RECENT CASES

DEATH ACT—RIGHT OF ACTION AGAINST GENERAL ADMINISTRATRIX—TIME LIMIT—INTEREST OF ILLEGITIMATE CHILDREN.—The defendant, Isabella, claiming to be the wife of the deceased through a ceremonial marriage with him in the City of New York, obtained letters of administration after his death. She, as administratrix ad prosequendum, effected a settlement for his wrongful death, which money was paid over to herself as the general administratrix. Joseph and Isabella had two children as the result of the alleged marriage, who are made defendants together with Isabella. Complainant, five years previous to the alleged marriage, entered into a lawful marriage with Joseph in Italy. Isabella, being a native of the same town as Rosa, the complainant, and Joseph, was aware of their marriage in Italy. The complainant seeks to recover the amount received in settlement for the deceased's death still in the hands of the administratrix and also to get possession of the lands to which Joseph died seized. A period of approximately twelve years had elapsed after the death of her husband before complainant brought this suit, she, in the interim had brought other actions to recover that which she claims is due her. *Held*: Complainant, as lawful widow of the deceased, was entitled to recover the full amount remaining in the trust fund and the lands since the second marriage was void *ab initio* and the children are, therefore, illegitimate; and her action was not barred by the Statute of Limitations. *Capraro v. Propati et al,* 126 N. J. E. 67, 8 At. 2d 52 (Ch. 1939).

The statute[1] dealing with causes of action for wrongful death requires that the action be brought in the name of the administrator ad prosequendum for the benefit of those named in the statute.[2] If

1. R. S. 1937, 2:47-2. Every action, proceeding or claim brought, instituted or made under this chapter shall be brought, instituted or made in the name of an administrator *ad prosequendum* of the decedent, for whose death damages are sought to be recovered. . . .

2. R. S. 1937, 2:47-4. The amount recovered in the proceedings under this chapter shall be for the exclusive benefit of the widow, surviving husband, and the next of kin of the decedent, and shall be distributed to them in the proportions provided by law for the distribution of personalty of intestates, except that where decedent leaves a surviving widow or husband, but no children or descendant of any children and no parents, the widow or surviving husband shall be entitled to the whole of the amount recovered, which amount shall be paid to her or him.

Isabella had obtained the position of administratrix ad prosequendum in a manner that was void, then the complainant would not be entitled to maintain this action; for then Isabella would have recovered an unlawful judgment, and the defendant in the wrongful death action might then seek to reacquire the money so paid. But complainant could not be entitled to a claim against that fund as there would be no fiduciary relationship between herself and Isabella which might give rise to a beneficial interest therein. But such is not the case.

The administrator ad prosequendum is just a nominal party[3] and a mere trustee[4] for the purpose of bringing an action or instituting any claims. The duty of such representative is only to prosecute the action in favor of such beneficiaries and this is borne out by the provision of the statute[5] which requires that payment in settlement of the claim under the act shall be made only to the general administrator and not to the administrator ad prosequendum. The administrator ad prosequendum is only a party to the cause of action because of special appointment under the statute and, therefore, is not by such position entitled to receive any part of the recovery for the claim or judgment,[6] but will be benefited by the distribution made by the general administrator if he is one of those named as beneficiary under the statute. This leads to the conclusion that an administrator ad prosequendum need not have any special qualifications to bring proceedings, but that such party as is appointed by the court having jurisdiction, may properly bring the action.

The question of qualification necessary to obtain the letters of this special administration only pertains to the matter of priority of right for securing the letters that certain persons or classes of persons have. In order to be entitled to letters, the one attempting to secure them must show that he or she is the surviving spouse or next of kin, and if she cannot set up her rightful claim the letters may be success-

3. Loughney v. Thomas *et al*, 117 N.J.L. 169, 187 A. 329 (E&A 1936).

4. Cetofonte v. Camden Coke Co., 78 N.J.L. 662, 75 A. 913 (S. Ct. 1910); and Wilson v. Dairymen's, etc., Ass'n, 105 N.J.L. 188, 143 A. 454 (S. Ct. 1928).

5. R. S. 1937, 2:47-6. When an action is brought or proceedings instituted or claim made by an administrator *ad prosequendum* under authority of this chapter, no payment in settlement thereof or in the satisfaction of a judgment therefore shall be made to him, but such shall be made only to duly appointed general administrator of the estate of decedent, who has filed with tribunal appointing him a supplemental bond, with sufficient security. . . .

6. Riley v. Lukens Dredging & Contracting Corp., 4 F.Supp. 145 (1933).

fully opposed and denied. Thus, Isabella, who is not the deceased's lawful widow because her marriage was void, would not have a right to secure the letters, and the granting of such letters might have been denied for this reason.[7] Though the right to special administration is sometimes in the same person as that entitled to the general letters of administration, in absence of such statute this is not necessary and the selection is not limited to those having a right to general administration.[8] However, the special administration secured by Isabella was not void so as to invalidate the acts she did thereunder. Isabella applied and obtained letters which she had no right to do, yet having been granted the authority by the proper official and having become the administratrix ad prosequendum, she so retained it until it was opposed and declared invalid[9] or until the duties under the special appointment were fulfilled. It is observed, therefore, that since defendant's appointment was not opposed, she might properly institute a claim under the act and as trustee effect a settlement for the benefit of those specified in the statute. This she did and in accordance with the statute[10] the sum obtained in settlement was paid over to herself, as the general administratrix.

Unless complainant, deceased's first wife, is prohibited from bringing this action by the Statute of Limitations, she is entitled as deceased's lawful widow to a distributive share of the fund settled in the hands of the general administratrix. The acts of the general administratrix are valid for the reasons noted above.[11] The complainant may waive her legal rights to the position of administratorship by not attacking the validity of the administration set up and may treat the defendant as the lawful general administratrix whose duty it is to distribute the assets to the beneficiary or the beneficiaries named in the statute. We now arrive at the issue whether this cause is barred by the Statute of Limitations.

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7. Ellis v. Ellis, 55 Minn. 401, 56 N.W. 1056, 23 L.R.A. 287 (1893); and *In Re* Smith, 4 Wash. 702, 30 Pac. 1059, 17 L.R.A. 573 (1892).

8. 24 C. J. 1174.

9. Buckner v. Louisville, etc., R. Co., 120 Ky. 600, 87 S.W. 777 (1905); Fridley v. Farmer's, etc., Sav. Bank, 136 Minn. 333, 162 N.W. 454, L.R.A. 1917 E. 544 (1917); and Mowry v. Latham, 20 R.I. 786, 40 A. 236, 341 (1891). The last case states that a person having no interest in the estate has no standing to apply for administration thereon, although a grant of administration made on the application of such person is valid, unless reversed or appealed.

10. *Supra*, note 5.

11. *Supra*, notes 7 and 9.

The two year limitation specified in the Wrongful Death act has no application here, as this suit is for a distributive share of the sum collected and is not an action against the wrongdoer who caused the death of the decedent.

A general administrator is a trustee who holds the money given to him in a direct trust for the benefit of the *cestui que trust*.[12] As long as the trust continues, the administrator cannot invoke the Statute of Limitations[13] as a bar to the actions of the next of kin or other persons entitled to a distribution of the assets.[14] The statute will not commence to operate until there is a renunciation, in no uncertain terms, of the trust relationship, which according to the evidence is not the situation in this case. Defendant was not aware of the fact that there were any adverse claimants and thus, must have held the trust fund consistent with the trust relationship. The only evidence of a possible renunciation of the trust is that the defendant here, defended an action prosecuted in Orphans Court[15] for a distribution of the funds. But the evidence does not show such a renunciation as is required. On the contrary, she intended that the trust relation should continue as it had previously. There was no reason for defendant to renounce the trust, for the Orphans Court decided in her favor and though she intended to hold adverse to complainant's interest, it was not the breaching of a trust, but it was the same as holding adverse to everyone whom she thought had no rightful claim in the trust fund.

Having decided that complainant may maintain this action, it is now necessary to discover to what portion of the fund the complainant is entitled to recover as a beneficiary under the statute. Is she entitled to the full sum as deceased's lawful widow, or only to share as a beneficiary together with other next of kin, if any exist? The solution depends upon the answer to the question whether the

12. Hedges v. Norris, 32 N.J.E. 192, 194 (Ch. 1880); Lawrence v. Warwick, 4 A. 431 8 L.R.A. 648 (1886); App v. Dreisback, 2 Rawle 787, 8 L.R.A. 648. The latter case stands for proposition that every deposit is a direct trust; and every person who receives money to be paid to another, or to be applied to a particular purpose, is a trustee.

13. R. S. 1937, 2:24-1.

14. Hedges v. Norris, *supra*, note 12; approved in Magee *et al* v. Bradley *et al*, 54 N.J.Eq. 326, 35 A. 103 (Ch. 1896); see Jones v. Haines *et al*, 79 N.J.Eq. 110, 80 A. 943 (Ch. 1911); Rivley v. Barnett, 12 Mo. 3, 49 Am. Dec. 115, 8 L.R.A. 648.

15. See *In re* Capraro's Estate, 116 N.J.Eq. 259, 172 A. 907 (Ch. 1932); aff. 119 N.J.Eq. 82, 180 A. 830 (E& A 1935).

issue resulting from decedent's second purported marriage were legitimate or illegitimate. At the common law these children would have been considered as illegitimates, but the growing tendency has been to make or declare children legitimate wherever possible. It is sufficient to show how strong this tendency has been by noting that courts have turned to absurd presumptions of law in order to sustain the legitimacy of children.[16] That courts of law would reach to such an extreme clearly demonstrates that law and society have always been eager to remove the stigma of bastardy from the status of an innocent child. Therefore, it seems clear that the motivating intention of the Legislature of New Jersey was to avoid putting such a burden upon the shoulders of one, who himself had committed no wrong.

In considering the statute[17] which relates to the effect of a decree of nullity on the legitimacy of the issue, there appears to be no basis for a distinction between the status of the issue before the decree and after the declaration of nullity. It would seem obvious that if there is a decision in favor of legitimacy after a decree, such holding would be stronger at a time when a nullity has not been judicially declared.

This statute declares that "a decree of nullity of marriage shall not render illegitimate the issue of any marriage so dissolved because either party had another spouse living at the time of a second or other marriage. Such marriage shall be deemed void *ab initio*, and the issue thereof shall be illegitimate."[18] Put in a positive form the statute states that an issue shall be deemed legitimate even after a decree of nullity except where there has been a bigamous common law marriage, and only in that case will the children be illegitimate. This exception did not exist in the original Divorce Act of 1907,[19] but was inserted in the amendment of this act, in the laws of 1931.[20] Thus by legislative *fiat* a progressive step was taken by legitimatizing children born of a ceremonial marriage.

