property to a certain company, the agreement providing for the payment of commissions. Shortly before the consummation of the sale, defendant Feist & Feist notified an associate of the complainant that it claimed commissions because it had interested another company in the purchase of the property and had registered that name with the complainant. On appeal from a decree of the Court of Chancery allowing interpleader, *held,* reversed *Carrier Corp. v. Bedworth, Inc.,* 125 N.J.Eq. 163 (E. & A. 1939).

The theory of a strict bill of interpleader is that the fruit of a dispute is in the hands of a disinterested third party; and, in order to save him risk, cost, and vexatious litigation, the litigants are compelled to settle between themselves. The practice surrounding the action has become crystallized and certain rules have been developed which the complainant must satisfy as a condition precedent to relief.

The position of the applicant must be such that he needs the aid of the Court of Chancery. There must be a well-founded danger or appre-

16. Att'y General v. Firemen's Ins. Co., 74 N.J.Eq. 372, 73 Atl. 80 (E. & A. 1908).

hension of conflicting claims.[1] There must be no collusion between the applicant and any of the claimants to the fund in dispute. The remedy is open only to a disinterested stakeholder. Thus, the want of an affidavit of non-collusion to a bill of interpleader is a defect that may be objected to *in limine* or at the hearing.[2] The applicant must bring into court or surrender *all* that is claimed by either of the several claimants. Any dispute as to amount by the complainant is fatal to the bill, for then he is no longer a disinterested stakeholder.[3] The Court of Chancery must have the power to determine the entire controversy. Thus, if the granting of relief will interfere with the function of a federal court, the bill will be dismissed for want of jurisdiction.[4] The applicant must not be guilty of laches;[5] he must apply before verdict or judgment at law,[6] although the rule is not strictly adhered to where the effect of the verdict is merely to settle the quantum of damages,[7] and the right to interplead is not lost by filing pleas in bar in actions at law.[8]

Each of the above principles is founded in reason and justify a requirement of strict adherence. There are, however, three other rules which have developed with the action of interpleader that are devoid of intelligent reason and confusing to both the student and practicioner. There is the requirement of identity: the same debt, duty or thing must be claimed by both or all the parties against whom relief is demanded. A leading case in New Jersey[9] held that identity was not required, but if interpleader would settle the claims of dispute against the applicant the bill was well founded. The test evolved is that the claims must be mutually exclusive, and the requirement of identity is confined to the case where each party claims that a single undivided sum in the hands

1. Blair v. Parker, 13 N.J.Eq. 267 (Ch. 1861).
2. Mount Holly, Etc. Turnpike Co. v. Ferree, 17 N.J.Eq. 117 (Ch. 1874).
3. Williams v. Matthews, 47 N.J.Eq. 196, 20 Atl. 261 (Ch. 1890).
4. Smith v. Reed, 74 N.J.Eq. 776, 70 Atl. 961 (Ch. 1908).
5. Lozier v. Van Saun, 3 N.J.Eq. 325 (Ch. 1835).
6. Holmes v. Clark, 46 Vt. 22; Danaher v. Prentiss, 22 Wisc. 311. *Cf.* Lozier v. Van Saun, *supra*, note 5.
7. Maxwell v. Leichtman, 72 N.J.Eq. 780, 65 Atl. 1007 (Ch. 1907). See Hamilton J. Marks, 5 DeG. & S. 638, criticised in Danaher v. Prentiss, *supra*, note 6. See also Lozier v. Van Saun, *supra*, note 5.
8. Maxwell v. Leichtman, 72 N.J.Eq. 780, 65 Atl. 1007 (Ch. 1907).
9. Packard v. Stevens, 58 N.J.Eq. 489, 46 Atl. 250 (Ch. 1899).

of the stakeholder is wholly payable to him. A *dictum* in the case recognizes that unliquidated damages might be interpleaded, and that each claimant might allege a different value and claim a different amount.[10]

The privity rule requires that all adverse claims or titles must be dependent or be derived from a common source. In cases of adverse independent titles, the party holding the title must try it at law.[11] In *Trust Company of New Jersey v. Biddle,*[12] the Court of Errors and Appeals overthrew the privity rule without mentioning it. There a bank who had made a loan on demand collateral notes and who had sold sufficient collateral on default to satisfy the loan was held entitled to a bill of interpleader against the borrower and a third party who claimed part of the collateral as her property. The Court stated that the applicant need only plead facts showing that there are hostile claimants asserting rights in the same property or fund, in which he has no interest other than to discharge his duty. The decision was subsequently clarified, and the rule requiring privity expressly overruled[13] as harsh and inequitable. It is well to note that both the requirement of identily and the privity rule have been repudiated in the federal courts.

