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THE 1956-57 LEGISLATURE: PROBLEMS LEFT UNCORRECTED

The New York State Law Revision Commission, as part of its 1957 program, recommended ten subjects to the legislature accompanied by bills.[1] The recommendations encompassed a wide variety of topics where it was felt that the existing law was either inadequate or inconsistent. The purpose of this comment is to present a critical study of four of the proposals which, though not enacted into law in this session, deserve future legislative attention because of the outstanding defects to which the proposals call attention.

Distribution to Children Born After the Making of a Will

Under the provisions of section 26 of the Decedent Estate Law, a child born to a testator after he has made his last will, and who is unmentioned and unprovided for in such will and unprovided for by any settlement, is entitled to take his intestate share of the estate.[2] To preclude an after-born child from succession by virtue of the statute, by reason of mention or provision in the will, it appears that it is necessary that the will explicitly dispose of property in favor of such child or manifest an intention to omit any disposition in favor of him.[3] The legislature has not chosen to specify the character or content

1. Statute of Frauds Governing Contracts Not To Be Performed Within a Year or a Lifetime, N.Y. Legis. Doc. (1957) No. 65(A); Security for Damages Caused by the Filing of a Notice of Pendency of an Action for Specific Performance of a Contract To Convey Real Property, N.Y. Legis. Doc. (1957) No. 65(B); Disposition of Ineffective Residuary Devises and Bequests, N.Y. Legis. Doc. (1957) No. 65(C); Distribution to Children Born After Making of a Will, N.Y. Legis. Doc. (1957) No. 65(D); Permissive Recording of Memoranda of Leases, N.Y. Legis. Doc. (1957) No. 65(E); Repeal of Domestic Relations Law, Section 52, N.Y. Legis. Doc. (1957) No. 65(F); Effect of Collateral Payments on Recovery for Personal Injury, N.Y. Legis. Doc. (1957) No. 65(G); Arbitration Awards by Confession, N.Y. Legis. Doc. (1957) No. 65(H); Reimbursement of Litigation Expenses of Corporate Officials Incurred in Criminal Proceedings, N.Y. Legis. Doc. (1957) No. 65(I); Revocation of a Proxy by Death of the Person Who Executed It, N.Y. Legis. Doc. (1957) No. 65(J).

2. N.Y. Deced. Est. Law § 26. Section 26 is typical of provisions which exist in almost all of the states. Mathews, Pretermitted Heirs: An Analysis of Statutes, 29 Colum. L. Rev. 748, 752 (1929). The statutes in the minority of states make special provision: (1) depending upon whether or not there are prior-born children living at the time of the execution of the will; (2) for children born prior to the execution of the will and their descendants; (3) regarding children absent and reported dead; and (4) for posthumous children. Id. at 753-64, 752-53, 764-66, 766-77.

3. Tavshanjian v. Abbott, 200 N.Y. 374, 93 N.E. 978 (1911). "These after-born children are not provided for and if they are not mentioned, in the sense that their birth is referred to by the testator as an event comprehended within his testamentary provisions, then they will take their proportionate share of his estate." Id. at 377, 93 N.E. at 978-79. "The mention of children is not such as to convey any idea of a purpose not to provide for those who might be born thereafter." Ibid. "[A]n intent to disinherit must appear from the will itself." Id. at 378, 93 N.E. at 979. Cf. McLean v. McLean, 207 N.Y. 365, 372, 101 N.E. 178, 180 (1913); 25 Fordham L. Rev. 752, 753-54 (1957).

essential to a settlement. It has been held that such a determination in each case involves a fact situation in which the character and size of the provision for the after-born child, the nature of a provision made for another child, the circumstances under which they were made, and the value of the entire estate are to be considered with a view to determining whether the parent's intent was directed toward an out-of-will provision to act as a settlement.[4] The parent's intent, rather than form or method, is the most important factor to be considered[5] and ". . . any act of the testator indicating an intention to make future provision would fulfill the requirement . . ." for a settlement.[6] A settlement may be effected prior to, simultaneously with, or subsequent to the execution of a will.[7]

Section 28 of the Decedent Estate Law empowers a child who is protected by section 26 to maintain an action against the legatees or devisees of his deceased parent to recover his share of the estate to which he is entitled to succeed.[8] Section 26 applies to the wills of both a mother and a father[9] and the after-born child need not survive the testator in order to share in the distribution of his estate.[10] The present law also provides that ". . . the right of an after-born child taking pursuant to section 26 is subject to a valid power of sale contained, either expressly or impliedly, in the will."[11]

It is the common-law rule that birth of issue alone does not revoke a parent's prior will,[12] but a marriage and birth of issue generally effect a revocation of a

4. Matter of Faber, 305 N.Y. 200, 203-04, 111 N.E.2d 883, 885 (1953).

5. Ibid.

6. Matter of Brant, 121 Misc. 102, 104, 201 N.Y. Supp. 60, 61-62 (Surr. Ct. 1923).

7. Matter of Faber, 305 N.Y. 200, 204, 111 N.E.2d 883, 885 (1953); cf. Matter of Stern, 189 Misc. 639, 56 N.Y.S.2d 631 (Surr. Ct. 1945).

8. Under these statutes, adopted children have all the rights of a natural child. Matter of Guilmartin, 156 Misc. 699, 282 N.Y. Supp. 525 (Surr. Ct. 1935), aff'd, 250 App. Div. 762, 293 N.Y. Supp. 665 (2d Dep't 1937), aff'd, 277 N.Y. 689, 14 N.E.2d 627 (1938); Matter of Meng, 201 Misc. 589, 110 N.Y.S.2d 263 (Surr. Ct. 1952). And a foster child, adopted subsequent to the execution of the foster parent's will, has a right, as an after-born child, to an intestate share of his parent's estate. Matter of Upjohn, 304 N.Y. 366, 107 N.E.2d 492 (1952).

9. Section 26 as formerly embodied in 2 N.Y. Rev. Stat., pt. 2, c. 6, § 49 (1830) affected only a will executed by a father. Cotheal v. Cotheal, 40 N.Y. 405 (1869). N.Y. Sess. Laws 1869, c. 22, § 1 amended this so that the provision now applies to the wills of both parents.