From the wording of the statute, it seems that the effect of the exception is to put a ceremonial bigamous marriage on the same plane

16. See *In re* Findlay, 253 N.Y. 1, 170 N.E. 471 (1930).
17. R. S. 1937, 2:50-32.
18. *Supra*, note 17.
19. Laws of 1907, c. 216, sect. 1, p. 475; C.S. p. 2021, sect. 1.
20. Laws of 1931, c. 311, sect. 1, p. 783.

as that of other causes of nullity. The result of this would be to make such a bigamous marriage merely voidable and not void. However that may be, the marriage could still be attacked by complainant while the wife of the illegal marriage is living and it could be declared void. But it is difficult to presuppose that a bigamous marriage is other than void and a long line of decisions have so held.[21] There is no sound reason why the legislature may not expressly or impliedly declare that although the marriage is void *ab initio,* the children born of a ceremonial marriage shall be considered legitimate. The statute relating to the effect of a decree of nullity, above referred to, taken in conjunction with another statute,[22] conclusively proves that the legislators intended that the issue born of a void bigamous marriage, when there has been a ceremonial ritual, shall be as legitimate as are the children born of a bona fide marriage. The latter statute dealing with void ceremonial marriages expressly states that, "Any child heretofore or hereafter born of a ceremonial marriage is the legitimate child of both parents . . . " and this clause, in its strict sense, is all inclusive.

The court of equity in deciding the instant case declared that the children of the second purported marriage were illegitimate and stated as its reason that the statute was not intended "to apply to bigamous marriages, where both parties were conscious of a matrimonial impediment." It concludes with the statement that 9:15-2 of Revised Statutes, "was planned to protect the offspring of a marriage entered into in good faith, through apparent honest motives, which the parties believed to be valid, and it was not meant to legitimatize the offspring of a designedly bigamous relationship." Thus the court attempts to judicially legislate a new exception and decides that "ceremonial" connotes a ceremony entered into in good faith. In this respect, the court fell into error and erroneously construed the purport of the statute.

One can agree with the statement that parties entering into a ceremonial marriage shall not make a mockery of such a sacred ritual

21. See *In re* DeConza's Estate, 13 Misc. 281, 177 A. 847 (Orphan's Court 1935).

22. R. S. 1937, 9:15-2. Any child heretofore or hereafter born of a ceremonial marriage is the legitimate child of both parents not withstanding the marriage be thereafter annulled or declared void. Such child shall enjoy the status and rights to which he would have been entitled had he been born of a valid marriage.

which is "a deliberate matrimonial fraud." But should the sin of immoral parents be visited upon the innocent offspring? It is an assumption of a false conclusion to state that the intent of the legislators was not to include children where the ceremonial marriage was without color of right, for the intent of the statute is not to insure the welfare of the wrongdoing parents, but, on the contrary, and in spite of the acts of the wrongdoers, to protect the resulting issue of such a relation. To permit such children to enter into society on a basis of equality, we must construe the statute in a liberal manner and so affect a decision consistent with this purpose.

The evidences to support this contention are several, some extrinsic to and some an intrinsic part of the statute. The first supporting ground is that R. S. 9:15-2 deals with "children of a void ceremonial marriage." The line of reasoning employed by the Court tends only to indicate that the ceremonial marriage is void because it was not availed of in good faith and therefore the children are illegitimate. But the provisions of this statute deal with "void" ceremonies and there is no basis for supposing that the legislature desired to differentiate between degrees of "voidness" according to the amount of good faith present in the case. Such an absurd result would seem to be inadvertent if any attempt is made to distinguish what sort of "ceremonial marriage" is in the purview of the enactment.

Further, the distinction is unavailing in that Rev. St. 9:15-2 states that, "any child . . . born of a ceremonial marriage . . ." is legitimate. Thus the legislators did not contrast a child born as a result of a marriage ceremony which was entered into with an apparent color of right with one of bad faith, but that the word "any" should remain, as the legislators must have intended, unqualified.

It cannot, with propriety, be said that when the legislators amended the earlier statute by inserting the exception to a bigamous marriage, "not being a ceremonial one" that they did not contemplate a situation such as is present in this case. There are only three real distinctions among bigamous ceremonial marriages and one is almost as prevalent and notorious as the other. These are: 1. where both parties enter into the marriage in good faith—neither of them being conscious of a legal impediment; 2. where one of either of the parties concluded the ceremony in good faith—where the other conceals the fact of his having a spouse living by a prior marriage; and 3. where both parties

entered into the ceremonial ritual without any colorable right—which is the present case. How any of these circumstances could have escaped the minds of the legislators is beyond comprehension; and it is, therefore, more in line with logical reasoning to maintain that the above quoted words included the three possibilities set forth. Rev. St. 2:50-33 demonstrates that bigamous marriages were included in "ceremonial marriage" in Rev. St. 9:15-2 and the above reasoning leads to the conclusion that the intention is to make "ceremonial marriages" all inclusive.

As concluding evidence which manifests the intention of the legislators and shows to whom the benefits of the statute were to go, is the statute[23] relating to provisions for bastards. Running concurrently through all the sections of the chapter, there is a preception of the uncertain intent to assure the welfare of such children and to lend them a helping hand to meet their adversities. Though this is not directly in point with the case at hand, it, nevertheless, emphasizes the conclusion that the statute does not look to the deeds of the parties of a ceremonial marriage, but to the issue.

It would therefore appear that under a proper construction of the statutes, the children are legitimate, and therefore, as the next of kin of the decedent, are entitled to share the amount recovered in settlement for deceased's wrongful death, together with complainant, the decedent's lawful widow.[24] Each is to recover an amount "in the proportions provided by law for the distribution of personal property of intestates."[25] And the administratrix ad prosequendum is not entitled to anything, she being only a formal party to the action and the rights that existed before her appointment to which she was not entitled, were not affected by it.[26]

As to the real property involved (in regard to status of parties) the complainant is entitled to share in the estate as decedent's lawful widow together with deceased's lawful children in a manner provided by the laws relating to the distribution of real property of intestates.

It has been stated by a writer of domestic relations[27] that although the children of a bigamous marriage will be considered legitimate, where

23. R. S. 1937, 9:15-3 *et seq.*
24. *Supra*, note 2.
25. *Supra*, note 2.
26. See Public Service Electric Co. v. Posts, 257 F. 933 (1919).
27. N.J.Divorce; N.J.Suppl. 1932-1938; by Francis Child.

there has been a ceremonial ritual, yet courts would probably hold that such children are not entitled to share in deceased's estate. But this is contrary to the expressed intent of the Legislature. The state[28] states that, "Such child shall enjoy the status and rights which he would have been entitled had he been born of a valid marriage." The intent is more clearly manifested in the source of the act which is unamended. That statute[29] states substantially the same as the above and adds, "It is the intention of this act to make the status of any child that of a child born of a valid marriage." That they are entitled to share in deceased's estate is incontrovertible and it should be so decided.

HUSBAND AND WIFE—SEPARATE MAINTENANCE—AMOUNT OF AWARD.—Husband during pendency of maintenance suit sold the bulk of his valuable property to his brother for $50,000.00. In addition to decree for maintenance, wife also prayed that husband pay arrearages due her under contract formed in 1935, at which time husband promised to convey house, assign insurance and pay her $188.00 weekly on her promsie to drop her then pending maintenance suit and resume marital relations. *Held*, conveyance of property to brother was fraudulent and done by husband with intent to cheat wife by wasting his estate. Wife entitled to maintenance of $200.00 a week which is based on the value of his estate prior to conveyance. Also, she is entitled to $2,001.00 under the previous contract with which he has failed to comply. *Adams v. Adams*, 17 N. J. Misc. 234, 8 A 2d 214 (Ch. 1939).

Husband sold to his brother for $50,000.00 stock which year before gave him a $15,000.00 salary and $16,000.00 dividends. This, together with other facts enabled the court to find that the property was fraudulenty conveyed. Fraud cannot be presumed, but must be proved.[1] Suspicion of fraud is not the equivalent of proof. These tests are apparently sufficiently met.

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28. *Supra*, note 22.
29. Laws of 1924 C. 144, p. 318.
1. Grobart v. Grobart, 119 N.J.Eq. 565, 182 Atl. 630 (E. & A. 1936).

In making the decree the court took into consideration the value of the property fraudulently conveyed. This is a rather novel situation in New Jersey;[2] and merits some consideration, although it has been treated in other jurisdictions.[3] There is in fact no reason why equity should treat the situation any differently from what it has done in this case. The court has found that the husband and father has attempted to work a fraud on his wife and children by wasting his estate. Certainly the mere form of his transaction cannot deprive him of his property to cheat his wife for equity looks at the effect and not the form of his deed.[4] Even though his conveyance should have the form of law under a sheriff's execution, it is not sufficient.[5]

It is not entirely unlike a situation where a husband during the pendency of a suit gives up a job at $75.00 a week and takes one at $20.00.[6] In this case the court found that the husband had an earning capacity of $75.00 and his fraudulent act in accepting a $20.00 position was done with intent to cheat his spouse. It may be argued that these situations are not entirely analogous since it is within the husband's power to procure another job at $75.00 but in our case the husband is powerless to get his property back, since between grantor and grantee the transaction is valid, although it may be fraudulent as to a third party.[7]

In support of the argument one may describe a set of facts where a husband has property worth $500,000.00, and in order to waste his estate takes $450,000.00 in cash and throws it in the ocean, leaving him with but $50,000.00 as in our case. It is urged that in both cases the action was fraudulently done and that the grantor is unable to get his property back. The conclusion from this then is that the award can only be based on the $50,000.00 remaining and not on the original estate of $500,000.00. It is true that the husband is unable himself to get his property back in both cases, but this is not the test—

2. Clark v. Clark, 13 N.J.Misc. 49, 176 Atl. 81 (Ch. 1935); Grobart v. Grobart, *supra*.
3. Dougan v. Dougan, 97 N.W. 122 (Minn. 1903); Griffith v. Griffith, 190 S.W. 1921 (Kans. 1916).
4. Horton v. Bamford, 79 N.J.Eq. 356, 81 Atl. 761 (Ch. 1911); Metropolitan Bank v. Durant, 22 N.J.Eq. 35 (Ch. 1871).
5. Forsythe v. Matthews, 14 Pa. 100.
6. Pinkinson v. Pinkinson, 91 N.J.Eq. 109, 109 Atl. 731 (Ch. 1920).
7. Garretson v. Kane, 27 N.J.L. 208 (C Ct. 1858); Doughty v. Miller, 50 N.J.Eq. 529, 25 Atl. 153 (Ch. 1892).