The rule that creates the most confusion is that which requires that the applicant must have incurred no independent liability to either of the claimants.[14] If he has entered into a contractual relation with one of the defendants which is independent of the duty on which the other defendant relies, interpleader will not lie.[15] The rule was recently clari-

10. But see Dodd v. Bellows, 29 N.J.Eq. 127 (Ch. 1878), wherein it was held that a claim for use and occupation by a purchaser of the demised premises, under attachment proceedings against the landlord, as opposed to that of the landlord himself, for rent under a lease for the same period, did not present a case for a bill of interpleader by the tenant.

11. STORY, EQ. JURIS,, § 812.

12. 112 N.J.Eq. 347, 164 Atl. 583 (E. & A. 1934).

13. Camden Safe Deposit & Trust Co. v. Barbour, 117 N.J.Eq. 401, 176 Atl. 313 (E. & A. 1934). See also Arion B. & L. v. Schweickhart, 119 N.J.Eq. 434, 182 Atl. 854 (Ch. 1936); Bergen County Nat. Bank v. Sheriff, Etc., 121 N.J.Eq. 517, 191 Atl. 560 (Ch. 1937); Equitable Life Assurance Society v. Kelsey, 124 N.J.Eq. 38, 199 Atl. 590 (Ch. 1938).

14. Pratt v. Worrell, 66 N.J.Eq. 194, 57 Atl. 450 (Ch. 1904).

15. Leader Holding Corp. v. McLintock, 121 N.J.Eq. 542, 191 Atl. 768 (Ch. 1937).

fied and kept within strict bounds in *Equitable v. Kelsey*.[16] It does not apply where the complainant is, so far as his own acts are concerned, under only a single liability and yet is called upon to pay by two or more claimants. The implication is that if the situation arose where the determination of the dispute between the defendants would settle the claim of each defendant against the complainant, interpleader would be allowed, even though a separate obligation was involved.

The principal case, while it does little to further clarify the scope of the independent liability rule, falls within its prohibition; and the circumstance that complainant appeared to have entered into a separate obligation deprives it of its right to have the contending brokers settle their dispute among themselves.

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MORTGAGES—ORAL PROMISE TO GIVE A MORTGAGE—PAYMENT OF MONEY NOT SUFFICIENT PART PERFORMANCE TO CREATE EQUITABLE MORTGAGE.—Complainant gave defendant $8,556.25 in return for defendant's oral promise to give a mortgage as security for the loan. Defendant refused to comply with her agreement and complainant seeks to have an equitable lien impressed on the premises in question. Court of Chancery granted relief to complainant. Defendant appealed. *Held*: Reversed. Payment of money, without more. does not constitute such part performance as to take the case out of the statute of frauds. *Feldman v. Warshawsky*, 4 A2d 84 (E. & A., 1938) reversing 122 N.J.Eq. 596, 196 A. 205 (Chan., 1937).

It has long been the settled law in this state that the payment of a part of the purchase money is not such part performance that will take an oral contract of sale of land out of the statute of frauds.[1] This is the position of the great weight of authority with some consistent exceptions.[2] It is based on the premise that the money so paid can be recov-

16. 124 N.J.Eq. 38, 199 Atl. 590 (Ch. 1938).

1. Titus v. Taylor, 65 Atl. 1003 (Ch. 1907); Shipman v. Shipman, 65 N.J. Eq. 556, 56 Atl. 694 (Ch. 1904); Lippincott v. Bridgewater, 55 N.J.Eq. 208, 36 Atl. 672 (Ch. 1897); Cochrane v. McEntee, 51 Atl. 279 (Ch. 1896); Brown v. Brown, 33 N.J.Eq. 650 (E. & A. 1881).