10. Matter of Horst, 264 N.Y. 236, 238, 190 N.E. 475 (1934).

11. Legis. Note, 24 Fordham L. Rev. 502, 504 (1955). This section had been held not to operate to subject the estate of the after-born child to a power of sale contained in the will or confine his remedy to a pursuit of the proceeds of the sale where only a portion of the property descended to the after-born child. He was permitted to sue the grantee of the executor in ejectment. Smith v. Robertson, 89 N.Y. 555, 558 (1882); cf. Matter of Smith, 202 Misc. 64, 107 N.Y.S.2d 993 (Surr. Ct. 1951). Section 26 was amended in 1955 and the after-born child now takes subject to such a power. N.Y. Sess. Laws 1955, c. 225, Legis. Note, 24 Fordham L. Rev. 502 (1955).

12. Doe d. White v. Barford, 4 M. & S. 10, 105 Eng. Rep. 739 (K.B. 1815); Easterlin v. Easterlin, 62 Fla. 468, 56 So. 688 (1911). Contra, Negus v. Negus, 46 Iowa 487 (1877); McCullum v. McKenzie, 26 Iowa 510 (1868).

prior will.[13] However, under the civil law the subsequent birth of a child nullifies an existing will even though the marriage took place prior to the execution of the will.[14] The object of the civil law is to prevent ". . . such disinheritance [by the testator because it] violates a social duty to provide for the family, in particular, for issue. . . ."[15] The nullification is effected ". . . regardless of his expressed desire."[16] On the other hand, the object of the present statutory provision, in following the common law, is to prevent what is presumed to be the probable oversight of the parent in failing to provide for the after-born child, and to provide a scheme for the disposition of the testator's property to give effect to his presumed intention only when such oversight occurs.[17] For some time it has been suggested that the scheme of disposition under section 26 does not adequately approximate the testator's presumed intention, but proposed amendments to it have not been acted upon.[18]

In order to make the provision for after-born children contained in section 26 of the Decedent Estate Law conform more nearly to the probable intent of the testator, the New York State Law Revision Commission recommended[19] a comprehensive amendment to it.[20] The main purpose of the bill was to create separate rules to be applied where the testator does or does not have prior-born children at the time of the execution of his will.[21] Another provision excluded certain property from the computation of the testator's estate.

The thinking behind the proposed amendment was the belief that where the testator has children living at the time of the execution of his will, the provision he makes for them in his will furnishes the basis for an inference as to how he would have treated the after-born children if he had made a new will after their birth. The present law disregards this indication of what the testator himself would have done and often frustrates his apparent testamentary intent and may work a disparity of treatment between the prior-born and after-born children. For example, if the testator has a number of children at the time he makes his will, but nevertheless leaves his entire estate to his wife, the after-

13. Wormser v. Crose, 120 App. Div. 287, 104 N.Y. Supp. 1090 (1st Dep't 1907).

14. Brush v. Wilkins, 4 Johns. Ch. 506, 510-11 (1820). This decision by Chancellor Kent contains an excellent review of the common and civil law on this subject.

15. Mathews, supra note 2; see Dainow, Inheritance by Pretermitted Children, 32 Ill. L. Rev. 1 (1937).

16. Mathews, supra note 2, at 749.

17. "The legislature attempted neither to entail estates in favor of after-born children nor to shield them from intentional disinheritance or unequal treatment. Its sole objective was to assure that if, through oversight, they were neglected in the will, other provision would be made for them." Matter of Faber, 305 N.Y. 200, 203, 111 N.E.2d 883, 885 (1953); see McLean v. McLean, 207 N.Y. 365, 371, 101 N.E. 178, 179 (1913).

18. 177th Session 1954, Assembly Int. No. 362; 176th Session 1953, Assembly Int. No. 796; see Ass'n of the Bar of the City of New York, Committee on State Legislation 93 (1954).

19. N.Y. Legis. Doc. (1957) No. 65(D), McKinney's Session Law News at A-170 (1957).

20. 180th Session 1957, Assembly Int. No. 393, Senate Int. No. 237. The bill was not reported out of committee at the last session of the legislature.

21. Such a distinction is made in other states as noted above under minority exception 1 at note 2 supra.

born child may claim his intestate share, while his brothers and sisters take nothing. It seems a more justifiable inference that the testator would have made the same provision in his will whether he had considered the possibility of after-born children or not. Also where a testator leaves his entire estate in trust for the surviving spouse with remainders over to his prior-born children, the inference is warranted that he would have left a similarly limited estate to the after-born child rather than to have him take absolutely to the exclusion of the surviving spouse and prior-born children.

Under the present statute, the after-born child, if he takes at all, takes his intestate share. In every case where a will gives property to anyone other than the surviving spouse or children, the total estate received by the children not after-born but named in the will must be less than their intestate share. This is so because the interests of the prior-born children under the will must bear proportionately the burden of contribution to make up the after-born child's intestate share. The inequality will be even greater where the prior-born children are not given their intestate shares in the will. Therefore, the child who is expressly provided for, will very likely take less than the child not provided for.[22]

To remove the inequities in the present statute, the Law Revision Commission proposal provided that the after-born child would be entitled to a proportionate share in each gift made to a child living at the time of the will upon the same terms and subject to the same conditions as though his interest were created by the will. Such a provision allows the contingencies in the gifts to the prior-born children to work themselves out and results in equality in the abatement of the gifts.

Except in one instance, the prior-born children may not recover from other devisees and legatees under the proposed amendment. The portion of the after-born child was to be determined by the number of after-born children plus the number of prior-born children living at the time of the testator's death, or who predeceased him leaving descendants who take by statute or under the will. Where a prior-born child predeceases the testator and his share passes to a person not a child of the testator or a descendant of the deceased child, the after-born child will take a larger share of the estate than the prior-born child and will take only a part of the substitutionary gift. The bill provided that this gift should abate and be applied to the gifts to the living children or their descendants to the extent that their shares have been diminished to provide for the after-born child.

The operation of the existing statute does not effect what may be presumed to be the testator's intent with regard to the relative rights of the surviving spouse and an after-born child where that spouse is a parent of the child and receives benefits under the will greater than the minimum required by section 18 of the Decedent Estate Law. Where a testator has prior-born children and leaves his estate to his surviving spouse, a presumption arises that he would not intend the after-born child to take as against the surviving spouse in whom he has reposed confidence. Such an inference may not be as strong where the

22. Mathews, supra note 2, at 753-54.

testator had no prior-born children. But there is a basis for inferring that the testator would continue the provision where the after-born children are born during the lifetime of the testator and he failed to change his will. It is also reasonable to assume that the testator would want his testamentary disposition to remain undisturbed rather than to have the after-born children take intestate shares as against the surviving spouse who is their parent. It would seem that the testator in making a substantial provision for his spouse is relying on the spouse to support, educate and care for the after-born children.[23] The proposed amendment provided that where the only after-born children are posthumous children, and the testator has no prior-born children, there is no basis for assuming that the absence of a provision was deliberate, and therefore the provision for the surviving spouse should not be excluded from the estate to which the child has a claim to the extent that it exceeds one-half of the net estate. The provision for the surviving spouse would be entirely excluded where there are prior-born children or the after-born children are not posthumous.