the test is can the property be restored to the husband. In the case where the property is destroyed it cannot be so regained and hence the award should properly be based on $50,000.00. Here, however, the fact that the husband is himself unable to regain his possessions is not important. This is a disability imposed on him by the law as a result of his fraudulent act. Of course, he cannot go into equity for reconveyance under the well known maxims "ex dolo malo no noritur actis" and "in pari delicto ratio est conditio defendentis." But a creditor is enabled to have such a conveyance set aside. Although the court in our case does not consider the wife a creditor—"she is neither a creditor nor has she in her possession a decree," she nevertheless is so since she was awarded $2,001.00 which the husband owed her under the pre-existing contract. However that may be, should she not be a creditor at the time of the pendency of the suit, she becomes one when an award for maintenance is decreed and she can then have the conveyance set aside[8]

It will be noted that in our case the award was made without having the conveyance set aside. Does this in any way constitute error? It is of course true that the grantee was not made a party to the suit, and the court was therefore powerless to set aside the conveyance without his appearance. Plaintiff's counsel should most certainly have brought in the grantee for it is no valid objection that in a suit for maintenance, parties other than husband and wife are included.[9]

Be that as it may, there is no reason why the court should have to set the conveyance aside before a decree for maintenance may be awarded. The fraudulent transfer of property need not be disturbed any further than the exigencies of the judgment awarding alimony (maintenance) require.[10] This husband has property from which he can meet the payments to which his wife is entitled. He still has $50,000.00 cash and various parcels of real property. That he has by his own act fraudulently conveyed away property which he now cannot get back does not give him an excuse for a failure to comply with the court's decree. Such a conveyance as this is treated as null and void and is given no effect by the court. The court may set it

8. Feigley v. Feigley, 7 Md. 537; Bailey v. Bailey, 61 Me. 361.
9. Way v. Way, 6 Wis. 662; Murray v. Murray, 115 Cal. 266, 47 Pac. 37 (Calif. 1896).
10. Murray v. Murray, *supra*, note 9.

aside or it may merely ignore it and consider the defendant as still in possession of the property.[11] This question need not influence the court for the wife can come in at a late time and have the conveyance set aside.[12]

An equally interesting problem arises from the second phase of the decision—that which awards the wife $2,001.00 under the pre-existing contract. Ordinarily such a contract made between husband and wife is considered void as being contrary to public policy.[13] The court easily skips this hurdle by stating that equity will enforce such a contract if it appears not to be inequitably made. In support of this proposition the court cites *Cohen v. Cohen*,[14] but the citation does not apply for that pertains to a contract for separate maintenance, while our case presents a contract of an entirely different nature. The facts were these: In 1935 the husband had abandoned his wife and she brought a suit for maintenance. The husband then, in consideration of abandoning her suit, agreed to have a Grecian divorce decree set aside, resume cohabitation with her and pay her $188.00 a week, deliver to her a deed for the premises on which they lived, etc. This clearly then was not a contract for maintenance or separation as was *Cohen v. Cohen* and other cases supporting, but clearly contemplated the resumption of marital relations. Is such a contract then contrary to public policy?

There is no reason why it should be. Although this is a rather novel point, it is nonetheless a very interesting one. The problem has been approached in numerous jurisdictions and the majority seems to support the view that there is ample consideration to support the contract.[15] In the principal case the wife, in view of her husband's abandonment, was fully entitled to bring her action for maintenance.

11. Muir v. Muir, 92 S.W. 314 (Ky. 1906) ("the mortgage to Muir and Wilson and theirs should be set aside or ignored.")
12. David v. David, 111 N.J.Eq. 493, 162 Atl. 538 (E. & A. 1932).
13. Demarest v. Terhune, 62 N.J.Eq. 663, 50 Atl. 664 (Ch. 1901).
14. 121 N.J.Eq. 299, 188 Atl. 244 (Ch. 1926).
15. For the majority view see: Barbour v. Barbour, 49 N.J.Eq. 429, 24 Atl. 227 (Ch. 1892); Adams v. Adams, 91 N.Y. 381 (1883); Woodruff v. Woodruff, 90 S.W. 266 (1906); Duffy v. White, 73 N.W. 363 (Mich. 1897). Restatement of Law par. 585, "A barbain between married persons who have separated or been divorced or who contemplate separation or divorce, for reconciliation is not illegal." Moayon v. Moayon, 72 S.W. 33 (Ky. 1903); Rodgers v. Rodgers, 128 N.E. 117 (N.Y. 1920). For the minority view see: Merrill v. Peasley, 16 N.E. 271 (Mass. 1888); Miller v. Miller, 35 N.W. 464 (Iowa 1837).

She thereafter, at his request, gave up her suit and resumed cohabitation with him. Is not the giving up of her suit ample consideration in contemplation of the cases cited below? As for its being contrary to public policy, there is no reason why it should be so treated. Justice O'Rear speaking for the Kentucky court carefully considered this question.[16] The same point was succintly dealt with in an oft quoted New York case.[17] "While the law favors the settlement of controversies between all persons it would be a curious policy which would forbid husband and wife to compromise their differences or preclude either from foregoing a wrong committed by the other."

MORTGAGES—ASSUMPTION OF MORTGAGE DEBT—ACTION FOR DEFICIENCY AGAINST SUBSEQUENT GRANTEES.—An owner of land executed a bond to another and secured it by a mortgage. Subsequently the mortgagor entered into a covenant with D to sell him the mortgaged premises for a specified sum which the latter agreed to pay in part by assuming the mortgage. The deed, which was made out later, merely recited that the conveyance was "subject to a mortgage . . ." Thereafter D conveyed to a third party who assumed the mortgage. Directly after confirmation of the foreclosure sale, the complainant filed suit on the bond for deficiency, naming as defendants the first grantee and the devisees of the second grantee. Seven months later he discontinued action against the first grantee. A statute[1] requires that action on a mortgage bond be commenced within three months from the date of confirmation of the foreclosure sale. *Held*: the statute barred suit against the assuming grantor and thereby relieved the assuming grantee of liability. *Meyer v. Supinski*, 125 N. J. Eq. 584, 7 A 2d 277 (Ch. 1939).

Although the words in a deed "subject to a mortgage" do not alone constitute words of assumption,[2] a covenant collateral to the

16. Moayon v. Moayon, *supra*, note 15.
17. Adams v. Adams, *supra*.
1. R. S. 1937, 2:65-2, N.J.S.A. 2:65-2.
2. The effect of these words is merely to make the part conveyed subject to

deed whereby the grantee promises to assume the mortgage debt as part consideration for a conveyance is independent of the deed and in no way contradictory thereto.[3] The stipulation of assumption is a contract by the grantee to indemnify the grantor who is personally liable for the mortgage debt.[4] When the mortgagor conveys his land and the grantee assumes the mortgage debt as part of the consideration, the grantee, in equity, becomes as between the grantor and grantee, the principal debtor, and the mortgagor becomes surety for the grantee; and the change of relationship inures to the benefit of the mortgagee.[5]

While the courts are almost unanimous in their support of this rule, they do not agree as to the basis on which the liability is founded. Thus in some jurisdictions[6] the rule imposing personal liability on an assuming grantee is sustained on the theory that a promise of one person to another for the benefit of a third person may be enforced by the beneficiary directly. Other jurisdictions[7] adhere to the view that the mortgagee is entitled to the benefit of the contract under the familiar doctrine that a creditor is entitled by equitable subrogation to all securities[8] held by a surety of the principal. New Jersey follows this reasoning.[9] It is important to note that while the third party beneficiary theory, when used in its broad sense, renders the liability of the grantor immaterial in determining the liability of the grantee, the doctrine of equitable subrogation demands that the grantor himself be liable to entitle the mortgagee to a judgment against the grantee.[10]

The statute, however, states only that action on the bond shall be commenced within three months from the confirmation date of the sale. Does this apply only to the obligor or does it also apply to his grantees? It is submitted that to include assuming grantees within the terms of the statute would do no violence to principles of statutory

its proper proportion of the encumbrances. Hoy v. Bramhall, 19 N.J.Eq. 74 (Ch. 1868).

3. Dieckman v. Walser, 114 N.J.Eq. 382, 168, A. 582 (E. & A. 1933).

4. Green v. Stone, 54 N.J.Eq. 387, 34 A. 1099 (E. & A. 1896). Feitlinger v. Heller, 112 N.J.Eq. 209, 164 A. 6 (E. & A. 1933).

5. Klapworth v. Dressler, 13 N.J.Eq. 62 (Ch. 1860). Fisk v. Wuensch, 115 N.J.Eq. 391, 171 A. 174 (Ch. 1934).

6. Ala., Ill., Minn., N.Y., Ohio, R.I., Wis.

7. Keller v. Ashford, 133 U.S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 494 (1890). Osborne v. Cabell, 77 Va. 462 (1883). Also Calif., Mich., Vt.

8. The promise to assume is a collateral security. Green v. Stone, *supra*, note 4.

9. Crowell v. Hospital of St. Barnabas, 27 N.J.Eq. 650 (E. & A. 1876).

10. Biddle v. Pugh, 59 N.J.Eq. 480, 45 A. 626 (Ch. 1900).

interpretation. Where the liability of the grantor has ceased to exist, the entire basis for the assuming grantee's liability falls, and to enforce it thereafter creates the anomalous situation of giving effect to a contract to indemnify although all possibility of loss by the party indemnified has ended. Since a release of the mortgagor by the mortgagee will also release the assuming grantee,[11] then a release of the mortgagor by operation of the law should release the grantee. Seven months having passed since the foreclosure sale, the first assuming grantee may raise the bar of the statute and immunize him from liability on the bond. The second assuming grantee, having contracted to indemnify his grantor, is now in turn immunized. The court reached its present decision by declaring the discontinuance against the mortgagor's grantee served to raise the bar of the statute. Since the mortgagor was not made a party to suit on the bond, it seems equally logical to apply the statute directly to him, thus relieving the second assuming grantee immediately.[12]

A question arises as to whether the first assuming grantee is relieved of liability. Although the statutory period of three months has passed, he is still liable in the eyes of the law, because the court will not raise the bar of limitations for a defendant who fails to plead it specially.[13] The first grantee cannot be accused of negligence, though, since he is no longer party to the action. Should the second grantee suffer because his grantor is effectively silenced? The courts hold with little dissent that the successor in interest to a debtor may plead the statute for the latter if he dies[14] or, in an action where both grantor and grantee are joined, plead it for him if he neglects or refuses to plead it.[15] This is in accord with reason, for if the ultimate grantee may not defend by reason of the passage of time as to his

11. Feitlinger v. Heller, *supra*, note 4.

12. The Court of Chancery has jurisdiction to determine the rights and liabilities of successive grantees of the mortgaged premises in a single suit with a view to avoiding circuity of action. Howell v. Baker, 106 N.J.Eq. 434, 151 A. 117 (Ch. 1930).