2. Delaware holds that where payment is either admitted or proved by a

ered back by an action at law with interest by way of damages for its detention. Part performance takes a case out of the statute of frauds only because to allow the statute as a defense would be operative to promote rather than to prevent fraud. Acts relied on as part performance must be exclusively referable to the contract[3] and even personal services which may be compensated for in damages are not sufficient.[4] Where the vendee takes possession under an agreement, that is sufficient,[5] unless the possession was taken without the consent of the vendor.[6]

In the face of this well-formulated stand the Court of Chancery in this case held that an oral promise to give a mortgage, when the loan was advanced, would create an equitable mortgage. The Court relied on three New Jersey cases[7] to support its view but on examination the cases are found to be clearly distinguishable as the Court of Errors and Appeals stated. In one case[8] the consideration cited to support the equitable mortgage was not payment of money but rather an agreement by the complainant to permit the equitable mortgagor to acquire the premises at a sheriff's sale free and discharged of complainant's mortgage lien. Also in that case one other than the equitable mortgagor sought to plead the statute of frauds. The court held that the judgment creditor of the mortgagor could not plead it as it was a personal defense. In another case[9] the statement that payment of money is sufficient part performance was *obiter dictum* as the case turned on the fact that the statute of limitations barred defendant's setting up an equitable mort-

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writing it is sufficient part performance. Sussex Inv. Co. v. Clendaniel, 129 Atl. 919; Matthes v. Wier, 10 Del. Ch. 63, 84 Atl. 878; Townsend v. Houston, 1 Har. 532.

3. POMEROY ON SPECIFIC PERFORMANCE, sec. 108.

4. Cooper v. Colson, 66 N.J.Eq. 328, 58 Atl. 337 (E. & A. 1904). The result would be different if the services caused the complainant to change his mode of living or life work. See Young v. Young, 45 N.J.Eq. 27, 16 Atl. 921 (Ch. 1889).

5. Green v. Richards, 23 N.J.Eq. 32 (Ch. 1872).

6. Nibert v. Baghurst, 47 N.J.Eq. 201, 20 Atl. 252 (Ch. 1890).

7. Rutherford National Bank v. H. R. Bogle & Co., 114 N.J.Eq. 571, 169 Atl. 180 (Ch. 1933); Clark v. Van Cleef, 75 N.J.Eq. 152, 71 Atl. 260 (Ch. 1908); Dean v. Anderson, 34 N.J.Eq. 496 (Ch. 1881).

8. Rutherford National Bank v. H. R. Bogle & Co., 114 N.J.Eq. 571, 169 Atl. 180 (Ch. 1933).

9. Clark v. Van Cleef, 75 N.J.Eq. 152, 71 Atl. 260 (Ch. 1908).

gage. In the third case[10] relied on by the Vice-Chancellor the complainant was induced to convey his estate to a third party and to give up his agreement for a mortgage on the estate sold in return for an oral promise that a mortgage would be given on the property in issue. The only other case[11] in point in this state seems clearly contra to the Vice-Chancellor's reasoning.

In spite of the fact that the weight of authority is in accord with the majority opinion of the Court of Errors and Appeals in this case, it is to be regretted that the minority[12] failed to reveal the reasons for their dissent. The position taken by the court of last resort in New York seems to reach a more equitable result without any amount of strained logic.[13] That court held that a lien attaches on the payment of the money and may be enforced so long as the debt may be enforced Drawing a comparison with a vendor's lien it is pointed out that the party advanced money under an agreement that its payment should be secured by a mortgage on specific realty. It is indeed questionable that the creditor has an adequate remedy at law to recover the loan if in fact the debtor is insolvent and there are other subsequent liens on the realty. A party requires security by mortgage because he is unwilling to trust to the personal responsibility of the person with whom he agrees, and to refuse him a remedy against the estate agreed to be mortgaged, is to deprive him of the principal security on which he relied, and to leave him to a remedy which he was unwilling to trust to. and which might not answer the justice of the case.[14] It is difficult to see what has happened to the doctrine that equity regards that as done which ought to have been done.[15] The result in this case allows the statute of frauds to promote a fraud instead of to prevent a fraud and equity has always hesitated to permit this.

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10. Dean v. Anderson, 34 N.J.Eq. 496 (Ch. 1881).
11. Bernheimer v. Verdon, 63 N.J Eq. 312, 49 Atl. 732 (E. & A. 1901).
12. It was a 9-6 decision.
13. Sprague v. Cochran, 144 N.Y. 104, 38 N.E. 1000.
14. Dean v. Anderson, 34 N.J.Eq. 496 (Ch. 1881).
15. Some courts relying on this maxim grant relief. See Foster Lumber Co. v. Harlan County Bank, 80 Pac. 49 (S. C. of Kansas); Baker v. Baker, 49 N.W 1064 (S. C. of South Dakota).