It has been held that a surviving spouse has a right to elect where the portion left to her is less than her intestate share because the after-born child took under section 26.[24] If the testator makes his surviving spouse the beneficiary of a trust for life in less than the whole estate, the portion taken by the after-born child, there being no prior-born children, will generally reduce the corpus of the trust to the point where the spouse may elect and take a fee interest contrary to the testator's expressed intent. The testator's intention would have been effected by the proposed amendment because the spouse's interest is preserved while at the same time the after-born child would be protected by allowing him to take from others who have interests under the will.

In order to exclude property given to the surviving spouse from the estate in which the after-born child takes an intestate share, the proposal provided that the child's share of the precedent estate, the surviving spouse having a remainder interest, be recovered from the interest of the beneficiary of the antecedent estate as paid to the beneficiary during its actual term. Conversely, where a devisee or legatee has been given a postponed or remainder interest in property in which the surviving spouse, who is the parent of the after-born child, has an interest, the after-born child would take his proportionate share in the property as it vests in the other devisees or legatees, waiting out the events and contingencies which determine their interests, rather than taking a present equivalent.

There are certain gifts which a testator would probably make regardless of whether he considers the possibility of after-born children. In a situation where a testator has only after-born children, he alone, or together with the surviving spouse, will take the whole estate or place a substantial charge upon the gifts. The proposal would have excluded all gifts of money or other personal property, other than tangible personal property, from the computation of the testator's

23. The parents are under a legal obligation to provide for their children. N.Y. Children's Ct. Act §§ 31, 31-a; N.Y. City Dom. Rel. Ct. Act §§ 101, 102.

24. Matter of Vicedomini, 285 App. Div. 62, 136 N.Y.S.2d 259 (2d Dep't 1954).

estate where their value does not exceed five hundred dollars. Property passing by intestacy would also have been excluded.

The proposed amendment was an excellent attempt at approximating what may be presumed to have been the intention of the testator in situations where at the time of the execution of the will there were no prior-born children in existence and situations where there were prior-born children in existence. However, it seems that confusion could be avoided by a provision that the after-born child must outlive the testator in order to have a claim under section 26.[25] Also, a presumption arises that a testator intended to disinherit after-born children where for many years he does not change the provisions of his will. Therefore, and in order to provide a greater share of the estate for the younger after-born children, it should be provided that the after-born child must not have reached an age at which he would be self-sufficient at the time of the testator's death in order to have a valid claim.

Ineffective Residuary Dispositions

Where an ineffective disposition in a will is a part of the residuary clause, it is excluded from the operation of the remainder of the residuary clause, and passes by intestacy. It has been proposed[26] that this common-law rule, as applied in New York[27] and other jurisdictions,[28] should be abrogated, since in the majority of instances it does not represent the actual intent of the testator.

Where a person goes to the trouble of making and executing a will, the courts, in the absence of a contrary intention, will presume that the testator intended to dispose of all his estate.[29] This presumption is considerably strengthened when a will contains a general residuary clause, which serves as the catch-all for property not disposed of elsewhere in the will.[30] In accordance with the presumption, it is a well-settled rule that a disposition in a will, ineffective because of lapse,[31] illegality,[32] or various other reasons,[33] passes

25. See note 10 supra.

26. N.Y. Senate Int. No. 236 (1957), N.Y. Assembly Int. No. 392 (1957).

27. N.Y. Legis. Doc. (1957) No. 65(C).

28. See 96 C.J.S., Wills § 1226(2) (1957).

29. In the Matter of Forde, 286 N.Y. 125, 128, 36 N.E.2d 79, 80 (1941); In the Matter of Hayes, 263 N.Y. 219, 225, 188 N.E. 716, 718 (1934); Meeks v. Meeks, 161 N.Y. 66, 70-71, 55 N.E. 278 (1899); In the Matter of Butler, 1 A.D.2d 548, 551, 151 N.Y.S.2d 866, 869 (1st Dep't 1956). See also Riley v. McMaster, 313 Mass. 739, 49 N.E.2d 240 (1943).

30. Beekman v. Bonsor, 23 N.Y. 298, 312 (1861); In re Baumann's Will, 97 N.Y.S.2d 478, 484 (Surr. Ct. 1950). See also Fidelity Union Trust Co. v. Rienzi, 136 N.J. Eq. 312, 41 A.2d 701 (Ch. 1945).

31. Lapse takes place where the beneficiary predeceases the testator. See 96 C.J.S., Wills § 1197 (1957). Most states now have anti-lapse statutes (see 96 C.J.S., Wills § 1217 (1957)), such as New York Deced. Est. Law § 29, which provides that where the beneficiary is an heir at law his share does not lapse, but passes to his descendants.

32. A disposition may be a violation of a common-law rule, such as the rule against perpetuities, or in violation of a particular statute, e.g., New York Deced. Est. Law § 17, which provides that a testator leaving surviving heirs at law cannot leave more than half his estate to charitable, religious, etc. institutions.

33. E.g., a disposition may be inoperative because it is not sufficiently definite; because

under the residuary clause, rather than devolving by the laws of intestacy.[34] However, where the ineffective disposition is itself a part of the general residuary clause, this rule is not always applied.

Where the entire residuary estate is left to one person, and that disposition becomes ineffective, the residuum necessarily passes by intestacy, since no other residuary devisee remains to take.[35]

Where the residue is left to two or more persons, a distinction was made at common law. If the language of the testator indicated that the residuary devisees or legatees were to take as joint tenants,[36] or as members of a class,[37] or if the testator specifically provided that the survivors would take all,[38] then the ineffective residuary disposition passed to the remaining residuary legatees or devisees. But if the language of the testator indicated that each person named was to receive a specific portion,[39] or was to share as a tenant in common,[40] then an ineffective residuary disposition would not inure to the benefit of the other residuary devisees, but would pass by intestacy. It is this latter rule which the proposed legislation was designed to abrogate.

The rule was already well-settled law in England as early as 1721. In *Bagwell v. Dry*[41] the will in question left the residue of the estate to four persons to be divided in equal shares. One of the four predeceased the testator, and his share lapsed. The court held that ". . . the *residuum* being devised in common, it was the same as if a fourth part had been devised to each of the four, which could not be increased by the death of any of them."[42] As a result the fourth share passed by intestacy.