13. Inhabitants of West Hoboken v. Syms, 49 N.J.L. 546, 9 A. 780 (S. Ct. 1887). Dalton v. City of Hoboken, 12 N.J. Misc. 216, 171 A. 141 (S. Ct. 1924). Easton Nat'l Bank v. American Brick Co., 70 N.J.Eq. 732, 64 A. 917 (E. & A. 1906).

14. Mason v. Taft, 23 R.I. 388, 50 A. 648 (1901).

15. Hopkins v. Clyde, 71 Ohio St. 141, 72 N.E. 846 (1904). Hill v. Hilliard, 103 N.C. 34, 9 S.E. 639 (1889). Paine v. Dodds, 14 N.D. 189, 103 N.W. 931 (1905).

grantor, the purpose of the statute is nullified. A mortgagee could wait until after the three months and yet not suffer because of his delay. By merely leaving all intermediate assuming grantees out of the suit and proceeding only against the last grantee, he may recover the deficiency so long as the chain of liability is intact. Although action against the mortgagor and his grantees could be barred by the mortgagor's pleading the statute, the omission to proceed against him prevents him from proving his immunity unless his grantee may so plead for him.

MORTGAGES—DETERMINATION AND ALLOWANCE OF "FAIR VALUE." —In foreclosure proceedings instituted against defendant mortgagor, the amount due complainant upon the foreclosure decree was $785,-760.30. At the sheriff's sale the complainant's bid together with the tax liens amounted to $524,899.28, leaving a deficiency of $260,861.02 for which the defendant would be liable. The defendant filed objections to confirmation of the foreclosure sale and petitioned the Chancery Court for a determination of the fair value of the property to be credited upon a possible deficiency suit.[1] The Court concluded that

1. Chancery Rule 230 (Edition of 1938) provides "The sheriff or other officer by whom mortgaged premises shall be sold on proceedings for foreclosure, shall, within five days after the sale, report it to this court in writing, stating the name of the purchaser and the price obtained; and he shall accompany the report with his affidavit that the price was the best that the property would, at the time of the sale, bring in cash, and unless written objection to the confirmation of the sale to be filed within five days from the expiration of the time limited for filing the report, if the report be duly filed within the time limted by law and this rule (and if the report be not so filed, then within five days from the filing thereof), an order, which shall be an order of course, confirming the sale as valid and effectual in law, and directing the officer by whom the sale was made to execute a good and sufficient conveyance in law to the purchaser for the mortgaged premises, may be entered after the expiration of the time limited for making objections. If objections shall be filed, the question whether the property was sold for the best price that could be obtained for it in cash shall be disposed of summarily by the court, on affidavits or depositions."

3 Comp. St. 1910, p. 3422, par. 50 P.L. 1902, p. 541 provides "That in all foreclosure proceedings hereafter commenced, the sheriff or other officer who may be directed to sell any mortgaged premises shall, after making such sale, report the same within five days thereafter to the court out of which an execution or

for the purpose of this proceeding the fair value of the property was $600,000.00, and advised a decree confirming the sale because the bid was not unconscionable.[2] *Fidelity Union Trust Co. v. Ritz Holding Co.* 126 N. J. Eq. 148, 8 A 2d. 235 (Ch. 1939).

As a result of the decision, the defendant is not credited with the fair value, as the Court did not think the disparity between the bid and the fair value as determined by him was sufficient to shock its con-

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order to sell is issued, stating the name of the purchaser or purchasers and the price obtained, and if the said court, or a judge thereof, shall approve of such sale, they shall confirm the same as valid, effectual in law, and shall, by rule of court allowed in open court, or by a judge thereof at chambers, direct the said sheriff or other officer to execute good and sufficient conveyance in law to the purchaser or purchasers for the mortgaged premises so sold; provided, that no sale of mortgaged premises shall be confirmed by the court or further proceedings had until the court, or such judge, is satisfied by evidence that the property has been sold at the highest and best price the same would then bring in cash, and such evidence may be in the form of affidavits."

1 Comp. Stat. p. 447, par. 94 provides "Whenever the sheriff or other officer shall by virtue of any decree or order of the court, sell any lands or any interest therein, he shall within five days thereafter, report such sale to the Court making such decree or order of sale, and the Court shall, if it approve the sale, confirm the same as valid and effectual in law, and shall by rule of Court, allowed in open Court or at chambers, direct said sheriff or other officer to execute good and sufficient conveyance in law to the purchaser or purchasers for the lands or interest therein so sold; provided, no such sale shall be confirmed until the court is satisfied by evidence that the lands or interest therein have been sold at the highest and best price the same would then bring, and such evidence may be in the form of affidavits; provided further, such sale and the confirmation thereof, shall be subject to such rules and orders in respect thereto as the court at any time make.

Revised Statutes of N.J., 2:65-3, apply to bonds and mortgages executed after March 29, 1933.

If the purchaser seeks to be relieved of his purchase, he must bring an independent proceeding and not by objection to confirmation of the sale. Cropper v. Brown, 76 N.J.Eq. 406, 74 Atl. 987 (Ch. 1909).

2. It is interesting to note that prior to the determination by the Court, this matter was referred to a Special Maser, who after taking voluminous testimony, fixed the fair value of the property at the date of the sale at $850,000.00. Upon objections to the report by the complainant, the Court laid aside the Master's report in toto and considered the issue de novo. The determination of the fair value was a difficult one for the Vice Chancellor, who was compelled to scrutinize the appraisals of nine different realty experts, whose appraisals differed in amounts to such an extent that the highest value placed on the property was over $800,000.00 while the lowest appraisal was slightly over $500,000.00. The property involved was a spacious apartment house built to provide luxurious apartments for a wealthy group in the City of Newark, and while the building is substantially constructed, it is situated in a neighborhood demonstrating a transition toward business; and this affects the rentability of the apartments. The property involved being investment, the capitalized value upon income was given the most weight in determining the fair value, although other factors considered were the reproduction or replacement value, neighborhood conditions and trend, potential value, and the appropriateness of location. The income yield during the prosperous years which reverted back fifteen years was also considered by the Court.

science. No definite or precise rule can be formulated as to what differential should be allowed between the bid and the determined fair value to result in confirmation of the sale by the Court of Chancery, since each case is decided according to its own factual situation.[3] In the case *sub judice* the Court displayed no uncertainty in deciding that the difference amounting to $75,000.00, was not equitably sufficient to justify a refusal of confirmation of the sale.[4]

The doctrine and practice of filing objections to the confirmation of sale and of petitioning the Court of Chancery for credit of the fair value of the mortgaged premises was first enunciated in New Jersey in the case of *Federal Title & Mortgage Guaranty Co. v. Lowenstein.*[5] In this noteworthy case, the Court of Chancery refused to grant an order confirming the sale, which was by statute an order of

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3. Fidelity Union Trust Company v. Pasternack, 122 N.J.Eq. 180, 192 Atl. 837 (Ch. 1937), affirmed in 123 N.J.Eq. 181, 196 Atl. 469 (E. & A. 1938). Fidelity Union Trust Co. v. Dreyfuss, 121 N.J.Eq. 281, 189 A. 631 (E. & A. 1937). National Mortgage Corp. v. Deering, 121 N.J.Eq. 274, 189 Atl. 64 (E. & A. 1937). Ukranian National Association v. Linden Supply Co., Inc., 124 N.J.Eq. 400, 1 Atl. 2d 941 (Ch. 1938).

4. When bids made at the sale are not merely nominal, it is not an unusual occurrence to have the Court deny a credit of the fair value, even though the difference between the bid and the fair value is great. In Fidelity Union Trust Co. v. Pasternack, *supra,* confirmation was withheld where the bid was only $125,000.00, while defendant's affidavit fixed the value of the property in excess of $287,000.00.

5. 113 N.J.Eq. 200, 166 Atl. 538 (Ch. 1933, V. C. Berry, Backes and Stein hearing argument and concurring). The doctrine was explained and extended in the following cases: Maher v. Usbe B. & L. Ass'n, 116 N.J.Eq. 475, 174 Atl. 159 (Ch. 1934); Young v. Weber, 117 N.J.Eq. 242, 175, Atl. 273 (Ch. 1934); Blue stone B. & L. Ass'n v. Glasser, 117 N.J.Eq. 392, 176 Atl. 314 (Ch. 1934); Fidelity Union Trust Co. v. Petchesky, 119 N.J.Eq. 514, 183 Atl. 472 (Ch. 1936); Meyer v. Blacher, 120 N.J.Eq. 35, 184 Atl. 191 (Ch. 1936); Miller v. Bond & Mortgage Guaranty Co., 121 N.J.Eq. 197, 188 Atl. 678 (Ch. 1936). A party to a mortgage foreclosure suit in the Circuit Court has the same right to object to confirmation of sale as if the proceedings are in Chancery Court, and the Chancery Court has jurisdiction to enjoin an action on a deficiency judgment prosecuted in another state. Harvester Building & Loan Ass'n v. Kaufhers, 121 N.J.Eq. 327, 190 Atl. 491 (Ch. 1937), affirmed in 122 N.J.Eq. 373, 194 Atl. 82 (E. & A. 1937). The mortgagor is not entitled to credit for the fair value, where the mortgagee was willing to recover the property if the debt was paid. Fidelity Union Trust Co. v. Pasternack, 122 N.J.Eq. 180. 192 Atl. 837 (Ch. 1937). Affirmed 123 N.J.Eq. 181, 196 Atl. 469 (E. & A. 1938). Ukrainian National Ass'n v. Linden Supply Co., 124 N.J.Eq. 400, 1 Atl. 2d 941 (Ch. 1938). Fidelity Realty Co. v. Fidelity Corp., 113 N.J.Eq. 356, 166 A. 727 (Ch. 1933). Lurie v. J. J. Hockenjos Co., 113 N.J.Eq. 504, 167 A. 766 (Ch. 1933), *aff.* 115 N.J.Eq. 304, 170 A. 593 (E. & A. 1934) Fruzynski v Phillips, 114 N.J.Eq. 23, 168 A 168 (Ch. 1933) *aff.* 117 N.J.Eq. 117, 175 A. 112 (E. & A. 1934).

course, except and until the complainant purchaser stipulated that he would credit upon the bond the fair value of the property and would institute a deficiency suit only for the balance.