TORTS—HUSBAND AND WIFE—MARITAL UNITY AS BAR TO SUIT AGAINST HUSBAND'S PRINCIPAL. — Plaintiff sustained injuries as a result of the negligence of the defendant corporation's agent, who was the plaintiff's husband. On motion to strike, plaintiff's complaint on the ground that the unity of husband and wife preclude suit against the principal in the absence of allegations of independent liability. *Held*, motion granted. *Hudson v. Gas Consumers Association*, 62 N.J.L.J. 63 (Circ. Ct. 1939).

Up to the time of the decision of *Schubert v. Schubert*,[1] the law in this country was well settled that a wife was unable to sue her husband in tort unless such a right was expressly conferred by statute.[2] The immunity extended to cases where the husband was acting for a principal or master.[3] In the *Schubert* case (the facts of which were similar to those in the principal case),[4] the New York Court of Appeals, through Chief Judge Cardozo, held that where the act itself is unlawful, the common law immunity will not extend to the husband's principal. The reasoning of the case is doubtful: it is not clear that an act which inflicts an injury is unlawful when the actor may not be proceeded against either civilly or criminally.[5]

Since the decision in the *Schubert* case there has been a wide split of authority, and *Caplan v. Caplan*,[6] considerably limited its effect by refusing to hold a partnership liable for an injury inflicted upon the

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1. 249 N.Y. 253, 164 N.E. 42 (1928).

2. See cases collected in 30 CORPUS JURIS. 715.

3. Maine v. Maine & Sons Co., 198 Iowa 1278, 201 N.W. 20 (1924); White v. International Textbook Co., 150 Iowa 27, 129 N W. 338 (1911); Riser v. Riser, 240 Mich. 402, 215 N.W. 290 (1927); Emerson v. Western Seed, etc. Co., 116 Neb. 180, 216 N.W. 297, 56 A.L.R. 327 (1927).

4. "Plaintiff, while on the highway, was struck by the defendant's car and injured. The car causing the hurt was driven by the plaintiff's husband, who was then in the defendant's service. His negligence is not disputed," per Cardozo, C. J.

5. See Morril v. Morril, 104 N.J.L. 557, 142 Atl. 337 (E. & A. 1928): "To create a legal liability upon the part of a defendant there must be something more apparent in the case than mere physical damage; there must exist under the well-settled rules of tort liability legal damages resulting from what has been scientifically termed a legal injury," per Minturn, J. See also People v. Schmitz, 153 Cal. 18, 94 Pac. 419, 15 L.R.A. (N.S.) 717; State v. Bulot, 175 La. 21, 142 So. 787.

6. 268 N.Y. 445, 198 N.E. 23 (1935).

person of the wife of one of the partners by her husband during the commission of partnership business.

In the only reported New Jersey decision,[7] the court determined that the Married Woman's Act changed no rule of substantive law touching the liability of third persons and held the master liable for the servant's wrong to his wife. In concluding that the wife was a stranger to her husband in the enforcement of her rights, the court overlooked the fact that the liability of the master was wholly derivative.

It is submitted that the decision in the principal case reaches a more desirable result. Disregarding the question of public policy, which frowns on an actual wrong without a competent remedy, it must be recognized that an allowance of recovery unduly burdens the corporation: it would be subject to suit by one who is without a legal remedy against the actual wrong-doer, and whose chief witness is the actual wrong-doer possessed of a pecuniary interest in the outcome. The argument that recovery will give the corporation an action against the husband is far from convincing. Such an action would defeat the common law rule of the disability of husband and wife to sue each other in tort,[8] will put the corporation to added expense, and subject it to the risk of the husband's insolvency. As a matter of realistic fact, the real but less obvious reason for the type of action in the principal case is that the corporation is usually protected by insurance coverage.[9]

If we are to deny a wife's recovery in tort against her husband, it is submitted that, in the absence of independent liability, a recovery against the husband's principal should also be denied.

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7. Cerruti v. Simone, 13 N.J.Misc. 466, 179 Atl. 257 (Circ. Ct. 1935).

8. Doremus v. Root, 23 Wash. 715, 63 Pac. 574, 54 L.R.A. 649.

9. Maine v. Maine & Sons Co., 198 Iowa 1278, 201 N.W. 20 (1924): "The occasion for a controversy of this character between parties so related and associated, may be found in the fact . . . that the appellant company carried a policy protecting against liability for damages caused by the automobile in question," per Vermilion, J.