The English common-law rule has been given almost universal acceptance by American courts.[43] New York readily adopted the common-law rule in early

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the beneficiary is a subscribing witness to the will; because the beneficiary voluntarily renounced the disposition; or because the disposition was conditional, and the condition did not occur.

34. In re Batchelder, 147 Mass. 465, 18 N.E. 225 (1888); Wright v. Wright, 225 N.Y. 329, 340, 122 N.E. 213, 216 (1919); Floyd v. Carow, 88 N.Y. 560 (1882).

35. In the Matter of Durand, 250 N.Y. 45, 164 N.E. 737 (1928); In the Matter of Knuppel, 151 Misc. 773, 273 N.Y. Supp. 867 (Surr. Ct. 1933).

36. Downing v. Marshall, 23 N.Y. 366, 373 (1861).

37. In the Matter of Kimberly, 150 N.Y. 90, 93, 44 N.E. 945, 946 (1896); In re Long's Estate, 121 N.Y.S.2d 183 (Surr. Ct. 1953).

38. In re Blood's Estate, 115 N.Y.S.2d 220 (Surr. Ct. 1952), aff'd, 281 App. Div. 1045, 122 N.Y.S.2d 625 (2d Dep't 1953); In the Matter of Kempe, 191 Misc. 993, 78 N.Y.S.2d 830 (Surr. Ct. 1948).

39. In the Matter of Seaman, 196 Misc. 202, 91 N.Y.S.2d 854 (Surr. Ct. 1949).

40. In the Matter of Watson, 262 N.Y. 284, 186 N.E. 787 (1933); Matter of Hoffman, 201 N.Y. 247, 94 N.E. 990 (1911).

41. 1 P. Wms. 700, 24 Eng. Rep. 577 (Ch. 1721).

42. Id. at 701, 24 Eng. Rep. at 578. Accord, Skrymsher v. Northcote, 1 Swans. 566, 570, 36 Eng. Rep. 507, 509 (Ch. 1818).

43. Only four other states, New Jersey, Ohio, Pennsylvania, and Rhode Island, have abrogated the rule by statute, and at least two others have rejected it by court decision. See Corbett v. Skaggs, 111 Kan. 380, 207 Pac. 819 (1922); Hedges v. Payne, 85 Ind. App. 394, 154 N.E. 293 (1926).

decisions,[44] but later courts have not hesitated to pronounce their dissatisfaction with the rule. In *Wright v. Wright*[45] the New York Court of Appeals criticized the distinction made between the general rule as to ineffective dispositions and the rule in regard to ineffective residuary dispositions, and declared that "the reason for this distinction in most cases is not very apparent, satisfactory or convincing."[46] The court reluctantly concluded that ". . . without attempting to justify this distinction as logical or reasonable in most cases we nevertheless are forced to realize that as the result of inheritance and frequent repetition the rule has become too firmly established to be disregarded."[47] In *Oliver v. Wells*[48] the same court spoke of the common-law rule as ". . . a technical rule, reluctantly enforced by courts when tokens are not at hand to suggest an opposite intention, that a gift of 'a residue of a residue' is not to be augmented by the lapse of another gift out of the general residuum . . . ."[49] Since almost all wills vary in language, the courts have had little trouble in finding "tokens" of an opposite intention, when so inclined.[50] The result is a confusing and often contradictory body of cases on the subject, serving as precedent only to wills identical in language to those adjudicated.[51]

The sole argument of the proponents of the common-law rule seems to be that when the testator leaves a residuary estate to *A*, *B*, and *C*, share and share alike, or when he leaves a specific one third to each, he clearly intends to devise to them only a third, and that to give *A* and *B* a half share when *C*'s disposition fails is contrary to that intent.[52] Such reasoning is considerably weakened by the fact that, at the time of the execution of the will, the residuary estate, in almost all cases, is an unascertainable amount, and therefore the testator has no definite amount in mind.[53] Rather the intent of the testator is to dispose of all his property by will, and it is reasonable to assume, where the testator has left his residuary estate to *A*, *B*, and *C*, that if the testator could have foreseen that his disposition to *C* would be ineffective he

44. Booth v. Baptist Church, 126 N.Y. 215, 28 N.E. 238 (1891); Kerr v. Dougherty, 79 N.Y. 327 (1880); Beekman v. Bonsor, 23 N.Y. 298 (1861).

45. 225 N.Y. 329, 122 N.E. 213 (1919).

46. Id. at 340, 122 N.E. at 217.

47. Id. at 341, 122 N.E. at 217.

48. 254 N.Y. 451, 173 N.E. 676 (1930).

49. Id. at 457, 173 N.E. at 678.

50. See Oliver v. Wells, 254 N.Y. 451, 173 N.E. 676 (1930); In the Matter of Buttner, 215 App. Div. 62, 213 N.Y. Supp. 268 (2d Dep't 1925).

51. See Annot., 36 A.L.R.2d 1117 (1954).

52. "No injustice is thereby done to the other residuary legatees. They receive the gifts which the decedent intended them to have." In the Matter of Burnside, 185 Misc. 808, 809, 59 N.Y.S.2d 829, 830 (Surr. Ct. 1945). See also Bagwell v. Dry, 1 P. Wms. 700, 24 Eng. Rep. 577 (Ch. 1721).

53. "[I]t is difficult to appreciate the force of the reason in such a case as the present one where the residuum to be disposed of consists of a certain portion of an estate of unknown value, and where there seems to be no good ground for withholding application to the residuary clause and lapsed legacy of the principles ordinarily covering such a situation." Wright v. Wright, 225 N.Y. 329, 340-41, 122 N.E. 213, 217 (1919).

would have left the whole residuary estate to *A* and *B*, rather than have it pass by intestacy.

It has been proposed that unless a contrary intent is expressed, a disposition with respect to the residue shall not be deemed inapplicable to property which was the subject of an ineffective devise or bequest merely because it was a devise or bequest of part of the residue. It is in accord with the well-established presumption that a testator does not intend to die intestate as to any portion of his estate. If this view were to be enacted into law, it would resolve and simplify a great body of case law, and at the same time it would observe the primary canon of the construction of wills, that the intent of the testator should be followed whenever possible.