This case established the principle that where there is such a gross inadequacy of price in the bid at the sale as to shock the Court's conscience, as where there is a foreclosure sale devoid of competitive bidding resulting in a nominal bid, the Court will withhold confirmation until the fair value is credited to the mortgagor. The objector to be entitled to relief must give evidence of distressing circumstances and the existence of an emergency rendering refinancing impossible. If the objector has sufficient ability and resources to protect himself at the sale he is denied relief.[6]

Before the economic depression mere inadequacy of price was never sufficient to prevent confirmation of the sale, but if inadequacy of price was present together with other slight circumstances, the Court would withhold confirmation of the sale.[7] The former practice was to set aside the sale whenever the property did not bring the highest and best price obtainable or where the bid was so unconscionably below the value of the property as to give rise to an inference that the sale must have been fraudulent or irregular.[8]

The present rule as applied in the *Lowenstein* case was adopted to obviate the possibility of a double satisfaction of the debt. The maxim is that "Equity will not suffer a wrong without a remedy." With this purpose in mind, it would appear more equitable if the rule were extended to allow the mortgagor credit of the fair value in all cases where the bid is lower than the determined fair value and

6. Maher v. Usbe B. & L. Association, *supra*, note 5. Fruznski v. Jablonski, *supra*, note 5. Young v. Weber, *supra*, note 5. Harvester B. & L. Association v. Kaufhen, *supra*, note 5.

7. The following cases show what circumstances combined with inadequacy of price have been held sufficient justification for refusing confirmation of the sale by the Court: Howell v. Hester, 4 N.J.Eq. 266 (Ch. 1843). Mistake of the date of the sale by the Mortgagor's agent. Workingmen's B. L. Ass'n v. McGillick, 28 Atl. 468 (Ch. 1894). The arrival of a bidder ten minutes late. Wetzler v. Schaumann, 24 N.J.Eq. 60 (Ch. 1873). Misinformation and misapprehension of the terms of the sale. Rea v. Wheeler, 27 N.J.Eq. 292 (Ch. 1876). Illness of counsel rendering him unable to attend the sale. Banta v. Brown, 32 N.J.Eq. 41 (Ch. 1880). Misunderstanding among the solicitors of the parties. Dunlop v. Chenoweth, 90 N.J.Eq. 85, 105 Atl. 592 (Ch. 1918). A defendant bidder was ill. New Jersey National Bank v. Savemore Realty Co., 107 N.J.Eq. 478, 153 Atl. 480 (E. & A. 1931). An interested bidder arrived late, because a street car was delayed.

8. Cropper v. Brown, 76 N.J.Eq. 406, 74 Atl. 987 (Ch. 1909).

not only in those cases where the bid shocks the conscience of the Court. In view of the present distressing economic depression such a rule would be more adaptable to the accomplishment of the purpose of the Court's control over the foreclosure sale as expressed in the *Lowenstein* case where the court stated that "It is still the Court's privilege to withhold sanction of the sale which frustrates the aim of our act, securing by competitive bidding, the highest and best price, not only to satisfy the debt, but as well to save the owner the value of his equity." While the doctrine of the *Lowenstein* case has prevented double satisfaction in many cases, it will not completely eliminate double satisfaction of the debt unless it is extended to provide an allowance of fair value whether or not the differential between the bid and fair value shocks the conscience of the Court.

The most articulate objection to an extension of the doctrine is the extinction of the importance of the sale with its concomitant competitive bidding. It has always been the policy of the law in the past never to obstruct bidding but to foster and encourage open bidding made in good faith without collusion or misconduct.[9] The stability of a judicial sale and competitive bidding was a development of the pre-depression era designed to protect the mortgagor. The Courts did not uphold the bids of the purchaser because of the right of the purchaser but rested the rule on the ground of a public policy to encourage competitive bidding so as to obtain higher bids at the sheriff's sale; thereby lessening the amount of deficiency for which a mortgagor would be liable.[10] The Court in the *Lowenstein* case recognized the fact that competitive bidding at foreclosure sales has temporarily ceased to exist, and that there is no longer any benefit derived from a rule producing competitive bidding.[11] The somewhat anachronistic vestige of the era of prosperity should be suspended in favor of a rule which will give enough protection to the mortgagor to at least allow

9. Morrise v. Ingles, 46 N.J.Eq. 306, 19 Atl. 16 (E. & A. 1890).

10. Ryan v. Nelson, 64 N.J.Eq. 797, 52 Atl. 993 (E. & A. 1902).

11. In the Lowenstein case, *supra*, p. 541, the Court stated: "There is no longer any competitive bidding at foreclosure sales, and the reason for the rule has temporarily ceased to exist. The reason for the rule having disappeared, the rule itself should fall or its application be suspended until its potency as a factor in producing competitive bidding is restored. Competitive bidding was thought requisite for the protection of the mortgagor whose rights were jeopardized by strict foreclosure. The result of current sales being the same as in strict foreclosure, the rule has ceased to be of any benefit."

him the fair value of his property when the mortgagee who has partial satisfaction of his mortgage by foreclosure of the mortgaged property seeks further satisfaction from the bond executed with the mortgage.

It is contended that the mortgagee is an unwilling purchaser, and since the mortgagor has agreed to pay any deficiency arising from the sale of the security, the mortgagee should not be burdened with a loss in such a lending transaction.[12] If relief were granted in the principle case, the mortgagee would not be compelled to share a larger burden of the common misfortune of the economic depression, but the effects caused by the general decrease in property value would be equally shared without any great injustice to any one party.

The Court of Chancery has always possessed the inherent power to order a sale of mortgaged premises and to control its process directed to that end,[13] although the power is now derived from statute.[14] While discussing the power of the Court of Chancery, the Court in the *Lowenstein* case stated that "the ancient practice of appraising the property for the purpose of fixing the deficiency, originally adopted for the protection of the mortgagee should now be invoked for the protection of the mortgagors." This case allowed the Chancery Court complete control over foreclosure sales and it may be cited to support the principle that the Court of Chancery has power to give relief to the mortgagor whenever there is *mere* inadequacy of price as well as where the bid is nominal or the price is *unconscionably* inadequate.[15] There is no deterrent to prevent the adoption of this rule.

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12. Rose v. Jerome-Harvey Development Company, 115 N.J.Eq. 574, 171 Atl. 832 (E. & A. 1934). Fruzynski v. Jablonski, *supra*.

13. Donovan v. Smith, 88 Atl. 167 (Ch. 1913). JONES ON MORTGAGES (8th edition), Sec. 2012, p. 465, "Independently of all statutory provisions a Court of Equity has jurisdiction to order a sale and provide for carrying it out, although in most of the states where foreclosure is effected by a judicial sale there are statutes providing for this, and regulating it."

14. R. S. 1937; 2:29-84 provides that the sale by the sheriff and the confirmation thereof, "shall be subject to such rules and orders in respect thereto as the Court may at any time make." The Lowenstein case has contrued this statute so as to give the Court of Chancery complete control and liberty of approval or disapproval of the sale.

15. In passing upon the statute providing for confirmation of the sale when the Court is satisfied that the property was sold at the best and highest price obtainable, note 1, *supra;* the Court construed this proviso as a limitation to invoke this remedy whenever the bid is not the best and highest price, but also stated "the Legislature did not intend to control judicial action in refusing to confirm when the mortgaged property does not yield an appropriate equivalent in money." The

The extraordinary relief afforded the mortgagor by the Chancery Court under the doctrine of the *Lowenstein* case and its allied cases, should not be confounded with the remedy provided by statutory enactments.[16] The statutes in New Jersey allowing the mortgagor the fair value in deficiency suits, apply only to bonds and mortgages executed after March 29, 1933 because the acts were held unconstitutional as applied to pre-existing bonds and mortgages.[17] In this state of affairs with the legislature powerless to deal with pre-existing mortgages, the Court of Chancery was compelled by exigency to remedy the situation by invoking its power to withhold confirmation of the foreclosure sale (heretofore a matter of course) in order to prevent an injustice to the mortgagor, whose property was sold at a nominal bid during a time when he was unable to protect his interest. The statutory relief (applying only to bonds and mortgages executed after March 29, 1933) is broader in scope and in situations where applicable always allows the mortgagor credit of the fair value upon a deficiency suit. The Court of Chancery should exercise its power to refuse confirmation of sale in such a situation and afford the mortgagors of bonds and mortgages executed prior to March 29, 1933 a remedy in foreclosure proceedings similar to the remedy afforded mortgagors of subsequent executed bonds and mortgages.

Court always has the privilege to withhold sanction of a sale which frustrates the aim of our foreclosure act.

16. R. S. 1937; 2:65-3, provides that the obligor of any bond (where both the bond and mortgage have been given for the same debt) executed after March 29, 1933, may set up the fair value of the proprty in his answer to a deficiency suit and the fair value will bededucted from the mortgage debt.

17. The first statute was passed in 1933. P.L. 1933, chap. 82, p. 172. Revised Statutes of 1937, *2:65-2 to 2:65-5*. The constitutionality of this act was passed upon in Vanderbilt v. Brunton Piano Co., 111 N.J.L. 596, 169 Atl. 177 (E. & A. 1933), 89 A.L.R. 1080, which held the act unconstitutional in so far as it purported to restrict or limit the pre-existing right of recovery on the bond.

A second statute was passed in 1935. P.L. 1935, chap. 88, p. 260, R. S. 1937, 2:65-5.1. This act contains a preamble which states that a public necessity exist requiring legislative intervention. The constitutionality of this enactment was passed upon in Alert Building & Loan Ass'n v. Bechtold, 120 N.J.L. 397 ,199 Atl. 734 (E. & A. 1938) which held the act unconstitutional only to the extent of an impairment of the obligation of a contract, or deprivation of a remedy enforcing a contract, which existed when the contract was made. Article 4, Sec. 7, Par. 3 of the New Jersey Constitution.

For cases relating to the constitutionality as regards Article 1, Sec. 10 of the Federal Constitution, see: Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co., 300 U.S. 124, 57 S. Ct. 338, 81 L. Ed. 552, 108 A.L.R. 886.

NUISANCE—TIME TO SUE—PRESCRIPTIVE RIGHTS.—Complainants, forty-eight in number, bring a bill praying for an injunction to restrain defendants from operating a stone quarry in such a manner as to constitute a nuisance. Complainants allege that their homes are shaken and damaged by the blasting, and that stones are cast upon their premises; that their lives are in danger; that their peace and comfort is disturbed, and their health affected by the noise and vibration. Defendants have been in business on the same site for thirty-four years, while the complainants in most instances moved into the vicinity of the quarry during the past eight years. Preliminary injunction granted, *Benton et al v. Kernan et al,* 125 N. J. Eq. 412, 6 A (2d) 195 (Ch. 1939).

The status of the law in many jurisdictions is that, "an unjustifiable invasion of property may constitute a nuisance private,"[1] and it is restrainable in equity, even though a proper remedy at law exists, in order to avoid a multiplicity of suits.[2]

The blasting of rocks with explosives in the vicinity of another's dwelling house is a restrainable nuisance.[3] Such blasting which causes stones to fall upon the property of another, and walls to crack from vibration, is a restrainable nuisance regardless of negligence.[4] A license from the municipal authorities, issued in the instant case, is no defense in an action to enjoin a private nuisance from continuing.[5] No prescriptive right to continue a nuisance to the damage of others can be acquired[6] regardless of how long it has been in existence. In

1. Whitla v. Ippolito, 102 N.J.L. 354, 131 Atl. 873 (E. & A. 1925).

2. Rouse v. Martin, 75 Ala. 510, 51 Amer. Rep. 463 (1883); Owen v. Phillips, 73 Ind. 284 (1881).

3. Green v. T. A. Shoemaker & Co., 111 Md. 69, 73 Atl. 688 (1909); Colton v. Onderdonk, 65 Cal. 155, 3 P. 673, 58 Amer. Rep. 556 (1886); Wilkins v. Consolidated Slate Co., 96 Me. 385, 52 Atl. 755 (1902).

4. Beecher v. Dull, 294 Pa. 17, 143 Atl. 498 ((1928); Hakkila v. Old Colony Broken Stone etc. Co., 264 Mass. 447, 162 N.E. 895 (1928); Fitzsimmons & Connell Co. v. Brown, 199 Ill. 390, 65 N.E. 249 (1902); Longley v. McGloch, 115 Md. 182, 80 Atl. 843 (1911).

5. Nichols v. Pixly, 1 Root (Conn.) 129; Hakkila v. Old Colony Broken Stone etc. Co., *Supra,* Note 4.

6. Commonwealth v. Upton, 6 Gray (Mass.) 473 (1856); Lawton v. Herrick, 83 Conn. 417, 76 Atl. 986 (1910); City of Baltimore v. Fairfield Imp. Co., 87 Md. 352, 39 Atl. 1081 (1898); "Prescriptive rights cannot arise for public nuisances whether the state complains against them or not." Hurlbut v. McKone, 55 Conn. 31, 10 Atl. 164 (1887); "A man is not to be precluded from building and living on his own land because the adjoining proprietor first erected a nuisance." Laflin Rand Powder Co. v. Tearney, 131 Ill. 322, 23 N.E. 389 (1890); "Even

those jurisdictions which allow the prescriptive period to run the time to begin computing in order to establish the right does not occur until a cause of action has accrued to someone by virtue of the nuisance continuing. Since a tenant may bring the action in his own name it is quite obvious that even though the prescriptive period may have run against the landlord, yet any new tenant coming into possession of the premises may bring the action to enjoin.[6a] Every day's continuance is a new and fresh nuisance.[7] If a new machine, different from those used in an ancient mill be installed, the operation of which creates a nuisance; then the antiquity of the mill is no defense, and the latter is treated as an original and independent mill.[8]

The fact that the defendants may have had extensive investments in the quarry, would not deter the court from restraining the operation of the quarry in such a manner as to constitute a nuisance.[9]

Things annoying to the sensibilities of the public generally are nuisances, although not unpleasant or annoying to some persons because of their habits or occupation.[10] Neither is the criterion those persons with super-sensibilities.[11]

In an examination of the early cases which form the precedents for the later decisions,[12] it appears that the decisions are contrary to the principles of equity to permit a landowner to build a residence alongside an established business enterprise located in an isolated area, and through equity enjoin said enterprise out of existence because of

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where the plaintiff acquiesced in the erection, he is not estopped from complaining." Harley v. Merrill Brick Co., 83 Iowa 73, 48 N.W. 1000 (1891); St. Helen's Smelting Co. v. Tipping, 11 H.L. Cas. 642; Bliss v. Hall, 4 Bing. 183, 132 Eng. Repr. 758 (1838); Except where the action is barred by the statute of limitations. Kentucky Stat. sec. 2515; Ky. & W. Va. Power Co. v. McIntosh, 278 Ky. 797, 129 S.W. (2d) 522 (1939).

7. N. Brunswick Towns'p v. Lederer, 52 N.J.Eq. 675, 29 Atl. 444, (Ch. 1874); Crawford v. Rambo, 44 Ohio 279, 7 N.E. 429 (1886); Slight v. Gutzloff, 35 Wis. 675, 17 Am. Rep. 476 (1874); Byrne v. Minn. etc. Ry. Co., 38 Minn. 212, 36 N.W. 339 (1888); Mahon v. N.Y. Central R. R. Co., 24 N.Y. 658, 5 N.Y.S. 526 (1860); Valley Ry. Co. v. Franz, 43 Ohio 623, 4 N.E. 88 (1885); Morris Canal Co. v. Ryerson, 27 N.J.L. 457 (S. Ct. 1859).

8. Simpson v. Seavy, 8 Me. 138.

9. Susquehanna Fertilizer Co. v. Spangler, 86 Md. 562, 39 Atl. 270 (1898); Longley v. McGeoch, *Supra* note 4.

10. Kroecker v. Camden Coke Co., 82 N.J.Eq. 373, 88 Atl. 955 (Ch. 1913).

11. Rogers v. Elliot, 146 Mass. 349, 15 N.E. 768 (1888); Westcott v. Middleton, 43 N.J.Eq. 478, 11 Atl. 490 (Ch. 1887).

12. Bliss v. Hall, *Supra* note 6; Walters v. Selfe, 4 De. G. & S. 315, 64 Eng. Repr. 849 (1851); Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 20 Atl. 900 (1890).

noise,[13] vibration,[14] etc., either with or without malice.[15]

Most of the cases which are milestones in the annals of the courts are clearly distinguishable, because in those early cases the nuisance moved in upon the residential community.[16] The resident was there first; the industrial revolution was of quite recent origin. It seems quite clear that where the nuisance enterprise was established first, the courts would not enjoin based on the theory that of itself the enterprise could not be a nuisance unless some-one moved close enough to be affected thereby.[17]

The contention, that a nuisance affects the value of real property adversely, has had too broad an application, and too much weight has been given to it in relation to other equally important circumstances to be considered in the determination of a nuisance.[18] This value is only relative, and the nuisance, depending upon the nature and location of the property affected, may be in fact the very source of its value commercially and not an arbitrary value determined by a use at the whim and caprice of the adjoining landowner.[19]

For no apparently sound reason, the doctrine has been made all inclusive today, and no matter which came first, the business enterprise or the residential community, if the enterprise constitutes a nuisance, then it should be enjoined. Public policy and good conscience on the part of equity would call for a distinction to be made between these two types of cases; and such a distinction if made would not prejudice the complainants in the case under consideration, as they would be left to an adequate remedy at law for damages. A case which should have been so distinguished is *Sturgess v. Bridgman* in which a poor balance of equities resulted from its decision.[20]

Although the doctrine of balancing equities has often been made use of by many courts,[21] yet unbalanced equities have resulted in many

13. Peragallo v. Luner, 99 N.J.Eq. 726, 133 Atl. 543 (Ch. 1926).
14. Wallace & Tiernan v. U.S. Cutlery Co., 97 N.J.Eq. 408. 128 Atl. 872 (Ch. 1925).
15. Edwards v. Allonez Mining Co., 38 Mich. 46 (1878).
16. Bliss v. Hall, *Supra* note 6; Walters v. Selfe, *Supra* note 12; Hennessey v. Carmony, 50 N.J.Eq. 616, 25 Atl. 374 (Ch. 1892).
17. Marshall v. Street Comm., 36 N.J.L. 283 (S. Ct. 1873).
18. St. Helens Smelting Co. v. Tipping, *Supra* note 6; Angel v. Pa. R. R., 38 N.J.Eq. 58, 7 Atl. 432 (Ch. 1884).
19. Edwards vs. Allonez Mining Co., *Supra* note 15.
20. Sturgess v. Bridgman, L.R. 11, Chan. Div. 852 (1879).
21. Hauser v. Kraeuter & Co., 97 N.J. Eq. 413, 129 Atl. 473 (Ch. 1925);

instances because the doctrine itself is not founded upon sound reason and principle.[22] The use first in existence, should prevail over the subsequent uses unless clearly abandoned[23] for a determinable period like the statute of limitations. This construction would harmonize with the accepted doctrine that, "He who by choice or necessity must live in an accepted and established type of community, must take it as he finds it."[24]

Rights to maintain nuisances by prescription have very limited application in a few jurisdictions, and properly so restricted, are kept within control by the courts.[25] The doctrine of first user[26] coupled with that of balancing equities would go further in the administration of justice and in accord with a long line of cases which have enjoined nuisances from moving in upon dwelling areas;[27] and which, through a misconceived sense of equitable justice, have formed the precedents for enjoining nuisances when dwellings, etc., moved in upon the nuisances.[28]

Another distinction should be made between those enterprises in which mere vibration or noise is present, since sound does not travel very far, and those which emit foul odors [29] and noxious gases[30]

Clifton Iron Co. v. Dye, 87 Ala. 471, 6 S. 192 (1889); Demarest v. Hardham, 34 N.J.Eq. 469 (Ch. 1881); Madison v. Ducktown etc. Co., 113 Tenn. 331, 83 S.W. 658 (1904); Huckenstine's Appeal, 70 Pa. 102, 10 Amer. Rep. 669 (1872).

22. Sturgess v. Bridgman, *Supra* note 20; Beseman v. Pa. R. R. Co., 52 N.J.L. 221, 20 Atl. 169 (E. & A. 1889); Pa. Coal v. Sanderson, 113 Pa. 126, 6 Atl. 453 (1886).