Effect of Payments From Collateral Sources on Damages in a Personal Injury Action

It is well established that in the measure of damages in a personal injury suit may be included any expenses incurred and the value of time lost with relation to the plaintiff's earning capacity. The question arises as to whether the plaintiff has suffered damages in respect to these items where the expenses have been paid by others and his wages have been continued by his employer despite his inability to work. The New York Court of Appeals first treated this problem in *Drinkwater v. Dinsmore.*[54] In that case the plaintiff brought an action to recover damages for personal injury and, as an item of damages, claimed lost wages due to inability to work. The trial court did not allow the question to be put to the plaintiff, as to whether he had been paid wages by his employer during the time he was incapacitated. On appeal, the Court of Appeals held that it was an error not to allow the question and pointed out that "before the plaintiff could recover for the loss of wages, he was bound to show that he lost the wages. . . . The defendant had the right to show . . . that the plaintiff . . . was under such a *contract* with his employer that his wages went on without service, or that his employer paid his wages from mere *benevolence.* In *either* case, upon such showing, the plaintiff could not claim that the defendant's wrong caused him to lose his wages, and the loss of wages could form no part of his damage."[55]

New York courts have, however, avoided this rule where payments were made in the form of insurance, sick leave, annual leave, disability compensation or workmen's compensation, or where the plaintiff could be compelled by the employer to repay the funds given during disability in the event of a recovery from the person responsible for the injury. They have held, in accord with the majority of jurisdictions,[56] that there will be no deduction in such cases.

Although the New York courts thus confined the *Drinkwater* decision to its facts, its rule seems to be unjust in not recognizing the function of damages for personal injuries.

54. 80 N.Y. 390 (1880).

55. Id. at 392-93. (Emphasis added.)

56. See notes 62 and 63 infra.

As in contracts,[57] the reason for computing the damages in a personal injury action is to compensate the plaintiff.[58] But, however, under a well-established exception, the collateral source doctrine, a tort-feasor will not be allowed to deduct benefits received by a plaintiff from another source.[59] The rationale of the collateral source doctrine in tort actions is that a tort-feasor should not be allowed to escape the pecuniary consequences of his wrongful act merely because his victim has received benefit from a third party. It has also been pointed out that the true measure of recovery is the loss of the opportunity to earn rather than the amount of wages lost; the latter sum being merely the evidence of the value of the loss of the opportunity to earn.[60] This is illustrated in cases where the plaintiffs were unemployed at the time of the injury, and therefore did not lose any wages. In such cases resort must be had to a claim for the loss of the opportunity to earn rather than for the interruption of the current wages or salaries.[61]

All courts agree that the receipt of money under an insurance policy by the injured person does not preclude recovery from the person responsible for the injury.[62] The rule is based upon the theory that the sums paid for such insurance are in the nature of an investment, which, like other investments made by the plaintiff, ought not to inure to the benefit of the defendant wrongdoer.[63] The same rule applies to government pensions or disability allowances,

57. 5 Williston, Contracts §§ 1338, 1358 (rev. ed. 1937).

58. McCormick, Damages § 137 (1935); Prosser, Torts § 2 (2d ed. 1955).

59. 1 Sutherland, Damages § 158 (4th ed. 1916); Restatement, Torts § 920, Comment e (1939). See generally Note, 1953 Wash. U.L.Q. 453 (1953). The collateral source doctrine, with its punitive overtones, became an exception to the compensatory theory on the assumption that a tortfeasor is guilty of a wrongful act. In an ordinary breach of contract, on the other hand, it would often be futile to determine the degree of moral obloquy of the breaching party. For this reason the collateral source doctrine applies to torts, but was not extended to contracts. 5 Corbin, Contracts § 1077 (1951).

60. McCormick, Damages § 87 (1935). The distinction between wages and value of the time lost has been made in Chelsea Moving & Trucking Co. v. Ross Towboat Co., 280 Mass. 282, 182 N.E. 477 (1932); Sibley v. Nason, 196 Mass. 125, 81 N.E. 887 (1907); Braithwaite v. Hall, 168 Mass. 38, 46 N.E. 398 (1897).

61. Cincinnati, N.O. & T.P. Ry. v. Perkins, 205 Ky. 798, 266 S.W. 652 (1924) (plaintiff recovered for lost time, though unemployed when injury occurred); Pawlicki v. Detroit United Ry., 191 Mich. 536, 158 N.W. 162 (1916) (though plaintiff retired, his former wages could be considered); Missouri, K. & T. Ry. v. Flood, 35 Tex. Civ. App. 197, 79 S.W. 1106 (1904) (unemployed at the time of injury).

62. Roth v. Chatlos, 97 Conn. 282, 116 Atl. 332 (1922); Pittsburgh, C. & St. L. Ry. v. Thompson, 56 Ill. 138 (1870); Evans v. Chicago, M. & St. P. Ry., 133 Minn. 293, 158 N.W. 335 (1916); Chernick v. Independent Am. Ice Cream Co., 66 Misc. 177, 121 N.Y. Supp. 352 (Sup. Ct. 1910); Littman v. Bell Tel. Co., 315 Pa. 370, 172 Atl. 687 (1934); Owen v. Dixon, 162 Va. 601, 175 S.E. 41 (1934); Gatzweiler v. Milwaukee Elec. Ry. & Light Co., 136 Wis. 34, 116 N.W. 633 (1908).

63. Campbell v. Sutliff, 193 Wis. 370, 375, 214 N.W. 374 (1927). The same result follows where the cost of medical care is paid for by insurance and where plaintiff seeks recovery therefor. See McCormick, Damages § 90 n.12 (1935).

unemployment compensation benefits and benefits received under the Workmen's Compensation Act.[64]

As to whether receipt of salary or wages from the employer precludes or reduces recovery against a tort-feasor the courts have adopted varying views. The overwhelming majority[65] of jurisdictions hold that an employee may recover fully for loss of earnings or injury to earning capacity from the person responsible for the injury, even though the employer has made payments to the employee during the disability. It makes no difference whether the payment was made gratuitously or whether the employer was obligated to make the payments.[66] The amount of wages received is admissible only as evidence of the value of the plaintiff's capacity to earn. In the cases where the employer pays because he is bound to pay, some courts reason that he compensates for past services and not for services during the disability; some courts say that the payment is a form of insurance for which the employee pays by accepting lower wages against disability pay than he would agree to without this protection.[67] Moreover, and more compelling, the courts reason that in the case of gratuitous payment the defendant ought not to be the beneficiary of the benevolence of strangers not intended for him.[68]

Two jurisdictions distinguish between the situation where the employer pays

64. Bang v. International Sisal Co., 212 Minn. 135, 4 N.W.2d 113 (1942); Berkholz v. Benepe, 153 Minn. 335, 190 N.W. 800 (1922); Seidel v. Maynard, 279 App. Div. 706, 108 N.Y.S.2d 450 (4th Dep't 1951); Lassel v. Gloversville, 217 App. Div. 323, 217 N.Y. Supp. 128 (3d Dep't 1926); Drake v. New York State Elec. & Gas Corp., 162 Misc. 167, 294 N.Y. Supp. 227 (Sup. Ct. 1937); Cunnien v. Superior Iron Works Co., 175 Wis. 172, 184 N.W. 767 (1921).