23. City of Baltimore v. Fairfield Imp. Co., *Supra* note 6.

24. Hauser v. Kraeuter & Co., *Supra* note 21; Collins v. Wayne Iron W'ks, 227 Pa. 326, 76 Atl. 24 (1910).

25. Hurlbutt v. McKone, *Supra* note 6; Laflin Rand Powder Co. v. Tearney, *Supra* note 6; Harley v. Merrill Brick Co., *Supra* note 6; Elliotson v. Feeltham, 2 Bing. 134; Johns v. Stevens, 3 Vt. 308 (1830); Bolivar Mfg. Co. v. Neponset Mfg. Co., 6 Pick. (Mass.) 241 (1834); Baldwin v. Caulkins, 10 Wend. (N.Y.) 167; Gladfelter v. Walker, 40 Md. 1; Crosby v. Bessey, 49 Me. 539, 77 Amer. Dec. 271.

26. Nevada Water Co. v. Powell, 34 Cal. 109; Gould v. Boston Duck Co., 13 Grey (Mass.) 442 (1859); Lincoln v. Chadbourne, 56 Me. 197.

27. Bliss v. Hall, *Supra* note 6; Everett *et al* v. Paschall, 61 Wash. 47, 111 Pa. 879 (1910); Walters v. Selfe, *Supra* note 12.

28. Sturgess v. Bridgman, *Supra* note 20; City of Baltimore v. Fairfield Imp. Co., *Supra* note 6; Hosmer v. Republic Iron & Steel Co., 179 Ala. 415, 60 S. 801 (1913).

29. Susquehanna Fertilizer Co. v. Malone, *Supra* note 12; Hosmer v. Republic Iron & Steel Co., *Supra* note 28; Susquehanna Fertilizer Co. v. Spangler, *Supra* note 9; N. Brunswick Towns'p v. Lederer, *Supra* note 7; Meigs v. Lister, 23 N.J.Eq. 199 (Ch. 1872); Rowland v. N. Y. Stable Manure Co., 88 N.J.Eq. 168, 101 Atl. 521 (Ch. 1917); English v. Progress Elec. Lt. & M. Co., 95 Ala.

which are wafted by the winds over large areas, for obviously, such enterprises would condemn too vast a territory from public use to justify their existence;[31] and priority in such cases should be immaterial.

It is submitted that such a composite doctrine would do equity[32] in the instant case because narrow enough to fit it and yet broad enough to meet nearly all situations coming under the purview of equity. Such a doctrine would not deprive complainants of an adequate remedy at law for damages, and at the same time it would protect the enterprise because established prior to the dwellings of complainants. This doctrine would in no way prejudice the rights of others who might suffer damages because of the operation of certain nuisances which, because such operations are acts at peril, carry a vicarious liability,[33] as for the maintenance of high tension transmission lines, etc.

In spite of the foregoing exposition of the law as it now stands, the question still remains to be answered: "Is a man obliged to erect a house on his property near a nuisance as soon as the nuisance comes into being or forever hold his peace?" It is submitted that the

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259, 10 S. 134 (1891); Ross v. Butler, 19 N.J.Eq. 294 (Ch. 1868); Bliss v. Hall, *Supra* note 6; Walters v. Selfe, *Supra* note 12; Rousch v. Glazer, 74 Atl. 39 (Ch. 1908); Laird v. Atlantic Sanitary Co., 73 N.J.Eq. 49, 67 Atl. 387 (Ch. 1907).

30. Cleveland v. Citizens Gas Light Co., 20 N.J.Eq. 201 (Ch. 1869); Susquehanna Fertilizer Co. v. Malone, *Supra* note 12; Bohn v. Port Jervis Gas Lt. Co., 122 N.Y. 18, 25 N.E. 246 (1890); Georgia v. Tenn. Copper Co., 206 U.S. 230, 51 L. Ed. 1038 (1907); Pennoyer v. Allen, 56 Wis. 502, 14 N.W. 609 (1883).

31. Georgia v. Tenn. Copper Co., *Supra* note 30; Bohn v. Port Jervis Gas Lt. Co., *Supra* note 30; Cleveland v. Citizens Gas Lt. Co., *Supra* note 30; Susquehanna Fertilizer Co. v. Malone, *Supra* note 12; Jones v. Williams, 11 M. & W. 176; Susquehanna Fertilizer Co. v. Spangler, *Supra* note 9; Meigs v. Lister, *Supra* note 29; Rowland v. N. Y. Stable Manure Co., *Supra* note 29; Rousch v. Glazer, *Supra* note 29; Czarniecki's Appeal, 117 Pa. 382, 11 Atl. 660 (1887); English v. Progress Elec. Lt. & M. Co., *Supra* note 29; Kroecker v. Camden Coke Co., *Supra* note 10; N. Brunswick Towns'p v Lederer, *Supra* note 7; Angel v. Pa. R. R., *Supra* note 18.

31. Beseman v. Pa. R. R., *Supra* note 22; Hosmer v. Republic Iron & Steel Co., *Supra* note 28.

32. Whitmore v. Brown, 102 Me. 47, 65 Atl. 516 (1906); Injunction denied because remedy at law held adequate.

33. Bradford Glycerine Co. v. St. Mary's Woolen Mills Co., 60 O. (St.) 560, 54 N.E. 528 (1899); McAndrews v. Collerd, 42 N.J.L. 189 (E. & A. 1880); Clark v. Longview Public Service Co., 143 Wash. 319, 255 Pac. 380 (1927); Judson v. Giant Powder Co., 107 Cal. 549, 40 Pac. 1020 (1895).

answer should be in the affirmative, in spite of the rule in *Hurbut v. McKone.*

Note: Since this writing was begun the court has modified the preliminary injunction in favor of the defendants by allowing them a more equitable use of their enterprise than allowed by the terms of the preliminary injunction which were almost confiscatory.

PRINCIPAL AND SURETY—RIGHT AND MEASUREMENT OF CONTRIBUTION—INTEREST OF SURETY IN SECURITY GIVEN BY COSURETY.—Complainant executed to defendant bank a bond and mortgage on her property as security for a debt of her son. Cosurety, the debtor's wife, paid the debt and the bond and mortgage were assigned to her by the bank. Complainant files a bill asking that the mortgage be cancelled. *Held*: A surety who pays a debt and receives from the creditor a security which had been given by a cosurety was entitled to benefit of the security to the extent of contribution from the cosurety. *Sanderson v. Cicero State Bank et al* 125 N. J. Eq. 450, 6A 2d 130 (Ch. 1939).

The validity of the assignment of the bond and mortgage by the creditor to the surety who paid the debt is accepted by the court without any discussion. However in a similar Massachusetts case, the holding was directly contra to this in that where one of two sureties gave collateral security for the payment of the debt on which he was surety, his cosurety did not by paying that debt become entitled to the benefit of that security since payment by one discharged both.[1] That decision proceeded upon the theory that the pledging of the security with the creditor for the payment of the debt gave to the creditor a lien upon the security but payment of the debt discharged the lien which the creditor had and therefore he had not right to transfer the security.

1. Bowditch v. Green, 44 Mass. 360 (1841). Plaintiff and one B. were sureties on two notes for debtor and plaintiff delivered as collateral security to creditor a note executed by defendant. Upon payment of the debt by B., the creditor delivered defendant's note to him. B. brings action on note in plaintiff's name.

It is generally accepted that as among cosureties, where one pays the debt for which they are all liable, he may have contribution from the others to the extent that they are thereby relieved.[2] For the justification of this right, the doctrine of subrogation has been invoked.[3] As applied to this situation, the surety who pays the principal's debt is subrogated to the rights of the creditor and to any lien or claim which the creditor might have asserted against the principal debtor.[4] But that to which the surety in this case is subrogated depends upon the effect of the payment. It has been held in such cases that although payment of the debt by a surety may extinguish the lien or obligation at law, yet a court of equity will keep the debt alive and preserve the security to the extent of the lawful claim for contribution as against the cosurety and will enforce subrogation.[5] So the payment, under this theory, did not discharge the lien and the assignment was valid and placed the charge, where, in equity, it belonged.

Through the negligence of the surety, who paid the debt, a chattel mortgage which had been executed by the principal debtor and that surety as security for the debt, also, was cancelled. A surety who has security from the principal debtor becomes a trustee for the cosureties and as such must faithfully hold the securities for the benefit of all his cosureties and he has no right, without their consent to transfer, surrender or cancel them.[6] The consequences to the promis-

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2. Paulin v. Kaighn, 29 N.J.L. 480 (E. & A. 1861); Wyckoff v. Gardner, 5 Atl. 801 (Ch. 1886); 21 R.C.L. 1134; 50 C.J. 285 *et seq.*

3. Bater v. Cleaver, 114 N.J.L. 346, 176 Atl. 889 (E. & A. 1934); Wilson v. Brown, 13 N.J.Eq. 277 (Ch. 1861); In re Hewitt 25 N.J.Eq. 210 (Ch. 1874); Philadelphia and Reading Railroad Co. v. Little, 41 N.J.Eq. 519, 7 Atl. 356 (E. & A. 1886). *Contra.* Dillenbeck v. Dygert, 97 N.Y. 303, 49 AM. REP. 525 (1884). "That the note (the debt) was extinguished by payment and therefore the doctrine of subrogation does not apply, we concede . . . Subrogation implies a presumed intention to keep the creditor's security alive and the equity of so doing as against a principal debtor. Contribution is among sureties only and presumes the payment and extinguishment of the debt by one for the benefit of all." Dinsmore v. Sachs, 133 Md. 434, 105 Atl. 524 (1919). "Special remedy of subrogation is one available only against principal debtor and cannot be utilized as against cosureties."

4. Knickerbocker Trust Co. v. The Cartaret Steel Co. *et al*, 79 N.J.Eq. 501, 82 Atl. 146 (Ch. 1911); Philadelphia and Reading Railroad Co. v. Little, *supra*, note 3.

5. Feltow v. Bissel, 25 Minn. 15 (1878); German American Savings Bank v. Fritz, 68 Wis. 390, 32 N. W. 123 (1887); Mason v. Pierron, 63 Wis. 244, 23 N. W. 119 (1885); Fleming v. Beaver, 2 Rawle 128, 19 Am. Dec. 629 (1828); see also 71 A.L.R. 300 (Pa. 1828).