65. Hayes v. Morris, 98 Conn. 603, 119 Atl. 901 (1923); Campbell v. Brandenburger, 5 Del. (5 Harr.) 203, 162 Atl. 354 (1932); Wachtel v. Leonard, 45 Ga. App. 14, 163 S.E. 512 (1932); Pittsburgh, C., C. & St. L. Ry. v. Bir, 56 Ind. App. 598, 105 N.E. 921 (1914); Perroux v. Murray-Brooks Hardware Co., 9 La. App. 189, 119 So. 453 (1928); Shea v. Rettie, 287 Mass. 454, 192 N.E. 44 (1934); Chelsea Moving & Trucking Co. v. Ross Towboat Co., 280 Mass. 282, 182 N.E. 477 (1932); Rusk v. Jeffries, 110 N.J.L. 307, 164 Atl. 313 (1933); Houston Belt & Terminal Ry. v. Johansen, 107 Tex. 336, 179 S.W. 853 (1915); Missouri P. Ry. v. Jarrard, 65 Tex. 560 (1886).

66. "We see no reason why one whose acts have caused injury to another should reap the entire benefit that comes from the payment of wages made by an employer, either as a gratuity to a faithful employee or because such payments are required by contract.... The extent of the liability of the wrongdoer is dependent upon the extent of the injuries inflicted by his wrongful act, not upon the question whether the employee receives wages during disability from the employer." Campbell v. Sutliff, 193 Wis. 370, 374, 214 N.W. 374, 376 (1927).

67. See Shea v. Rettie, 287 Mass. 454, 457, 192 N.E. 44 (1934); Rusk v. Jeffries, 110 N.J.L. 307, 164 Atl. 313 (1933); Hayes v. Mayor, 93 N.J.L. 432, 108 Atl. 868 (1919); McCormick, Damages § 87 (1935).

68. "[P]ublic policy would demand that the tortfeasor be prohibited from making a defense founded upon the proposition that he has been guilty of a wrong . . . but that some third person . . . not in sympathy with the wrongdoer . . . has, from some worthy motive, paid to the injured person. . . ." Nashville C. & St. L. Ry. v. Miller, 120 Ga. 453, 457, 47 S.E. 959, 960 (1904).

the wages gratuitously and the situation where he is obligated to pay, and hold that recovery is barred in the latter instance.[69]

New York and Alabama, representing another minority view, deny recovery in both situations, and hold that the plaintiff must prove his actual pecuniary loss.[70]

Where the payments are of a non-gratuitous nature, the contention of double recompense is without merit. Where employment contracts provide that payments are to be continued during incapacity, the employer gives only a part of the consideration in the form of wages; this is also an analogous situation to insurance or pension plans. Where the wages are continued as a gift, the employer-donor has no intention of aiding the tort-feasor, and the gift should not inure to his benefit. There is no double recompense since the gratuitous payment is not a wage for services rendered, although the manner of disbursement and the amount resemble the customary wage payment.[71] Therefore it is submitted that the majority holding, that payment of wages by the employer, whether gratuitous or not, should not diminish recovery in a personal injury action by the injured employee from the defendant responsible for the injuries, is the better rule.

In the spring session of 1957, a bill was introduced in the New York State Senate[72] and Assembly[73] to amend the Civil Practice Act by adding a new provision, section 479-a. The proposed section would have regulated the effect of collateral payments on a recovery for personal injury. As proposed, it provided: "In an action for personal injuries the damages recoverable shall not be reduced by reason of the fact that the injured person has received payments of wages, salary, medical or other expenses, or other monies or aid, whether gratuitous or otherwise, from any person, unless the payment or aid was made or rendered by or on behalf of a person who was [or] . . . may be liable to the injured person for causing such injuries or who was or may be liable to the injured person for the act or omission of the person who caused them."[74] The

69. Moon v. St. Louis Transit Co., 247 Mo. 227, 152 S.W. 303 (1912); Pensack v. Peerless Oil Co., 311 Pa. 207, 166 Atl. 792 (1933), where the plaintiff who, as a partner of his father and brother, received the usual salary during his inability to work, was not allowed to recover damages for loss of time. The court said: "But he did not lose any salary. It was paid to him." Id. at 210, 166 Atl. at 792. Where the payments were a gift to the plaintiff, these courts are in accord with the majority of jurisdictions and allow recovery on the ground that the defendant has no greater right to a reduction of damages on account of a gift from the employer than from a stranger. Quigley v. Pennsylvania Ry., 210 Pa. 162, 59 Atl. 958 (1904).

70. Montgomery & E. Ry. v. Mallette, 92 Ala. 209, 9 So. 363 (1891); Drinkwater v. Dinsmore, 80 N.Y. 390 (1880).

71. See note 68 supra.

72. N.Y. Senate Int. No. 264 (1957).

73. N.Y. Assembly Int. No. 361 (1957).

74. In recommending the enactment of the bill, the Law Revision Commission stated that its purpose was to abrogate the rule of Drinkwater v. Dinsmore and to conform the New York law to the rule followed in most states that payments from collateral sources should not reduce the amount recoverable in a personal injury action. N.Y. Legis. Doc. (1957) No. 65(G).

proposal was passed by the senate on February 11, 1957 but was not acted upon in the Assembly Codes Committee.

The proposed amendment would have changed the *Drinkwater* rule[75] by providing that the damages should not be reduced by reason of the fact that the injured person received payment of wages or salary, whether gratuitous or not. It would have codified the majority common-law rule in stating further that medical or other expenses, or other moneys or aid, whether gratuitous or not, would not affect recovery for personal injury.[76] The result to be achieved by the proposed bill would be a desirable one. It would eliminate fine distinctions[77] that have been fashioned by the New York courts in an effort to circumvent the *Drinkwater* rule, and would remove the undeserved windfalls which that rule makes available to the tort-feasor.