6. Paulin v. Kaighn, *supra*, note 2.

sor are the same whether such securities are voluntarily released or lost through the carelessness or negligence of the trustee, who is bound to exercise a reasonable degree of care in the preservation of the security.[7] The surety is discharged pro tanto, to the extent he is injured.[8]

The court released the complainant of liability to the extent of the face value of the chattel mortgage which was cancelled. This mortgage covered household furniture and was executed by the principal debtor and by his wife the cosurety who paid the debt.[9] But the court assumed the furniture belonged to the husband, and treated the chattel mortgage as the security solely of the principal debtor. Some jurisdictions raise the presumption that where personal property is in the joint possession of the husband and wife, title is in the husband.[9] Others in similar situations raise no presumption and hold that the burden of proof is upon the one who asserts ownership.[10] In view of the intent of the legislatures to confer upon married women the right to own property, it is submitted that the latter view is the more reasonable. The question is material here insofar as it affects the measure of contribution, since the cancellation of the chattel mortgage would release the complainant only to the extent of the principal debtor's interest in the furniture.

WILLS—TESTAMENTARY GIFTS OF LIFE ESTATES WITH GENERAL POWERS OF APPOINTMENT.—(The University of Newark Law Review in an earlier issue[1] reviewed the decision of the Court of Chancery in the case of *Trafton v. Bainbridge*.[2] Grounded upon

7. Stearns: *Law of Suretyship* 4th ed. *Scott "The Law of Trusts,"* 1939. p. 932.

8. *In re* Flax, 39 N.J.L.J. 107 (Com. P. 1916); Van Hoesen v. Gilfen, 103 N.J.Eq. 234, 143 A. 137 (Ch. 1928); Burack v. Mayer, 121 N.J.Eq. 135, 187 Atl. 767 (Ch. 1936); *aff'd* 122 N.J.Eq. 5, 191 Atl. 841 (E. & A. 1937).

9. State v. Kamieda, 98 Vt. 466, 129 Atl. 306 (1925); McClain v. Abshire, 63 Mo. App. 333 (1895); Farrell v. Patterson, 43 Ill. 52 (1867); Manny v. Rixford, 44 Ill. 129 (1867).

10. Oberfelder *et al* v. Kavanaugh, 29 Neb. 427, 45 N. W. 471 (1890); Wheton *et al* v. Snyder, 88 N.Y. 299 (1882).

1. University of Newark Law Review, Volume IV, no. 1, p. 105.

2. Trafton v. Bainbridge, 124 N.J.Eq. 179, 1 Atl. 2nd 2 (Chancery 1938):

past decisions in New Jersey, the Law Review expressed the opinion that the case was incorrectly decided. The Court of Errors and Appeals in 1939[3] reversed the opinion of the lower court and came to substantially the same conclusion as that stated in the University of Newark Law Review.)

When the testator has given a fee simple estate (expressed or implied), what effect shall be given to a general power of appointment when there is also an attempted remainder over upon the non-exercise of the power? The answer given by the great weight of authority both in the United States and in England is, that despite the manifest intent of the testator, the remainder over is void.[4] This appears to be an illogical anachronism. These are executory devises and the purpose of executory devises is to sustain the intent of the testator by freeing the courts of the old crystallized common law doctrine that a fee cannot be limited after a fee.

The unfolding of the law on this subject is enlightening. At early common law all contingent remainders except those to the heirs of living persons were void on the ground of repugnancy of the different estates. Until the Statute of Wills in 1540, no testamentary disposition of a freehold interest in land could be made at law. Such testamentary dispositions were accomplished only by "Uses" enforceable only in equity. At law the cestui que use had no estate in the land, although in equity he was considered to be the beneficial owner and to have an equitable estate in the land. By means of the springing or shifting use future legal interests might be accomplished. After

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Testatrix devised residue of her estate to husband for sole use and benefit during his life with full power of disposal with any undisposed portion at his death to go to nephew. Held: husband took a fee simple estate and the attempted remainder over to the nephew was void on the grounds of repugnancy of estates and the attempt to limit a fee after a fee.

3. Trafton v. Bainbridge, 125 N.J.Eq. 474, 6 Atl. 2nd 209 (E. & A. 1939); The New Jersey Court of Errors and Appeals reversed the decision of the Chancery Court, *supra*, on the grounds that the case came under the one exception recognized by the court and that the husband took but a life estate and the remainder over to the nephew was valid.

4. Dutch Church v. Smock, 1 N.J.Eq. 148 (Ch. 1830). Annin v. Van Doren Administrators, 14 N.J.Eq. 135 (Ch. 1861). Downey v. Borden, 36 N.J.L. 460 (E. & A. 1872). Third clause of the will gave wife absolute gift of the estate as long as she should remain testator's widow. Fifth clause gave wife the absolute disposal of one third of all of testator's estate that remained undisposed at the time of her death. Held: under the third clause the wife took a life estate; under the fifth clause she took a one third devise in fee of the estate on the grounds of the unrestricted nature of the power of disposal.

the Statute of Wills the same effect might be accomplished by the executory devise.

Before the Statute of Uses in 1536, the cestui que use could reserve to himself, or give to another, power to revoke the old and declare new uses. As, and when, these new uses were declared, the feofees became trustees for the new cestui que use. After the Statute of Wills in 1540, testators as well as settlors, could declare a valid power of appointment by devise. These powers of appointment added greatly to the flexibility of the disposal of interests in property. However an anomaly arose. Gifts in fee simple with powers of appointment and remainder over of the unappointed remainder were held void as to the remainder.[5] This is likewise true where the gift is indeterminate as to quantity,[6] or where the life estate arises merely by implication.[7] The one exception allowed by the courts is where the testator *expressly* states that he is giving a life estate. The courts will then hold the remainder over to be valid.[8]

The reasoning of the courts in such cases is that, with the ex-

5. Downey v. Borden, *supra*, Annin v. Van Doren, Administrators, *supra*. Kutschinski v. Sheffer, 109 N.J.Eq. 659, 158 Atl. 499 (E. & A. 1931): The wording of the will was that of the testator himself and was ungrammatical. Of necessity, many of the words were construed by the court so as to derive their meaning. The will contained three clauses. By the first clause, the testator gave all of his property to his wife; by the second clause he provided that if the wife should remarry she should take only one third; by the third clause he provided that if there was a remainder of the property undisposed of at the time of the wife's decease it should go to children. Held (by a 12 to 3 decision): the wife took an absolute fee by the first clause; this was qualified by the contingency to a one third fee by the second clause; but the third clause was treated as void by virtue of the rule of repugnancy of estates and limiting a fee after a fee. (The illogical result permits the husband to divest the wife of two thirds of the property upon the contingency of her remarrying; but refuses to allow the husband to provide for the contingency of the non-disposal of the property by the wife before her death.)

6. Downey v. Borden, *supra*: "As a rule of construction, the principle is well settled that where lands are devised in the first instance in language indeterminate in quantity, from which an estate for life would result from implication, and words adapted to the power of disposal without restriction as to the mode of execution are added, the construction will be that an estate in fee is given."

7. Downey v. Borden, *supra*, Bennett v. Association, 79 N.J.Eq. 76, 81 Atl. 1098 (Ch. 1911).

8. Downey v. Borden, *supra*. Wooster v. Cooper, 53 N.J.Eq. 682, 33 Atl. 1050 (E. & A. 1896: "The rule that the devise of an estate generally with the absolute power of disposal imports such dominion over the property that an estate in fee simple is created and that a devise over is consequently void, has one exception—that where testator gives an estate for life only, by certain and express words, and annexes to it such express power of disposal, the devisee will take an estate for life and in fee."

ception of the expressed life estate, the gift is bad as creating a contingent estate repugnant to the first estate and as limiting a fee after a fee. This reasoning harks back to the old common law of hundreds of years past. And this is true even where the words used by the testator clearly imply that a life estate was intended.[9]

In New Jersey, as elsewhere, the rule is definitely settled. The Court of Errors and Appeals has stated "that the propriety of questioning the rule is no longer open to question."[10]

Yet this rule has had some notable opposition.

In 1830, the Court of Chancery of New Jersey held[11] that a gift to the wife with an absolute power of disposal during life was gift in fee simple and further limitation was void.

In 1832, the United States Supreme Court, speaking through Chief Justice Marshall,[12] held that a gift to a wife with absolute power of disposal, and a remainder over of the undistributed portion of the gift, was to be construed as being a life estate to the wife with a valid contingent remainder. The Chief Justice followed the rule: If two parts of a will are unreconcilable, the subsequent words of the testator are to be taken as his subsequent intent. The approved doctrine being to give effect to the primary intent of the testator, the conflicting parts should be so read as to carry out his intent.

New Jersey, however,[13] has followed the rule of *Dutch Church v. Smock,*[14] although as a matter of legal policy she might very well have followed that of the U. S. Supreme Court in *Smith v. Bell.*[15] As no apparent public policy requires the present rule, it would seem to be an arbitrary retrogression to the primitive common law.

As stated by Professor Gray,[16] the process of civilization consists in the courts endeavoring more and more to carry out the intention of the parties, or restraining them only by rules which have their reasons for existence in considerations of public policy.

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9. Downey v. Borden, *supra.* Bennett v. Association, *supra.*
10. Trafton v. Bainbridge, *supra.*
11. Dutch Church v. Smock, *supra.*
12. Smith v. Bell, 8 U.S. 322 (1832).
13. Downey v. Borden, *supra.* Wooster v. Cooper, *supra.* Bennett v. Association, *supra.* Gaston v. Ford, 99 N.J.Eq. 592, 133 Atl. 531 (Ch. 1926). Trafton v. Bainbridge, *supra.*
14. Dutch Church v. Smock, *supra.*
15. Smith v. Bell, *supra.*
16. Prof. Gray: RESTRAINTS ON ALIENATION, 2nd Ed. 1895, Section 74-B.

The effect of the present rule is to defeat the expressed intent of the testator.

As in some other memorable instances of legal history,[17] the abolishment of the present rule will probably require a major operation by the legislature. This has been accomplished in at least one jurisdiction.[18]

In 1931, West Virginia, by statute, formally abrogated the rule, and the remainder over after a fee simple estate with the general power of appointment was held to be valid.

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17. For example, the rule in Shelly's case. This was abolished by statute in N.J.; likewise the necessity of the word "heirs" in order to convey a fee simple estate. Now (R.S. 1937 46:3-13) every deed to land, unless specifically restricted is to be a transfer in fee simple.

18. The West Virginia Code of 1931, Chapter 36, Art. 1. Section 16, provides that any interest in real or personal property given by sale or gift inter vivos, or by will with a limitation over, either by way of remainder or executory devise, or any other limitation, while at the same time conferring either expressly or by implication a general power of disposal in the first taker, shall not be defeated except to the extent that the first taker shall have lawfully exercised such power.