However, the proposed bill contained an ambiguous qualification. Insofar as the proposal did not apply to payments or aid received from, or on behalf of, one actually liable for the injuries, it adopted a sound policy. The bill, however, denied recovery where the person rendering the payment or aid was one who merely "may be liable" to the plaintiff. This might defeat the purpose of the statute. There are situations in which "monies or aid" may be received

75. See p. 380 supra.

76. Akin to the instant problem are the common holdings that where services or aid were rendered to the plaintiff gratuitously the plaintiff was entitled to recover the reasonable value of such service. Englewood v. Bryant, 100 Colo. 552, 68 P.2d 913 (1937); Roth v. Chatlos, 97 Conn. 282, 116 Atl. 332 (1922); Brosnan v. Sweetser, 127 Ind. 1, 26 N.E. 555 (1891); Strand v. Grinnell Automobile Garage Co., 136 Iowa 68, 113 N.W. 488 (1907) (service by wife); Lewark v. Parkinson, 73 Kan. 553, 85 Pac. 601 (1906); Wells v. Minneapolis Baseball & Athletic Ass'n, 122 Minn. 327, 142 N.W. 706 (1913) (nursing by member of the family without expectation of payment); Ernshaw v. Roberge, 86 N.H. 451, 170 Atl. 7 (1934); Houston & T.C. Ry. v. Gerald, 60 Tex. Civ. App. 151, 128 S.W. 166 (1910) ("The defendant should not be allowed to profit by reason of loving care of the wife"). Contra, Wicks v. Cuneo-Henneberry Co., 319 Ill. 344, 150 N.E. 276 (1926); Buchanan v. Morris, 198 Ind. 70, 151 N.E. 385 (1926); Baldwin v. Kansas City Rys., 218 S.W. 955 (Mo. App. 1920); Drinkwater v. Dinsmore, 80 N.Y. 390, 393 (1880) (dictum), where the court said arguendo: "But the defendant may show that no such expense was incurred . . . that the plaintiff was doctored at a charity hospital . . . gratuitously. In such a case, the doctor's bill could not be an element of his damage." Nelson v. Pauli, 176 Wis. 1, 186 N.W. 217 (1922) (no recovery for value of services of physician paid by benefit association of which plaintiff was a member). Later decisions indicate a definite trend toward applying the collateral source doctrine generally and the prevailing rule seems to be established that an injured person may recover for medical expenses and the reasonable value of other services or aid during his incapacity even though such amounts were supplied by insurance, an obligated employer or gratuitously. Hudson v. Lazarus, 217 F.2d 344 (D.C. Cir. 1954); Sainsbury v. Pennsylvania Greyhound Lines, 183 F.2d 548 (4th Cir. 1950) (medical care rendered by the Government); Standard Oil Co. v. United States, 153 F.2d 958 (9th Cir. 1946) (dictum); Plank v. Summers, 203 Md. 552, 102 A.2d 262 (1954) (member of the Navy in active duty should recover reasonable value of the medical and hospital service rendered by the Government).

77. Landon v. United States, 197 F.2d 128 (2d Cir. 1952), 21 Fordham L. Rev. 294.

by the plaintiff from one who is not joined as a defendant, or one who made the payment or rendered the aid without admitting any liability for the injury, or for no consideration whatsoever, but who conceivably "may be liable" for the injuries in question.[78] Literal application of the provisions of the bill might result in the plaintiff's recovery being unjustly reduced to the extent of any moneys or aid received from any person who comes within the vague and indefinite classification of one who merely "may be liable."

It is submitted that the words "may be liable" be retained and clarified to the effect that only *such* moneys or aid rendered by, or on behalf of, one who may be liable shall reduce the amount of recoverable damages *that appear to have been rendered in the fulfillment of (their mutual) tortious liability.*

The proposed amendment of the Civil Practice Act, so modified, would be in harmony with the reasonings supporting the majority rule in the United States, and in conformity with the purpose for which the amendment was designed.

The One Year Provision of the Statute of Frauds

The New York statute requiring a writing for contracts not to be performed within one year is based substantially on the English Statute of Frauds of 1677.[79] The supposed purpose underlying the enactment was to insure justice in delayed actions either because of the unavailability of witnesses or their tendency to forget. Also, the statute sought to protect against perjury and fraud.[80] Supposedly to achieve these objectives, the New York courts have pursued some rather artificial and certainly questionable distinctions. The result is, as the New York State Law Revision Commission has pointed out, a lack of uniformity in the treatment of contracts of similar import. The New York rulings, in certain situations, afford protection for the dishonest promisor and, at times, may help to reward a falsifying claimant.[81]

The statute requires a writing for every contract which "by its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime."[82] In most cases the courts have observed the exact wording of the statute and have held that only those contracts, which cannot by any possibility be performed within a year, require a writing.[83] If it is merely unlikely that the promise will be performed

78. E.g.: (a) where the plaintiff was injured while riding as a passenger in an automobile which collided with another car, and has received benefits under a medical payments provision of his host's automobile liability insurance (such benefits being payable regardless of fault), and suit is brought only against the owner of the other car; (b) where a husband is injured while riding as a passenger in a car owned and operated by his wife, as the result of a collision with another vehicle, and he receives "monies or aid" from his wife and then brings suit only against the owner of the other vehicle.

79. 29 Charles 2, c. 3 (1677); see also Costigan, The Date and Authorship of the Statute of Frauds, 26 Harv. L. Rev. 329 (1913).

80. 2 Corbin, Contracts § 444 (1950).

81. N.Y. Legis. Doc. (1957) No. 65(A).

82. N.Y. Pers. Prop. Law § 31.

83. Warner v. Texas & Pac. Ry., 164 U.S. 418 (1896); Duncan v. Clark, 303 N.Y. 282, 125 N.E.2d 569 (1955); Blake v. Voigt, 134 N.Y. 69, 31 N.E. 256 (1892); Restatement, Contracts § 198 (1932).

within a year, the statute has no application so long as performance is "possible." It follows that a building contract fixing a maximum period for performance far in excess of one year, would be outside the operation of the statute since it is possible to be performed within a year.[84] Although this rule has been applied for many years and has become almost universal,[85] it is not without question. The intent of the parties, as evidenced by the tenor of the agreement, was to contemplate a long time for performance. When this intent is considered, the possibility rule seems like an arbitrary excuse to avoid the statute.[86]

On the other hand, a contract of employment, where a salesman is to receive commissions upon all orders placed for an indefinite time, is within the statute.[87] Similarly, a contract for the payment of a commission in return for the introducing of a customer requires a writing.[88] The reasoning advanced in this type of case is that the contract has no specific duration and, therefore, imposes on the defendant a continuing obligation. By its terms the contract relationship will continue beyond a year, said the court in *Cohen v. Bartgis Bros. Co.*,[89] admitting that the continuing liability is a contingent one. The contingency referred to is the possibility that the defendant employer may die or cease as a business entity within a year and thereby put an end to the contract. The courts would regard this happening as not being full performance, but rather a termination that results in frustration of performance. Such reasoning becomes quite sound when it appears to be the intention of the parties that performance shall continue for more than one year, even though upon some improbable contingency it may be completed within a year.

An inconsistency appears when the above type of case is compared with those involving contracts to support a child for a definite period of years. The latter case does not come within the one-year clause.[90] It is argued that, since there exists the possibility of the death of the person to be supported within a year, the statute has no application. The happening of this contingency is said to fullfill the object of the contract and meet the requirements of full performance. However, when compared to commission or service contracts, there seems to be as much reason for holding that an agreement to serve is by implication conditional upon the continued life of one or both parties, as for holding that a promise to support a child for a definite term is conditional upon its life.[91]

84. Plimpton v. Curtiss, 15 Wend. 336 (N.Y. 1836); see also Gallagher v. Finch, Pruyn & Co., 211 App. Div. 635, 207 N.Y. Supp. 403 (3d Dep't 1925).

85. See 2 Corbin, Contracts § 444 (1950).

86. See Anson, Contracts § 106 (1939).

87. Cohen v. Bartgis Bros. Co., 264 App. Div. 260, 35 N.Y.S.2d 206 (1st Dep't 1942), aff'd, 289 N.Y. 846, 47 N.E.2d 443 (1943); Comment, The Cohen Case and the One Year Provision of the Statute of Frauds, 25 Fordham L. Rev. 720 (1956-57).

88. Martocci v. Greater New York Brewery, Inc., 301 N.Y. 579, 92 N.E.2d 887 (1950).

89. 264 App. Div. at 261, 35 N.Y.S.2d at 208.

90. Duncan v. Clark, 308 N.Y. 282, 125 N.E.2d 569 (1955).

91. "The decision that a promise to . . . support for seven years . . . can scarcely be reconciled with the decisions on contracts of personal service. . . ." 2 Corbin, Contracts § 446 (1950).

Therefore, if in service cases termination of duty is not equal to performance of the promise, why should not the same be true in support cases? It is submitted that, since the parties bargained for lengthy performance and the contract by its nature is one of considerable importance, the statute should not be excused merely because of the possibility of death. Recognizing this defect, the New York State Law Revision Commission has recommended that a writing be required ". . . whether or not such performance is or may be completed upon the death of any person within one year. . . ."[92]

The statute has also been applied rather rigorously to an employment contract in which the time required to serve is exactly one year. If the work is to begin at a future time more than one day after execution of the contract, the contract cannot be performed within one year from its making and is within the statute.[93] On the other hand, if the work is to commence on the day following the making of the agreement, the statute does not apply.[94] It has been proposed that contracts which are not to be completed within a year from the "commencement" thereof need not be in writing.[95]

If the statute is to be amended, should not consideration be given to denying to a defendant who admittedly entered into an oral contract the benefit of the statute? The statute was intended, not to invalidate an oral contract, but to guard against perjury. Accordingly, if the defendant in fact admits the contract, the purpose of the statute is served and the oral agreement should be enforced by the courts. One writer has suggested that the defense should be denied except to a party who is willing to submit himself to examination in court on the merits of the case and who under oath denies making the promise. It was felt that the statute should not be recognized where a defendant can, but does not, deny contracting.[96] Perhaps this would go too far, if the defense were denied to a defendant incompetent to testify or to the estate of a deceased promisor. New York has, in certain cases, at least given effect to the defendant's admission of the contract on the basis of estoppel.[97] Nevertheless, the Law Revision Commission would by statutory amendment deny the defense as to contracts within the one year provision where the promisor admits the making of the alleged promise in court.[98] Could it not be argued, however, that an affirmative admission of the terms of the contract would suffice as a written memorandum? An additional statutory amendment would, on the other hand,

92. N.Y. Senate Int. No. 238 (1957); see also N.Y. Legis. Doc. (1957) No. 65(A).

93. A contract to perform labor for one year to commence two days after the contract was made is within the statute, and the fact that the intervening day is a Sunday is irrelevant. Silverstein v. Lehrfeld, 181 Misc. 291, 43 N.Y.S.2d 694 (N.Y. City Ct. 1943).

94. Goon v. Fu Manchu's Restaurant, 253 App. Div. 531, 2 N.Y.S.2d 879 (1st Dep't 1938); Prokop v. Bedford Waist & Dress Co., 105 Misc. 573, 173 N.Y. Supp. 792, aff'd, 187 App. Div. 662, 176 N.Y. Supp. 376 (1st Dep't 1919).

95. If commencement is not within a year of the making of the contract, however, a writing would still be required. N.Y. Senate Int. No. 238 (1957); N.Y. Legis. Doc. (1957) No. 65(A).

96. Stevens, Ethics and the Statute of Frauds, 37 Cornell L.Q. 355 (1952).

97. Wikiosco, Inc. v. Proller, 276 App. Div. 239, 94 N.Y.S.2d 645 (3d Dep't 1949).

98. N.Y. Senate Int. No. 238 (1957); see also N.Y. Legis. Doc. (1957) No. 65(A).

make it impossible to raise the defense by motion unless it were supported by an affidavit either denying the contract or explaining why it couldn't be denied.[99] This proposal, it seems, does in reality effectuate the view that "the plaintiff should . . . be entitled to a sworn admission or denial of the making of the agreement. . . ."[100] Thus, a defendant could not use the statute as a sword without being required to admit or deny.

Many of the reasons for the original statute no longer exist or, at least, not to the same degree.[101] For this reason England two years ago rescinded its Statute of Frauds.[102] Nevertheless, to repeal the statute in this country would require the action of forty-eight legislatures which, as Professor Corbin notes,[103] is not to be expected. But the recommendations of the Law Revision Commission would be a step toward relieving some of the existing discomforts of the existing statute.

99. It is to be noted that the Statute of Frauds as a ground for dismissal is specified in N.Y. Rules Civ. Proc. § 107(7), requiring an affidavit. The Law Revision Commission recommendation would, in effect, require an admission, or denial in the affidavit, but not merely for the sake of argument.

100. Stevens, supra note 96, at 375 (1952).

101. Id. at 380-81.

102. Law Reform (Enforcement of Contracts) Act, 1954, 2 & 3 Eliz. 2, c. 34.

103. 2 Corbin, Contracts § 275 (Supp. 1956).

Erratum. The summary of allegations against the Hartford National Bank and Trust Company appearing in 26 FORDHAM LAW REVIEW 163 was incorrect in stating that the bank was drawing wills for its depositors.